Summary of the Draft Competition Bill

3 August 2020
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1. SUMMARY OF MAJOR AMENDMENTS

1.1. The Bill provides for the continued existence of the Competition Commission and includes a reconfiguration of its structure and powers. It establishes a body to be known as the Competition Adjudicative Panel (the CAP).

1.2. Currently all prohibited conduct cases (i.e. cartel and abuse of dominance cases and contraventions of the merger provisions) are referred to the High Court for adjudication and mergers determined by the Commission may be referred to the Minister of Industrialisation, Trade & SME Development for review.

**Competition Adjudicative Panel**

1.3. What is envisaged in the Bill is for the CAP to take on the roles currently played by the High Court and the Minister. The rationale being that:

1.3.1. The CAP will comprise of economists and lawyers with specialist skills;

1.3.2. Hearings before the CAP will be a less formal than those before the High Court without compromising principles of justice such as a fair hearing for both sides and open and unbiased decision-making;

1.3.3. Hearings will be less expensive, partly because parties will not be required to be represented by a practicing legal practitioner (as is the case in the high Court); and

1.3.4. Matters will be dealt with more expeditiously as the case load of the CAP will be much lighter than that of the High Court.

**Board of Commissioners**

1.4. The Board of Commissioners will continue to be responsible for the corporate governance of the Commission, determining mergers and referring prohibited practice matters for adjudication (albeit to the CAP instead of the High Court).

1.5. The Bill provides for a clear demarcation of the adjudicative role of the Board of Commissioners and the investigative role of the Executive (currently referred to as “the Secretariat”). Based on the wording of the current Act, the Commission is the Board of Commissioners (i.e. the Chairperson and 2 – 4 other members) and the investigative powers and function are carried out by the Commission. In practice, the powers and functions are delegated to the CEO and staff of the Commission.

**The Executive**

1.6. In the Bill, the Executive is directly empowered to conduct investigations of all mergers, exemption applications and prohibited conduct. The Executive is further granted powers to
make decisions on “phase 1 mergers”. What constitutes a phase one merger will be defined in rules made by the Board of Commissioners in consultation with the Minister of Industrialisation & Trade.

**The High Court**

1.7. In order to ensure the development of Namibian competition law jurisprudence, the CAP’s decisions regarding prohibited practices may be appealed to the High Court and its decision on the review of mergers and exemption applications may be reviewed by the High Court.

**In addition to the above, the Bill includes the following significant amendments:**

1.8. Currently the Competition Act exempts certain commercial activities from the application of the Act. The Bill applies to such activities and parties wishing to be exempted will have to make an application to the Board of Commissioners. In the same vein, the definition of an ‘undertaking’ to which the Bill applies has been expanded;

1.9. It makes a clear distinction between conduct involving undertakings in a horizontal and vertical relationships and between per se prohibitions (i.e. outright prohibitions) and those that can be justified taking into account technological, efficiency or other pro-competitive or public interest benefits;

1.10. It makes it clear that abuse of dominance is per se prohibited;

1.11. Regarding mergers, it omits the dominance test contained in the current Act and now list factors that can be taken into account in determining whether a merger leads to the substantial lessening of competition or not;

1.12. It includes additional public interest grounds that the Commission may take into account when determining a merger including: local procurement of goods and services; value addition in downstream markets, such as the beneficiation of natural resources; and a greater spread of ownership in the merging undertakings, in particular to increase ownership stakes of historically disadvantaged persons;

1.13. Where a merger has been implemented in contravention of the provisions of the Bill, the Executive may investigate the matter as an alleged prohibited conduct and recommend to the Board of Commissioners to refer the matter to the CAP;

1.14. It allows a complainant to apply for interim relief which may be granted in order to prevent serious or irreparable damage to the complainant or applicant. In the current Act, the responsibility to apply for an interim relief lies with the Commission;

1.15. The Bill sets time-frames within which the Board of Commissioners must refer prohibited conduct matters to the CAP and allows complainant to refer the matters directly where the Commission has decided not to refer the matter or fails to refer the matter within the set time-frame.
1.16. It empowers the Commission to assess and advise government on the competition impact of aid given to state owned entities;

1.17. It grants the Commission new powers relating to undertaking market inquiries, and

1.18. It codifies the corporate immunity policy.

2. SCOPE OF THE BILL

2.1. The current Act applies to all economic activity within or having an effect in Namibia except: agricultural commodities that have not undergone a process of manufacturing; the activities of statutory bodies authorised by any law; and concerted conduct designed to achieve a non-commercial socio-economic objective. Rather than excluding certain activities that may have an effect on competition from the ambit of the law, upfront and without an evaluation, the Commission now has the discretion to exempt these activities following an application by the party concerned.

2.2. Regarding conduct designed to achieve a non-commercial socio-economic benefit, the Bill removes this exception owing to the challenges of defining non-commercial activity.

2.3. Like the current Act, the Bill still allows the Minister, with the concurrence of the Commission, to exempt certain goods or services by notice in the Gazette and allows certain industries or types of goods and services, as Gazetted by the Minister, to be exempted from the provisions dealing with mergers and acquisitions.

3. SECTIONS IN THE BILL THAT DIFFER FROM THE CURRENT ACT

3.1 CHAPTER 1 – PURPOSE AND APPLICATION OF ACT

SECTION 1: DEFINITIONS

3.1.1 This section explains those definitions that are new or have been amended in the Bill.

‘Advocacy’

3.1.2 One of the important functions of the Commission is raising awareness on competition law and policy in all spheres of the economy. This is referred to as advocacy and is inherent in the Commission’s functions or roles. However, it is deemed important to provide for a definition of ‘advocacy’ to correspond with section 90 of the Bill which provides explicitly for the advocacy function of the Commission.

‘Board of Commissioners’

3.1.3 The Bill proposes two decision making structures within the Commission: the Executive and the Board of Commissioners, making it necessary to define these structures. As such, a
definition of ‘Board of Commissioners’ is linked to section 5 of the Bill which provides for its composition, appointment and term of office of the members.

‘Executive’

3.1.4 The definition of ‘the Executive’ is linked to section 16 of the Bill which provides for its composition and functions. The Bill changes the title of the ‘Secretary to the Commission’ in the current Act, to the ‘Chief Executive Officer’ (CEO).

‘Complainant’

3.1.5 A ‘complainant’ is defined as any person who lodges a complaint in terms of section 67 of the Bill. This allows the Commission to initiate complaints on its own or to receive a complaint, in a manner prescribed in the rules, from any other person regarding alleged prohibited conduct.

‘Dominance’

3.1.6 The Bill now provides criteria for determining dominance. Therefore, a definition of a ‘dominant undertaking’ is inserted linking it to section 33 of the Bill which contains the market share and market power factors to be taken into account in the determination of dominance.

‘Essential Facility’

3.1.7 There is also a definition of an ‘essential facility’ which is important when considering cases involving abuse of dominance as reflected in Section 33 of the Bill, especially in infrastructure and utility sectors. An essential facility is defined as one that cannot feasibly be duplicated from an economic, technical or environmental perspective in order to provide a service.

‘Horizontal Relationship’ & ‘Vertical Relationship’

3.1.8 The Bill now makes a clear distinction between conduct involving undertakings in a horizontal and vertical relationship. For instance, minimum resale price maintenance is only possible between firms in a vertical relationship and price fixing is only possible between firms in a horizontal relationship, yet in the current Act these are dealt with in the same section and the conduct is not clearly demarcated. Thus ‘Horizontal agreement’ is defined to mean an agreement between undertakings that are supposed to be competitors, operating at the same level of the value chain. This will assist in interpreting restrictive practices falling under section 31 of the Bill as well as in dealing with mergers. ‘Vertical agreement’ on the other hand is defined as conduct or agreement involving undertakings at different stages of the value chain as contemplated in section 32 of the Bill.
‘Market Inquiry’

3.1.9 The Bill grants the Commission new powers to conduct market inquiries and thus the term is defined to mean a formal inquiry that looks into the general state of competition in a given sector, without making any allegations of prohibited conduct against an individual or identified group of undertakings. This is meant to distinguish a market inquiry from an investigation of alleged prohibited conduct.

‘Market Power’

3.1.10 The definition of ‘market power’ will assist in dealing with abuse of dominance allegations. Market power is defined as the ability of an undertaking to control prices, exclude competition or behave independently of its competitors, suppliers, or customers. Section 33(4) provides factors that need to be taken into account to determine whether an undertaking exercises market power or not.

‘Prohibited Conduct’

3.1.11 The Bill defines ‘prohibited conduct’ as all conduct that breaches the Act and can be referred to the Competition Adjudicative Panel for adjudication and possible administrative penalties. Prohibited conduct is distinguished from offences arising from breaches that carry criminal liability and can only be prosecuted in the Magistrates & High Courts, such as failure to comply with a summons or providing false information to the Commission or the Competition Adjudicative Panel.

‘Regulatory Authority’

3.1.12 ‘Regulatory authority’ is defined as an entity established by or under any law which is responsible for regulating an industry or sector of an industry. Section 93 governs the relationship between the Commission and regulatory authorities.

‘Undertaking’

3.1.13 The definition of an ‘undertaking’ has been expanded to expressly include state-owned entities and all affiliates of an undertaking, whether these undertakings have a profit motive or not.

3.1.14 The inclusion of non-profit entities in the definition of an undertaking recognises the fact that non-profit entities can engage in commercial activity in competition with private sector, profit seeking undertakings. For instance, non-profit making entity can use the benefits of tax exemption to subsidize its commercial activities and in this way engage in predatory pricing by undercutting its competitors. Alternatively, non-profit entities can unfairly expand market share by using tax savings to reinvest in commercial activity, thus expanding the activity with a source of funds unavailable to profit making competitors. Bringing non-profit
entities under the ambit of competition law closes a gap that can potentially be used to evade accountability by such entities.

3.1.15 Similarly, the definition of undertaking also includes state-owned-entities, in an effort to underscore competitive neutrality in the application of competition law. This is also in line with international best practice where it is recognised that SOEs can stifle competition in the economy and need to be treated like any other commercial enterprise.

‘Respondent’

3.1.16 Just as ‘complainant’ is defined, so is ‘respondent’, to mean a person against whom a complaint has been lodged with the Commission.

SECTION 3: APPLICATION OF THE ACT

3.1.17 Section 3 of the Bill deals with the scope of the legislation and instances where the Bill does not apply. The Bill does away with the upfront exemption given to: agricultural commodities that have not undergone a process of manufacturing; the activities of statutory bodies authorised by any law; and concerted conduct designed to achieve a non-commercial socio-economic objective. Such conduct is now subject to the Bill and can only be exempted after consideration of an application brought by an interested party under the exemption provisions of the Bill.

3.1.18 The Bill also provides for the concurrent application of this Bill and another law, making it clear that in cases of inconsistency or conflict, this Bill will apply insofar as competition matters are concerned, unless otherwise provided for in that other law.

3.1.19 The Bill further sets out how days are counted and provides that, where a particular number of days are prescribed for doing an act, the period from 16 December to 15 January are not counted.

3.1.20 Under the current Act, the days are calendar days and run throughout the year. This creates a challenge as mergers are required to be determined within 30 days and, although extensions are possible, there are cases where no justifiable reason exists to extend the 30-day period. The result is that several mergers are required to be determined by round robin resolution as scheduling additional Board meetings is not always practical or feasible. The fact that the days continue to run throughout the December/January period, increases the risk of mergers expiring.

3.2 CHAPTER 2: INSTITUTIONAL AND ADMINISTRATIVE MATTERS

3.2.1 This chapter deals with institutional arrangements in Part A and the administrative and financial matters concerning the Commission in Part B.
SECTION 4: CONTINUED EXISTENCE OF NAMIBIAN COMPETITION COMMISSION

3.2.2 Section 4 provides for the continued existence of the Competition Commission and affirms its independence. The Bill provides clarity that is lacking in the current Act when it refers to the Commission as an institution and when it refers to the Commission as a decision-making structure such as the Board of Commissioners within the Commission.

3.2.3 This clarity becomes even more important where in the Bill there is an additional decision-making structure in the form of the Executive. Thus, the Bill clarifies the powers or functions given to the Commission as an institution and those given to the Board of Commissioners on the one hand and the Executive on the other, as decision making structures within the Commission.

SECTION 5: BOARD OF COMMISSIONERS AND APPOINTMENT OF MEMBERS

3.2.4 Section 5 does not differ significantly from the current Act except that it specifically provides for the appointment of a vice-chairperson and make it a requirement that at least one Board member has suitable qualifications and experience in law and at least one other member must have suitable qualifications and experience in economics.

SECTION 6: DISQUALIFICATION FROM APPOINTMENT AS A MEMBER OF THE BOARD OF COMMISSIONERS

3.2.5 Section 6 the of Bill is a new provision, it lists factors that disqualify a person from being appointed as a member of the Board of Commissioners, including factors such as: being an unrehabilitated insolvent; having been removed from an office of trust on account of fraud; being mentally unfit as declared by a competent court of law; having been convicted of a crime within Namibia, after 1990, and imprisoned without the option of a fine etc.

SECTION 7: POWERS AND FUNCTIONS OF THE BOARD OF COMMISSIONERS

3.2.6 According to section 7 the Board of Commissioners is responsible for the oversight and corporate governance of the Commission and making determinations on phase 2 and 3 mergers as well as exemption applications. Under the Bill, the Board of Commissioners now refers matters to the Competition Adjudicative Panel for adjudication instead of instituting proceedings in the High Court.

3.2.7 The following function are now included under the “powers and functions” section in the Bill, i.e. the power: to direct the strategy of the Commission; to approve the budget of the Commission; to approve the policies of the Commission; to ensure the effective and efficient use of the resources of the Commission; to ensure that the Commission is in compliance with all its legal requirements and its reporting and financial accountability obligations contemplated in this Act; to supervise the performance of the Chief Executive Officer; and to ensure that the Commission operates in accordance with the principles of good governance.
3.2.8 The powers to investigate complaints and merger notifications; to make determinations on phase 1 mergers; to advise the Minister or other relevant authorities on any policy or legislative adoption or change that might have an impact on competition; and to carry out research into competition related matters now fall under the section dealing with the powers of the Executive.

SECTION 12: MEETINGS OF THE BOARD OF COMMISSIONERS

3.2.9 Section 12 is similar to section 11 of the current Act. One difference being that it expressly allows members to make a decision by signing a written resolution, which has the same effect as a decision taken in a formal meeting.

SECTION 14: CHIEF EXECUTIVE OFFICER OF THE COMMISSION

3.2.10 Section 14 of the Bill empowers the Board of Commissioners to appoint a Chief Executive Officer and determine his or her remuneration and conditions of service subject to the Public Enterprises Governance Act, No. 1 of 2019. The Chief Executive Officer’s responsibilities are outlined in section 14, and they include the appointment of staff, the formation and development of an efficient administration and the organisation, control, management and discipline of staff.

3.2.11 The Bill changes the name of the position “Secretary to the Commission” to “Chief Executive Officer” and aligns the provision dealing the CEO’s remuneration with the Public Enterprises Governance Act (i.e. that remuneration and other service benefits of the chief executive officer must be determined by the board of the public enterprise with the concurrence of the Minister of Industrialisation & Trade with due regard to any directives laid down by the Minister of Public Enterprises.

3.2.12 The Bill specifically empowers the Board of Commissioners to appoint a management staff member of the Commission; or any other suitable person, to act as Chief Executive Officer should the position become vacant or if the Chief Executive Officer is unable to perform his/her functions.

SECTION 16: THE EXECUTIVE

3.2.13 Section 16 of the Bill establishes the Executive. The Executive includes the CEO and senior managers and is responsible for, among other things, investigating complaints and merger notifications; making determinations on phase 1 mergers; conducting market inquiries and impact assessments; conducting market inquiries; undertaking impact assessments; developing guidelines in respect of any matter to better achieve the purposes of this Act; advising the Minister or other relevant authorities on any policy or legislative adoption or change that might have an impact on competition; issuing non-binding advisory opinions; negotiating and entering into consent agreements; and carrying out research into competition related matters.
SECTION 19: APPOINTMENT OF INSPECTORS

3.2.14 An Inspector appointed in terms of section 19 is now limited to undertaking search and seizure operations, so as to remove the administrative burden of appointing inspectors for every investigation carried out by the Commission. An inspector must be in possession of the certificate of appointment during the course of his or her duties.

SECTION 21: FUNDS OF COMMISSION

3.2.15 In addition to the sources of funding contained in the current Act, the main one being parliamentary appropriations, the Bill proposes the Commission to retain a portion of administrative penalties levied for prohibited conduct, as prescribed. This will alleviate the fiscus and ensure that the Commission is able to undertake its mandate with no financial constraints. The reporting requirements of the Commission are similar to those in the current Act except that the reporting must be in line with the Public Enterprise Governance Act, No 1 of 2019.

SECTION 24: FINANCIAL YEAR, FINANCIAL STATEMENTS, ACCOUNTS, AUDIT AND ANNUAL REPORT

3.2.16 The current Act requires the accounting records and the financial statements of the Commission to be audited by the Auditor-General. This has proven to be problematic as the audits are never performed in time for the Commission to submit its annual report within the prescribed timeframes.

3.2.17 The Bill provides that the Board of Commissioners must appoint a person registered as an accountant and auditor in terms of the Public Accountants’ and Auditors’ Act, 1951 (Act No. 51 of 1951) and engaged in public practice as such, as the auditor of the Commission. The Bill further provides that the Commission must submit its financial statements to the auditor within three months after the end of the financial year for auditing; and to the Minister within six months of the end of the financial year.

3.3 CHAPTER 3: COMPETITION ADJUDICATIVE PANEL

3.3.1 Chapter 3 deals with the establishment, powers and functions of the Competition Adjudicative Panel.

SECTION 26: ESTABLISHMENT OF COMPETITION ADJUDICATIVE PANEL AND APPOINTMENT OF MEMBERS

3.3.2 Section 26 of the Bill establishes a Competition Adjudicative Panel, as an independent structure, appointed by the President to adjudicate matters and decide on review applications regarding the decisions of the Commission. The Competition Adjudicative Panel consists of a chairperson and at least six other members appointed for a renewable term of five years. The Chairperson of the Competition Adjudicative Panel manages its case load and may assign matters to a panel composed of any 3 members.
SECTION 27: STAFFING OF COMPETITION ADJUDICATIVE PANEL

3.3.3 The staffing of the Competition Adjudicative Panel is provided for in section 27. It may appoint a Registrar and other staff members and the CEO of the Commission may second members of staff to offer administrative support its functioning.

SECTION 28: FUNCTIONS OF COMPETITION ADJUDICATIVE PANEL

3.3.4 The functions of the Competition Adjudicative Panel are provided for in section 28 and include hearing matters referred to it in terms of the Bill. In carrying out its functions the Panel may consult any person or organisation with regard to any matter before it.

3.3.5 The Competition Adjudicative Panel will be required to conduct its proceedings as informally as possible; in an inquisitorial manner; as expeditious as possible; and in accordance with the principles of natural justice. In order to manage the case load, the chairperson of the Competition Adjudicative Panel may assign each matter to a subpanel of the Competition Adjudicative Panel composed of at least any three members.

SECTION 29: EVIDENCE BEFORE THE COMPETITION ADJUDICATIVE PANEL

3.3.6 Section 29 provides that when hearing a matter as contemplated the Panel may receive in evidence any statement, document, information or matter that may in its or their opinion assist to deal effectively with a matter adjudicated by it. It further provides that any person attending before the Competition Adjudicative Panel at a hearing is entitled to the same immunities and privileges as a witness before the High Court.

SECTION 30: REMUNERATION OF MEMBERS OF COMPETITION ADJUDICATIVE PANEL

3.3.7 Section 30 provides that members of the Competition Adjudicative Panel must be paid such remuneration, allowances or other benefits as the President, with the concurrence of the Minister of Finance, may determine.

3.4 CHAPTER 4: RESTRICTIVE BUSINESS PRACTICES

3.4.1 The core provisions relating to competition prohibitions are contained in Chapter 4. In Part A, the Bill makes a clear distinction between horizontal and vertical restrictive practices, while Part B deals with abuse of dominance.

SECTION 31: HORIZONTAL RESTRICTIVE PRACTICES

3.4.2 In line with international practice, section 31 draws a distinction between horizontal and vertical restrictive practices, which is blurred in the current Act. An explicit distinction is made between per se or outright prohibitions against anticompetitive practices and those that can be justified taking into account technological, efficiency or other procompetitive or public interest benefits. The outright prohibitions relate to price fixing and other cartel conduct which is regarded as the most egregious violations of competition law.
3.4.3  Section 31(3) creates a presumption that a restrictive agreement or concerted practice exists, if, among other things, any one of the undertakings owns a significant interest in the other or they have at least one director or one substantial shareholder in common. Section 31(5) now defines a ‘director’ to include a ‘person holding an equivalent position’, in addition to the other positions listed, in order to accommodate any unforeseen eventualities not covered by the definition of ‘director’ in the current Act.

SECTION 32: VERTICAL RESTRICTIVE PRACTICES

3.4.4  Section 32 prohibits vertical agreements and practices that restrict competition if the technological benefits of the agreement do not outweigh their anticompetitive effect. This is to accommodate instances where such agreements or practices may have other benefits, despite their negative effect on competition. However, the practice of minimum resale price maintenance is per se prohibited, since it is seen as a form of artificial setting of a price, without any benefits to consumers.

SECTION 33: ABUSE OF DOMINANT POSITION

3.4.5  With respect to abuse of dominance, the Bill in section 33 removes the overlaps between the current Chapter 3 Part I and Part II prohibitions. For instance, the following prohibitions under the current Part I prohibitions are repeated under the Part II or abuse of dominance prohibitions:
   a) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   b) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.

3.4.6  These are generally accepted to be abuse of dominance prohibitions and as such the Bill places them under section 33 that deals with abuse of dominance.

3.4.7  Furthermore, in the current Act the definition of a dominant position takes into account both the market share and market power of the undertaking in question. However, whilst there is criteria, in the Rules, for determining the market share threshold to establish dominance, there is no guidance or criteria for determining market power. The Bill now provides criteria for determining both market share and market power positions of an undertaking. Since the criteria is unlikely to change frequently, they are now contained in the Bill than in the Rules.

3.4.8  As such, section 33 of the Bill sets a threshold for dominant firms, based on market shares and market power considerations. Section 33(4) lists the factors that may be taken into account in establishing the existence of market power. Section 33 makes it clear that abuse of dominance is an outright prohibition. Such conduct is either exploitative to consumers or customers, such as the charging of unfair prices or is exclusionary to competitors, that is, it aims to remove competitors from the market, through price discrimination or refusing to deal with a competitor or to give a competitor access to an essential facility. Therefore, there
could be no justification for such conduct from technological, efficiency, pro-competitive or public interest grounds.

SECTION 34: APPLICATION FOR EXEMPTION FOR CERTAIN PROHIBITED PRACTICES AND CONSIDERATION OF APPLICATION

3.4.9 This Bill deals with exemptions in sections 34 to 38 of the Bill and categorises them into Chapter 4, Part A exemptions, intellectual property rights exemptions and exemptions in respect of professional rules. Section 34 provides for the application process.

3.4.10 Due to their exploitative and exclusionary nature, that cannot be justified on any grounds, abuse of dominance practices are not subject to the exemption provisions of the Bill. This is a justifiable departure from the current Act.

SECTION 39: CONFERENCE IN RELATION TO AN EXEMPTION APPLICATION

3.4.11 Section 39 allows the Executive to convene a conference at any time during the assessment of an exemption application. Should the Executive deem it necessary to hold a conference, it must notify all interested parties and indicate the matters to be dealt with at the conference.

3.5 CHAPTER 5: MERGER CONTROL

3.5.1 Chapter 5 provides for merger control, including merger notification, investigation, determination and revocation of the approval of mergers under certain circumstances.

SECTION 40: MERGER DEFINED

3.5.2 The definition of a merger and the concept of control remains substantially the same as in the current Act.

3.5.3 The only difference being that an instance that give rise to a merger now include a joint venture between two or more undertakings, in section 40(2) of the Bill. Joint ventures have long been recognised as legitimate and beneficial business arrangements. Undertakings may co-operate using a joint venture for various reasons, including, for instance, the sharing of risk and costs in research and development projects. A distinguishing feature between a joint venture and a merger transaction is that the latter results in a new undertaking whereas with the former the individual undertakings continue to exist. Joint ventures may also be created for a specific time period. However, joint ventures can raise competition concerns, especially where they function as fully fledged businesses. It is therefore advisable for competition authorities to evaluate whether such transactions trigger a notifiable merger.

SECTION 41: CONTROL OF MERGERS

3.5.4 Section 41(4) empowers the Commission to prescribe criteria for categorising mergers into various phases, for efficiency purposes. Phase 1 mergers are regarded as non-complex and not likely to raise competition concerns and should be considered within a relatively shorter
period of time compared to Phase 2 and 3 mergers. Consequently, the Executive is given powers to make decisions on Phase 1 mergers. Phase 2 mergers are more complex than Phase 1 but less complex than Phase 3 mergers which are likely to raise competition concerns and would involve more extensive analysis. Phase 2 and 3 mergers are decided by the Board of Commissioners, upon recommendation by the Executive.

SECTION 43: INVESTIGATION OF PROPOSED MERGER

3.5.5 Section 43 provides for the Executive to investigate all mergers and make a determination with respect to Phase 1 mergers and make recommendations to the Board of Commissioners with respect to Phase 2 and 3 mergers.

3.5.6 Importantly, the Bill now gives the Executive the same powers to investigate mergers as prohibited conduct. Under the Bill third parties can now be summoned to provide information to the Commission which will greatly assist with the assessment of mergers.

SECTION 45: PERIOD FOR MAKING DETERMINATION IN RELATION TO PROPOSED MERGER

3.5.7 The timeframes for assessing and deciding on a merger application are contained in section 45 and provision is made for an extended investigation period which can be suspended to allow for the submission of further information or other eventualities. The suspension of the time can only be done under exceptional circumstances, such as in instances where there is a material change to the merger notification or where parties submitted incorrect or misleading information.

SECTION 46: DETERMINATION OF PROPOSED MERGER

3.5.8 Section 46 provides factors that may be taken into account when determining whether a merger leads to the substantial lessening of competition or not. The Bill maintains 2 tests for the analysis of mergers: a competition test and a public interest test. The Bill adopts the emerging trend to focus on the substantial lessening of competition test, hence the Bill omits the dominance test.

3.5.9 The first analysis is meant to determine whether the merger will lead to a substantial lessening or prevention of competition. If the merger is likely to lead to a substantial lessening or prevention of competition then it must be determined whether there are technological, efficiency or innovation gains that outweigh the anticompetitive effect.

3.5.10 Should it be established that there are no benefits that outweigh the anticompetitive effects of the merger, the analysis turns to the consideration of the public interest, that is, whether the merger can be justified on public interest grounds.
SECTION 48: MERGERS FALLING BELOW THRESHOLD

3.5.11 In terms of section 48, the Executive may at any time, compel the undertakings concerned to notify the Commission if a proposed merger falls below the threshold referred to in section 41(3)(c), if the Executive considers it necessary to deal with the merger in terms of this Bill.

SECTION 49: MERGERS IMPLEMENTED IN CONTRAVENTION OF THIS CHAPTER

3.5.12 Where a merger has been implemented in contravention of the provisions of Chapter 5 of the Bill, the Executive may investigate the matter as an alleged prohibited conduct and recommend to the Board of Commissioners to refer the matter to the Competition Adjudicative Panel.

SECTION 50: REVIEW OF MERGER DECISIONS

3.5.13 The decisions of the Board of Commissioners may be reviewed by the Competition Adjudicative Panel.

3.6 CHAPTER 6: MARKET INQUIRIES

3.6.1 Chapter 6 provides for the conduct of market enquiries by the Executive, including the initiation process, notice, scoping and finalisation of market inquiries.

SECTION 52: PURPOSE OF MARKET INQUIRY

3.6.2 Chapter 6 grants powers to the Commission, not provided for in the current Act to, through the Executive, conduct market inquiries, the purpose of which, in terms of section 52, is to determine whether any feature or combination of features in a market or conduct by one or more participants in the market has the effect of preventing, restricting or distorting competition.

3.6.3 A market inquiry looks into a particular market or sector of the economy where there is no immediately discernible evidence of unilateral anticompetitive conduct by a particular firm or concerted practice by two or more firms. As such, a market inquiry is not targeted at an individual firm but rather it allows the Commission to understand why the market is not functioning as it should and why it exhibits particular outcomes, such as high prices, lack of innovation, lack of growth, limited product choice, low quality products, lack of competition and high levels of concentration, among others.

SECTION 53: INITIATION OF MARKET INQUIRY

3.6.4 Section 53 of the Bill provides for triggers, that is, conditions that may necessitate the initiation of a market inquiry, including (a) reasonable grounds to suspect that a restriction or distortion of competition is occurring; (b) a complaint having been lodged with the Commission by anyone; (c) a request lodged by the Minister by written notice; (d) the outcome of research, investigation, or merger evaluation process pointing to possible
competition problems in a particular market or markets; (e) a market inquiry undertaken in another jurisdiction leading to the need for a similar inquiry in Namibia.

SECTION 54: NOTICE OF MARKET INQUIRY

3.6.5 Sections 54 of the Bill requires the Board of Commissioners to publish a notice of the inquiry in the Government Gazette. The notice must specify the purpose of the inquiry; the terms of reference of the inquiry; the duration of the inquiry; the manner of making submissions to the inquiry; the matters that the Board of Commissioners wishes submissions regarding the inquiry to deal with; and the date of publication of the final report regarding the inquiry.

SECTION 55: SCOPE OF MARKET INQUIRY

3.6.6 According to section 51 the scope of a market inquiry may include matters pertaining the structure of the market, the conduct of market players or participants or any other relevant matter.

SECTION 56: CONDUCTING OF MARKET INQUIRY BY EXECUTIVE

3.6.7 In terms of section 56 the Executive can decide the manner in which it wishes to conduct a market inquiry, including convening public hearings, requesting people to appear before the Executive voluntarily or summoning people who fail to appear voluntarily. A market inquiry is exploratory in nature, with no allegation of prohibited conduct against any undertaking. Therefore, the powers of search and seizure which are regarded as intrusive, cannot be exercised for purposes of a market inquiry.

SECTION 57: OBLIGATIONS OF EXECUTIVE ON FINALISING MARKET INQUIRY

3.6.8 Once the Executive finalises a market inquiry, it is required to submit a report to the Board of Commissioners, recommending, among other things, the initiation of a formal investigation; making recommendations to a regulatory authority; making policy or legislative recommendations to government or taking any other appropriate action within its powers.

3.7 CHAPTER 7: INVESTIGATION AND ADJUDICATION PROCEDURES

3.7.1 Chapter 7 of the Bill deals with the investigation process and procedures, the powers of entry and seizure as well as adjudicative processes before the Competition Adjudicative Panel.

SECTION 58: POWER TO INVESTIGATE

3.7.2 The Executive is given powers, in section 57 of the Bill, to conduct investigations into prohibited conduct. The Executive can, either on its own initiative or upon receipt of information or complaint from any person, investigate any conduct where the Commission has reasonable grounds to suspect contravention of the law.
SECTION 59: NOTICE OF INVESTIGATION

3.7.3 Where an investigation is initiated, the Executive, in terms of section 59, should give notice to the person being investigated, notifying the person of the subject matter and purpose of the investigation and inviting the undertaking concerned to make representations and the time period for making such representation. However, the notice need not be given in instances where doing so is likely to jeopardise or prejudice the investigation to any undertaking which is suspected to be a party to the conduct being investigated.

SECTION 60: RIGHT TO CLAIM CONFIDENTIALITY

3.7.4 Sections 60 of the Bill allows for the safeguarding of confidential information and for the Commission to determine whether certain information is confidential as claimed by an applicant or not.

SECTION 61: RESTRICTED USE OF INFORMATION

3.7.5 Where confidential information has been relied upon in compiling the reasons for decision, the Commission should send the report to the owner of the information before publishing it.

SECTION 68: INTERIM RELIEF

3.7.6 The Bill allows a complainant through the Executive to apply for interim relief which may be granted in order to prevent serious or irreparable damage to the complainant or applicant. In the current Act, the responsibility to apply for an interim relief lies only with the Commission.

SECTION 69: CONSENT ORDER

3.7.7 Section 69 provides for the Executive to negotiate a consent agreement with a respondent and such consent can be confirmed by the Competition Adjudicative Panel as an order.

3.7.8 In the current Act, the Commission is only empowered to enter into consent agreement in relation to cartels and abuse of dominance cases. The Bill allows the Commission to enter into consent agreements for merger contraventions (i.e. mergers implemented prior to approval by the Commission or contrary to conditions imposed by the Commission).

SECTION 70: OUTCOME OF INVESTIGATION

3.7.9 At the end of an investigation the Board of Commissioners, in terms of section 70 of the Bill, may refer the matter to the Competition Adjudicative Panel, and in so doing has the discretion to refer all, some or additional particulars of the complaint to the Panel. If, after twenty-four months the Board of Commissioners has not made a referral to the Competition Adjudicative Panel and has not extended the investigation timeframe, the matter is presumed to have been non-referred.
3.8 CHAPTER 8: ENFORCEMENT OF THE ACT

3.8.1 Chapter 8 deals with the enforcement of the Act and provides for the orders that may be granted, their variation or rescission and limitations of instituting action.

SECTION 71: STATUS AND ENFORCEMENT OF ORDERS

3.8.2 Section 71 of the Bill deals with enforcement powers. With respect to enforcing the Act, the decisions or orders of the Competition Adjudicative Panel have a final and binding effect and may be served, executed and enforced as if they were orders of the High Court.

SECTION 72: CIVIL ACTIONS

3.8.3 Section 72 provides that a person who has suffered loss or damage as a result of prohibited conduct may not commence proceedings in a civil court for damages if that person has been awarded damages in a consent order in terms of section 69.

SECTION 73: VARIATION OR RESCISSION OF ORDER

3.8.4 Section 73 further provides for the Competition Adjudicative Panel to vary or rescind its decisions or orders where these are granted erroneously or where there is ambiguity, an obvious error or omission.

SECTION 74: LIMITATIONS ON INSTITUTING ACTION

3.8.5 In terms of section 74 of the Bill, a complaint may not be brought to the Commission 3 years after the conduct complained of has ceased.

SECTION 75: STANDARD OF PROOF

3.8.6 Section 75 of the Bill provides that the standard of proof when dealing with allegations of prohibited conduct is on a balance of probabilities.

3.9 CHAPTER 9: OFFENCES, ADMINISTRATIVE PENALTIES AND REMEDIES

3.9.1 The Bill makes provision for criminal and administrative sanctions in sections 76 to 78. Criminal sanctions relate to offences and administrative sanctions relate to prohibited conduct. The Bill provides for the imposition of fines and prison sentences for committing offences. The courts are responsible for the adjudication of all matters relating to alleged offences in terms of the Bill, whereas allegations of prohibited conduct are the purview of the Commission and the Competition Adjudication Panel.
SECTION 84: OTHER ORDERS

3.9.2 Section 84 empowers the Competition Adjudicative Panel to make appropriate orders in relation to prohibited conduct, such as declaring conduct to be prohibited conduct; interdicting any prohibited conduct; directing any action to be taken by the undertaking or undertakings concerned, to remedy or reverse the prohibited conduct or the effects thereof; or imposing an administrative penalty.

SECTION 86: PROOF OF FACTS

3.9.3 Section 86 makes presumptions regarding the proof of facts and the admissibility of evidence in criminal proceedings.

SECTION 87: REFERRAL OF MATTER TO PROSECUTOR-GENERAL

3.9.4 Section 87 provides for the referral of criminal offences directly to the Prosecutor-General. This new provision is aimed at addressing the likely challenges that would be caused by having such matters investigated by the police before being referred to the Prosecutor General. Apart from the delays, the police would likely lack the expertise to investigate such matters. It is thus proposed that the Prosecutor General or another delegated party investigate and prosecute.

3.10 CHAPTER 10 – GENERAL

3.10.1 The General Chapter of the Bill deals with various matters such as corporate immunity, the issuing of advisory opinions, competition advocacy and delegation of powers, among others.

SECTION 88: CORPORATE IMMUNITY

3.10.2 Section 88 provides, in exchange for information, for the granting of immunity from prosecution to undertakings involved in cartel activity. The details of the conditions and procedures for applying for immunity will be contained in a corporate immunity policy developed by the Commission. In order to give flexibility to the Commission it is advisable for legislation to contain an empowering provision that allows the Commission to develop a corporate immunity policy, but that such policy should not be in the legislation itself. This will ensure adaptability and easy amendment of the policy as required.

SECTION 89: ADVISORY OPINIONS

3.10.3 Section 89 empowers the Executive to issue advisory opinions for a fee. Such opinions are not binding either on the Commission or the requesting party.

SECTION 90: COMPETITION ADVOCACY

3.10.4 Section 90 explicitly provides for the Commission’s advocacy function by stating that it must take reasonable measures for the promotion of competition advocacy, creating awareness,
disseminating information, imparting knowledge and providing training on competition matters.

3.10.5 An important aspect of advocacy in this regard is the Commission’s discretion to issue opinions on the competition implications of state aid to state owned entities. This is in pursuit of the principle of competitive neutrality.

SECTION 94: REPEAL OF LAWS

3.10.6 Section 94 deals with the repeal of laws. The Competition Act, 2003 (Act No 2 of 2003) is repealed in its entirety.

SECTION 95: TRANSITIONAL PROVISIONS

3.10.7 Section 95 provides for transitional arrangements such as pending investigations and matters before the High Court as well as the continued existence of the rules made in terms of the Competition Act, 2003.