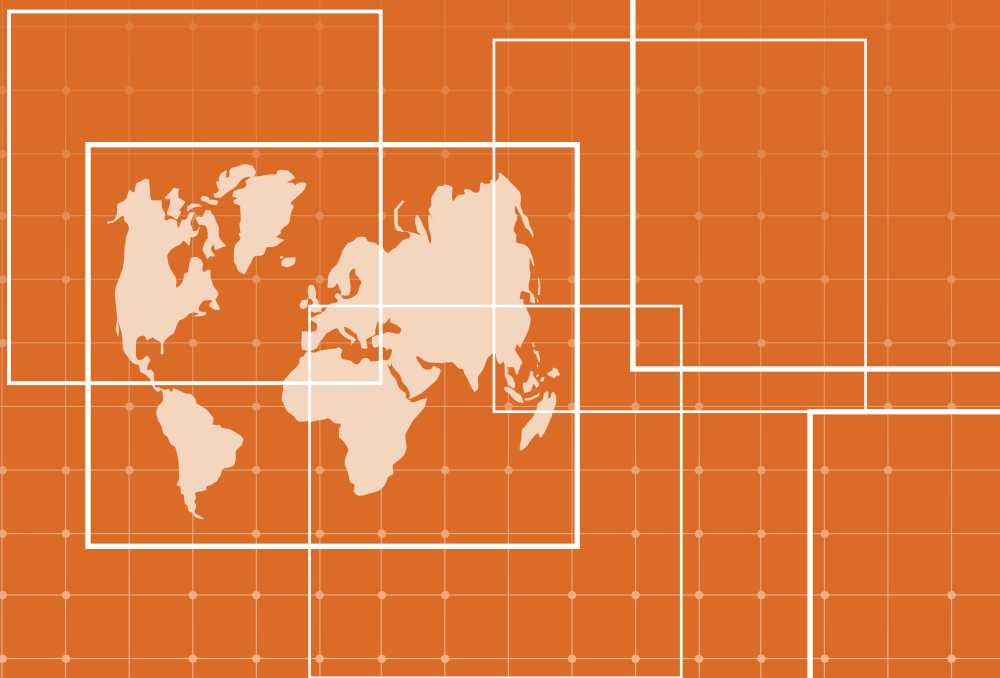




VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

NAMIBIA

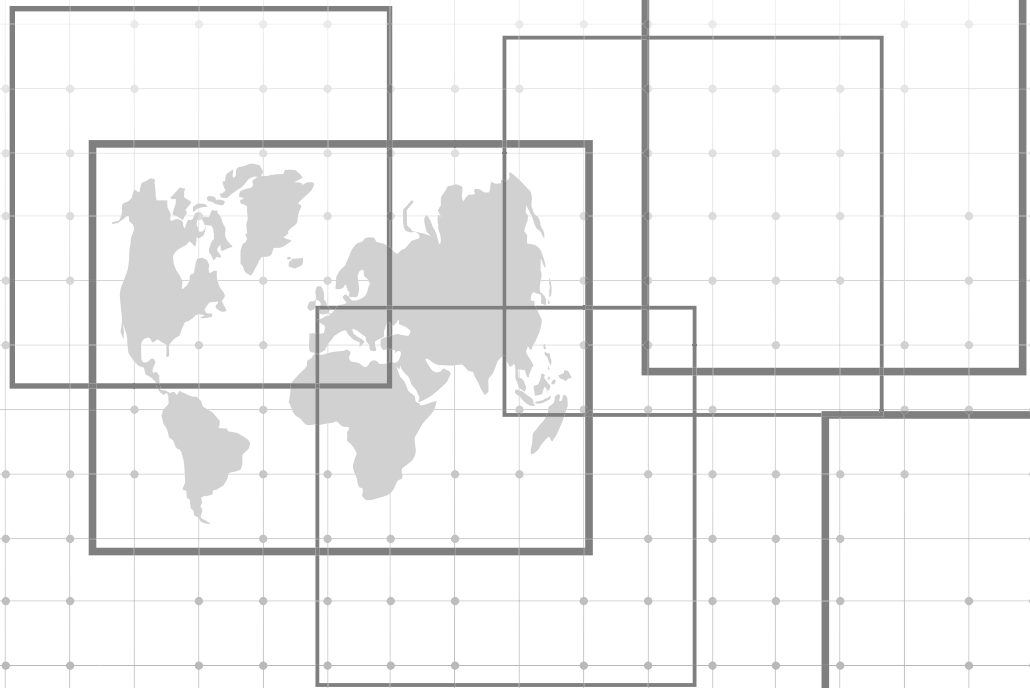




VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY:

NAMIBIA

Full Report



NOTE

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This Voluntary Peer Review of Competition Law and Policy has been prepared in response to the request of the Intergovernmental Group of Experts as stated in the Report of the Intergovernmental Group of Experts on Competition Law and Policy on its thirteenth session (TD/B/C.I./CLP/25). The opinions expressed in this Voluntary Peer Review are those of the peer reviewers and do not necessarily reflect the views of the United Nations Secretariat.

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ABBREVIATIONS AND ACRONYMS

ACCC	Australian Competition and Consumer Commission
ARIPO	African Regional Intellectual Property Organization
BIPA	Business and Intellectual Property Authority
BoN	Bank of Namibia
CCPOLC	Competition and Consumer Policy and Law Committee
COMESA	Common Market for Eastern and Southern Africa
CRAN	Communications Regulatory Authority of Namibia
DFID	Department for International Development (United Kingdom of Great Britain and Northern Ireland)
EC	European Commission
ECB	Electricity Control Board
IDRC	International Development Research Centre (Canada)
IPRs	intellectual property rights
ICN	International Competition Network
IMF	International Monetary Fund
ITC	International Trade Centre
GDP	gross domestic product
LRDC	Law Reform and Development Commission
NaCC	Namibian Competition Commission
NCPG	Namibia Consumer Protection Group
NCT	Namibia Consumer Trust
NAMPORT	Namibian Ports Authority
NAMFISA	Namibia Financial Institutions Supervisory Authority
OECD	Organization of Economic Cooperation and Development
SACU	South African Customs Union
SADC	Southern African Development Community
SWAPO	South-West Africa People's Organisation
UNCTAD	United Nations Conference on Trade and Development
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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1. HISTORICAL, POLITICAL AND ECONOMIC CONTEXT

The Republic of Namibia, previously known as South-West Africa, is a vast, sparsely populated country situated along the south Atlantic coast of Africa between 17 and 29 degrees south of the Equator.¹ It shares land borders with Angola and Zambia to the north, Botswana to the east, and South Africa to the south. Although it does not border with Zimbabwe in the real sense, less than 200 metres of riverbed (essentially the Zambia/Botswana border) separates them at their closest points.²

With a total area of 825,418 km², Namibia is the world's thirty-fourth largest country (after the Bolivarian Republic of Venezuela). As it is situated between the Namib Desert, which stretches along Namibia's entire coastline to the west, and the Kalahari Desert to the east, it is the country with the least rainfall in sub-Saharan Africa.³ Given the presence of the arid Namib Desert, it is one of the least densely populated countries in the world, based on its 2011 population census of 2.1 million.⁴

Namibia became a German colony in 1884 to forestall British encroachment, and was known as German South-West Africa. South Africa occupied the colony in 1915, after defeating the German forces during the First World War, and administered it from 1919 onward as a League of Nations mandated territory.

As will be demonstrated later in this report, the occupation of Namibia by South Africa had wide implications on the country's future competition law and practice. In occupying the then South-West Africa, the Government of South Africa desired to incorporate the territory into its own territory. It however never officially did so, although the territory was administered as a de facto "Fifth Province" of South Africa.⁵ Under such an arrangement, the white minority had representation in the whites-only Parliament of South Africa, as well as in electing their own local administration, the

South-West Africa (SWA) Legislative Assembly. The Government of South Africa also appointed the SWA Administrator, who had extensive powers.

Pressure mounted on South Africa during the 1960s to grant independence to South-West Africa as other European powers were granting independence to their colonies and trust territories in Africa. As reported by Sibeene (2009),⁶ in 1966 the International Court of Justice dismissed a complaint brought by Ethiopia and Liberia against South Africa's continued presence in South-West Africa. In response to the ruling by the International Court of Justice, the military wing of the South-West Africa People's Organization (SWAPO), the People's Liberation Army of Namibia, began armed struggle for independence.

The General Assembly of the United Nations revoked South Africa's mandate on South West Africa, while in 1971 the International Court of Justice issued an "advisory opinion" declaring South Africa's continued administration to be illegal.⁷ In 1978, the United Nations passed resolution 435 as the internationally agreed decolonization plan for Namibia. Transition to independence however only finally started in 1988, and the holding of the country's one-person-one-vote election for a Constituent Assembly was held in October 1989. The election was won by SWAPO, although it did not gain the hoped for two-thirds majority. The South Africa-backed Democratic Turnhalle Alliance (DTA) became the official opposition.

Namibia officially became independent on 21 March 1990, with His Excellency Sam Nujoma as the first President. After independence, multiparty democracy was introduced, with local, regional and national elections held regularly. Although SWAPO has won every election since independence, several registered political parties are active and represented in the National Assembly (the successor to the Constituent Assembly).⁸ The tran-

¹ Official website of the Government of Namibia, <http://www.gov.na>.

² <http://en.wikipedia.org/wiki/Namibia>.

³ Ibid.

⁴ Ibid.

⁵ <http://en.wikipedia.org/wiki/Namibia>.

⁶ Petronella Sibeene, "Swapo Party Turns 49", quoted in <http://en.wikipedia.org/wiki/Namibia>

⁷ "Namibian War of Independence 1966-1988", Armed Conflict Events Database, as quoted in <http://en.wikipedia.org/wiki/Namibia>.

⁸ Namibia has at least 11 political parties: (a) South-West Africa People's Organization (SWAPO); (b) All People's Party (APP); (c) Congress of Democrats (COD); (d) Democratic Turnhalle Alliance of Namibia (DTA); (e) Monitor Action Group (MAG); (f) National Democratic Movement for Change (NamDMC); (g) National Unity Democratic Organization (NUDO); (h) Rally for Democracy and Progress (RDP); (i) Republican Party (RP); (j) South-West Africa National Union (SWANU); and (k) United

sition from the 15-year rule of President Nujoma to his successor, His Excellency Hifikepunye Pohamba in 2005 went smoothly.

The Constitution of Namibia is the supreme law of the land and is at the apex of the Namibian legal system, and all laws are weighed against it. It has a mixed legal system of uncodified civil law based on Roman–Dutch law and customary law.⁹ The Constitution was ratified on 9 February 1990 and became effective on 12 March 1990, just before the country's independence from South Africa. It has been amended on two occasions, in 1998 and 2010.

Chapter 3 of the Constitution on fundamental human rights and freedoms has provisions that impact on the enforcement of any law in Namibia, including competition and consumer protection laws. The relevant provisions of the Constitution provide for the following rights: (a) respect for human dignity (article 8); (b) equality and freedom from discrimination (article 10); (c) fair trial (article 12); (d) privacy (article 13); (e) administrative justice (article 18); and (f) apartheid and affirmative action (article 23). Article 66 of the Constitution also recognizes the existence in Namibia of common law (i.e., law that has been developed by judges through decisions of courts and similar tribunals) and customary law.

Namibia is a member of various regional and international groupings, notably, the United Nations, the African Union (AU), the Commonwealth of Nations, the Southern African Development Community (SADC), the Southern African Customs Union (SACU)¹⁰, the Common Monetary Area (CMA)¹¹, World Trade Organization (WTO), World Intellectual Property Organization (WIPO) and the African Regional Intellectual Property Organization (ARIPO).

Since independence, the Government of Namibia has pursued free-market economic principles designed to promote commercial development and job creation to bring disadvantaged Namibians

into the economic mainstream.¹² To facilitate this goal, the Government has actively courted foreign investment. The liberal Foreign Investment Act of 1990 provides guarantees against nationalization, freedom to remit capital and profits, currency convertibility and a process for settling disputes equitably. The Government however owns and runs a number of companies such as Ai Namibia, TransNamib and NamPost.

Namibia's economy is tied closely to South Africa's due to their shared history.¹³ The largest economic sectors are mining, agriculture, manufacturing and tourism. Mining is the single most important contributor to the economy, providing about 25 per cent of Namibia's revenue. Namibia is the fourth largest exporter of non-fuel minerals in Africa, and the world's fourth largest producer of uranium. Rich alluvial diamond deposits make Namibia a primary source of gem-quality diamonds. Other minerals that are extracted industrially include lead, tungsten, gold, tin, fluorspar, manganese, marble, copper and zinc.

About half of the population of Namibia depends on agriculture, largely subsistence agriculture, for its livelihood.

Tourism is a major contributor (14.5 per cent) to Namibia's GDP, creating tens of thousands of jobs (18.2 per cent of all employment) directly or indirectly and servicing over one million tourists per annum.¹⁴ The country is among the prime destinations in Africa and is known for ecotourism which features Namibia's extensive wildlife.

In 2013, the global business and financial news provider Bloomberg named Namibia the top emerging market economy in Africa, and the thirteenth best in the world.¹⁵ Only four African countries made the Top 20 Emerging Markets list in the March 2013 issue of the Bloomberg Markets magazine, and Namibia was rated ahead of Morocco (nineteenth), South Africa (fifteenth) and Zambia (fourteenth). Worldwide, Namibia fared better than Brazil, Hungary and Mexico. The Bloomberg Markets magazine ranked the

Democratic Front (UDF).

⁹ WIPO, "The Constitution of the Republic of Namibia", <http://www.wipo.int/wipolex/en/details.jsp?id=9404>.

¹⁰ SACU member States are Botswana, Lesotho, Namibia, South Africa and Swaziland. The SACU Secretariat is located in Windhoek, Namibia.

¹¹ Members of CMA are Lesotho, Namibia, South Africa and Swaziland.

¹² "Economy of Namibia", http://en.wikipedia.org/wiki/Economy_of_Namibia.

¹³ <http://en.wikipedia.org/wiki/Namibia>.

¹⁴ "A Framework/Model to Benchmark Tourism GDP in South Africa", Pan-African Research and Investment Services, March 2010, as quoted in <http://en.wikipedia.org/wiki/Namibia>.

¹⁵ <http://en.wikipedia.org/wiki/Namibia>.

top 20 countries based on more than a dozen criteria. The data came from Bloomberg's own financial-market statistics, IMF forecasts and the World Bank. The countries were also rated on areas of particular interest to foreign investors, which are (a) the ease of doing business; (b) the perceived level of corruption; and (c) economic freedom.

Namibia is also classified as an upper middle-income country by the World Bank, and ranks eighty-seventh out of 185 economies in terms of ease of doing business.¹⁶

According to the WTO, nearly 70 per cent of Namibia's imports originate in South Africa, and approximately one third of Namibian exports are destined for the South African market.¹⁷ Outside of South Africa, the European Union (primarily the United Kingdom of Great Britain and Northern Ireland) is the chief market for Namibian exports. Namibia's exports consist mainly of diamonds and other minerals, fish products, beef and meat products, fruits and light manufactures. Namibia is seeking to diversify its trading relationship away from its heavy dependence on South Africa. Europe has become a leading market for Namibian fish and meat, while mining concerns in Namibia have purchased heavy equipment and machinery from Canada, Germany, the United Kingdom and the United States of America. The Government of Namibia is making efforts to take advantage of the American-led African Growth and Opportunity Act (AGOA), which provides preferential access to United States markets for a long list of products, including clothing and textiles.

The currency of Namibia is the Namibia dollar (N\$), which was introduced in September 1993. The Namibia dollar is fixed to and equals the South African rand (R) under the CMA. Currently (as at 9 December 2013), US\$1 equals R10.3358.

Namibia's future overview and main objectives as stated on the official website of the Government of Namibia contain various public interest elements upon which the enforcement of the country's competition law is based. The elements include the adoption of the policy of affirmative action and support for small and medium-sized enterprises. Promotion of investment in manufacturing and mineral processing is also envisaged.

¹⁶ "Namibia"; [Doingbusiness.org, as quoted in http://en.wikipedia.org/wiki/Namibia](http://en.wikipedia.org/wiki/Namibia).

¹⁷ <http://globaleledge.msu.edu/countries/namibia/economy>.

Competition law was enacted in Namibia in 2003 under the Competition Act, 2003 (Act No.2 of 2003). The enactment of the law preceded the formulation and adoption of a comprehensive national competition policy for the country, a development that was commented upon by many stakeholders that were consulted during the fact-finding visit as having affected the drafting and enactment of the country's competition law. One of the country's leading law firms submitted during the fact-finding visit that since there was no clear competition policy in Namibia before the drafting of the competition law, the direction to take was also not clear, resulting in "cut and paste" borrowings from other countries' competition legislations. The Chief Executive Officer and Secretary to the Commission of the Namibian Competition Commission (interchangeably referred to as "the NaCC" or "the Commission" in this report), Mr. Mihe Gaomab II, confirmed that the country's competition law was not based on a policy but was largely based on the South African law. The Commission was however in the process of formulating and drafting a comprehensive competition policy at the time of the fact-finding visit. In an article that appeared in *The Business Journal* of Namibia of August–September 2013 the Commission's Chief Executive Officer made keynote statements regarding the formulation of the competition policy, which gave an indication of the direction and coverage of the policy.¹⁸

The Commission's Chief Executive Officer also advised, in consultations held during the fact-finding visit to Namibia in November 2013,¹⁹ that unlike most other African and developing countries, the

¹⁸ In *The Business Journal* article, the NaCC Chief Executive Officer and Secretary to the Commission stated that the competition policy will aim at ensuring its relevance to other economic policies such as industrial, trade and investment policies, which are complementary. The interaction between competition and trade policies in issues such as cross-border trade or unfair trade practices and foreign competition will also be clearly defined in the competition policy. The new competition policy will also aim at advancing on a Competitive Neutrality Complaints function, since competitive neutrality is a policy which aims at promoting efficient competition between public and private businesses in Namibia, and competitive neutrality requires that State-owned enterprises (SOEs) should not enjoy a net competitive advantage over their private sector competitors by virtue of public sector ownership.

¹⁹ The fact-finding visit to Namibia was undertaken from 4 to 8 November 2013. A total of 37 officials from 22 organizations were interviewed and consulted during the visit (the list of the interviewees is included in annex I of this report).

adoption of competition law by Namibia was not a conditionality of the World Bank or the International Monetary Fund (IMF), but became imperative because of Namibia's closeness with South Africa, whose companies have many subsidiaries in Namibia and are engaged in various anticompetitive practices.

Ashipala (2006)²⁰ noted that in the past, competition issues in Namibia had been regulated by the Regulation of Monopolistic Conditions Amendment Act, 1958 (Act 14 of 1958) of South Africa, which was however not applied in Namibia after independence. Over time, the Government of independent Namibia recognized the urgent necessity for a competition law, and commissioned a study, with the assistance of the European Union, which drafted the Competition Bill in 1996. A Steering Advisory Committee on Competition was established, which widely discussed the Bill with all major stakeholders before the Bill was tabled before Parliament where it was duly passed.

The Competition Act, 2003, of Namibia was signed into law by the President on 3 April 2003 and published in terms of article 56 of the Constitution of Namibia in the *Government Gazette* of 24 April 2003 as Government Notice No. 92 of 2003. The Namibian Competition Commission (NaCC) that was established under the Act however only came into effective operation in December 2008 with the appointment by the Minister of Trade and Industry of its first Board of Commissioners. The Secretary to the Commission was appointed by the Board of Commissioners as Chief Executive Officer of the Commission under the terms of section 13(1) of the Act on 1 September 2009.

Before the appointment of the first full-time members of the Commission's Secretariat, the Commission's part-time Board of Commissioners was assisted in the running of the Commission, in terms of its administrative and operational affairs, by a three-person Unit in the Ministry of Trade and Industry, headed by the Deputy Director (Consumer Protection and Internal Market Regulation) in the Ministry.

In 2009, the Ministry requested technical assistance from the Southern African Development Community (SADC) in the enforcement of Namibia's competition law and the operationaliza-

tion of the enforcement agency. A SADC technical assistance project was undertaken in two stages. The first stage was undertaken during the period from 18 to 30 May 2009, and its terms of reference were to (a) provide guidance on the development of appropriate institutional framework; (b) provide strategic guidance on regulations and guidelines necessary for effective enforcement of the existing competition law; (c) build technical and analytical capacity to carry out competition investigations; and (d) provide guidance on the development and implementation of the Commission's annual business plans aligned to effective enforcement of the competition law. The Second Stage was undertaken during the period from 28 December 2009 to 8 January 2010, and its terms of reference were to (a) provide technical advice and guidance on outstanding and current cases involving mergers and acquisitions in line with relevant provisions of the Competition Act and the *Rules Gazette* and, further, to assist in quality assurance of such documentation and the processes involved and advice on possible actions; (b) provide technical advice on current complaints of an anticompetitive behaviour and generally guide on the processes and procedures involved; (c) guide the Commission Secretary on the processes involved in the organization of stakeholders' conferences and Commission Meetings and recommend appropriate advice on finalization of such cases addressing the outcomes and public sector concerns; (d) provide technical advice on the process and procedures of drafting possible guidelines on cooperation agreements with sectoral regulators in ports and financial sectors to ensure activation of draft cooperation agreements; and (e) provide technical support and advice on the revision of the proposed work plan of the Commission that covers the operational and institutional framework of the Commission.

The NaCC was officially launched on 9 December 2009. The Commission's guiding Mission Statement as announced at the launch was as follows: (a) *Mission*: to safeguard and promote competition in the Namibian economy; (b) *Vision*: fair market competition; (c) *Broad Promise*: fair competition, prosperous economy; and (d) *Values*: (i) national economic interests come first (our priority and commitment is to put in place national economic interests towards attainment of Vision 2030 ahead of any other considerations); (ii) impartiality (we

²⁰ John M. Ashipala, "Namibia", in *Competition Regimes in the World – A Civil Society Report*, CUTS International, 2006.

shall be fair and equitable living our purpose and upholding principles of impartiality and confidentiality, regardless of the circumstances); (iii) consistency (we shall be consistent in our approach in every instance, regardless of the circumstances and pressure that may be brought to bear); (iv) accountability for our role (we accept our responsibilities and are accountable for all our decisions and actions. We uphold and respect decisions taken by the Commission, whether or not an individual was party to an agreement).

2. SUBSTANTIVE CONTENT OF NAMIBIA'S COMPETITION LAW

The Competition Act, 2003 (No.2 of 2003), of Namibia is a general law of general application in line with international best practice.²¹ The preamble to the Act states its primary objectives as “to safeguard and promote competition in the Namibian market; to establish the Namibian Competition Commission and make provision for its powers, duties and functions; and to provide for incidental matters”.

The Act is arranged in 9 chapters, as follows: (i) chapter 1 (preliminary provisions); (ii) chapter 2: (Namibian Competition Commission); (iii) chapter 3 (restrictive business practices); (iv) chapter 4 (mergers); (v) chapter 5 (jurisdiction of court); (vi) chapter 6 (general provisions); (vii) chapter 7 (offences and penalties); (viii) chapter 8 (application of the Act and other legislation relating to competition); and (ix) chapter 9 (transitional provisions).

The following analysis of the scope of competition policy and law in Namibia is on the provisions of the above chapters of the Competition Act, 2003, as read together with the rules made under the Act²² and other relevant regulations.

2.1. Chapter 1: Preliminary provisions

The preliminary provisions of the Competition Act, 2003, cover definitions, the purpose of the Act and application of the Act.

²¹ “Model Law on Competition” (TD/RBP/CONF.7/8), UNCTAD, United Nations, New York and Geneva, 2010.

²² Rules Made under the Competition Act, 2003, General Notice No. 41 of 2008, published in the Government Gazette of the Republic of Namibia of 3 March 2008.

(a) Definitions

The definitions of most of the terms used in the Act are listed in section 1 of the Act. The section contains the primary catalogue of definitions of terms used throughout the Act, while some terms that are only used in specific parts of the Act are defined in the relevant chapters of the Act. Examples of terms that are exclusively used in specific chapters of the Act, and are therefore defined in those chapters, include terms such as “professional association” and “rules” (defined in chapter 3 on restrictive business practices), “merger” (defined in chapter 4 on mergers) and “public regulation” and “regulating authority” (defined in chapter 8 on the application of the Act and other legislation relating to competition).

The main definitional section 1 of the Act contains a total of 21 definitions. A number of the definitions are on common competition terms, such as “agreement” (which is defined in the Act as including “a contract, arrangement or understanding, whether or not legally enforceable”) and “concerted practice” (which is defined as “deliberate joint conduct between undertakings achieved through direct or indirect contact that replaces their independent actions”).

The term “undertaking” is defined as “any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service”. This is more or less in line with the definitions of the term in the competition legislations of some other countries in the SADC region,²³ with the notable exceptions of Mauritius and Zambia, which define the term as to mean a commitment or obligation given to the competition authority.²⁴

²³ The term “undertaking” is defined in terms of section 2(1) of the Competition Act [chapter 14:28] of Zimbabwe as meaning “any person engaged for gain in the production or distribution of a commodity or service”.

²⁴ The term “undertaking” is defined in terms of section 2 of the Competition and Consumer Protection Act, 2010, of Zambia as meaning “a commitment, promise or other future conduct that a person or enterprise provides to the Commission in order to address any concern raised by the Commission”. A more or less similar definition of the term is found under section 2 of the Competition Act, 2007, of Mauritius. However, in both the Zambian and Mauritian legislations, the term “enterprise” is given the same definition as the term “undertaking” in other legislations in the region. In the Mauritian legislation,

In the UNCTAD Model Law on Competition, the term “enterprises” is given the same meaning as is given the term “undertaking” in the Namibian competition legislation, namely “firms, partnerships, corporations, companies, associations and other juridical persons, irrespective of whether created or controlled by private persons or by the State, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities directly or indirectly controlled by them”.

The term “undertaking” as defined in the Competition Act, 2003, of Namibia however seems to be causing the Commission enforcement problems. In its terms of reference on the *Review of the Competition Act No.2 of 2003 and the Rules Made Thereunder (2008)*,²⁵ the Commission identified the definition of “undertaking” as one of the provisions of the Act for review and/or amendment consideration. It was noted that related to its application on restrictive business practices, the definition of the term “undertaking” “needs to be changed so as to include those that do not operate for ‘gain or reward’ but whose activities have an effect on competition”. Related to mergers and acquisitions, it was however noted that:

[T]he most challenged provision of the Act relates to the definition of an undertaking as defined in the definition section of the Act. This definition is directly linked to section 42(1) which defines a merger as: “For purposes of this chapter, a merger occurs when one or more **undertakings** directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking”. Subsection (2) continues: “a merger contemplated in subsection (1) may be achieved in any manner, including:

the term “enterprise” is defined as to mean “any person, firm, partnership, corporation, company, association or other juridical person engaged in commercial activities for gain or reward, and includes its branches, subsidiaries, affiliates or other entities directly or indirectly controlled by it”, while in the Zambian legislation it is defined as meaning “a firm, partnership, joint venture, corporation, company, association and other juridical persons, which engage in commercial activities, and includes their branches, subsidiaries, affiliates or other entities, directly or indirectly, controlled by them”. In the Competition Act No. 89 of 1998 of South Africa, the term “firm” is used instead of the term “undertaking” and is defined as including “a person, partnership or a trust”.

²⁵ NaCC Request for Proposal No. 05/2013.

(a) purchase or lease of shares, an interest, or assets of the **undertaking** in question...”. The definition is vague and should be amended to include individuals who conduct business.

The NaCC’s above proposed amendments of the definition of the term “undertaking” seem to contradict each other. On one hand, the proposal is that the definition should include those that do not operate for “gain or reward” (or in other words those that are not engaged in commercial activity) but whose activities have an effect on competition, and on the other hand, the proposal is that the definition should be amended to “include individuals who conduct business”. Apparent contradictions of definitions of terms in the same piece of legislation should be avoided since they defeat the very purpose of definitions, which is, as stated in the UNCTAD Model Law on Competition,²⁶ to “make the reading of the law easier and prevent confusion or ambiguity”.

The application of the Competition Act, 2003, in terms of its section 3 is very clear in that it applies to all **economic activity** within Namibia or having an effect in Namibia” (author’s emphasis). The same section 3 of the Act exempts “concerted conduct designed to achieve a **non-commercial socioeconomic objective**” (author’s emphasis). The suggested scope of application of competition law in the UNCTAD Model Law on Competition also refers to those engaged in commercial activity. The suggested application includes the following: “applies to all enterprises... in regard to all their commercial agreements, actions or transactions regarding goods, services or intellectual property” and “applies to all natural persons who, acting in a private capacity as owner, manager or employee of an enterprise, authorize, engage in or aid the commission of restrictive practice prohibited by the law”.

Therefore, to include in the definition of “undertaking” those that do not operate for gain or reward would have no basis.

However, the Commission’s notation that the definition of “undertaking” is causing enforcement problems when applied with the definition

²⁶ United Nations Conference on Trade and Development, “Model Law on Competition”, United Nations, New York and Geneva, 2010, available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx>.

of “merger”, and should therefore be amended to include individuals who conduct business, has some merit. One of the law firms that was consulted during the fact-finding visit also was of the view that there is a need to give more clarity on what is meant by an “undertaking” in the definition of “merger”.

The definition of the term “undertaking” as given in section 1 of the Competition Act, 2003, is adequate and in line with international best practices. It is however the use of that term in the definition of “merger” in section 42 of the Act that needs to be clarified.

The term “confidential information” is defined in the Act as “trade, business or industrial information that belongs to an undertaking, has a particular economic value and is not generally available to or known by others” is also in line with similar definitions of the term in the SADC region.²⁷ This common understanding of what “confidential information” means is crucial in the NaCC’s cooperation with other competition authorities in the region that involves exchange of information.

It is also noteworthy that the term “historically disadvantaged persons” is defined in the Act as “persons who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices”.²⁸ This reflects Namibia’s sociopolitical history as enshrined in the country’s Constitution.

The definition of the term “goods” in the Act however seems too restrictive as it excludes commercial trading in certain goods from the application of the Act. The term is defined as not including “(a) agricultural commodities which have not undergone a process of manufacture; and (b) goods exempted under section 3(1)(c)”. Section 3(1)(c) of the Act refers to goods which the Minister of Trade

and Industry declares to be exempt from the provisions of the Act. The exclusion from the definition of “goods” of agricultural commodities which have not undergone a process of manufacture effectively means that such agricultural commodities are exempted from the application of the Act. This could have serious implications on competition in Namibia since agriculture is one of the country’s major economic activities, involving about half of the population. However, the NaCC Chief Executive Officer and Secretary to the Commission, in consultations held during the fact-finding visit, explained that the exemption is only for those basic agricultural commodities such as maize and other grains that would not have been further processed. The conduct of players in the value chain in any manufacturing process of the commodities is subject to the provisions of the Act.

While an Act of Parliament cannot contain all possible definitions of terms referred to, or having a meaning, in the Act, there are some terms that have to be defined in competition legislation. One such term is “relevant market”. Identifying the relevant market in which an anticompetitive practice is being engaged in generally provides a good starting point for the assessment of competition cases since all calculations, assessments and judgements about the competitive implications of any given conduct depend on the size and shape of the relevant market.²⁹ A delineation of the relevant market is imperative to establish the context for the exercise of market power, and the competitive effect of the anticompetitive practice under investigation. The notion of relevant market is used in order to identify the products and undertakings which are directly competing in a business. Therefore, the relevant market is the market where the competition takes place.

The term ‘relevant market’ is however not defined in the Competition Act, 2003, of Namibia, even though the notion of market is prominent in issues connected with abuse of a dominant position and mergers and acquisitions, which require an accurate identification of the relevant market. A dominance investigation must be confined to

²⁷ An almost similar definition of the term “confidential information” is found in the Competition Act No. 89 of 2008 of South Africa; it is defined as “trade, business or industrial information that belongs to a firm, has a particular economic value and is not generally available to or known by others”. In the Competition and Consumer Protection Act, 2010 of Zambia, the term “confidential information” is also defined as “trade, business, commercial or industrial information that belongs to an enterprise, has a particular economic value and is not generally available to or known by others”.

²⁸ The definition of “historically disadvantaged persons” also includes women from all racial groups who are regarded as disadvantaged.

²⁹ John Clark and R Shyam Khemani, *Market Definition and Assignment of Market Shares*, in *A Framework for the Design and Implementation of Competition Law and Policy*, World Bank, Washington, D.C., and Organization for Economic Cooperation and Development (OECD), Paris, 1999.

Competition term	Suggested definition
Dominant position	<ul style="list-style-type: none"> • "Dominant position of market power" refers to a situation where an enterprise, either by itself or acting together with a few other enterprises, is in a position to control the relevant market for a particular good or service or group of goods or services (UNCTAD Model Law) • "Dominant position" means a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors (Competition Act, 2009 of Botswana) • "Dominant position" means a situation where an enterprise or a group of enterprises possesses such economic strength in a market as to make it possible for it to operate in that market and to adjust prices or output without effective constraint from competitors or potential competitors (Competition Act No. 89 of 1998 of South Africa)
Essential facility	<ul style="list-style-type: none"> • "Essential facility" means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers (Competition Act No. 89 of 1998 of South Africa) • "Essential facility" means an infrastructure or resource that cannot reasonably be duplicated, without access to which competitors cannot reasonably provide goods or services to their customers (Competition and Consumer Protection Act, 2010 of Zambia)
Negative clearance	<ul style="list-style-type: none"> • "Negative clearance" means the certification by the Commission that an otherwise anticompetitive conduct can be allowed under conditions specified by the Commission (Competition and Consumer Protection Act, 2010 of Zambia)
Statutory monopoly	<ul style="list-style-type: none"> • "Statutory monopoly" means a commercial undertaking or an activity conducted by an entity, whether or not owned wholly or partly by the State, on the basis of statutory provisions that preclude other entities from conducting the same activity (Competition and Consumer Protection Act, 2010 of Zambia)

the smallest possible market likely to be affected by the alleged restrictive practices, otherwise the effects of the anticompetitive conduct might be understated. If the market is defined as being very large, the dominance of an otherwise abusive firm might seem to be small and thus escape the scrutiny of the competition authority. To prove a case of abuse of dominance, the abusive practice or conduct must not only exist but the relevant market in which the practice or conduct has greatest effect must be identified. Thus in dominance cases, market definition helps in the understanding of the scope of competition and the competitive constraints that limit a firm's ability to exercise market power.³⁰ It also helps in the understanding of the respective positions of rival firms, competitive interactions among them and the constraints a firm's customers impose. In merger examination as well, identifying the market in which the merger is occurring is essential in assessing the transaction's full competitive effects and in assessing whether the transaction could lead to a substantial lessening of competition in the relevant market.

The term "relevant market" therefore needs to be defined in the Competition Act of Namibia for the common understanding and interpretation of the term.

³⁰ ICN Unilateral Conduct Working Group, May 2011.

The suggested definition of the term "relevant market" in the UNCTAD Model Law on Competition³¹ is that it "refers to the general conditions under which sellers and buyers exchange goods, and implies the definition of the boundaries that identify groups of sellers and of buyers of goods within which competition is likely to be restrained. It requires the delineation of the product and geographical lines within which specific groups of goods, buyers and sellers interact to establish price and output. It should include all reasonably substitutable products or services, and all nearby competitors, to which consumers could turn in the short term if the restraint or abuse increased prices by a not insignificant amount".

It is therefore recommended that the term "relevant market" be defined in the Competition Act, 2003, of Namibia, under section 1 of the Act, to give clear guidelines on the identification of markets under competition investigations.

Other common competition terms that are of relevance to the enforcement of some provisions of the Act that are not defined in the Act include terms such as "dominant position", "negative clear-

³¹ UNCTAD, "Model Law on Competition", United Nations, New York and Geneva, 2010.

ance”, “essential facility” and “statutory monopoly”. Table 1 presents the suggested definitions of the terms in the UNCTAD Model Law on Competition and in other competition legislations in the SADC region.

It is recommended that common competition terms such as “dominant position”, “essential facility”, “negative clearance” and “statutory monopoly” be defined in section 1 of the Competition Act, 2003, in line with international best practices.

(b) Purpose of the Act

The purpose of the Competition Act, 2003 is stated under the terms of section 2 of the Act as “to enhance the promotion and safeguarding of competition in Namibia”.³²

It is noteworthy that while some of the objectives are efficiency and competition-related (those meant “to promote the efficiency, adaptability and development of the Namibian economy” and “to provide consumers with competitive prices and product choices”), the rest are related to the achievement of other socioeconomic benefits of a public interest nature. This is in line with the Constitution of Namibia as translated in the Government of Namibia’s official future overview and main objectives.

(c) Application of the Act

Section 3 of the Act provides for its application. In that regard, it is provided in section 3(1) that subject to some exceptions, the “Act applies to all economic activity within Namibia or having an effect in Namibia”. These are very important provisions on the jurisdiction of the Act and of the NaCC that enforces the provisions of the Act. This is more so if the provisions of section 3(1) are read

together with those of section 3(2), which states that the Act “binds the State in so far as the State engages in trade or business for the production, supply or distribution of goods or the provision of any service”, albeit with the proviso that the State is not subject to any provision relating to criminal liability. Furthermore, section 3(3) of the Act also provides that the “Act applies to the activities of statutory bodies”.

However, the application of the Act to the activities of statutory bodies under section 3(3) is subject to the exception of those activities of statutory bodies that “are authorized by any law”. This exception has the effect of exempting from the application of Act many such economic and commercial activities of statutory bodies. This would be at variance with the general provision that the Act “applies to all economic activity within Namibia or having an effect in Namibia”. As observed by a senior member of the NaCC’s Restrictive Business Division in consultations held during the fact-finding visit, the exception in section 3(3) presents enforcement problems to the Commission in that, in Namibia, statutory bodies control large parts of the economy and, as such, the exemption of some of their activities from the application of the Act has adverse effects on competition in the economy. One of the other stakeholders that were consulted during the visit, a law firm, also referred to the inability of the Commission to investigate State-owned enterprises that are operating as monopolies.

Section 3(3) of the Competition Act, 2003, should therefore be amended to remove the exception from the application of the Act of those activities of statutory bodies that are authorized by any law. Alternatively, the whole of section 3(3) can be deleted since statutory bodies can be covered under section 3(2) which deals with the State.

The exception to the general applicability of the Act under section 3(1)(c) of the Act that goods or services which the Minister declares can be exempted from the provisions of the Act can also be contrary to the basic principle that competition law, or any other law, should be general law of general application. Therefore, the law should have as few exceptions as possible. While it is noted that the Minister can only exercise his exemption powers “with the concurrence of the Commission”, in practice statutory bodies like

³² The stated purpose of enhancing the promotion and safeguarding of competition in Namibia is with the objective of (a) promoting the efficiency, adaptability and development of the Namibian economy; (b) providing consumers with competitive prices and product choices; (c) promoting employment and advancing the social and economic welfare of Namibians; (d) expanding opportunities for Namibian participation in world markets while recognizing the role of foreign competition in Namibia; (e) ensuring that small undertakings have an equitable opportunity to participate in the Namibian economy; and (f) promoting a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.

competition authorities find it extremely difficult not to agree with ministerial decisions, especially if there are no statutory guidelines on the making of such decisions, as is the case with section 3(1)(c) of the Act. The exception under section 3(1)(c) of the Act can therefore be used for political, rather than economic, expediency and thus distort competition in the economy.

It is however also noted that the enforcement of competition law should be done in coherence with the Government's other socioeconomic policies to ensure planned economic development, which is the duty of the responsible Ministers. The Minister should therefore be allowed to exercise his exemption powers under section 3(1)(c) of the Act, but with clear guidelines on the exercise of the powers aimed at meeting public interest objectives of a socioeconomic nature as provided for in the Constitution of Namibia.

The rest of the exceptions to the general applicability of the Act under section 3(1) are common in competition legislations worldwide or have no adverse effects on the enforcement of Namibia's competition law. These are related to "collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 1992 (Act No.6 of 1992)" (section 3(1)(a) of the Competition Act) and "concerted conduct designed to achieve a non-commercial socioeconomic objective" (section 3(1)(b)).

2.2. Chapter 2: Namibian Competition Commission

Section 4 of the Competition Act, 2003 establishes the Namibian Competition Commission (NaCC) as an independent juristic person that is subject only to the Namibian Constitution and the law. The Commission has jurisdiction throughout Namibia and is required to be impartial and to perform its functions "without fear, favour or prejudice".

In terms of section 16 of the Act, the Commission is given the responsibility for the administration and enforcement of the Act, with the statutory functions of investigating and remedying anti-competitive practices, inclusive of restrictive business practices and anticompetitive mergers and of opening up markets. It also has the functions of advocacy, education and awareness, as well as of cooperating and exchanging information, with

other competition authorities, and of advising the Government on matters related to public interest and sector regulation concerning competition matters.

The Commission has powers in terms of section 22 of the Act to make rules relating to the administration, organization and operations of the Commission, including prescribing forms of applications, notices, certificates and other documents required for the purposes of the Act, as well as fees to be paid for the purposes of the Act. The Commission's powers under section 22 of the Act must however be exercised with the approval of the Minister, and the rules thus made must be by way of a notice in the *Government Gazette*.

In exercising its rule-making powers under section 22 of the Act, the Commission gazetted under General Notice No.41 of 2008 the Rules Made under Competition Act, 2003. The Rules are arranged in seven parts covering, inter alia, definitions and office functions of the Commission, delivery of documents, access to records of the Commission, complaint procedure, exemption procedures and merger procedures. The Rules also have an Annex A (Index to Forms and Forms), and Annex B (Categories of Small Undertakings).

2.3. Chapter 3: Restrictive business practices

Chapter 3 of the Act, on restrictive business practices, is in four parts: (a) part i (restrictive agreements, practices and decisions); (b) part ii (abuse of dominant position); (c) part iii (exemption of certain restrictive practices); and (d) part iv (investigation into prohibited practices).

(a) Part I: Restrictive agreements, practices and decisions

Section 23(1) of the Act prohibits "agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia".

The stated objects or effects of prohibited agreements include those related to the hard-core cartel activities of price-fixing, market-sharing and

bid-rigging, as well as production limitation. They also include relatively softer vertical restraint practices and conduct, such as discriminatory trading, conditional and tied selling, and even resale price maintenance.

There is therefore no clear distinction under section 23 of the Act between the treatment of horizontal agreements and vertical agreements, whose harmful effects to competition are not the same. Among horizontal agreements, there is also no clear distinction between those that constitute hard-core cartels, which should be per se prohibited because of their serious effects on competition, and those that have some efficiency and/or pro-competitive elements, which should be considered using the “rule of reason” approach. This can present serious enforcement problems to the NaCC.

The Commission’s Restrictive Business Practices Division, in consultations held during the fact-finding visit, noted that horizontal agreements and vertical agreements have the same treatment under section 23 of the Act, even though horizontal agreements are generally viewed as being more harmful to competition, and this potentially presents enforcement problems for the Commission. The Division was however of the view that the problem first needs to be tested in law courts, which has still not been done in Namibia, before something can be done. It was also advised that even though the Act does not specifically provide for the consideration of competition cases involving restrictive business practices using the per se prohibited and “rule of reason” approaches, the Division in practice is doing so. In considering the prohibition of agreements in terms of section 23(1) of the Act, the Division does so in two stages. The first stage is to look at the “object” of the agreement. If it is found that the object or intention of the agreement is not to compete, then the agreement is per se prohibited without looking at any perceived efficiency reasons. The Division normally views the object of most hard-core cartel agreements as being to prevent competition and, therefore, per se prohibited. However, if no proof of object not to compete is found then the “effect” of the agreement is assessed using the “rule of reason” approach. The above consideration of “object” and “effect” of agreements is also made on vertical agreements.

While the enforcement problem of the non-distinction in the Act of the treatment of horizontal agreements and vertical agreements can wait to be tested in law courts before resolution, as suggested by the Commission’s Restrictive Business Practices Division, this would be a time- and resource-consuming approach to an already identified problem. Pre-emptive action would be required for risk prevention. Also, while the Commission is already assessing anticompetitive agreements using the per se prohibited and “rule of reason” approaches, this is not statutorily provided for, and there are no objective guidelines on which practices should be per se prohibited and which should be considered using the “rule of reason” approach. This could open the Commission to unwarranted and time-wasting challenges from the business community and make enforcement of the law difficult.

International best practice is to have separate provisions in competition legislations dealing with prohibited horizontal agreements and prohibited vertical agreements. For example Part A on Restrictive Practices of the Competition Act No. 89 of 1998 of South Africa under the terms of section 4 deals with prohibited horizontal agreements and lists those practices involved that are, or per se, prohibited outright. Section 5 of that Act deals separately with prohibited vertical agreements. Under the terms of section 8 of the Competition and Consumer Protection Act, 2010 of Zambia, any category of agreement, decision or concerted practice which has as its object or effects the prevention, restriction or distortion of competition to an appreciable extent in Zambia is anticompetitive and prohibited. Section 9 of that Act prohibits per se horizontal agreements between enterprises if the agreements involve hard-core cartel arrangements, such as (a) price-fixing arrangements; (b) market-sharing arrangements; (c) bid-rigging or collusive tendering; (d) setting production quotas; and (e) providing for collective refusal to deal in, or supply, goods or services. Section 10 of the Act also prohibits per se vertical agreements involving resale price maintenance (with certain provisos). Section 12 of the Act deals with other horizontal and vertical agreements that are not per se prohibited and are considered using the “rule of reason” approach.

It is recommended that there be a clear distinction in the Competition Act, 2003, between horizontal and vertical agreements and their treatment as either per se prohibited offences or those considered using the “rule of reason” approach. The terms “horizontal agreement” and “vertical agreement” would also need to be defined in the relevant part of the Act, i.e., part i (restrictive agreements, practices and decisions) of chapter 3 on restrictive business practices.

Under the terms of section 23(4) of the Competition Act, 2003 resale price maintenance is absolved if the price is clearly recommended. This is in line with international best practice. The proviso in section 23(8) of the Act that agreements between, or practices engaged in by companies and their wholly owned subsidiaries, or by undertakings that are owned or controlled by the same person or persons, are not prohibited under the Act is also in line with international best practice.

(b) Part II: Abuse of a dominant position

Abuse of a dominant position in a market in Namibia is prohibited in terms of section 26(1) of the Act. Practices that constitute abuse of dominant position in terms of section 26(2) of the Act include the following: “(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; (b) limiting or restricting production, market outlets or market access, investment, technical development or technological progress; (c) applying dissimilar conditions to equivalent transactions with other trading parties; and (d) 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 matter of the contracts”.

The two broad types of business conduct that have traditionally been recognized as abusive by competition laws and enforcement agencies worldwide are therefore incorporated in the Act. These are: “(i) exploitative abuses, in which a firm takes advantage of its market power by charging excessively high prices to its customers, discriminating among customers, paying low prices to suppliers, or through related practices; and (ii) exclusionary abuses, in which a firm attempts to suppress com-

petition – for example, by refusing to deal with a competitor, raising competitors’ costs of entering a market, or charging predatory prices”³³

Excessive pricing is included as one of the abusive practices of a dominant firm under section 26(2) of the Act (imposing unfair selling prices). Proving excessive pricing is extremely difficult for competition authorities and can be highly subjective, particularly for those authorities without in-house cost accounting expertise. Remedying excessive pricing could also lead to price controlling, an activity that runs counter to the basic principle of competition. To minimize the above problems, the term “excessive pricing” has been clearly defined in some competition legislations,³⁴ and the resultant price regulation remedy has been made subject to direct connection to the elimination of the responsible restrictive business practice.³⁵

It is recommended that the term “excessive pricing” be defined in chapter 3 (restrictive business practices) of the Competition Act, 2003, and that its price regulation remedy be clearly linked to the elimination of the responsible restrictive business practice to avoid it being used for unrelated price controls, which should be the responsibility of other relevant government policies.

The Act also provides in terms of section 24 for the determination by the Minister, with the concurrence of the Commission, of dominance thresholds in relation to undertakings in Namibia, either in general or in relation to a specific industry. In

³³ Robert Anderson, Timothy Daniel and Alberto Heimler, *Abuse of Dominance*, in *A Framework for the Design and Implementation of Competition Law and Policy*, World Bank, Washington, D.C., and Organization for Economic Cooperation and Development (OECD), Paris, 1999.

³⁴ The term “excessive price” is defined under the terms of section 1 of the Competition Act No. 89 of 1998 of South Africa as meaning “a price for a good or service which: (a) bears no reasonable relation to the economic value of that good or service; and (b) is higher than the value referred to in subparagraph (a)”. Economic value is the amount that is considered to be a fair equivalent for something else. The economic value of a particular item is measured by the maximum amount of other things that a person is willing to give up to have that item.

³⁵ The Competition Act [Chapter 14:28] of Zimbabwe provides under the terms of section 31 that the Commission can make an order regulating the price which any person may charge for any commodity or service “provided that the Commission shall not make any such order unless it is satisfied that the price being charged by the person concerned is essential to the maintenance of the restrictive practice to which the order relates”.

that regard, the Rules Made under Competition Act, 2003, that were gazetted in March 2008 prescribed under Rule 36 specific criteria to be applied for determining a dominant position in a market. Under those criteria, an undertaking has, or two or more undertakings have, a dominant position in a market if (a) it has or they have at least 45 per cent of that market; (b) it has or they have at least 35 per cent, but less than 45 per cent, of that market, unless it or they can show that it does, or they do, not have market power; or (c) it has or they have less than 35 per cent of that market, but has or have market power. For the purposes of the above, "market power" means "the power of an undertaking or undertakings to control prices, to exclude competition or to behave to an appreciable extent independently of its competitors, customers or suppliers".

It is important to note that collective abuse of a dominant position is captured in the above Rule. The import of this is that abuse of a dominant position is not only by individual firms but also by a number of connected firms acting collectively. In the case of Namibia, there are a number of firms that are connected through common shareholding and cross-directorships.

(c) Part III: Exemption of certain restrictive practices

Under the terms of section 27(1) of the Act, any undertaking or association of undertakings may apply to the Commission to be exempted from the provisions of part I (restrictive agreements, practices and decisions) and part II (abuse of dominant position) of chapter 3 of the Act in respect of (a) any agreement or category of agreements; (b) any decision or category of decisions; and (c) any concerted practice or category of concerted practices.

In granting the applied for exemption, the Commission is required in terms of section 28(2) of the Act to satisfy itself that there are exceptional and compelling reasons of public policy for such an exemption. The Commission is also required under the terms of section 28(3) to take into account the extent to which the agreement, decision or concerted practice concerned contributes to or results in the following: "(a) maintaining or promoting exports; (b) enabling small undertakings

owned or controlled by historically disadvantaged persons to become competitive; (c) improving or preventing decline in the production or distribution of goods or the provision of services; (d) promoting technical or economic progress or stability in any industry designated by the Minister, after consultation with the Minister responsible for that industry; (e) obtaining a benefit for the public which outweighs or would outweigh the lessening in competition that would result, or would be likely to result, from the agreement, decision concerted practice or the category of agreements, decisions or concerted practices".

Public interest considerations therefore play a big role in the granting of exemption of restrictive business practices under the Act. It is however noteworthy that the public interest benefit must outweigh the lessening in competition that would result. Applications for exemption therefore have to be considered using the "rule of reason" approach.

It is however noted that exemption from the provisions of art I (restrictive agreements, practices and decisions) of chapter 3 of the Act can be applied in the case of all anticompetitive agreements falling under section 23 of the Act. It has already been pointed that section 23 of the Act does not distinguish between horizontal agreements, most of which should be per se prohibited, and vertical agreements, most of which should be considered using the "rule of reason" approach. This therefore means that even those horizontal agreements that should be per se prohibited because of their serious effects on competition, including hardcore cartel arrangements, can be considered for exemption, which should not be the same. International best practice is that per se prohibited restrictive business practices should not be eligible for exemption from the application of competition rules.

It is also noted that exemption from the provisions of part II (abuse of dominant position) of chapter 3 of the Act can be applied for abuse of a dominant position under section 24 of the Act. Consultations during the fact-finding visit to Namibia with a senior member of the Restrictive Business Practices Division of the NaCC indicated that it is confusing to the Division on what grounds abuse of dominance can be exempted from the provisions of part II of chapter 3 of the Act. The confu-

sion of the Division is real. Even though abuse of a dominant position is normally considered using the “rule of reason” approach, it has already been pointed out that its related abusive practices are of exclusionary and exploitative natures, which are serious restrictive business practices that go to the core of anticompetitiveness because of their effect on competition and consumer welfare. Since exemption is on future conduct, it would be inconceivable to give an undertaking a “green light” to engage into such practices.

It is therefore recommended that those restrictive business practices that seriously affect competition, such as anticompetitive horizontal agreements of a hard-core cartel nature, and abuse of a dominant position, should not be eligible for exemption from the provisions of part I (restrictive agreements, practices and decisions) and part II (abuse of dominant position) of chapter 3 of the Competition Act, 2003.

Intellectual property rights (IPRs) are specifically mentioned under section 30 of the Act as eligible for exemption from the provisions of the Act against restrictive business practices. The relevant provisions of section 30(1) provide as follows: “[t]he Commission may, upon application, and on such conditions as the Commission may determine, grant an exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights”.

In a number of competition legislations in the region, such as those of Botswana, Zambia and Zimbabwe, the exercise of intellectual property rights is exempted from the application of the relevant Competition Acts. Such exemption is however provided for in the application provisions of the Acts. It is therefore in line with such practice that section 30(1) of the Competition Act, 2003, of Namibia provides for application for exemption of such rights. The only difference is that in the Namibian competition legislation the exemption of intellectual property rights is subject to “rule of reason” consideration, which is an improvement.³⁶

³⁶ A detailed discussion on intellectual property (IP) is made later in the report on the part dealing with other relevant laws. It is noted that a Business and Intellectual Property Authority (BIPA) is in the process of being established in Namibia, and

In consultations with the Commission’s Restrictive Business Practices Division during the fact-finding visit to Namibia, concerns were raised that section 30(1) of the Act seems to imply that in all cases of intellectual property rights (IPRs) there should be an application to the Commission for exemption, and that if this is the case, then the limited resources of the Commission could be overstretched, and the Commission could be accused of pursuing income-generating objectives from exemption fees. However, the granting of an IPR exemption under the terms of section 30(1) of the Act is upon application to the Commission. It is therefore up to the IPR holder to decide whether or not to make an application for exemption to the Commission. The risk of not getting such an exemption is that the IPR could be subject to competition investigation by the Commission if the holder abuses the rights.

The Act also provides for exemption in respect of professional rules.³⁷ Section 31(1) of the Act provides that “[a] professional association whose rules contain a restriction that has the effect of preventing or substantially lessening competition in a market may apply in the prescribed manner to the Commission for an exemption in terms of subsection (2)”, which relates to exemption from the provisions of part I (restrictive agreements, practices and decisions) of chapter 3 of the Act for a specified period if any restriction contained in those rules that has the effect of preventing or substantially lessening competition in a market is reasonably required to maintain professional standards or the ordinary function of the profession.

that it has been expressed that the NaCC intends to conclude a cooperation agreement with that Authority when it becomes fully operational. In assessing applications for exemption of IPRs under section 30 of the Act, the Commission will benefit from the expert input of BIPA.

³⁷ For the purposes of the exemption, the term “professional association” is defined in the Act as meaning “the controlling body established by or registered under any law in respect of the following professions, and includes any other association which the Commission is satisfied represents the interests of members of any of the following professions: (a) accountants and auditors; (b) architects; (c) engineering; (d) estate agents; (e) legal practitioners; (f) quantity surveyors; (g) surveyors; (h) town and regional planners; (i) health services profession governed by: (i) the Medical and Dental Professions Act, 1993 (Act No. 21 of 1993); (ii) the Nursing Professions Act, 1993 (Act No. 30 of 1993); (iii) the Pharmacy Professions Act, 1993 (Act No. 23 of 1993); (iv) the Veterinary and Para-veterinary Professions Proclamation, 1984 (Proclamation No. 14 of 1984); (v) the Allied Health Services Professions Act, 1993 (Act No. 20 of 1993).”

(d) Part IV: Investigation into prohibited practices

The Commission has powers under the terms of section 33 of the Act to investigate restrictive business practices either on its own or upon receipt of a complaint. Any person can submit a competition complaint to the Commission. Section 33(3) of the Act provides that if the Commission decides to conduct an investigation, it must give a written notice of the proposed investigation to every undertaking whose conduct is to be investigated, indicating the subject matter and purpose of the investigation and inviting the undertaking concerned to submit to it any representations which the undertaking may wish to make to the Commission in connection with any matter to be investigated.

A concern was raised by the Commission during the fact-finding visit on the desirability of warning undertakings in terms of section 33(3) of the Act that they are being investigated since the undertakings would destroy evidence implicating them. The concern is real if dealing with practices that are per se illegal, such as hard-core cartel activities in most jurisdictions. In the case of "rule of reason" prohibitions, there is need for natural justice purposes to inform the respondents of the allegations against them to enable them to make any representations on the matter.

In the case of Namibia, the competition legislation does not clearly distinguish between those anticompetitive practices that should be per se prohibited and those that should be considered using the "rule of reason" approach, and it has already been suggested that such a distinction is necessary. The distinction between per se illegal and "rule of reason" prohibitions would make it possible to treat the prohibitions differently in as far as their investigation is concerned.

In carrying out an investigation into restrictive business practices, the Commission has powers under the terms of section 34 of the Act to conduct "dawn raids" for the purposes of assisting it in ascertaining or establishing whether any undertaking has engaged in or is engaging, or is about to engage, in conduct that constitutes or may constitute an infringement of the part I (restrictive agreements, practices and decisions) or the part II

(abuse of dominant position) prohibition under chapter 3 of the Act on restrictive business practices.³⁸

As a general rule in terms of section 34(3) of the Act, the Commission's "dawn raids" powers of "entry and search" have to be exercised with the support of a warrant issued by a judge of the High Court of Namibia.³⁹

So far, the Restrictive Business Practices Division of the Commission had been unable to utilize the provisions of section 34 of the Act to conduct dawn raids, mainly because the Act requires the conduct of such raids to be undertaken by inspectors, and such inspectors have not been designated or appointed in terms of section 14(1) of the Act. The Mergers and Acquisitions Division of the Commission also noted that section 47(3) of the Act provides that, for the purpose of considering a proposed merger, the Commission may refer the particulars of the proposed merger to an inspector for investigation. It was advised that when the Commission commenced operations with only one officer in the Division, use was made of Form 40 under the Rules Made under Competition Act,

³⁸ Under such "dawn raids" powers, the Commission's inspectors may: (a) enter upon and search any premises; (b) search any person on the premises if there are reasonable grounds for believing that the person has personal possession of any document or article that has a bearing on the investigation; (c) examine any document or article found on the premises that has a bearing on the investigation; (d) request any information about any document or article from the owner of the premises, the person in control of the premises, any person who has control of the document or article; or any other person who may have the information; (e) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation; (f) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to search any data contained in or available to that computer system, reproduce any record from that data, and seize any output from that computer for examination and copying; and (g) attach and, if necessary, remove from the premises for examination and safekeeping anything that has a bearing on the investigation.

³⁹ The Commission is however allowed, under the terms of section 34(8) of the Act, to enter any premises without a warrant, other than a private dwelling, during its investigation if "(a) the owner, or any other person in control of the premises consents to the entry and search of the premises; or (b) the inspector on reasonable grounds believes: (i) that a warrant would be issued under subsection (3) if applied for; and (ii) that the delay in obtaining a warrant would defeat the object of the entry and search". In exercising its powers of "entry and search" without a warrant, the Commission may be accompanied and assisted by the police (section 34(9) of the Act).

2003, on notice of referral to investigate and report, to designate the officer as inspector whenever there was a proposed merger that needed to be investigated, but this has since stopped.⁴⁰

The issue of the absence of inspectors to conduct investigations into restrictive business practices and mergers under the Act does not require any changes or amendments to the Act since it is a purely administrative matter. A more permanent method of designating inspectors is required instead of using the case-by-case method of Form 40 under the Rules Made under Competition Act, 2003. A security identity card with the photograph of the holder issued under the terms of section 14(1) of the Act could suffice.

Section 36(1) of the Act requires the Commission, if upon conclusion of an investigation it proposes to make a decision that there has been an infringement, to give written notice of its proposed decision to each undertaking which may be affected by the decision. Any undertaking that may be affected by the Commission's proposed decision has a right, under the terms of section 37(1) of the Act, to be given an opportunity to make oral representations on the matter to the Commission, and the Commission must convene a conference to be held in that regard. Following that, the Commission may, under the terms of section 38 of the Act, institute proceedings in the High Court of Namibia against the undertaking or undertakings concerned for an order: "(a) declaring the conduct which is the subject matter of the Commission's investigation to constitute an infringement of the Part I or the Part II prohibition; (b) restraining the undertaking or undertakings from engaging in that conduct; (c) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof; (d) imposing a pecuniary penalty; or (e) granting any other appropriate relief".

The remedial actions under the Act are therefore numerous and include "cease and desist" orders,

possible restitution and damages, and imposition of fines. It is however noted that all the remedies are of a behavioural nature, and that structural remedies are not specifically provided for in the Act for restrictive business practices. Structural remedies, which are aimed at changing or altering the structure of the market, such as ordering divestiture or full dissolution or breakup of a firm, are generally preferred to behavioural remedies, which are aimed at regulating or modifying the future conduct of the offending firm to prevent or control the identified anticompetitive practices. They are found to be more effective in the long run and do not require continuing oversight or regulation by the competition authority.

The Commission may also, under the terms of section 39 of the Act, apply to the High Court of Namibia for an interim order restraining an undertaking from engaging in a restrictive business practice pending the conclusion of its investigation if it believes that it is necessary for it to act as a matter of urgency for the purpose "(a) of preventing serious, irreparable damage to any person or category of persons, or (b) of protecting the public interest".

The interim relief given under section 39 of the Act however has a limited effective period of six months after the date of the interim order (section 39(4) of the Act).

The Commission may also, under the terms of section 40(1) of the Act, enter into an agreement of settlement with the concerned undertaking, during or after an investigation into an alleged restrictive business practice, for application to the High Court of Namibia for confirmation as an order of the Court. Section 40(2) of the Act provides that the settlement agreement between the Commission and the concerned undertaking may include "(a) with the consent of any person who submitted a complaint to the Commission in relation to the alleged infringement, an award of damages to the complainant; (b) any amount proposed to be imposed as a pecuniary penalty".

Section 41 of the Act provides for the publication in the *Government Gazette* of Commission decisions following its investigations into restrictive business practices, including any consent agreements reached.

⁴⁰ Form 40 under the Rules Made under Competition Act, 2003 (Notice of Referral to Investigation and Report) on the designation of inspectors applies only to the investigation of proposed mergers under section 47(3) of the Act, i.e., and on notification of merger investigation under Rule 29 of the Rules Made under Competition Act, 2003. The Form can however only be used on a case-by-case basis, and the designation of inspectors under it is therefore temporary.

In responding to the Reviewer's questionnaire on control and prevention of restrictive business practices, a consultant/business that had given commercial advice to complainants in a case involving abuse of dominance and price fixing, felt that in general the restrictive business practices provisions of the Competition Act, 2003, were not too frustrating and served a purpose. He also advised that "Namibia has a very flat economy, thus care must be taken not to frustrate limited economic activity. It is, unfortunately, political policy that frustrates certain economic activities, not necessarily the legislation".

2.4. Chapter 4: Mergers

The merger control provisions in chapter 4 of Namibia's Competition Act, 2003, are extensive, with nearly 10 sections covering pertinent issues such as change of control, pre-merger notification and merger notification thresholds. The provisions however need to be reviewed against international best practices, as enunciated by renowned competition experts, to assess their effectiveness in Namibia.

Merger notification is the legal burden placed upon undertakings to declare the impending changes of control contemplated. Merger notification systems differ from one jurisdiction to another. Many jurisdictions have established a system of notification prior to consummation of mergers, while some have retained a mandatory system of notification after consummation of the merger. A few only require a voluntary notification process, and others apply a mixture of the different merger notification systems.

It has generally been accepted that the pre-merger notification system is the most preferred because it avoids a number of difficulties that competition authorities encounter when they challenge anti-competitive mergers after they occur. Pre-merger notification provides competition authorities with the opportunity to stop a merger if it will result in a substantial lessening of competition in a relevant market, since it is much easier to stop the merger in advance rather than to try to undo a merger once the merger has been consummated.⁴¹ Ko-

vacic (1998)⁴² stated that "such (pre-merger notification) mechanisms are a common element of modern antitrust practice in Western economies, and they reflect a consensus that, in principle, meaningful remedies frequently will be unattainable if antitrust intervention occurs after a transaction is completed and the operations of the merging parties are combined". It can also be argued that political pressures in favour of a merger are not so high in a pre-merger notification situation because there would not be so many stakeholders in the transaction at that stage. This is very important in developing countries like Namibia in which political pressures in business transactions are common. In a pre-merger notification situation, information on the merger is also easily gathered and available from the merging parties in their quest to have the transaction approved.

It has also been accepted that not all mergers need to be preceded by notification. Such a requirement would add a significant and unnecessary compliance burden for the business community and an equally heavy burden for the competition authority that has to review the notifications. As observed by the OECD,⁴³ in several countries the change is to higher size thresholds for merger notification in order to reduce the number of mergers that must be notified. Merger notification thresholds may be based on the merging parties' annual sales (turnover), total assets or both (size-of-the-transaction test). Alternatively, they can be based on the parties' share of the relevant market (market-share test). Kovacic (1998) found that in most instances, notification mechanisms that use market-share thresholds to trigger reporting obligations are likely to be inferior to size-of-the-transaction tests because calculation of a firm's market share is more subjective and prone to manipulation than the calculation of turnover or assets. The ICN Recommended Practices for Merger Notification Procedures⁴⁴ also state that notification thresholds that are clear and understandable are those based on assets and sales (or turnover) and not those based on market share and potential transaction-related effects.

⁴¹ Mark A A Warner, *International Aspects of Competition Policy – Possible Directions for the FTAA*, in "World Competition: Law and Economics Review", Vol. 22 No.1, March 1999.

⁴² William E Kovacic, *Merger Enforcement in Transition: Antitrust Controls on Acquisition in Emerging Economies*, in University of Cincinnati Law Review, Vol. 66, No.4, Summer 1998.

⁴³ OECD Journal of Competition Law and Policy, Vol. 3, No. 1, OECD, Paris, 2001, p. 106.

⁴⁴ See <http://www.internationalcompetitionnetwork.org/uploads/library/doc588.pdf>.

In 2005 the OECD Competition Committee adopted a Recommendation on Merger Review, which aims at contributing to greater convergence of merger review procedures, including notification and review procedures. According to the Recommendation, the criteria to determine whether a merger must be notified should not only be clear and objective, but OECD member countries should assert jurisdiction only over those mergers that have an appropriate nexus with their jurisdiction and review only those mergers that could raise competition concerns in their territory. While the Recommendation does not define what would constitute an “appropriate nexus” with the jurisdiction, the ICN Recommended Practices include criteria on what constitutes an appropriate nexus, i.e. that thresholds should apply to local sales or assets of at least two parties to the transaction or the target.

The need for merger control in Namibia given the country’s relatively small economy was discussed with stakeholders during the fact-finding visit. The consensus was that there is need for merger control in Namibia. In responding to the Reviewer’s questionnaire on merger control, a firm of attorneys incorporated in South Africa that specializes in all aspects of corporate commercial law, including competition law, advised as follows:

We do believe that Namibia requires merger control as part of its implementation of competition policy and law. The philosophical underpinning of merger control is to prevent the formation of anticompetitive structures within a country. Should no merger control be in place in Namibia, this may well enable monopolies to develop which is of course not ideal for consumers, as this may well ultimately result in a limitation of choice of products and innovation and an increase in prices.

Some views were however expressed that merger control might not be the best for everyone since it might restrict business, as some transactions that could be beneficial for the economy might be prevented or some beneficial transactions might not be pursued because of the rigorous merger notification and examination procedures.

It should however be noted that very few mergers are rejected by competition authorities worldwide. Those that are rejected usually fall within the

“substantial lessening” of competition category and would therefore not be beneficial for the economy. Instead, a large number of merger transactions are approved with certain conditions aimed at alleviating the identified competition concerns or advancing other benefits of a socio-economic nature.

In the Competition Act, 2003, of Namibia, the term “merger” is defined under the terms of section 42.⁴⁵ The definition of “merger” in the Act clearly shows the change of control that occurs in the transaction and covers all the three types of mergers (i.e., horizontal mergers, vertical mergers and conglomerate mergers), as well as joint ventures. It also covers the acquisition of controlling interest in both shares and assets of other undertakings.

The Mergers and Acquisitions Division of the NaCC in consultations held during the fact-finding visit was however of the opinion that the definition is not comprehensive and clear enough. It was notified that the Division is frequently being requested by law firms that submit merger notifications to the Commission on behalf of their clients to give advisory opinions on whether certain transac-

⁴⁵ Under the terms of section 42(1) of the Act, a merger occurs “when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another undertaking”. According to section 42(2) of the Act, such a merger may be achieved in any manner including the “purchase or lease of shares, an interest or assets of the other undertaking in question” or the “amalgamation or other combination with the other undertaking”. Section 42(3) of the Act lists the circumstances under which a person is deemed to control an undertaking. In that regard, a person controls an undertaking if that person: (a) beneficially owns more than one half of the issued share capital of the undertaking; (b) is entitled to vote a majority of the votes that may be cast at a general meeting of the undertaking or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that undertaking; (c) is able to appoint or to veto the appointment of a majority of the directors of the undertaking; (d) is a holding company, and the undertaking is a subsidiary of that company as contemplated in the Companies Act, 1973 (Act No. 61 of 1973); (e) in the case of the undertaking being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust; (f) in the case of the undertaking being a close corporation, owns the majority of the members’ interest or controls directly or has the right to control the majority of members’ votes in the close corporation; or (g) has the ability to materially influence the policy of the undertaking in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to above.

tions are mergers for the purposes of notification because of the non-clarity of the definition. It was also notified that some clients of law firms are not sure whether they are “undertakings” as defined in the Act for the purposes of notifying mergers.

One of the law firms that was consulted during the fact-finding visit was however of the view that the definition of “merger” in the Act is wide enough to cover all types of transactions that need to be merger-controlled, but also that there is need to give more clarity on what is meant by an “undertaking” in the definition. Another law firm that was consulted was of the opinion that the definition of “merger” in the Act is too broad. The example given was that property transactions are included in definition, which was felt should not be the case since such transactions do not have any competitive effects. In its response to the questionnaire on merger control, one firm of attorneys also commented as follows:

Whilst we believe that the definition of “merger” is sufficiently comprehensive without being overly restrictive, we do believe that it would be useful for section 42 of the Competition Act, 2003 of Namibia (the “Competition Act”) to specifically exclude intergroup restructures. Whilst we appreciate that the Namibian Competition Commission (the “NaCC”) adopts a pragmatic approach in this respect and does not require intergroup transactions to be notified where indirect control is not affected (a view with which we respectfully concur), it would provide greater certainty if this were to be incorporated in the Competition Act. It would also be useful for the NaCC to provide a guideline on what may be said to constitute the “whole or part of a business”. By way of example, the NaCC has advised that the acquisition of control of an entity holding only a prospecting licence which had not been used for any significant exploration fell within the definition of a merger, which may be a somewhat overly restrictive interpretation of a “whole or part of a business”.

The general consensus was therefore that there is need for greater clarity in the definition of “merger” in the Act to avoid misinterpretations and misrepresentations.

It is recommended that a clearer definition of “merger” be found to meet the concerns of the stakeholders. In that regard, consideration could be given to adopting the definition in the UNC-TAD Model Law on Competition, which is that “mergers and acquisitions” refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates.⁴⁶

The clarification of the term “merger” should also address, as noted in the comments above, the exclusion of transactions involving intergroup restructures, which is normal practice in merger control worldwide. While it can be said that this exclusion is already incorporated in the present definition, which states that “a merger occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of the business **of another undertaking**” (author’s emphasis). What might be required are similar provisions in the Act as those in the Competition Act [Chapter 14:28] of Zimbabwe which specifically provide that “companies which are all part of a single group of companies” should not be considered as separate entities for competition consideration. The previously suggested clarification of what is meant by “undertaking” in the definition could also enable looking into this issue.

For transparency and consistency in merger control, there is nothing wrong with the Commission providing a guideline on what may be said to constitute the “whole or part of a business” in the definition of “merger”, as suggested by one stakeholder. The example given warrants clarification in guidelines and not necessarily in a statutory amendment. The definition correctly covers acquisitions of “shares”, “interests” and “assets”. Prospecting licences are interests and, if they are commercially acquired by another undertaking for a

⁴⁶ The definition of “merger” in the Fair Competition Act, 2003 of the United Republic of Tanzania is also of interest in that it clearly brings out the element of change of control and covers acquisitions outside the United Republic of Tanzania but which have effect in the country. In that Act, “merger” means “an acquisition of shares, a business or other assets, whether inside or outside [the United Republic of] Tanzania, resulting in the change of control of a business, part of a business or an asset of a business in [the United Republic of] Tanzania.”

consideration, this constitutes “change of control”, which has globally been accepted as resulting in a merger transaction. Regardless of whether or not the prospecting licence has been used for any significant exploration, the transaction needs to be examined by the competition authority for its competitive effects in the relevant market. In this regard, it should be noted that merger control is forward-looking and attempts to foresee whether any merger transaction could increase the probability of the exercise of market power or produce market structures that are anticompetitive in the sense of cartelization or monopolization.

Section 43(2) of the Act provides for the determination, by the Minister, of merger notification thresholds “on any basis which the Minister considers appropriate, including with reference to (a) the aggregate value of the assets of the parties to the proposed merger, or the value of the assets or any one of them; (b) the aggregate turnover over a specified period of the parties to the proposed merger, or the turnover of any one or more of them; (c) specified industries or categories of undertakings; (d) the number of parties involved in the proposed merger”. The Minister of Trade and Industry in Government Notice No. 307 (Determination of Class Mergers to Be Excluded from Chapter 4 of Competition Act, 2003)⁴⁷ determined the merger notification thresholds as follows:

- (a) the combined annual turnover in, into or from Namibia of the acquiring undertaking and target undertaking is equal to or valued below N\$20 million;
- (b) the combined assets in Namibia of the acquiring undertaking and target undertaking are equal to or value below N\$20 million;
- (c) the annual turnover in, into or from Namibia of the acquiring undertaking plus the assets in Namibia of the target undertaking is equal to or valued below N\$20 million;
- (d) the annual turnover in, into or from Namibia of the target undertaking plus the assets in Namibia of the acquiring undertaking are equal to or valued below N\$20 million;
- (e) the annual turnover in, into or from Namibia, of the target undertaking is equal to or valued below N\$10 million; and

- (f) the asset value of the target undertaking is equal to or valued below N\$10 million.

In line with international best practice, the above merger notification thresholds are based on “size-of-the-transaction” factors. They also provide an appropriate local nexus of jurisdiction as recommended by both the OECD and ICN.

During the fact-finding visit, the Mergers and Acquisitions Division of the NaCC, and other stakeholders, expressed the opinion that the gazetted merger notification thresholds were low given the fact that the rate of merger notifications to the Commission is still high,⁴⁸ and may not fulfil the intended purpose of screening those transactions that might not cause serious competition concerns. It was also highlighted by one law firm that the number of merger notifications they handled had not changed significantly since the publication of the thresholds.

It is recommended that the merger notification thresholds that were published in December 2012 should be reviewed upwards to ensure that they serve their intended purpose of screening those transactions that might not cause serious competition concerns.

Section 43(3) of the Act prohibits any person from implementing a proposed merger unless it has been approved by the Commission and is implemented in accordance with any conditions attached to the approval. This requires pre-merger notification, again in line with international best practice.

The period for making determination in relation to the proposed merger is provided for under the terms of section 45 of the Act. In that regard, section 45(1) provides as follows: “[s]ubject to subsection (2), the Commission must consider and make a determination in relation to a proposed merger of which it has received notification in terms of section 44(1): (a) within 30 days after the date on which the Commission receives that notification; or (b) if the Commission requests further information under section 44(2), within 30 days after the date of receipt by the Commission of the information; or (c) if a conference is convened in accordance with section 46, within 30 days after the date of conclusion of the conference.”

⁴⁷ *Government Gazette* of 24 December 2012.

⁴⁸ As many as eight notifications are received per month.

Section 45(2) of the Act however provides that “[i]f the Commission is of the opinion that the period referred to in paragraph (a), (b) or (c) of subsection (1) should be extended due to the complexity of the issues involved it may, before expiry of that period, by notice in writing to the undertakings involved extend the relevant period for a further period, not exceeding 60 days, specified in the notice”.

In consultations held during the fact-finding visit, the Mergers and Acquisitions Division of the Commission advised that it has proved very difficult to meet the 30-day deadline for considering mergers, and that on many occasions it has to extend the consideration period in terms of the provisions of section 45(2) of the Act. In order to meet the deadline, the Division has agreed in its *Internal Merger Guidelines* to fast-track non-problematic mergers if certain conditions are met, such as: (a) no overlap between the activities of the parties in regards to the relevant market in question; (b) market share(s) of the merged entity in all the relevant markets being less than 15 per cent; (c) transactions where one of the parties is an altogether new entrant into the relevant market; and (d) management buy-out transactions. Decisions on such fast-tracked mergers can be taken within 25 business days of notification.

Statutory merger determination deadlines are necessary for efficient merger control. Mergers and acquisitions need to be examined as expeditiously as possible since the transaction costs to the merging parties can be high. The provisions of section 45 of Namibia’s Competition Act, 2003 are therefore in order and have not unduly hindered the NaCC from effectively examining merger transactions given the fast-track merger examination mechanism in its *Internal Merger Guidelines*.

In making a determination in relation to a proposed merger, the Commission may, under the terms of section 47(1) of the Act, either give approval for the implementation of the merger or decline to give approval for the implementation of the merger. Also under the terms of section 47(6), the Commission may give approval for the implementation of a proposed merger on such conditions as the Commission may consider appropriate. Section 47(2) provides that the Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger.⁴⁹

The criteria not only include consideration of competition issues but also of other public interest issues. This is highly debatable in competition policy and law, particularly whether competition authorities in determining mergers and acquisitions should only take into account competition and efficiency considerations or should also take into account public interest considerations.

The need to ensure coherence in the implementation of competition policies and other government socioeconomic policies has been advocated and promoted at various international forums.⁵⁰ It has been noted that coordination between competition policy and other government socioeconomic policies is crucial for economic development. Competition policy should aim not only at promoting and maintaining fair and unrestricted business practices, but should also be implemented in support of other government policies since these affect competition in one way or other. It has however been observed that the interrelationship between competition policy and other

⁴⁹ Section 47(2) of the Act provides that the Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the merger, including “(a) the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; (b) the extent to which the proposed merger would be likely to result in any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market; (c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market; (d) the extent to which the proposed merger would be likely to affect a particular industrial sector or region; (e) the extent to which the proposed merger would be likely to affect employment; (f) the extent to which the proposed merger would be likely to affect the ability of small undertakings, in particular small undertakings owned or controlled by historically disadvantaged persons, to gain access to or to be competitive in any market; (g) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets; and (h) any benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods or provision of services and access to markets”.

⁵⁰ For example, the Annual Conferences of the ICN, the Global Forum on Competition of the OECD and the Intergovernmental Group of Experts on Competition Law and Policy (IGE) of UNCTAD.

public economic policies is so complex that there is often a lack of coordination between the policies, leading to policy incoherence. This is particularly so in developing countries, most of which are aiming to achieve economic growth within the shortest possible period through a multiplicity of economic objectives.

It has therefore been urged that competition authorities in developing countries should utilize their merger control powers to ensure the effective implementation of their Governments' other economic policies by imposing merger approval conditions not only of a competition nature, but of a wider socioeconomic nature as well.

A number of competition legislations worldwide provide for public interest considerations in the examination of mergers and acquisitions. In the SADC region, South Africa's Competition Act No.89 of 1998, under the terms of its section 12A(3) on consideration of mergers, provides that "when determining whether a merger can or cannot be justified on public interest grounds, the Competition Commission or the Competition Tribunal must consider the effect that the merger will have on: (a) a particular industrial sector or region; (b) employment; (c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive; and (d) the ability of national industries to compete in international markets". Zambia's Competition and Consumer Protection Act, 2010 provides, under the terms of its section 31, that "[t]he Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest in the proposed merger, including: (a) the extent to which the proposed merger is likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition; (b) the extent to which the proposed merger would, or is likely to, promote technical or economic progress and the transfer of skills, or otherwise improve the production or distribution of goods or the provision of services in Zambia; (c) the saving of a failing firm; (d) the extent to which the proposed merger shall maintain or promote exports from Zambia or employment in Zambia; (e) the extent to which the proposed merger may enhance the competitiveness or advance or protect the interests of micro and small business enterprises in Zambia; (f) the extent to which the proposed merger may affect the ability of national industries to compete in

international markets; (g) socioeconomic factors as may be appropriate; and (h) any other factors that bear upon the public interest".

In Zimbabwe, the Competition Act [Chapter 14:28] provides, under the terms of section 32(1), that in determining whether or not any merger is or will be contrary to the public interest, the Commission should "take into account everything it considers relevant in the circumstances, and shall have regard to the desirability of: (a) maintaining and promoting effective competition between persons producing or distributing commodities and services in Zimbabwe; and (b) promoting the interests of consumers, purchasers and other users of commodities and services in Zimbabwe, in regard to the prices, quality and variety of such commodities and services; and (c) promoting, through competition, the reduction of costs and the development of new techniques and new commodities, and of facilitating the entry of new competition into existing markets".

Further afield, the Trade Practices Act, 1974 of Australia refers to public interest considerations in competition analysis as "public benefits". In that regard, public benefits include "(i) a significant increase in the real value of exports; (ii) a significant substitution of domestic products for imported goods; and (iii) all other relevant matters that relate to the international competitiveness of any Australian industry".

It is noteworthy that the issue of public interest considerations in the examination of mergers and acquisitions was discussed at the OECD Global Forum on Competition that was held in Paris, France, during the period 28 February to 1 March 2013. The general consensus was that such considerations are necessary.

The public interest considerations in merger determinations that are provided for under the terms of section 47(2) of the Competition Act, 2003, of Namibia include such factors as employment, promotion of small and medium-sized enterprises, particularly those formed by historically disadvantaged persons, and foreign trade competitiveness. The stakeholders that were consulted during the fact-finding visit had mixed feelings on the consideration of public interest issues in merger determination. One law firm was of the opinion that competition legislation should not be used to address public interest issues since

that may lead to uncertainty and inconsistency, and that public interest should therefore be regulated in a separate legislation. Another firm of attorneys in its response to the questionnaire on merger control submitted that while public interest considerations comprise a diversion from “pure” competition, they have their place in the examination and approval of mergers and acquisitions. It stressed however the importance of third parties not being accorded greater rights by virtue of public interest provisions in the Competition Act than they would have by virtue of the relevant governing legislation, such as labour legislation. The Commission was also urged not to permit third parties to unfairly utilize such provisions, or the Commission to do so itself, to coerce the merging parties into granting concessions where the merger does not give rise to any issues in question. It recognized that this is a fine line to be walked by the Commission and requires an exercise of judgement in order to ensure that public interest considerations are not abused by parties for their own non-merger related specific needs.

It should also be noted that the public interest factors in the determination of mergers that are provided for in the Act have a basis in the Constitution of Namibia. It has however been generally accepted that the substantive test in merger control is, and should remain, the substantial lessening of competition, with all other considerations being secondary. As such, public interest considerations should be supplementary and complementary to, and not replace, the promotion of competition. Stakeholders also opined that public interest factors taken into account in determining mergers should be merger-specific and not unrelated to the transaction under examination.

The Commission may, under the terms of section 48(1) of the Act, revoke a decision approving the implementation of a proposed merger if “(a) the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or (b) any condition attached to the approval of the merger that is material to the implementation is not complied with”. The revocation must however be made after consideration of any representations made by parties interested in the matter.

Section 49 of the Act provides for the review by the Minister of Trade and Industry of decisions of the Commission on mergers. In that regard, section 49(1) provides that a party to a merger may make application to the Minister of Trade and Industry to review the Commission’s decision on the merger not later than 30 days after notice is given by the Commission of its determination. The Minister may (a) overturn the decision of the Commission; (b) amend the decision of the Commission by ordering restrictions or including conditions; or (c) confirm the decision of the Commission.

The Commission’s Mergers and Acquisitions Division submitted that the Act does not specify criteria that can be used by the Minister in reviewing the Commission’s decisions on mergers, and the Commission cannot give the Minister guidelines on the matter since it would be its own decisions under review. Up to the time of the fact-finding visit, the Minister had reviewed two merger decisions of the Commission, on conditions imposed by the Commission on the approval of the mergers, with different outcomes. In one review the Minister upheld the Commission’s decision, while in the other he disagreed with the Commission.

It was submitted during the fact-finding visit that the involvement of the Minister in the review of the Commission’s decisions on mergers had been questioned by a number of lawyers, particularly in connection with the Walmart case. The concerns were that the Minister is most likely not a competition expert and has to rely on the NaCC for guidelines, which puts the Commission in a difficult position. The suggestion was therefore that the Act should make provision for the establishment of a competition law unit within the Ministry of Trade and Industry tasked specifically with the function of overseeing the Commission’s technical work, such as the review of mergers and acquisitions. Alternatively, the responsibility of reviewing the Commission’s decisions on mergers could be given to an independent tribunal, as happens in many other jurisdictions.

It is noted that in reviewing the Commission’s decisions on mergers, the Minister is only acting as one of the authorities in the appeal process. To some extent, the Minister can be a more effective review authority than a law court. As stated by the judges of the Supreme Court of Namibia in the case between the NaCC and the Minister of Trade

and Industry (appellants) and Walmart Stores Incorporated (respondent).⁵¹

51] [S]ection 49(3) (**of the Competition Act, 2003**) makes plain that the Minister is not only empowered to confirm or overturn the decision of the Commission but is also empowered to amend the decision of the Commission by ordering restrictions or including conditions to the approval of the proposed merger. **The Minister therefore has extensive powers to alter the decision of the Commission in the light of the information he receives, which a court reviewing the Commission's decision does not.** In making his decision on the proposed merger, the Minister, like the Commission will have to take into account the considerations set out in section 2 of the Act, as well as those set out in section 47(2). (Author's emphasis.)

The above judicial statement also suggests a solution to the concerns raised by the Commission's Mergers & Acquisitions Division that the Act does not specify criteria that can be used by the Minister in reviewing the Commission's decisions on mergers. In that regard, it is stated that "in making his decision on the proposed merger, the Minister, like the Commission will have to take into account the considerations set out in... section 47(2)". The considerations set out in section 47(2) give clear criteria of the factors to be taken into account in determining mergers. However, since they only apply to the determination of mergers by the Commission, and not specifically by the Minister, it can be made clear under section 49 of the Act that the considerations for determining mergers set out in section 47(2) for the Commission also apply for the Minister's review determination of the Commission's decisions on mergers.

Under the terms of section 50 of the Act, "[a]pproval of a proposed merger granted by the Commission, or by the Minister upon a review, under this Chapter: (a) does not relieve an undertaking from complying with any other law which requires that the sanction of the Court be obtained for the merger; (b) is not binding on the Court". The import of these provisions is that recognition is being made of the existence of sector regulators that also have competition functions, including merger control functions.

⁵¹ Supreme Court of Namibia Case No.: SA 41/2011.

2.5. Chapter 5: Jurisdiction of court

Under the terms of section 52 of the Act, the High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted under the Act. Section 53(3) of the Act empowers the High Court to impose pecuniary penalties for contravention of the provisions of the Act.⁵²

Pecuniary penalties imposed under the Act must be paid into the State Revenue Fund (section 53(5) of the Act), and orders imposing pecuniary penalties have the effect of, and may be executed as they were, civil judgements granted by the High Court of Namibia in favour of the Government of Namibia (section 53(4)).

2.6. Chapter 6: General provisions

The general provisions of the Act provide for (a) civil actions and jurisdictions (section 54); (b) prohibitions on disclosure of information (section 55); (c) disclosure of private interest by staff (section 56); (d) time within which investigation may be initiated (section 57); (e) limitation of liability (section 58); and (f) standard of proof (section 59).

2.7. Chapter 7: Offences and penalties

Section 60 of the Act provides that "[a] person commits an offence who hinders, opposes, obstructs or unduly influences any person who is exercising a power or performing a duty conferred or imposed on that person by this Act". It is also an offence under the Act to fail to comply with

⁵² The High Court can, under the terms of section 53(1) of the Act, impose pecuniary penalties for (a) contravention of Part I (restrictive agreements, practices and decisions) prohibitions or part II (abuse of a dominant position) prohibitions; (b) contravention of, or non-compliance with, a condition attached to an exemption granted; (c) contravention of, or non-compliance with, an order of the Court; and (d) the implementation of a merger without the approval of the Commission, or in contravention of a decision of the Commission prohibiting the merger, or in a manner contrary to a condition under which approval for the merger was given by the Commission. Pecuniary penalties imposed are for any amounts that the High Court considers appropriate, but not exceeding 10 per cent of the global turnover of the undertaking during its preceding financial year (section 53(2) of the Act). The penalties are therefore deterrent enough since they can affect the offending company's bottom line.

a summons issued by the Commission to attend before it, or being in attendance to refuse to take an oath or affirmation, to answer any question to which the Commission requires an answer, or to give false evidence, or to fail to produce evidence that is required by the Commission (section 61 of the Act), as well as to fail to comply with orders of the High Court given under the terms of the Act (section 62 of the Act).

Other offences under terms of section 63 of the Act include (a) improperly influencing the Commission concerning any matter connected with the exercise of any power or the performance of any function of the Commission; (b) anticipating any decisions of the Commission concerning an investigation in a way that is calculated to influence the proceedings of decision; (c) doing anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law; and (d) knowingly providing false information to the Commission.

Penalties for committing offences are provided for under section 64 of the Act and are in the form of both monetary penalties and imprisonment.⁵³

2.8. Chapter 8: Application of Act and other legislation relating to competition

Chapter 8 of the Act deals with the very important issue of the relationship between the Commission and those sector regulators that also have competition functions. With regard to the relationship between the competition authority and sector regulators in Namibia that have jurisdiction over competition matters related to restrictive business practices and mergers, section 67(1) of the Act provides that the Commission and the sector regulator must negotiate a concurrent jurisdiction agreement to coordinate

and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the Competition Act.

3. OTHER RELEVANT LAWS

Namibia has a number of other laws and policies that impact on competition. In addition to the laws on sector regulation, these include laws and policies on consumer protection, intellectual property, foreign investment, public procurement, affirmative action, industrial development and small and medium-sized enterprises. The following analysis will however only be on laws and policies on sector regulation, consumer protection and intellectual property.

3.1. Sector regulation

The interface between competition and sector regulation is for the most part contentious worldwide. The extent of the problem is such that UNCTAD in 2006 undertook a study on this subject for scrutiny and consideration by the Intergovernmental Group of Experts on Competition Law and Policy (IGE).⁵⁴

It is noted that despite potentially playing complementary roles in fostering competitive markets and safeguarding consumer welfare, the different approaches employed and different perspectives held by competition policy and sector regulation can be a source of friction. The friction is heightened by the blurring of the distinction between economic and technical regulation and competition enforcement.

However, as pointed out by UNCTAD, although a sector regulator and a competition authority have different legislative mandates, employ different approaches and have different perspectives, they can share common goals and play complementary roles in fostering competitive markets and safeguarding consumer welfare. Table 2 below shows the institutional characteristics of sectors regulators and competition authorities.

⁵³ In terms of section 64 of the Act, "a person convicted of an offence in terms of this Act, is liable: (a) in the case of a contravention of section 62, to a fine not exceeding N\$500,000 or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; (b) in the case of a contravention of section 55, to a fine not exceeding N\$50,000 or to imprisonment for a period not exceeding three years, or to both a fine and imprisonment; or (c) in any other case, to a fine not exceeding N\$20,000 or to imprisonment for a period not exceeding one year, or to both a fine and imprisonment".

⁵⁴ See UNCTAD, "Best Practices for Defining Respective Competences and Settling of Cases Which Involve Joint Action by Competition Authorities and Regulatory Bodies" (TD/RBP/CONF.6/13/Rev.1 and TD/B/COM.2/CLP/44/Rev.2, of 17 August 2006).

	Sector regulator	Competition authority
Mandate	Substitute for lack of competition: broad range of socioeconomic goals	Protect and enhance process of competition: emphasis on efficiency goals and consumer welfare
Approach	Attenuate effects of market power wielded by natural or network monopoly Impose and monitor behavioural conditions Ex ante prescriptive approach Frequent interventions requiring continual flow of information	Forestall and penalise anticompetitive conduct Impose structural (and behavioural) remedies Ex post enforcement (except with merger review) Information gathered in case of investigation: more reliant on complaints

Source: Adapted by UNCTAD from OECD, *Relationship between Regulators and Competition Authorities*, 1999.

Despite having a common goal, however, friction may arise between sector regulators and competition authorities, mainly because of differences in the approaches and methods used in meeting the objectives. The interaction of

competition law and policy and sector regulation is nevertheless not only unavoidable but also necessary. That interaction is described in UNCTAD Model Law on Competition as outlined in box 1 below.

Box 1. Competition law and policy and regulation

- Basically, competition law and policy and regulation aim at defending the public interest against monopoly power. Although both provide a Government with tools to fulfil this objective, there is variation in the scope and types of intervention. Competition law and regulation are not identical. There are four ways in which competition law and policy and regulatory problems interact:
- *Regulation can contradict competition policy.* Regulations may enable, or even require, conduct or conditions that would otherwise be in violation of the competition law. For example, regulations may allow price coordination, prohibit advertising or require territorial market division. Other examples include laws banning sales below costs, which purport to promote competition but are often interpreted in anticompetitive ways, and the very broad category of regulations that restrict competition more than necessary to achieve the regulatory goals. Modification or suppression of these regulations compels firms affected to change their habits and expectations.
- *Regulation can replace competition policy.* In natural monopolies, regulation may try to control market power directly, by setting prices (price caps) and controlling entry and access. Changes in technology and other institutions may lead to reconsideration of the basic premises in support of regulation, i.e. that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.
- *Regulation can reproduce competition law and policy.* Coordination and abuse in an industry may be prevented by regulation and regulators as do competition law and policy. For example, regulations may set standards of fair competition or tendering rules to ensue competitive bidding. However, different regulators may apply different standards, and changes or differences in regulatory institutions may reveal that seemingly duplicate policies may have led to different practical outcomes.
- *Regulation can use competition institutions' methods.* Instruments to achieve regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Coordination may be necessary in order to ensure that these instruments work as intended in the context of competition law requirements.

Source: UNCTAD Model Law on Competition

Jurisdiction over common regulatory tasks between competition authorities and sector regulators is also not always clear-cut and poses

dilemmas. Box 2 below shows those common regulatory tasks.

Box 2. Common regulatory tasks

- **Competition protection:** controlling anticompetitive conduct and mergers.
- **Access regulation:** ensuring non-discriminatory access to necessary inputs, particularly network infrastructure.
- **Economic regulation:** adopting measures to control monopoly pricing.
- **Technical regulation:** setting and monitoring standards to ensure compatibility and to address privacy, safety and environmental concerns.

Source: OECD, Relationship between Regulators and Competition Authorities, 1999.

While it might appear logical to confine sector regulators to economic and technical regulation and assign competition protection to competition authorities, the distinction between economic and technical regulation and competition regulation can often be blurred. UNCTAD gave the example of telecommunications in which technical decisions regarding spectrum use and accompanying decisions about licences affect the intensity of competition in the sector. Therefore, the determination of reasonable access conditions and their enforcement are an issue in which both the competition authority and the industry regulator have some degree of competence.

It has also been found that jurisdictional conflicts occur as a result of ambiguities in the law as to whether sector regulation or competition law has precedence with regard to competition issues. In

many instances, sector regulators preceded competition authorities and were thus given responsibility for competition issues in their respective sectors. Even in cases where new sector regulators have been created after competition authorities, most countries choose to assign them competition responsibilities as a means of infusing and diffusing competition principles in the sector-regulatory regime.

It has however been found that competition authorities and sector regulators can coexist under various conditions. Different countries have chosen different approaches to ensure coordination and policy coherence between sector regulators and competition authorities. UNCTAD has classified the various coordination approaches taken by different countries into five types, as shown in table 3 below:

Table 3 Classification of approaches ensuring coordination and policy coherence between sector regulators and competition authorities

Type	Approach
I	To combine technical and economic regulation in a sector regulator and leave competition enforcement exclusively in the hands of the competition authority
II	To combine technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions
III	To combine technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority
IV	To organize technical regulation as a stand-alone function for the sector regulator and include economic regulation within the competition authority
V	To rely solely on competition law enforced by the competition authority

Source: UNCTAD.

It should however still be noted that there is no cut and dried formula for the division of labour between sector regulators and competition authorities.

Namibia has a number of sector regulators in key sectors, such as the financial services sector (the Bank of Namibia (BoN) and the Namibia Financial Institutions Supervisory Authority (NAMFISA)) and the communications services sector (the Communications Regulatory Authority of Namibia (CRAN)), the regulation of ports (the Namibian Ports Authority (NAMPORT)) and the distribution of electricity (the Electricity Control Board (ECB)). The sectors require regulation since they are monopolistic or oligopolistic. Some of the sector regulators in Namibia were established before the NaCC and were therefore given the function of promoting competition in their respective sectors.

BoN, CRAN and ECB have clear overlaps with the Commission on competition in the regulated sectors. While the enabling Acts of NAMFISA and NAMPORT, the Non-Banking Financial Institutions Supervisory Authority Act, 2001, and the Namibian Ports Authority Act, 1994, respectively, do not specify any clear competition mandate for the sector regulators, the Commission correctly noted in an undated document titled "Ensured Effective Cooperation Between the Competition Commission and Sector Regulators – A Namibian Perspective" that situations can arise which create overlaps between the functions of agencies and those of the Commission that make it difficult for them to carry out their respective mandates.

In anticipation of the potential conflicts that can arise between the Commission and the other sector regulators in the Namibian economy over competition issues, section 67 of the Competition Act, 2003, deals with the relationship with other authorities and provides for the conclusion of agreements between the competition authority and sector regulators on concurrent jurisdiction on competition.

As at the time of the fact-finding visit, the Commission had negotiated and concluded cooperation agreements with four sector regulators: CRAN, BoN, ECB, and NAMPORT. It had also concluded an agreement with the Anti-Corruption Commission on bid-rigging and collusive tendering. The agreements with CRAN, BoN and ECB are in the form of

memorandums of agreement (MoAs) on concurrent jurisdiction over competition in the regulated sectors. The agreements cover the following areas: (a) purpose and basis of the agreement (promotion and maintenance of fair market competition in the regulated sector, and promotion of cooperation and coordination between the Authorities when dealing with cases of anticompetitive behaviour); (b) complaints related to restrictive business practices (consultation procedures in dealing with identified restrictive business practices in the regulated sector); (c) application for approval with regard to mergers and acquisitions (submission of separate and concurrent applications for merger approvals to the Authorities); (d) sharing of information (exchange of information between the Authorities that is necessary to give effect to the agreement); and (e) confidentiality and use of information (use of confidential information shared under the agreement only for lawful regulatory purposes).

The NaCC's MoA with the Bank of Namibia specifically provides that, on issues of concurrent jurisdiction and in addressing the matters, "the Bank agrees that primary authority should reside with the Commission to promote and safeguard matters of competition in the banking sector, and the Commission after consultation with the Bank shall make the final determination on such matters" and "the Commission agrees that primary authority should reside with the Bank to promote safety and stability of banking system and the Bank after consultation with the Commission shall make the final determination on such matters". The MoA also further provide for circumstances that may indicate that the Commission or the Bank would deal with complaints related to restrictive business practices. In that regard, circumstances that may indicate that the Commission would deal with the matter include the following: (a) the complaint relates primarily to restrictive business practices as set out in parts I (restrictive agreements, practices and decisions) and II (abuse of a dominant position) of the Competition Act; and (b) the complaint does not relate to fees and charges related to payment systems services. Circumstances that may indicate that the Bank would deal with the matter include the following: (a) the complaint primarily relates to fees and charges related to the payment systems services; and (b) the complaint primarily relates to

a contravention of the Payment System Management Act or the Banking Institutions Act.

The cooperation agreement with NAMPORT is in the form of a memorandum of understanding (MoU), which was summarized in the NaCC's undated document "Ensured Effective Cooperation between the Competition Commission and Sector Regulators – A Namibian Perspective". The main coverage of the agreement is on consistency of regulatory policy (recognition of the importance of mutual consultation across a wide range of issues relevant to competition in the ports areas and promotion of cooperative decision-making) and on information sharing.

During the fact-finding visit, CRAN's Head of Economics and Sector Research advised that the Authority is mandated to regulate any practice or activity that has the objective or effect of preventing, distorting or restricting competition in the communications technology industry. This includes the abuse of individual or collective market dominance, as well as any proposed acquisition that may hamper competition, and any agreement deemed to be anticompetitive. Part of CRAN's mandate is to ensure that dominant telecommunications carriers (Telecom Namibia Limited and Mobile Telecommunications Limited) are required to grant access to their infrastructure to other carriers, based on agreed terms and conditions, as long as such an arrangement does not place an unreasonable burden on the dominant carrier. In the undertaking of its competition functions, CRAN can investigate complaints of restrictive business practices and examine mergers and acquisitions in the sector. In the case of restrictive business practices it can issue enforcement orders and can take the case to the courts. Fines of up to N\$1 million can be imposed, and the executives of the offending undertakings can be imprisoned. However, while the Authority had received a number of complaints for investigation, it had by the time of the fact-finding visit still not penalized anyone since most are willing to rectify the situation.

All mergers and acquisitions in the communications sector must be notified to CRAN for examination since there are no merger notification thresholds. The Authority and the NaCC can undertake separate merger examinations on the same transaction and arrive at different conclusions. For ex-

ample, in one case the NaCC approved the merger without any conditions while CRAN conditionally approved the transaction. CRAN advised that it has the necessary personnel in the form of technicians, economists and lawyers to perform its competition functions.

It was advised by CRAN that the cooperation agreement between the Authority and the NaCC was working very well, even though its confidentiality and use of information provisions prevent the exchange of information on the business transactions under scrutiny because most of the information is confidential. CRAN has excellent working relationships with the NaCC, and the Authority invites the Commission to all its hearings on economic issues, and the Commission does the same. What is required is allowing the two regulators to exchange confidential information required for the investigation of cases, and this exchange should be provided for in the two parties' enabling Acts. The NaCC's Corporate Secretary and Legal Adviser were also of the opinion that the Commission's cooperation agreement with CRAN was operating very well, with regular meetings being held, while the one with BoN was rather dormant. It was however advised that the agreement with NAMPORT had not been effective, mainly because of the dual role of that organization of being both regulator and market player. The Electricity Control Board (ECB) advised that its cooperation agreement with the Commission was still in its infancy, and that the quarterly meetings between the parties provided for had still not been held.

The ECB also advised that it has good working relations with the NaCC which was recently settled with the signing of the cooperation agreement between the two regulators. The General Manager (Regulation) advised during the fact-finding visit that the Board's competition functions complement what the NaCC is doing. The Board has the mandate of introducing a competitive environment in the electricity sector of Namibia, which had traditionally been monopolized. Areas that can be opened to competition in the sector are the generation and supply, and even distribution, of electricity. The transmission of electricity cannot be opened to competition because of its natural monopoly elements. Competition in electricity generation has already been opened up as per the provisions of the Electricity Act on private

sector participation, and the Board has issued a number of generation licences, which still have to be activated by the establishment of generation plants.

The ECB further advised that it has the necessary regulatory tools to use in the tackling of its core issues, which are: (a) economic issues (to do with tariffs, in which the Board has full autonomy); (b) technical issues (related to standards, access to the grid by private sector participants and quality of service); and (d) licensing issues (under the licensing regime, all electricity entities, generating above 500kva, or any generation or commercial purposes, have to be licensed).

To a very large extent, Namibia has managed to contain the normally contentious issue of the interface between competition and sector regulation. The cooperation agreements between the competition authority and sector regulators seem to be working well, with the parties having good working relationships in the promotion of competition in the regulated sectors. However, as pointed out by CRAN, there is a need for greater exchange of information, including confidential information, between the parties for more effective undertaking of competition investigations.

It is recommended that the exchange of confidential information between NaCC and those sector regulators that have competition functions be provided for in the Competition Act, 2003, and the enabling Acts of the sector regulators.

3.2. Consumer protection

It has become an established fact that the ultimate objective of competition policy is consumer welfare. Competition has links with consumer protection in that the key aim of competition policy and law is economic efficiency, which in the long run results in producer benefit and consumer welfare in the form of a wider choice of goods and services at lower prices.

While Namibia has an enforceable competition law, and is in the process of formulating a comprehensive competition policy, it still does not have such law and policy related to consumer protection. During the fact-finding visit, the Deputy Director in the Consumer Protection Division of the Ministry of Trade and Industry of

Namibia advised that nothing much was happening on the drafting of a consumer protection law. A consultant was assigned the task of looking at the formulation of a consumer protection policy first and then the law, but the process was taking too long. The Law Reform and Development Commission (LRDC)⁵⁵ has now taken it upon itself to spearhead the drafting of the law.

Consultations held with Namibian consumer groups during the fact-finding visit highlighted the need for a consumer protection law and an agency to enforce that law. The Volunteer Director of the Namibia Consumer Protection Group noted that there was a Consumer Division in the Ministry of Trade and Industry, which was effectively operational. He however felt that there was a need to have consumer law in Namibia, with the head of the enforcement agency having direct access to the President and not falling under a line ministry. He advised that a consumer protection law had been drafted and discussed but no action had been taken by the Ministry of Trade and Industry, citing the potential upset within the business community by enacting law on consumer protection. The Law Reform and Development Commission (LRDC) of Namibia had also lobbied for the enactment of a consumer protection law and had prepared a draft discussion paper on consumer protection in Namibia.

The LRDC's *Discussion Paper: Consumer Protection Project* analysed legislation that may be relevant to consumer protection in Namibia. The analysis involved the evaluation of constitutional, current legislative and common law protection afforded to the consumer within the Namibian legal system, including competition law. It was noted that the provisions of Namibian Constitution on fundamental human rights and freedoms that are particularly applicable to consumers include the following: (a) article 6 (protection of life); (b) article 8 (respect for human dignity); (c) article 10 (equality and freedom from discrimination); (d) article

⁵⁵ The Namibian Law Reform and Development Commission (LRDC) is a creature of the Law Reform and Development Commission Act, 1991 (Act No. 29 of 1991). Its core mandate is to undertake research in connection with all branches of law and to make recommendations for the reform and development of such law. The Secretary to the Commission heads the Directorate of Law Reform, an organizational component in the Ministry of Justice.

12 (entitlement to fair trial); (e) article 13 (privacy); (f) article 16 (right to property); and (g) article 18 (administrative justice). Also under article 95 of the Constitution, the State is required to actively promote and maintain the welfare of the consumer by adopting policies aimed at “ensuring that every citizen has a right to fair and reasonable access to public facilities and services in accordance with the law” and “maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and the utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future. In particular, the Government shall provide measures against the dumping or recycling of foreign nuclear toxic waste on Namibian territory”.

It was noted that common law relevant to consumer protection regulation is that which applies to contracts and products. In most instances, a party to a contract is assumed to know and understand the provision of the contract he or she signs. Similarly, a person acquiring the product is required to understand and know the product he or she is acquiring and the burden to prove the contrary is on such a person.

With regard to competition law and policy in Namibia, it was noted in the LRDC Discussion Paper that economic efficiency has traditionally been the key aim of competition policy and law, and that the effective enforcement of competition law contributes to the efficient and equitable functioning of the progressive market economy that in the long term results in producer benefit and consumer welfare. The relevance of competition policy to consumer protection regulation therefore is linked to the optimization of consumer welfare through the application of competition policy. The provisions in the Competition Act, 2003, that were analysed by the LRDC in the Discussion Paper as having a bearing on consumer protection and welfare include the following:

- *Section 2: Purpose of Act:* The purpose of the Act is to enhance the promotion and safeguarding of competition in Namibia in order to, inter alia, provide consumers with competitive prices and product choices. These provisions of the Act have a direct application to consumer welfare since they protect consumers’ right to product choice.
- *Section 16(1): Functions, Powers and Duties of Commission:* The Commission is responsible for the administration and enforcement of the Act and, in addition to any other functions conferred on the Commission, it has powers and functions to implement measures to increase market transparency, which is necessary for consumer decision.
- *Section 26: Abuse of Dominance:* (1) Any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market in Namibia or a part of Namibia is prohibited. (2) Without prejudice to the generality of subsection (1), abuse of a dominant position includes: (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions; ... (d) 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 matter of the contract. The consumer welfare implications of these provisions are related to a consumer’s right to fair pricing.
- *Section 39(1): Interim Relief:* If the Commission on reasonable grounds believes that an undertaking has engaged, or is proposing to engage, in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition and that it is necessary for the Commission to act as a matter of urgency for the purpose (a) of preventing serious, irreparable damage to any person or category of persons or (b) of protecting public interest, the Commission may make application to the Court for an interim order restraining the undertaking or undertakings from engaging in such conduct. These provisions have an indirect application to consumer protection.
- *Section 47(2): Determination of Proposed Merger:* The Commission may base its determination of a proposed merger on any criteria which it considers relevant to the circumstances involved in the proposed merger, including: ... (c) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh a detriment which would be likely to result from any undertaking, including an undertaking not involved as a party to the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market. These provisions also have an indirect application to consumer welfare and protection.

It was therefore correctly inferred in the Discussion Paper that competition law in Namibia provides for consumer protection through action against collusion, price fixing, abuse of a dominant position or restrictive business practices, and that this denotes positive outcomes for consumers. It was however cautioned that it would be wrong to treat competition policy and law as a panacea that would automatically serve consumer interests.

The involvement of the LRDC in the drafting of Namibia's consumer protection law is a welcome development since that could speed up the process.

The Deputy Director for Consumer Protection in the Ministry of Trade and Industry was also hopeful on the conclusion of the consumer protection law drafting process, advising that the major debate is on whether to have a separate consumer protection agency or to combine the enforcement of the law with another agency, such as the NaCC, which has expressed its willingness to engage in the enforcement of both competition and consumer protection laws. The Volunteer Director of the Namibian Consumer Protection Group (NCPG) was however of the opinion that the enforcement of consumer protection law should be separated from the enforcement of competition law, and should be undertaken by a different agency, since the NaCC has shown that it cannot adequately handle consumer concerns, which include the contentious issue of product standards and expiry dates on products that affect public health. The Executive Director of Namibia Consumer Trust (NCT) was also doubtful that the NaCC had the necessary teeth to effectively handle consumer concerns. Examples given were that no one had been penalized for price fixing, which was rampant in Namibia. For instance, in the case of frequent milk price fluctuations due to collusive practices of the suppliers, and the NaCC seems not to have had the teeth to prevent and control the practice. It was felt that the NaCC is concentrating more on mergers that affect the business community than on restrictive business practices that affect the consumer.⁵⁶

It was suggested that Namibia could start by appointing two or three Consumer Commissioners to spearhead the process towards the enact-

⁵⁶ These views will be explored in detail later in the report on the part dealing with Competition Law Enforcement.

ment of the country's protection law, but also that pending the enactment of such a law, which can take years as shown by the current slow progress, Namibia has sufficient sectoral laws protecting consumers, and these should be enforced.

An increasing number of competition authorities worldwide are also enforcing consumer protection laws, and doing so successfully. Probably the best such arrangement is that of the Australian Competition and Consumer Commission (ACCC), which administers the Trade Practices Act, 1974 that has comprehensive competition and consumer protection provisions. In the SADC region, the Competition and Consumer Protection Act, 2010 of Zambia also has competition and consumer protection provisions, as does the Fair Competition Act, 2003 of the United Republic of Tanzania. In Seychelles, the Fair Trading Commission enforces both the Fair Competition Act, 2009 and the Consumer Protection Act, 2010. Such arrangements in the SADC region are working fairly well, as found from independent reviews of implementation of competition laws and policies in the relevant countries under the auspices of UNCTAD.⁵⁷ All that needs to be done is to ensure that the multitude of consumer concerns and complaints do not divert the attention and resources of the competition authority from competition issues.

It is recommended that the process towards the formulation and enactment of a consumer protection policy and law in Namibia be speeded up, and that serious consideration be given to having the NaCC be the primary implementer and enforcer of that policy and law.

3.3. Intellectual property

The issue of the interaction between intellectual property (IP) and competition is very topical because of the inherent tensions between the two. As observed by Sumanjeet (n/d),⁵⁸ intellectual property rights create monopolies, while competition law battles monopolies. There should how-

⁵⁷ Voluntary Peer Review of Competition Law and Policy: Zambia (2012), Voluntary Peer Review of Competition Law and Policy: United Republic of Tanzania (2012), and Independent Review of Competition and Consumer Protection Laws: Seychelles (2013).

⁵⁸ Dr. Sumanjeet, *Intellectual Property Rights and Their Interface with Competition Policy: In Balance or in Conflict?* <http://ssrn.com/abstract=1724463>.

ever be no conflict between IP and competition since IP and competition law are complementary in that they both aim at achieving the same objective, i.e. the promotion of consumer welfare and innovation.⁵⁹

Khor (2005)⁶⁰ noted that in a market economy, competition is seen by most as generally important and essential to curb market distortions, induce efficiency in the use of resources, prevent monopoly or oligopoly, maintain prices at fair levels or as low as possible, prevent excessive or monopoly profits and promote consumer interests and welfare. On the other hand, an intellectual property right (IPR) is seen by many as a privilege granted in recognition of the need of the holder to recoup costs incurred in the research and innovation process, so as to maintain incentives for further innovation. Thus an IP entails an exclusive right for a limited time, enabling the holder to charge a higher price than the marginal cost of production. That higher price reduces access of consumers to the product and access of other producers to production inputs and methods.

⁵⁹ As stated by the World Intellectual Property Organization in the *WIPO Intellectual Property Handbook* (2004 second edition), Intellectual property (IP), very broadly, means the legal right which results from intellectual activity in the industrial, scientific, literary and artistic fields, and generally speaking, intellectual property law aims at safeguarding creators and other producers of intellectual goods and services by granting them certain time-limited rights to control the use made of those productions. Intellectual property is traditionally divided into two branches, "industrial property" and "copyright". (Industrial property includes literary and artistic works such as novels, poems and plays, films, musical works, artistic works such as drawing, paintings, photographs and sculptures and architectural designs. Rights related to copyright include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programmes.) On the other hand, the "competition" has been defined in a number of ways, all having the same basic meaning, including the following: "the striving or potential striving of two or more persons or organisations engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another for the same or related object which results in greater efficiency, high economic growth, increasing employment opportunities and lower prices and improved choice for consumers". Competition encourages and promotes efficiency by: (a) driving prices towards marginal costs; (b) ensuring that firms produce at the lowest attainable costs; (c) providing incentives for firms to undertake research and development; and (d) encouraging firms to be innovative and introduce new products and production methods in the market.

⁶⁰ Martin Khor, *Intellectual Property, Competition and Development*, Third World Network, Penang, Malaysia, 2005.

The question is whether there should be tensions between IP law and competition law. The European Commission (EC) in a 2007 document entitled *Competition Policy and the Exercise of Intellectual Property Rights*⁶¹ analysed this question, and its views on the matter are that early copying of an innovation and freeriding on an innovator's efforts undermine the incentive to innovate. This is why IP laws grant the innovator a legal monopoly. A legal monopoly may, depending on the availability of substitutes in the relevant market, in turn lead to market power and even monopoly as defined under competition law. One would therefore come to the conclusion that there is a source of conflict: that competition law would take away the protection which IP law is providing. If the aims of IP law and competition law are truly different, this might impose serious limits on the application of competition law to IP. However, this is only an apparent source of conflict. In noting that the source of conflict between IP and competition law is only apparent, the EC concluded that:

At the highest level of analysis, IP and competition law are complementary because they both aim at promoting consumer welfare. Competition policy aims at promoting consumer welfare by protecting competition as the driving force of efficient and dynamic markets, providing at all times the best quality products at the lowest prices. The objective of IP laws is to promote technical progress to the ultimate benefit of consumers. This is done by striking a balance between over- and under-protection of innovators' efforts. The aim is not to promote the individual innovator's welfare. The property right provided by IP laws is awarded to try to ensure a sufficient reward for the innovator to elicit its creative or inventive effort while not delaying follow-on innovation or leading to unnecessary long periods of high prices for consumers. A delay in follow-on innovation may result when the innovation consists of an improvement on earlier ideas that have been granted patent protection already. Unnecessary long periods of high prices will result when the innovation allows the IPR hold-

⁶¹ Paper by the European Commission submitted at UNCTAD's Eighth Session of the Intergovernmental Group of Experts on Competition Law and Policy held in Geneva, Switzerland, during the period 17 – 19 July 2007.

er to achieve market power in the market(s) where the IPR is exploited and where the IPR protects this monopoly position longer than is required to elicit the innovative effort.

It has thus been noted that competition policies in most countries generally take a favourable attitude to IPRs.⁶² However, intervention by competition authorities may be warranted and undertaken where a pragmatic case-by-case analysis indicates IPR-based market power is unreasonably restraining competition in the relevant markets. In that regard, there is concern over cartel-like restraints, exclusionary conduct and monopoly leveraging by dominant firms, refusals to license IPRs or to sell IPR-protected products, etc., which all can be treated as monopolization or abuse of dominant positions.

Namibia has an Industrial Property Act, 2012 (Act No.1 of 2012), which has the object “to provide for the establishment of an Industrial Property Office and the appointment of a Registrar of industrial property; to provide for the grant, protection and administration of patents and utility model certificates; to provide for the registration, protection and administration of industrial designs; to provide for the registration, protection and administration of trademarks, collective marks, certification marks and trade names; to provide for the registration of industrial property agents; to provide for the establishment of an Industrial Property Tribunal; and to provide for incidental matters”.

In that Act, the term “industrial property” is defined as to mean “patents, utility model certificates, industrial designs, and trademarks including certification trademarks and collective trademarks”. An Industrial Property Office is established under the terms of section 2 of the Act to be responsible for all functions relevant to the registration, maintenance and administration of industrial property rights.

The Competition Act, 2003, of Namibia recognizes IPRs in its exemption of certain restrictive practices. Section 30 of the Act provides that “the Commission may, upon application, and on such conditions as the Commission may determine, grant an

exemption in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights”.

As in the case of any exemption application, a case-by-case or “rule of reason” approach in the consideration of an application for exemption of IPRs under section 30 of the Act would be required to determine whether or not the IPR is being abused by unduly restraining or distorting competition in the relevant market.

At the time of the fact-finding visit, the NaCC had handled at least two competition cases involving IPRs, one involving restrictive business practices and the other a merger. With regard to the case on IP in restrictive business practices, which is still at the investigation stage, the parties are in a vertical relationship with the upstream undertaking holding an IP right on a product that it allows a small number of downstream undertakings to sell on its behalf. The IP right is granted by a foreign company to only one undertaking in Namibia. The case relates to a complaint of abuse of dominance by the upstream undertaking that has an effect on the downstream competitors of distributors.

A Business and Intellectual Property Authority Act is in the process of being enacted by Parliament. The relevant Bill under consideration aims at establishing the Business and Intellectual Property Authority (BIPA).

The Bill also has provisions empowering BIPA to “consult with any person, organization or institution with regard to any matter and additionally: (i) liaise with any regulatory authority on matters of common interest and exchange information with, and receive information from, any such regulatory authority pertaining to: (a) matters of common interest; and (b) a specific complaint or investigation; (ii) participate in the proceedings of any regulatory authority; (iii) advise, or receive advice from, any regulatory authority”. The Bill further provides for the conclusion of cooperation agreements between BIPA and other regulatory authorities.

BIPA was launched by the Minister of Trade and Industry on 22 May 2013, and it has been expressed that the NaCC intends to conclude a MoA with that Authority when it becomes fully operational. The intention to conclude a cooperation agree-

⁶² “Competition Policy and the Exercise of Intellectual Property Rights”, report by UNCTAD secretariat to the Intergovernmental Group of Experts on Competition Law and Policy, Geneva, 3–5 July 2002.

ment between the NaCC and BIPA is in the right direction.

A subregional Workshop on Intellectual Property and Competition Policy for Certain African Countries was held in Harare, Zimbabwe, during the period 12–13 November 2013. The objective of the workshop, which was organized by the African Regional Intellectual Property Organization (ARIPO) and the World Intellectual Property Organization (WIPO), was to bring together the intellectual property (IP) and competition agencies to discuss various aspects concerning the interface between the protection of intellectual property and the enforcement of competition and/or consumer protection rules.

The workshop was attended by IP and competition agencies from five countries (Kenya, Malawi, Mozambique, Zambia and Zimbabwe). Keynote speakers were from WIPO (Mr. Giovanni Napolitano), the COMESA Competition Commission (Mr. George Lipimile) and UNCTAD (Ms. Elizabeth Gachuri). Important recommendations on critical issues raised at the workshop were made.⁶³

It is recommended that Namibia involve itself in events on the important interface between the protection of intellectual property and the

⁶³ The following were the critical issues raised, and the recommendations made, at the ARIPO/WIPO subregional workshop on intellectual property and competition policy that was held in Harare, Zimbabwe, during the period 12–13 November 2013: *Critical Issues Raised*: (i) lack of interaction between IP authorities and competition authorities in the member States of ARIPO; (ii) some ARIPO member States do not have enabling legislation on competition and competition authorities to enforce competition law; (iii) low level of IP awareness and competition culture in the member States of ARIPO; (iv) conflict between competition regulations and IP regulations and other government policies; (v) ineffective IP and competition enforcement measures in member States of ARIPO; and (vi) lack of joint training programmes on IP and competition laws. *Recommendations*: (i) need for effective collaboration between IP offices and competition authorities in areas such as information sharing on best practices, capacity-building and joint training programmes, establishment of interministerial/ inter-agency committees, and conclusion of memorandums of understanding (MoU) for the effective enforcement of IP and competition laws; (ii) need for joint programmes and capacity-building activities among the participating partners at international and regional levels (WIPO-UNCTAD-ARIPO-COMESA) with academic institutions such as Africa University; (iii) need for national IP policies to incorporate competition issues; and (iv) member States of ARIPO should consider new intellectual property regimes such as geographical indication to address areas where member States have a competitive advantage.

enforcement of competition and/or consumer protection law, and that it seriously consider implementing the recommendations made at the ARIPO/WIPO subregional workshop on intellectual property and competition policy held in Harare in November 2013.

4. INSTITUTIONAL FRAMEWORK

4.1. Competition institutions

The Competition Act, 2003, of Namibia provides for the establishment of a regulatory agency to implement and enforce the country's competition policy and law. The designation of other institutions to complement the agency is also provided for. This is as it should be, since it has been found that no matter how good a country's competition policy and law has been formulated and drafted, it will not be effective unless efficient institutional arrangements are put in place for the implementation of that policy and the enforcement of the law.

In line with international best practice, competition legislations in most, if not all, countries provide for the establishment of the administering authority of that legislation. The trend nowadays is to establish stand-alone specialized competition agencies for the purposes of ensuring and facilitating impartial and independent decision-making.⁶⁴ Best practices also demand that the investigative and adjudicative functions of a competition authority should be clearly separated. The principle of due process and natural justice requires this clear separation of the authority's investigative and adjudicative functions since one cannot be a police officer, prosecutor and judge on the same issue.

Institutional arrangements of competition authorities should also include appeal mechanisms. The right of a person to appeal against the decision

⁶⁴ Besides specialized stand-alone competition agencies, competition agencies in some countries are government ministries or departments or divisions of government ministries. Examples are the agencies in Albania and Finland. The competition authority of Kenya used to operate as a department of the Ministry of Finance under the repealed Restrictive Trade Practices, Monopolies and Price Control Act, Chapter 504, but is now a stand-alone specialized agency under the new Competition Act (No. 12 of 2010). Other countries, notably the United Kingdom and the United States of America, have both types of authorities.

of the competition authority is enshrined in the competition laws of most countries. Bodies that hear appeals against the decisions of competition authorities differ from country to country.⁶⁵

Regarding the independence of competition authorities, arguments for such independence include the need for a high degree of objectivity and impartiality that is required for the effective undertaking of the work of the authorities, which is mostly of a quasi-judicial nature.

Linked to the issue of independence of competition authorities is the question of the relationship of the authorities with their responsible government ministers. As statutory bodies, or departments of government ministries, competition authorities are required to support and contribute to the Government's socioeconomic policies under the guidance of a government minister. Competition legislations of most countries therefore have provisions that grant government ministers powers of giving policy directions to competition authorities.⁶⁶

⁶⁵ According to *The 2003 Handbook of Competition Enforcement Agencies* (fifth edition) of the Global Competition Review, bodies that hear appeals against the decisions of competition authorities include the following: (i) *Courts of First Instance/ High Courts* (Albania, Algeria, Brazil, Cyprus, European Union, Jamaica, Japan, New Zealand, Poland, Romania, United Kingdom); (ii) *Administrative Courts* (Bulgaria, Croatia, Estonia, Finland, Greece, Italy, Luxembourg, Mexico, Slovenia, Sweden); (iii) *Courts of Appeal* (Argentina, Belgium, France); (iv) *Supreme Courts* (Austria, Chile, India, Ireland, Pakistan); (v) *Competition Tribunals* (Australia, Denmark, Iceland, Israel, Switzerland); and (vi) responsible government ministers (Montenegro, the Niger, Norway, the Philippines, Serbia and the former Yugoslav Republic of Macedonia).

⁶⁶ Under the Competition and Fair Trading Act (Cap. 48:09) of Malawi, the Competition and Fair Trading Commission under the terms of section 12 of the Act may, where necessary, seek the general direction of the Minister as to the manner in which it is to carry out its duties under the Act. Any direction given by the Minister to the Commission should however be in writing and should be published by the Commission in the *Government Gazette*. The Minister of Industry and Commerce of Zimbabwe may give the Competition and Tariff Commission in terms of section 18 of the Competition Act [Chapter 14:28] such general directions "relating to the policy the Commission is to observe in the exercise of its functions as the Minister considers to be necessary in the national interests". The Minister's policy directions to the Commission must however be in writing, and the Commission has the right to submit its views on the direction in writing. The Commission is also required to ensure that the direction and any of its views on that direction are set out in its annual report for presentation to Parliament. More or less similar provisions are found in competition legislations of a number of other SADC countries.

Good corporate governance also demands that competition authorities, like all other corporate bodies, must account and be held accountable for their conduct and actions. This means that they must be answerable to some higher authority. Voluntary peer reviews under the auspices of UNCTAD and the OECD, which are increasingly becoming popular, can be viewed as a means of assessing the accountability of competition authorities. According to the UNCTAD secretariat (2004),⁶⁷ "the peer review process aims at spurring countries to consider seriously the impact of domestic policies not only internally, but also on neighbouring countries, and to promote mutual accountability, as well as compliance with best practice".

4.2. Namibian competition institutions

In analysing the situation in Namibia, the Competition Act, 2003, provides for a number of institutions in the enforcement of the country's competition law. These are: (a) the Namibian Competition Commission (NaCC); (b) the Minister of Trade and Industry; and (c) the High Court of Namibia.

(a) *The Competition Commission*

Section 4 of the Act provides for the establishment of the Namibian Competition Commission as a juristic person, which is independent and subject only to the Namibian Constitution and law. The Commission is also required to be impartial and to perform its functions without fear, favour or prejudice.

The Commission has many powers and duties under the Act, which includes powers to: (i) make rules,⁶⁸ (ii) make determinations on applications

⁶⁷ See UNCTAD, Roles of possible dispute mediation mechanisms and alternative arrangements, including voluntary peer reviews, in competition law and policy (TD/B/COM.2.CLP/37/Rev.1 of 9 August 2004).

⁶⁸ Under section 22 of the Act, the Commission has powers to make rules: (i) relating to administration, organization and operations of the Commission; (ii) prescribing procedures to be followed in respect of application and notices and proceedings of the Commission; (iii) prescribing forms of applications, notices, certificates and other documents required for the purpose of the Act; (iv) prescribing fees to be paid for the purposes of the Act; (v) the manner of making submissions in relation to the subject matter of any application to or investigation by the Commission; (vi) prescribing procedures

for exemptions of certain restrictive practices (section 22 of the Act); (iii) make decisions on the infringement of part I prohibitions (restrictive agreements, practices and decisions) and part II prohibitions (abuse of a dominant position; section 36); (iv) institute proceedings in the High Court of Namibia against undertakings for remedial orders (section 38);⁶⁹ (v) make application to the High Court of Namibia for interim orders restraining undertakings from engaging in potentially damaging conduct pending conclusion of the matter (section 39); (vi) enter into agreements of settlement (consent agreements) with concerned undertakings setting out the terms to be submitted to the High Court of Namibia for confirmation as orders of the Court (section 40); and (vii) make determinations on proposed mergers and acquisitions (section 47).

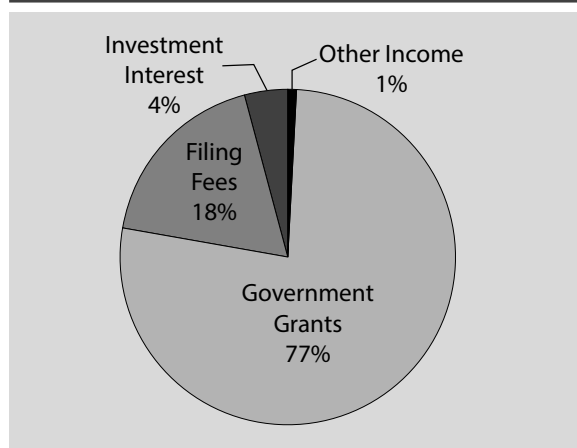
Being a non-commercial Statutory Body, the Commission is largely dependent on the Government for the funding of its operations. Section 17(1) of the Competition Act, 2003, provides that the funds of the Commission consist of “(a) money appropriated by Parliament for the purposes of the Commission; (b) fees payable to the Commission in terms of this Act; (c) money vesting in or accruing to the Commission from any other source; and (d) interest derived from the investment of funds of the Commission”.

During the Commission’s 2012/13 financial year which ended on 31 March 2013, the sources of funding for the Commission were as follows: (i) government grants (77 per cent); (ii) filing fees (mergers) (18 per cent); (iii) investment interest (4 per cent); and other income (exemption fees, profit on sale of vehicle, sundry income, etc.) (1 per cent).

for investigations under the Act; (vii) prescribing requirements for small undertakings; and (viii) relating to any other matter which is required or permitted to be prescribed under the Act, or considered necessary or expedient by the Commission in order to achieve the objects of the Act.

⁶⁹ Under section 38 of the Act, the Commission can institute proceedings in the High Court of Namibia against undertakings for orders: (i) declaring the investigated conduct to constitute an infringement of part I and part II prohibitions; (ii) restraining the undertaking or undertakings from engaging in that conduct; (iii) directing any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or its effects; (iv) imposing pecuniary penalties; or (v) granting any other appropriate relief.

Graph 1: Sources of NaCC funding in 2012/13 financial year



The trend continued into the current 2013/14 financial year, during which the Commission’s revenue in the first six months, ending 30 September 2013 and totalling N\$15,832,728, consisted of: (i) government grants, N\$12,000,000 (75.8 per cent); (ii) rendering of services, N\$3,230,190 (20.4 per cent); (iii) penalties received, N\$100,000 (0.6 per cent); and (iv) investment revenue, N\$502,538 (3.2 per cent).

Table 4 Sources of Commission funding, 2009/10–2010/11

Source of funds	Financial year		
	2008/09 (N\$)	2009/10 (N\$)	2010/11 (N\$)
Government grants	7 100 000	5 450 000	7 600 000
Rendering of services – fee income	129 500	537 000	3 517 544
Interest revenue	469 137	575 361	748 898
Totals	7 698 637	6 562 361	11 866 442

It is noteworthy that while government grants to the Commission have been increasing over the years, income from other sources has been somewhat stabilized. Table 4 above shows comparatively the sources of the Commission’s funding during the first three financial years of its operations, i.e. from the 2008/09 financial year to the 2010/11 financial year.

During the 2008/09, 2009/10 and 2010/2011 financial years, the Commission received govern-

ment grants of N\$7,100,000, N\$5,450,000 and N\$7,600,000 respectively. It also earned income from services rendered, which related to mergers, exemption applications, etc., of N\$129,500, N\$537,000 and N\$3,517,544 in the respective financial years. In addition to the above, the Commission further earned interest on surplus funds available on its current and Notice Deposit accounts of N\$469,137, N\$575,361 and N\$748,898, respectively for the 2008/09, 2009/10 and 2010/11 financial years. Government grants thus constituted the largest source of funding for the Commission during that establishment period. Fee income however progressively became a formidable source of the Commission's funding, from contributing only about 2 per cent of total funding in 2008/09 to about 30 per cent in 2010/11. The contribution was however reduced to 18 per cent during the 2012/13 financial year, with a marginal increase to 20.4 per cent during the first six months of the current 2013/14 financial year. The continued contribution of interest revenue to total income has showed the Commission's prudent investment of its surplus funds.

The Ministry of Trade and Industry acknowledged in consultations held during the fact-finding visit that the Government is the major funder of the NaCC's operations as a public service provider, despite the Commission receiving some funds through merger notification and exemption application fees. In that regard, the Ministry gives the Commission the necessary support in its budgetary bids to Treasury.

While the Commission is currently in a sound financial position from its present sources of funding, experiences of other competition authorities in the region show that heavy reliance and dependency on government funding for operations inhibit expansion. In the case of the NaCC, the Commission needs to expand its operations from Windhoek into other regions of the country. The Chief Executive Officer and Secretary to the Commission in consultations held during the fact-finding visit also advised that effective enforcement of the restrictive business practices provisions of the Act requires significant financing and is being adversely affected by financial constraints. Advocacy and awareness campaigns are also resource-intensive.

The Commission therefore needs to identify alternative sources of funding for its expansion programmes, which however should not compromise its independence and put it in conflict of interest positions. It is noted that the Act gives the Commission some leeway in seeking funds from sources other than the Government, including from administrative fees and "any other source".⁷⁰ So far, the administrative fees that the Commission is collecting are from merger notifications and exemption applications. The Commission is however giving many advisory opinions on the application of the provisions of the Act, mostly to law firms for the advice of their clients for which it can collect fees. The business community can also be levied for the Commission's competition promotion services, which are of direct benefit to that community.

It is recommended that the Commission identify alternative sources of funding for its operations subject to the provisions of section 17(1) of the Competition Act, 2003.

The Act provides for the establishment of a Board of Commissioners consisting of "a chairperson and not less than two or more than four members all of whom are appointed by the Minister". Members of the Board must have "expertise in industry, commerce, economics, law, accountancy, public administration or consumer affairs" (section 5 of the Act). The appointment by the Minister of alternate members of the Board is also provided for in the Act. Alternate members of the Board may attend meetings of the Commission in the absence of the Commissioners with whom they alternate.

The current members of the Board of Commissioners and their qualifications and professions are shown in table 5 below.

The first Interim Chair of the Commission was Mr. Douglas Reissner, and the other members of the first Board of Commissioners, who were appointed by the Minister of Trade and Industry on 19 December 2008, were: (i) Mr. Festus Hangula; (ii) Dr. Omu Kakujaha-Matundu; and (iii) Ms. Nelong Kasuto. The first substantive Chair of the Commission, Mr. Lucius Murorua, was appointed by

⁷⁰ As provided for under the terms of section 53(5) of the Act, pecuniary penalties payable under the Act are paid into the State Revenue Fund and do not constitute direct funds of the Commission.

Board member	Term of office	Qualifications and professions
Mr. Festus Hangula (Chair)	December 2011 to December 2014	Qualifications: MBA in Finance (Manchester Business School/University of Wales, United Kingdom); BBA (Cum Laude), Concordia College, United States). Graduated with distinction as Fellow of MEFMI. Profession: Commerce Professional and Chief Executive Officer: NAMPOST.
Mr. Nghidinua Daniel	March 2013 to March 2016	Qualifications: MSc. Public Policy and Management (University of London/SOAS, United Kingdom); Post Graduate Diploma in Public Policy and Management (University of London/ SOAS, United Kingdom); BA Economics and Development Administration (UNISA). Profession: Public Policy Professional and Deputy Permanent Secretary: Ministry of Trade and Industry.
Dr. Omu Matundu-Kakujaha	December 2011 to December 2014	Qualifications: PhD in Economic Development (Institute of Social Studies, The Hague); Certificate in Resource Management (University of York, United Kingdom); MA Economics (University of Botswana); BA Economics (UNAM). Profession: Profession Economist and Senior Lecturer: University of Namibia.
Ms. Nellago Kasuto	December 2011 to December 2014	Qualifications: B.Com Accounting (University of the North, RSA); B.Com (Hons); Higher Diploma in Administration of Estates (ESSTAX). Profession: Chartered Accountant and Managing Director of Komeho Development Agency.
Mrs. Malverene Theron	September 2013 to September 2016	Qualifications: Bachelor of Laws (LLB) (UCT); Certificate in Compliance and Corporate Governance; Certificate Insurance Supervision (UCT). Profession: Legal Practitioner and Procurement Manager: DeBeers Namibia.

the Minister on 1 February 2010. On 17 September 2013, Mr. Hangula succeeded Mr. Murorua as Chair following the retirement of the latter, after having served his term of office.

Members of the Board of Commissioners of NaCC therefore possess the requisite qualifications for effective implementation of competition policy and law (i.e., economics, law, accountancy and administration) and have the necessary expertise in line with section 5 of the Act.

Members of the NaCC's Board of Commissioners hold office for terms of three years and are eligible for reappointment but should not hold office for more than two consecutive terms (section 7 of the Act). Of the present five members of the Board of Commissioners, three of them are serving their second terms of office, which end in December 2014, with no possibility of reappointment. That will leave the Board with members that have less than two years of experience in the Commission and will therefore be lacking the necessary institutional memory for informed and effective decision-making.

It is recommended that, in appointing members to the Board of Commissioners of NaCC, the Minister should ensure that not more than one mem-

ber is retired at the same time after serving two consecutive terms.

For the better exercise of its functions, the Commission may establish under the terms of section 12(1) of the Act "one or more committees" of the Board of Commissioners to "exercise any power or perform any function of the Commission which the Commission may delegate or assign to the committee" except the power to make rules. It is also provided under the terms of section 12(2) that committees of the Board may not only consist of Commissioners but may also consist of other persons with the relevant qualifications and experiences as required by the Commission.

The Commission has established three Committees under the terms of section 12(2) of the Act: (i) the Technical Committee, which considers competition cases; (ii) the Human Resources and Administration Committee; and (iii) the Audit, Risk and Finance Committee. The present membership of the Committees is comprised only of Commissioners, with no outsiders.

The Secretariat of the Commission is headed by the Secretary to the Commission, who is appointed under the terms of section 13(1) of the Act as the Commission's chief executive officer responsi-

ble for “(a) the formation and development of an efficient administration; and (b) the organization, control, management and discipline of the staff of the Commission” (section 13(2)). The Secretary is also the accounting officer of the Commission responsible for “(a) all income and expenditure of the Commission; and (b) all assets and the discharging of all liabilities of the Commission” (section 17(4)).

The Commission also has powers under the terms of section 13(1) of the Act to appoint other employees “as it deems necessary to assist in the performance” of its functions and may, under the terms of section 14(1), designate any of its employees, or appoint any other suitable persons, to be an inspector for the purposes of the Act. The Commission may further engage consultants “to give advice to, and perform services for, the Commission on such terms and conditions of engagement as the Commission may determine” (section 15 of the Act).

The Commission is basically a quasi-judicial body with investigative and limited adjudicative functions under the Act.⁷¹ The Act however does not clearly apportion the Commission’s investigative and adjudicative functions between its Secretariat and Board of Commissioners. It does not lucidly define when and what sort of actions should be taken by the Secretariat (i.e., the Chief Executive Officer and staff of the Commission) and by the Board of Commissioners (i.e., appointed members of the Commission) in the handling of competition cases due to the term “Commission” referring to both Board and staff. The term “Commission” is defined under the Act as “the Namibian Competition Commission established by section 4”. Section

4 of the merely states that “there is established a juristic person to be known as the Namibian Competition Commission”, yet section 5(1) states that “the Commission consists of a chairperson and not less than two nor more than four other members all of whom are appointed by the Minister”.

It is however inferred in the Act that the Secretariat is the Commission’s investigative arm. Section 14(1) of the Act provides for the designation of any of the Commission’s employees as inspectors for the purposes of investigating restrictive business practices and examining mergers and acquisitions. It has also become established practice in the NaCC that the Secretariat investigates competition cases and submits reports on the findings to the Board of Commissioners for determination. Similar arrangements are in place in other competition jurisdictions in the region in like situations, such as Seychelles, Zambia and Zimbabwe, by virtue of the fact that full-time Secretariats have more time to undertake investigations than part-time Boards of Commissioners.

The NaCC Secretariat saw the lack of clear separation in the Act of the Commission’s investigative and adjudicative functions as a non-issue because:

The Act clearly sets out the structure of the Commission and its function. The personnel employed by the Commission is there to assist the Commission in carrying out its functions and does not take independent decisions to that of the Commission, i.e., the investigation done by the staff (“the Secretariat”) is on behalf of the Commission.

Nevertheless, unclear statutory separation of a competition authority’s investigative and adjudicative functions has grave legal implications. In Jamaica, for example, the constitutional validity of the country’s Fair Trading Commission was successfully contested in 2001 before the Court of Appeal, rendering the competition authority practically inoperative and many core provisions of the Fair Competition Act unenforceable.⁷² The fundamental issue in this instance was the lack of separation of the adjudicative functions from the investigative functions under the Act. The Court of Appeal found the lack of separation of the adjudicative and investigative functions contrary to the

⁷¹ The NaCC Secretariat pointed out that the Commission performs a quasi-judicial role in some areas and not in others. Such a quasi-judicial role is performed when the Commission approves or refuses mergers or acquisitions and where it considers exemption applications under the terms of sections 27 to 32. The Commission does not perform a quasi-judicial role when it decides to investigate complaints or initiate a complaint and start investigations in terms of section 23 and 26 of the Act. The Commission performs an investigative role and, where the Board proposes to make a decision that a part I or part II prohibition has been infringed, the Commission may institute proceedings in the High Court against the party alleged to have committed the infringement, with the court being the adjudicator in matters concerning part I and part II of the Act, even consent agreements reached under the terms of section 40 must be confirmed by the High Court.

⁷² UNCTAD Report on Voluntary Peer Review on Competition Policy: Jamaica, United Nations, New York and Geneva, 2005.

principles of natural justice. The Jamaican competition authority had no choice but to revert to moral suasion and voluntary compliance to fulfil its mandate.

It is therefore recommended that the separation of the NaCC's investigative and adjudicative functions be clearly provided for under the Act, with the Commission's Secretariat being formally given statutory investigative functions and the Board of Commissioners retaining adjudicative functions, with well-defined responsibilities and spheres of operation.

The other contentious issue is the independence of the Commission. For a competition authority to be effective in the implementation of a country's competition policy and law, it must not only be expert and professional but must also operate independently of pressures from both public and private sectors. According to CUTS (2008):⁷³

The most independent institutions are not only administratively separate from the Government, but they are also staffed by competition professionals and do not rely on the Government for budget allocation. The least independent authorities are those that form part of a government ministry and are also therefore subject to civil service restrictions on recruitment and on central budget allocations for the administrative personnel.

The independence of the NaCC is specifically provided for in the Competition Act, 2003. Under the terms of section 4 of the Act, the Commission is established not only to have jurisdiction throughout Namibia, but also as a juristic person "independent and subject only to the Namibian Constitution and the law" and "must be impartial and must perform its functions without fear, favour or prejudice". The Commission is also a stand-alone competition agency, and not a government ministry or a department or division of a government ministry.

There are however other provisions of the Act that limit the independence of the Commission. For example, members of the Board of Commissioners are appointed by the Minister of Trade and Indus-

try under the terms of section 5 of the Act. Under the terms of section 8 of the Act, the Minister may also remove a Commissioner from office, albeit for specified acts or misconduct, after giving the Commissioner a reasonable opportunity to be heard.⁷⁴ The appointed Commissioners therefore owe allegiance to the Minister who appoints them and may remove them. Section 17 of the Act also provides that the funds of the Commission shall consist, inter alia, of "money appropriated by Parliament for the purposes of the Commission". While the Act also provides for other sources of funds for the Commission (e.g. fees payable to the Commission in terms of the Act and money vesting in or accruing to the Commission from any other source), government funding is most likely going to continue being the largest source of funds for the Commission, given the limitations in other sources of funding.

It is however not being suggested that the Minister should not get involved in the appointment or removal of Commissioners, or that the Commission should not rely on the Government for budget allocation. For competition authorities, which are statutory bodies, it is inevitable, and even desirable, that the responsible ministers get involved in the appointment of members of the Commission, and that Government should be the primary funder of the operations of the Commission.

It is a different matter if ministers or Governments use their statutory obligations to competition authorities to influence the authorities in their decision-making processes.

⁷⁴ Section 8(2) of Namibia's Competition Act, 2003, provides that "the Minister may, by notice in writing, remove a member from office if the Minister, after giving the member a reasonable opportunity to be heard, is satisfied that the member: (a) has failed to comply with any obligation imposed by section 10; (b) is guilty of neglect of duty or misconduct; or (c) is incapable of performing the duties of his or her office, by reason of physical or mental illness". Section 10(1) of the Act provides that "a member of the Commission may not: (a) engage in an activity that may undermine the integrity of the Commission; (b) participate in any investigation or decision concerning a matter in respect of which the member has a financial or other personal interest; or (c) use any confidential information obtained in the performance of his or her functions as a member to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person". Even though the Act does not specifically provide for an appeal process against the Minister's decision to remove a Commissioner from office under the terms of section 8(2), normal administrative law provides that any ministerial decision can be appealed against in appropriate law courts.

⁷³ *Enforcing the Competition Law in Namibia: A Toolkit*, CUTS International and CUTS Centre for Competition, Investment and Economic Regulation, Jaipur, India, 2008.

More serious, however, are the provisions of the Act that give the Minister of Trade and Industry wide powers over the Commission's activities. While there is nothing wrong with the Minister requesting the Commission to carry out research into competition matters, or to advise him on any other competition matters, as provided for in section 16 of the Act, or to require the Commission to furnish him with reports relating to the performance of its functions as provided for in section 21, the powers of the Minister to review the Commission's decisions on mergers and acquisitions under the terms of section 49 of the Act could constitute an undesirable political interference into the activities of the Commission if no clear guidelines on the use of the powers are provided for in the statutes.

A number of stakeholders that were consulted during the fact-finding visit to Namibia in November 2013 also commented on the independence of the Commission. In particular, the head of Economics and Sector Research with the Communications Regulatory Authority of Namibia (CRAN) was of the opinion that the major problem with the NaCC was that the Commission was not an independent authority, nor was it perceived by its stakeholders as being an independent authority, as it fell under the authority of the Minister of Trade and Industry and was therefore subject to political interference. The Minister's involvement in the review of the Commission's decisions on mergers was given as an example. It was advised that in the case of CRAN, it is an independent authority that was established as such by its enabling Act with full decision-making powers. Appeals against the Authority's decisions can only be made to the High Court. It was also advised that the same applies to the Electricity Control Board (ECB).

The independence of an organization has many dimensions, including the following: (i) institutional independence dimension;⁷⁵ (ii) personal

independence dimension;⁷⁶ and (iii) budgetary independence dimension.⁷⁷ These dimensions are assessed and analysed by the Reviewer below in as far as they apply to the NaCC:

- **Institutional independence:** It is now an accepted fact that competition authorities, to be effective, require institutional independence in the undertaking of their daily tasks without interference or direct supervision by Governments. While in the past a number of competition authorities worldwide were departments or divisions of government ministries, the trend now is to establish "independent" authorities for the purposes of avoiding political and special interest group influences. In Namibia, the NaCC was established as an "independent" stand-alone body separate from any government

good competition authority is expected to maintain an arm's length distance from the Government (and other political and special interest groups) to demonstrate their independence, while remaining influential with Government in order to carry out effective advocacy.

⁷⁶ Personal independence refers to the freedom of the members of the decision-making body of the competition authority to decide cases merely on the merit (i.e. based on the law and the facts of the case) and not be influenced by political considerations or their individual interests. It includes the manner in which management and staff are appointed, their tenure and dismissal. Independence is best served if there are clear rules on hiring and firing. Under such rules, staff of competition agencies should enjoy security of tenure, enabling them to speak and take action without fear of removal by the present Government. In addition, personal independence includes the openness and transparency of decision-making of the competition authority.

⁷⁷ Budgetary independence refers to the role of the Government in the determination of the size and use of the authority's budget, including staffing of the authority and salary levels. A competition authority that independently decides over the sources, size and use of its budget is better able to withstand political interference to ensure that competent staff are hired. If the budget is too small, the authority will not be able to attract highly qualified staff and pay market-rate salaries. The World Bank stated in its report on "Building Institutions for Markets" that "the competition authority should be independent of a government ministry and should have its own budget" (World Bank, 2002). This has been reiterated by the CUTS Centre which believes that "a combination of funds allocated by the legislature and those received from filing fees seems to be the best solution. A danger with having funds allocated by a government department is that they become subject to political influence" (CUTS Centre, 2003). Funding through the Government can also be used by the latter to organize other types of interference in the law enforcement process. In some cases, the Government can threaten to withhold or squeeze funding if the authority is too strict on politically connected firms.

⁷⁵ The independence of a competition authority is largely dependent on its institutional arrangement. Institutional independence refers to the degree of freedom which the competition authority has to undertake its daily task without the interference or direct supervision from the Government. This includes the status of the authority as an institution separate from the executive branch of Government. It has been found that agencies under the direct supervision of the Government are less independent. According to the ICN, a

ministry or department.⁷⁸ The independence of the NaCC is enshrined in the Competition Act, 2003. Under the terms of section 4 of the Act, the Commission “is independent and subject only to the Namibian Constitution and the law”. However being a statutory body established by an Act of Parliament, the Commission, like most other competition authorities, is aligned with a particular government ministry (the Ministry of Trade and Industry in the case of Namibia) for accountability and budgetary allocations purposes, as well as for policy guidance purposes.

The Competition Act, 2003 gives the NaCC sufficient competences to fulfil its role of promoting competition, including powers to initiate competition investigations, to issue binding decisions, to impose sanctions and to recommend improvements in public policy, regulation and legislation, etc. The carrying out of competition investigations by the Commission’s Secretariat, and the making of final decisions and determinations on the cases by its Board of Commissioners reinforces the effective separation of the Commission’s investigative and adjudicative functions for natural justice purposes and thus enhances its competences.

The NaCC’s decisions on mergers can however be reviewed by the Minister, who can confirm or overturn the decision, or can amend the decision. This lessens the independence of the Commission to some extent and exposes its decisions to political influences. The Minister’s involvement in determining and prescribing, through regulations, merger notification thresholds, merger notification forms and fees, etc., and in the making of other regulations that give effect to the provisions of the Act, as well as in giving policy directions to the Commission, is in line with the Minister’s responsibilities as representing the executive arm of Government. That also gives the necessary authority to operating instruments of the Commission.

⁷⁸ The same applies to other competition authorities in the region, in countries such as Botswana, Malawi, Mauritius, Swaziland, South Africa, the United Republic of Tanzania, Zambia and Zimbabwe.

- **Personal independence:** Under the terms of section 5(1) of the Competition Act, 2003, members of the Board of Commissioners of the NaCC are appointed by the Minister. Section 13(1) provides that the Commission (meaning the Board of Commissioners) appoints the Secretary, and chief executive officer of the Commission. It is common practice in the region that members of the Boards of Commissioners of competition authorities are appointed by the responsible Ministers (e.g. Botswana, Zambia, Zimbabwe) or by the President upon the advice of the Commission (Seychelles). In the United Republic of Tanzania, the Fair Competition Act, 2003 provides under the terms of section 62(6) that the Chair of the Board of Commissioners is appointed by the President, while the other members of the Board are appointed by the Minister. The chief executive officers of most of the authorities are appointed by the Boards of Commissioners, with the notable exception of the chief executive officers of the authorities in Botswana and Seychelles, who are appointed by the Minister, after consultation with the Commission. The above appointment mechanisms do not compromise the independence of competition authorities.

The appointment criteria of members of the Boards of Commissioners of competition authorities must be clear and objective for independence purposes. In that regard, section 5(2) of Namibia’s Competition Act, 2003 provides that “when appointing members of the Commission the Minister must select persons who, in the opinion of the Minister, have experience in industry, commerce, economics, law, accountancy, public administration or consumer affairs”. The current Board of Commissioners of the NaCC was appointed in strict adherence to the above appointment criteria. The members of the Board are all professional people operating in both the public and private sectors of the economy, including academia, with the requisite qualifications for the effective implementation of competition policy and enforcement of competition law.

Section 7 of the Competition Act, 2003, provides with regard to the terms of office of members of the Commission (Commission-

ers) that "...a member holds office for a term of three years, and is eligible for reappointment at the expiration of that term, but a member may not hold office for more than two consecutive terms". The Act does not provide for the term of office of the Chief Executive Officer and Secretary to the Commission. However, the current incumbent in that position is on a fixed-term employment contract, as are the Divisional Directors. The appointment of members of the Board on terms of only three years might be too short to enable members to grasp the intricacies of competition policy and law and thus enable them to effectively contribute to decision-making on competition matters. It is however noted that the Commissioners can be reappointed for another term of office at the expiration of their initial three-year terms of office, thus giving them a possible total of six years in office. It is normal practice that chief executive officers of competition authorities, and some of their senior staff, are put on fixed-term employment contracts. In a way, that ensures their tenure against arbitrary dismissal, as long as they perform according to the contracts.

Section 8 of the Act provides for the vacation of office of the NaCC's members of the Board of Commissioners. Section 8(1) provides that a member vacates his or her office if the member: "(a) is convicted of an offence and sentenced to imprisonment without the option of a fine; (b) resigns his or her office by giving the Minister one month's notice in writing of his or her intention to resign; (c) has been absent for three consecutive meetings of the Commission without leave of the Commission; or (d) is removed from office by the Minister under subsection (2)". Subsection (2) of section 8(1) provides that the Minister can only remove a member of the Commission from office if, after giving the member a reasonable opportunity to be heard, the Minister is satisfied that the member: "(a) has failed to comply with any obligations imposed by rules of conflict of interest; (b) is guilty of neglect of duty or misconduct; or (c) is incapable of performing the duties of his or her office by means of physical or mental illness". The above grounds for vaca-

tion of office by Commissioners are clear and legitimate, and in line with corporate governance principles. The fixed-term employment contracts of the Chief Executive Officer and senior members of staff of the NaCC clearly lay out the grounds for the dismissal of the staff, which would have been accepted by the staff.

The NaCC is required under the terms of section 41 of the Competition Act, 2003 to publish in the *Government Gazette* any decisions it makes following competition investigations. The publication must include the name of every undertaking involved in the investigation and the nature of the conduct that was the subject of the investigation. Section 32 of the Act also requires the Commission to cause to be published in the *Gazette* every exemption granted or revoked. The Commission's decisions on competition cases can also be publicly accessed from its website.

Under the terms of section 52 of the Competition Act, 2003, the High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of the Act. The Minister of Trade and Industry however has powers under section 49 of the Act to review, on application, the Commission's decisions on mergers. In undertaking such review, the Minister can (a) overturn the decision of the Commission; (b) amend the decision of the Commission by ordering restrictions or including conditions; or (c) confirm the decision of the Commission. Appeals against the Minister's review decisions can be made to the High Court of Namibia.

- **Budgetary independence:** Being a non-commercial statutory body, the NaCC is largely dependent on government funding for its operations. As provided for under the terms of section 17(1) of the Competition Act, 2003, "money appropriated by Parliament for the purposes of the Commission" constitutes some of the funds of the Commission. The Commission channels its budgetary bids to the Treasury through the Ministry of Trade and Industry. The Ministry is however not involved in the determination of salaries in the Commission. Salaries for the executive staff of

the Commission (Chief Executive Officer and Directors) are pre-determined in the State-Owned Enterprises Remuneration Table, which is managed by the State-Owned Enterprises Council in the Prime Minister's Office under the State-Owned Enterprises Act. For the purposes of remuneration, State-owned enterprises (SOEs) are classified into three tiers: (i) Tier One (large enterprises); (ii) Tier Two (regulators) and (iii) Tier Three (other Boards). The NaCC is classified in Tier Two. Even though the Commission has powers to determine salary levels of its non-executive staff, the levels set for its executive staff in the State-Owned Enterprises Remuneration Table cannot be exceeded. The above somewhat limits the Commission's independence in offering market-related salaries, which is necessary for competence-enhancing for institutional independence.

From the analyses made above, the NaCC seems to possess most of the elements required for an independent competition authority. The major hindrances to its independence are the involvement of the Minister in its decisions on mergers and limited budgetary independence in determining employee salary levels.

(a) Minister of Trade and Industry

The Minister of Trade and Industry reviews decisions of the Commission on mergers and acquisitions (section 49 of the Act). The review can however only be undertaken upon application by a party to the merger (section 49(1)), which should be made within 30 days following the gazetting of the Commission's decision. After reviewing the Commission's decision, the Minister can in terms of section 49(3) of the Act either: (i) overturn the decision of the Commission; (ii) amend the decision of the Commission by ordering restrictions or including conditions; or (iii) confirm the decision of the Commission.

(b) High Court of Namibia

Under the terms of section 52 of the Act, the High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted under the terms of the Act. The Court has the sole responsibility under the terms of section

53 of the Act of imposing pecuniary penalties for breach of the provisions of the Act. The following are the provisions of section 53 related to the imposition of pecuniary penalties by the High Court:

- Pecuniary penalties may be imposed for: (i) contravention of a part I (restrictive agreements, practices and decisions) or part II (abuse of dominance) prohibition; (ii) contravention of, or non-compliance with, a condition attached to an exemption granted in part III (exemption of certain restrictive practices) of chapter 3; (iii) contravention of, or non-compliance with, an order of the Commission, in contravention of a decision of the Commission prohibiting the merger, or in manner contrary to a condition under which approval for the merger was given by the Commission (section 53(1)).
- Pecuniary penalties may be imposed for any amount which the Court considers appropriate, but not exceeding 10 per cent of the global turnover of the undertaking during its preceding financial year (section 53(2)).
- In determining an appropriate penalty, the Court must have regard to all relevant matters concerning the contravention, including (i) the nature, duration, gravity and extent of the contravention; (ii) the nature and extent of any loss or damage suffered by any person as a result of the contravention; (iii) the behaviour of any undertaking involved; (iv) the market circumstances on which the contravention took place; (v) the level of profit derived from the contravention; (vi) the degree to which the undertaking involved has cooperated with the Commission and the Court; and (vii) whether the undertaking has previously been found by the Court to have engaged in conduct in contravention of the Act (section 53(3)).
- Orders imposing pecuniary penalties have the effect of, and may be executed as if they were, civil judgements granted by the Court in favour of the Government of Namibia (section 53(4)).
- The pecuniary penalties must be paid into the State Revenue Fund (section 53(5)).

In consultations with a senior member of the Mergers and Acquisitions Division of the NaCC during the fact-finding visit, a concern was raised that the Act does not specify the criteria used in determining penalties of up to 10 per cent of an

undertaking's turnover when it comes to mergers. It was advised that such criteria in the Act are only for restrictive business practices, which are also being used for mergers but has been challenged by some law firms. A close reading of section 53 of the Act however shows that the criteria that the High Court must use in determining appropriate penalties in terms of section 53(3) also apply to the imposition of pecuniary penalties on contraventions of merger control provisions as stated in section 53(1)(d).

It was also advised that even though the Commission sometimes enters into penalty settlements with parties to a merger, there are doubts as to whether the Commission has the necessary jurisdiction for entering into such settlements for the purpose of registering the settlements with the High Court. A reading of section 53 of the Act also shows that it is the High Court, and not the Commission, that has the jurisdiction over penalties on contravention of merger control provisions of the Act.

A senior member of the Commission's Restrictive Business Practices Division was also of the view that the fixing of fines for competition contraventions under the Act should not be left to the High Court's discretion but should be subject to recommendations of the Commission on the basis of clear criteria. It should however be noted that the High Court's determination of pecuniary penalties under section 53 of the Act is not discretionary, but is subject to specific criteria in terms of section 53(3). The imposition of fines is a purely judicial function, in which the Commission should not get involved as otherwise that could divert it from its core competition functions.

(c) *Interrelationship of the Namibian competition institutions*

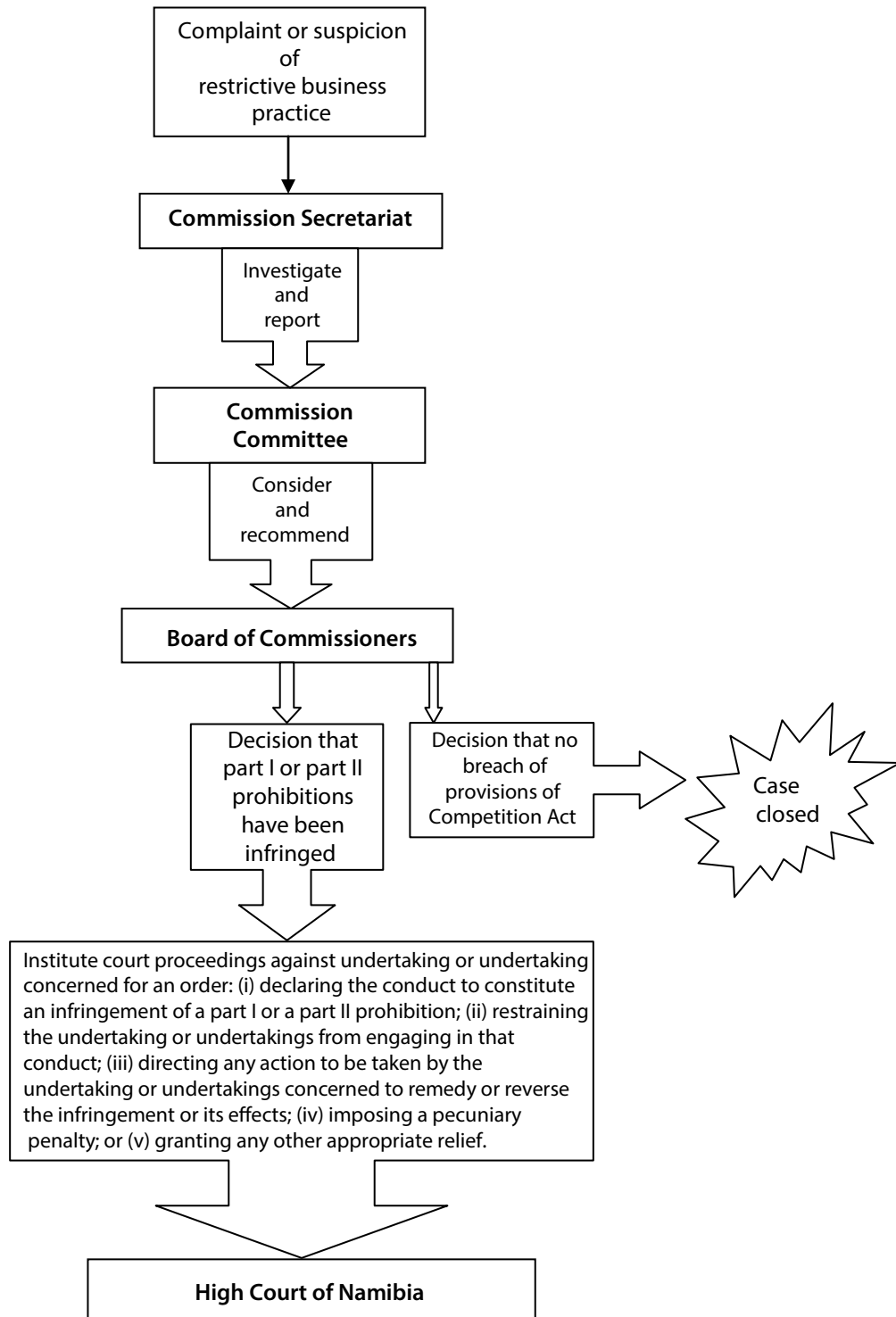
The NaCC has the responsibility of investigating complaints of restrictive business practices referred to it, and other competition concerns that it identifies on its own. It also has the responsibility of examining proposed mergers notified to it. The Act gives the Commission all the necessary powers of conducting such investigations and examinations.

While the Commission can upon conclusion of an investigation make a decision that a part I prohibition (restrictive agreements, practices and decisions) or a part II prohibition (abuse of a dominant position) has been infringed, it must institute proceedings in the High Court of Namibia against the undertaking or undertakings concerned for the necessary remedial orders. The same applies to Commission decisions on interim reliefs and consent agreements.

The above institutional arrangement of the Commission having to institute proceedings in the High Court against undertakings it finds in contravention of the Act's provisions on restrictive business practices for the necessary remedial orders, which is enshrined in section 38 of the Act, gives enforcement strength to the orders. However, it prolongs the remedying of the effects of the anticompetitive practices identified by the Commission, given the usual backlog of court cases. In terms of Article 80 of the Constitution of Namibia, the High Court should consist of a Judge-President "and such additional judges as the President, acting on the recommendation of the Judicial Service Commission, may determine". The High Court acts as both a court of first instance and a court of appeal over civil and criminal prosecutions and in cases concerning the interpretation, implementation and preservation of the Constitution. At the time of the fact-finding visit, there were 11 permanent High Court judges, who were operating with a large backlog of cases, as reported in the *Namibian* newspaper of 17 January 2012.⁷⁹ In a subsequent

⁷⁹ The *Namibian* newspaper of 17 January 2012 reported as follows: "Judge Damaseb revealed that four judgements dating from 2002 remain outstanding, as are four reserved judgements dating back to 2003, five from 2004, two from 2005, five from 2006 and three from 2007, the Judge President said. Thirteen judgements reserved in 2008 must still be delivered, while 17 reserved judgements from 2009 remain outstanding, 37 from 2010, and 28 from 2011. Judge President Damaseb reportedly cited figures, which showed that close to 120 (118 to be exact) reserved judgements, most of them as old as three years, have yet to be delivered and have gone past the deadlines. Furthermore, statistics produced in late 2010 by the Registrar of the High Court and Supreme Court show that 1 High Court judgment dating back to 2001, 5 judgements dating from 2002, 5 from 2003, 7 from 2004, 6 from 2005, 7 from 2006 and 9 from 2007 were still outstanding by the end of 2010. A list of outstanding judgements compiled by the Law Society of Namibia (LSN) late in 2010 also shows that 1 appeal judgment dating from 2004 was still being awaited in the Supreme Court, while 2 judge-

Diagram 1 Institutional working relations in the consideration of restrictive business practices



article in 2013, the *Namibian* newspaper however reported that in 2013 a High Court case management system had been implemented, which is expected to increase the delivery of court judgements.

The institution in the High Court of proceedings against the undertaking or undertakings concerned for the necessary remedial orders also reduces the Commission's role in the finding of the most suitable remedies for specific restrictive business practices, thereby giving credence to stakeholder criticisms that the Commission does not have the teeth to deal with restrictive business practices.

The solution might be to give the Commission full powers to make remedial orders on restrictive business practices, but for enforcement purposes having the orders registered with the High Court as a civil judgement of the High Court, as is the case in Zimbabwe.⁸⁰

In the case of mergers, the Commission can make a determination on either approving the implementation of the merger or declining to give approval for the implementation of the merger. The Minister of Trade and Industry however has statutory powers of reviewing, upon application by the aggrieved party, the Commission's decisions on mergers and acquisitions.

The High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted under the terms of the Competition Act.

The effective separation of functions between the institutions in the consideration of restrictive

ments dating from 2005, 8 judgements dating from 2006 and 3 judgements dating from 2007 had also not yet been delivered in the Supreme Court by late 2010".

⁸⁰ Section 33 of the Competition Act [Chapter 14:28] of Zimbabwe provides that "(1) the Commission or any person in whose favour or for whose benefit an order has been made may lodge a copy of the order, certified by the Director or a person authorized by the Director, with: (a) the Registrar of the High Court; or (b) the clerk of any magistrates court which would have had jurisdiction to make the order had the matter been determined by it; and the Registrar or clerk shall forthwith record the order as a judgement of the High Court or the magistrates court, as the case may be. (2) An order that has been recorded under subsection (1) shall, for the purposes of enforcement, have the effect of a civil judgement of the High Court or the magistrates court, as the case may be".

business practices, and examination of mergers and acquisitions, is therefore adequately provided for in the Act. Diagram 1 below shows what could be the working relationship between the statutory institutions provided for under the Act in as far as the consideration of restrictive business practices is concerned.

More or less similar procedures could be followed in cases of interim reliefs and consent agreements. In both cases, the preliminary investigation has to be done by the Commission's Secretariat for the Board of Commissioners' determination, on recommendation by its relevant committee. The Commission then has to make application to the High Court of Namibia for the interim restraining order or confirmation of the consent agreement.

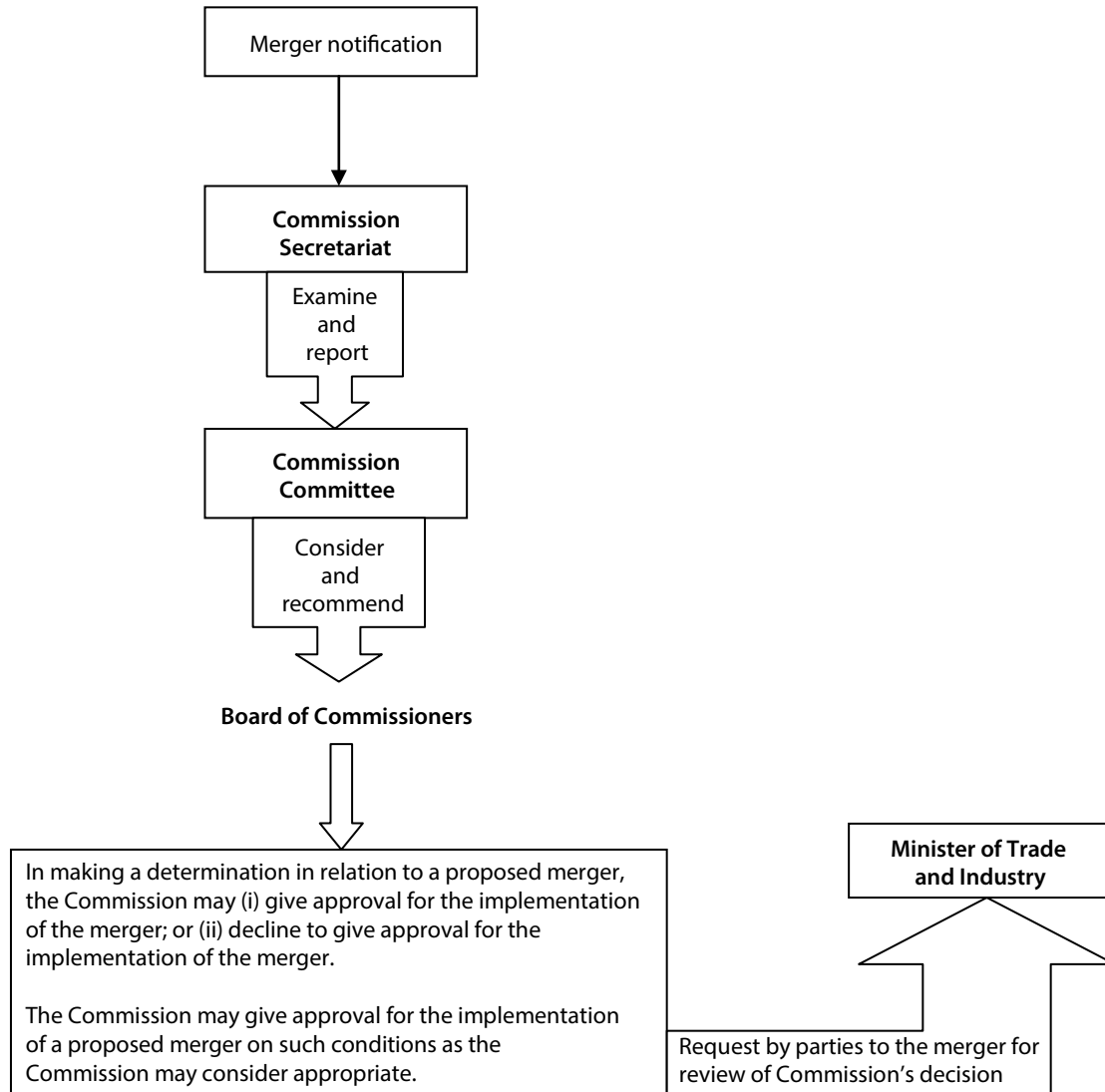
Diagram 2 below graphically shows what could be the division of functions between the statutory institutions in the examination and determination of mergers and acquisitions.

In the case of exemptions (of certain restrictive practices, in respect of intellectual property rights and in respect of professional rules), the Board of Commissioners could make final determinations, following investigation by the Commission Secretariat and on recommendation of its committee, subject to full stakeholder consultations, including with the Minister responsible for the administration of any law governing the profession concerning the application, in the case of exemptions in respect of professional rules.

The illustrative competition case handling approaches in diagrams 1 and 2 above demonstrate the effective operational relationship between the NaCC's competition institutions as provided for in the Act for the purposes of effecting a workable separation of functions between the institutions.

The NaCC's most profound dealings with the Judiciary of Namibia have been on the Walmart case, which involved the Commission's conditional approval of the Walmart/Massmart merger that was appealed against in the High Court, with a counter-appeal in the Supreme Court. In its appeal to the Supreme Court, the Commission was represented by a private law firm, while its co-appellant, the Minister of Industry and Trade, was represented by the Attorney General's Office. During the fact-

Diagram 2 Institutional working relations in the examination and determination of mergers and acquisitions



finding visit, the Reviewer was however unable to get the feedback of the Attorney General’s Office on the lessons learned from that case because of the apparent lack of communication between the NaCC and that Office.⁸¹

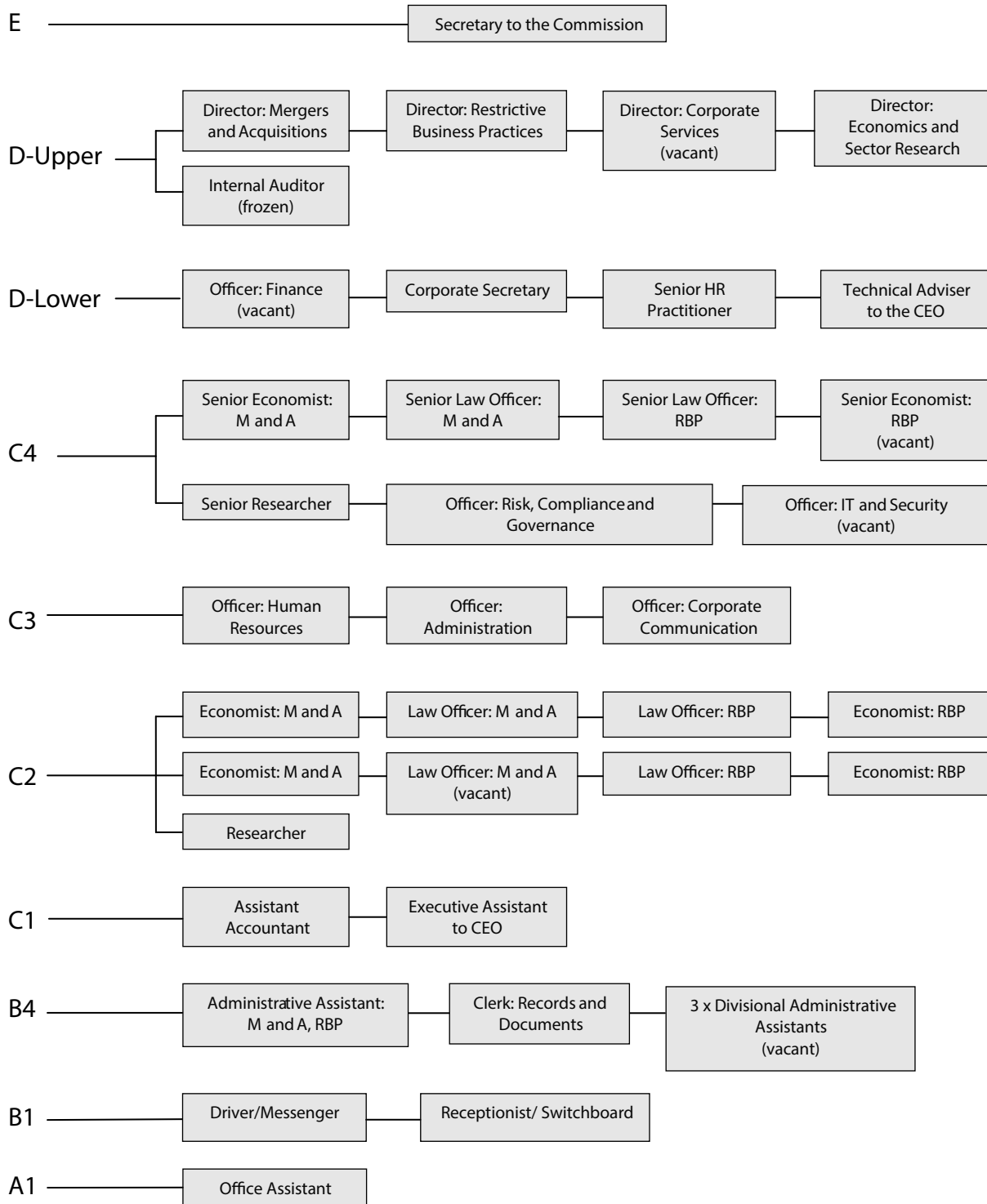
⁸¹ The Chief Legal Adviser in the Attorney General’s Office advised that the Office was not in the position of officially exchanging views with the Reviewer on the matter since the Commission did not notify the Office of the peer review exercise, and why the review was necessary, and the specific areas that needed exchange of views. He attributed that to a serious lack of communication between the Commission and the Office.

5. STAFFING AND HUMAN RESOURCES

As at the time of the fact-finding visit, the NaCC had a staff complement of 28 employees, of which 23 were professional staff, 4 administrative support staff and 1 unskilled labourer. The staff establishment however has a total of 40 positions, as shown in figure 1 below on the Commission’s organization chart.

The NaCC’s Corporate Services Division confirmed that the vacancies in the staff are not due to poor

Figure 1 Organization chart of NaCC



staff retention. Since its inception in 2009, the Commission has experienced only three terminations of service, two from resignations and one from death. The resources to fill the vacant posts can also be made available since sufficient budgetary allocation is made every financial year. Besides the three terminations of service referred to above, the other vacancies exist because the Board of Commissioners provided guidance that such vacancies should be filled on a priority, and staggered, basis spread over two financial years. It is also a fact that there is a lack of qualified candidates in Namibia. Lawyers and economists trained in competition law and policy are not readily available. The Commission's recruitment efforts are thus aimed at securing candidates who have the potential for further training in these fields and who will ensure return on the investment within the shortest time possible.

A senior member of the Corporate Services Division advised during the fact-finding visit that the intention is to grow the number of staff to 45 during the next five years, with the expected expansion in the Commission's operations.

All the Commission's professional staff are adequately qualified for their positions and have university degrees in their respective areas of competences (i.e., economics, law, administration and accounts). The mix of economists and lawyers for the effective implementation and enforcement of competition policy and law is also adequate, with 11 economists in position and 7 lawyers.

The professional and academic qualifications of staff in the Commission's various Divisions and Departments are shown in table 6 below.

Table 6 Professional and academic qualifications in NaCC divisions

Division/department	Number of professional staff	Professional positions in division/department	Qualifications
Office of the Secretary to the Commission	3	Chief Executive Officer and Secretary to the Commission; Technical Adviser to the Secretary to the Commission; Corporate Secretary/Legal Adviser	B.Com. (Hons), Post Graduate Diploma in Quantitative Economics), MSc. (Quantitative Economics); B.Econ (Hons), MSc (International Business), PGD in Education, Certificate in Management and Competition Law, PhD Economics Fellow; B.Juris, LLB, PG in Board Governance, Legal Practitioner.
Corporate Services Division	4	Senior Human Resources Officer; Corporate Communications Officer; Administration Officer; Assistant Accountant	National Diploma in Public Administration; BBA; National Diploma in Journalism; National Diploma in Cost and Financial Accounting, Master Financial Controller Certification.
Mergers and Acquisitions Division	6	Director; Senior Economist, Senior Law Officer, Economists (2), Law Officer	B.Admin, LL.M in Economics; B.Econ., PGD in Economics for Competition Law; BSc (Hons) (Agricultural Economics), Post-Graduate Diploma Competition Law; Bachelor of Laws, Bachelor of Social Sciences; B.Juris, LLB (Hons).
Restrictive Business Practices Division	7	Director; Senior Law Officer; Law Officers (2); Economists (2); Divisional Administrative Assistant	B.Juris, LLB, LL.M, Post-Graduate Diploma in Economics for Competition Law; Bachelor of Laws; Diploma in Business Administration; B.Econ; B.Com (Economics and Public Management), Honours Degree in Commerce (Economics), Diploma in Public Policy Formulation and Implementation.
Economics and Sector Research Division	3	Director; Senior Researcher; Researcher	PhD (Economics), MSc (Finance and Investments), MA (Economics), BA (Economics); Bachelor Degree in Economics; Bachelor of Economics, Post-Graduate Diploma in Economics for Competition Law, Diploma in Local Government Studies.

Source: NaCC Corporate Services Division.

Besides the Office of the Secretary to the Commission, the Commission's employees are organized into four Divisions: (i) the Corporate Services Division; (ii) the Mergers and Acquisitions Division; (iii) the Restrictive Business Practices Division; and (iv) the Economics and Sector Research Division, as described and analysed below:

- **Corporate Services Division:** The Division is responsible for providing support services to the Commission through its four Sections: (i) Finance Section; (ii) Administration Section; (iii) Corporate Communications Section; and (iv) Human Resources Section. It currently has a staff complement of eight, including professional and administrative/financial support staff.

Besides giving administrative and financial support services to the Commission's other Divisions, the Corporate Services Division directly contributes to the core operations of the Commission through its advocacy and awareness activities. In that regard, it coordinates the publication of the Commission's newsletter, which is a joint effort of all Divisions, and liaises with the media. It also provides registry services, which play an important role in the receipt and recording of competition complaints and notifications.

The Division is providing adequate support services to the Commission's other operational Divisions. Its Corporate Communications Section, which has important advocacy and awareness functions, is however under resourced in terms of human resources since it is manned by only one officer.

- **Mergers and Acquisitions Division:** The Division is responsible for administering the provisions of chapter 4 of the Competition Act, 2003, and its core function is the investigation and analysis of mergers. It has a staff complement of six professional staff, comprising both economists and lawyers.
- The Mergers and Acquisitions Division is the busiest in the Commission in terms of the number of competition cases handled. It also operates under intense demands and pressure from the business community, as well as from the statutory deadlines in examining merger transactions. The Division has nevertheless

performed fairly well despite the demands on it. However, given the fact that it presently is manned by only six officers, and that the Division is receiving an average of eight merger notifications per month,⁸² the quality of merger examination and analysis might be compromised because of staffing constraints.

- **Restrictive Business Practices Division:** The main function of the Division is to enforce chapter 3 of the Competition Act, 2003. The chapter deals with practices that are anticompetitive and therefore prohibited, unless exempted in terms of sections 27 to 32 of the Act. The Division has a staff complement of seven professional staff consisting of lawyers, economists and an administrator.

The Restrictive Business Practices Division of the Commission should be extremely busy given the prevalence of anticompetitive practices in Namibia.⁸³ The Division is however underperforming if viewed from the number of competition cases it is investigating and the length of time it is taking to complete the investigations. The identified reasons for this include inadequate mechanisms for proactive identification of competition cases, and apparent overcautiousness in making recommendations against likely restrictive business practices.

The above is not surprising, given the staffing composition of the Division. Of the six staff members of the Division, four are lawyers, with only two being economists. The most senior members of the Division, including the Director, are lawyers. Lawyers by nature are cautious of legal challenges to their decisions, which is not the case with economists. While there is nothing wrong with this, it builds overcautiousness in handling competition cases. Of course, things depend on whether the cases received and investigated contain infringements of the law or are supported by enough evidence for prosecution.

⁸² The Director of the Mergers and Acquisitions Division advised during the fact-finding visit that the rate of merger notifications is high, with about seven to eight notifications per month.

⁸³ Anticompetitive practices in Namibia are mostly of a monopolization nature arising from abuse of dominance by Namibian-based subsidiaries of South African companies.

- **Economics and Sector Research Division:**

The Division is responsible for developing and implementing the Market Inquiry and Price Surveillances regimes and for the research and policy advice functions as set out in Chapter 2 of the Competition Act, 2003. It also serves as a division responsible for ensuring the development of a comprehensive national competition policy. It also provides economic input to complex cases of the other Divisions. The Division is presently being manned by three professional staff.

The Economics and Sector Research Division was established recently, and it has already undertaken important tasks. The Director of the Division advised during the fact-finding visit that the Division has undertaken sectoral studies into competition in a number of industries and sectors, such as the retail sector and the poultry and cement industries. It also is developing an industrial sector database to know how many companies Namibia has per sector. It is further involved in price monitoring in key sectors such as the poultry, dairy and cement industries.

The Division has strong linkages with the Commission's other operational Divisions. It does economic analyses of complex competition cases for both the Mergers and Acquisition Division and the Restrictive Business Practices Division. It is also doing a merger impact study for the Mergers and Acquisitions Division. Its sectoral studies into competition in various industries and price monitoring activities can facilitate proactive investigation of competition cases by the Restrictive Business Practices Division.

The Division is manned by amply qualified economists, but given its role and responsibilities it is understaffed.

The Office of the Secretary to the Commission has a staff complement of four professional and administrative support staff, including the Executive Assistant to the Chief Executive Officer. The corporate secretariat section of the Office provides secretariat services to the Board of Commissioners in the form of arranging meetings and ensuring that Board resolutions are complied with. It is also involved in the drafting of agreements and governance mat-

ters related to compliance with the Act and other legislation. The Section is however being manned by only one officer, the Corporate Secretary/Legal Adviser, who is overwhelmed the work demands. There are therefore plans to recruit a Risk and Compliance Officer to assist with the work.

It is recommended that the Commission should resource all its Divisions in terms of human resources by filling all vacant posts on its staff organization chart and in particular (i) adequately staff the Corporate Communications Section of the Corporate Services Division, the Mergers and Acquisitions Division and the Economics and Sector Research Division; and (ii) recruit more economists at senior levels in the Restrictive Business Practices Division.

The Commission has a staff development programme under which it assists its employees in advancing their academic and professional qualifications. As at the time of the fact-finding visit to Namibia in November 2013, the Commission had two officers studying competition policy at London University in the United Kingdom, one on full-time study and the other on part-time study. It also had an officer undertaking an economic policy course with Stellenbosch University in South Africa. The Commission's staff development programme includes the following:

- On-the-job training on competition case investigation and analysis, in which the Technical Committee of the Secretariat plays a big role. The Technical Committee is made up of all staff within the Commission's technical Divisions. The Committee meets regularly to discuss and exchange views on draft reports on competition investigations before the reports are passed on to the Board of Commissioners for consideration. The Committee is an important training tool since it provides peer review of investigations undertaken and analyses made on competition cases.
- Attendance and participation by all professional staff at various international competition events, such as the annual meetings of UNCTAD's Intergovernmental Group of Experts on Competition Law and Policy, meetings of the OECD Global Forum, annual conferences of the ICN and meetings of the ICN Working Groups, international conferences on competition of the Bundeskartellamt and the annual spring meetings of the Antitrust Section of the American Bar Association.

- Attendance and participation at regional training workshops on competition policy and law under the auspices of SADC and the AFC. Under the SADC Declaration on Regional Cooperation in Competition and Consumer Policies, annual SADC regional training workshops on competition and consumer law and policy, which the NaCC always attends, give valuable training and exposure to Commission officials. The African Competition Forum's (AFC) work programme includes training workshops, on various competition subjects (such as on research skills for competition analysis, which was held in Windhoek, Namibia, in December 2012; bid-rigging, which was held in Dar es Salaam, the United Republic of Tanzania, in June 2013; and agency effectiveness, which was held in Nairobi, Kenya, in July 2013), that officials of the NaCC attend.
- Arrangement of tailor-made training on competition law and practice for professional staff of the NaCC. Recent such training included practical training by officials of the Competition Commission of South Africa on the conduct of dawn raids that was held at the NaCC offices in Windhoek in November 2011.
- The NaCC's engagement with the University of Namibia on the Commission's provision of lectures on competition policy and law at the institution of higher learning, and the writing of articles by technical staff of the Commission for the NaCC Newsletter requires intensive research which provides a powerful staff development tool for the staff.

The cooperation agreements that the Commission has concluded with sector regulators in Namibia also provide staff development opportunities for staff of the Commission on regulation practices.

It is recommended that the NaCC continues with, and further develops, its staff training programme. The programme should include study tours of more developed competition authorities and staff exchanges with other authorities in the region.

Staff turnover in the Commission is very low. A senior member of the Commission's Corporate Services Division advised in consultations held during the fact-finding visit that the Commission

had had only two separations during the last three years, one from a resignation and the other from death. It was advised that the low staff turnover is attributed to the excellent conditions of service in the Commission. A deliberate attempt is made to make the working environment as employee-friendly as possible. The Commission also recruits young people from low-paying organizations elsewhere. The employees therefore have a strong affinity with the Commission.

6. COMPETITION LAW ENFORCEMENT

6.1. Competition case load

As at the time of the fact-finding visit, the NaCC had handled over 291 competition cases and market investigations since it effectively came into operation in 2009. Of these cases, 234 were on mergers and acquisitions, 54 involved restrictive business practices, including exemptions, and 3 were market investigations, as shown comparatively in table 7 below.

Table 7 Competition cases received and handled by NaCC over the years

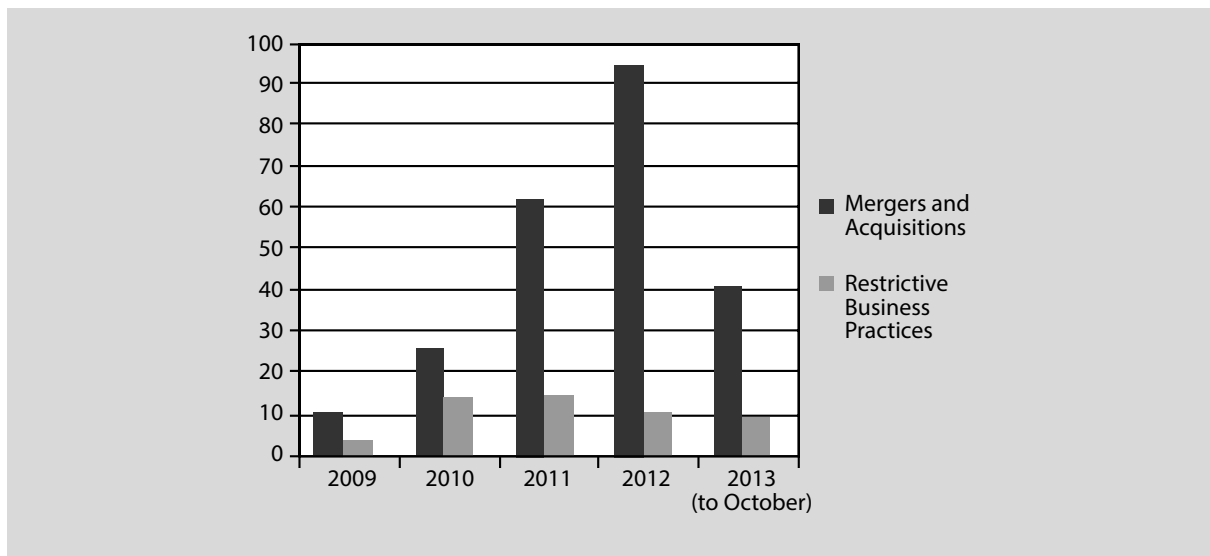
Case category	2009	2010	2011	2012	2013 (to Oct)	Total
Mergers and acquisitions	11	26	62	94	41	234
Restrictive business practices	4	14	15	11	10	54
Market investigations	0	0	0	0	3	3
Totals	15	40	77	105	54	291

Source: NaCC's operational Divisions.

Graph 2 below shows the comparative intensity over the years of the competition cases involving restrictive business practices and mergers and acquisitions received and handled by the Commission since 2009.

Of the 234 cases of mergers and acquisitions that were received and handled by the Commission since 2009, 206 cases (88.03 per cent) were approved unconditionally, 20 (8.55 per cent) were approved with conditions, 3 (1.28 per cent) were prohibited, 1 (0.43 per cent) was not challenged and 4 (1.71 per cent) were withdrawn by the merging parties.

Graph 2 Comparative intensity of competition cases received and handled over the years



6.2. Mergers and acquisitions

The three merger transactions that were prohibited by the Commission were mostly of a horizontal nature, and were in different sectors and industries (the cement industry, the transport and communications sector, and the utilities (electricity and water) sector. The transaction that was not challenged by the Commission was in the agriculture and forestry sector, and the non-challenge was for lack of jurisdiction.

The sectors in Namibia that were affected most by the mergers and acquisitions that were notified to, and examined by, the Commission since 2009 were the wholesale and retail trade sector, followed by the real estate and business services sector and then by the mining and quarrying sector, as shown comparatively in table 8 below.

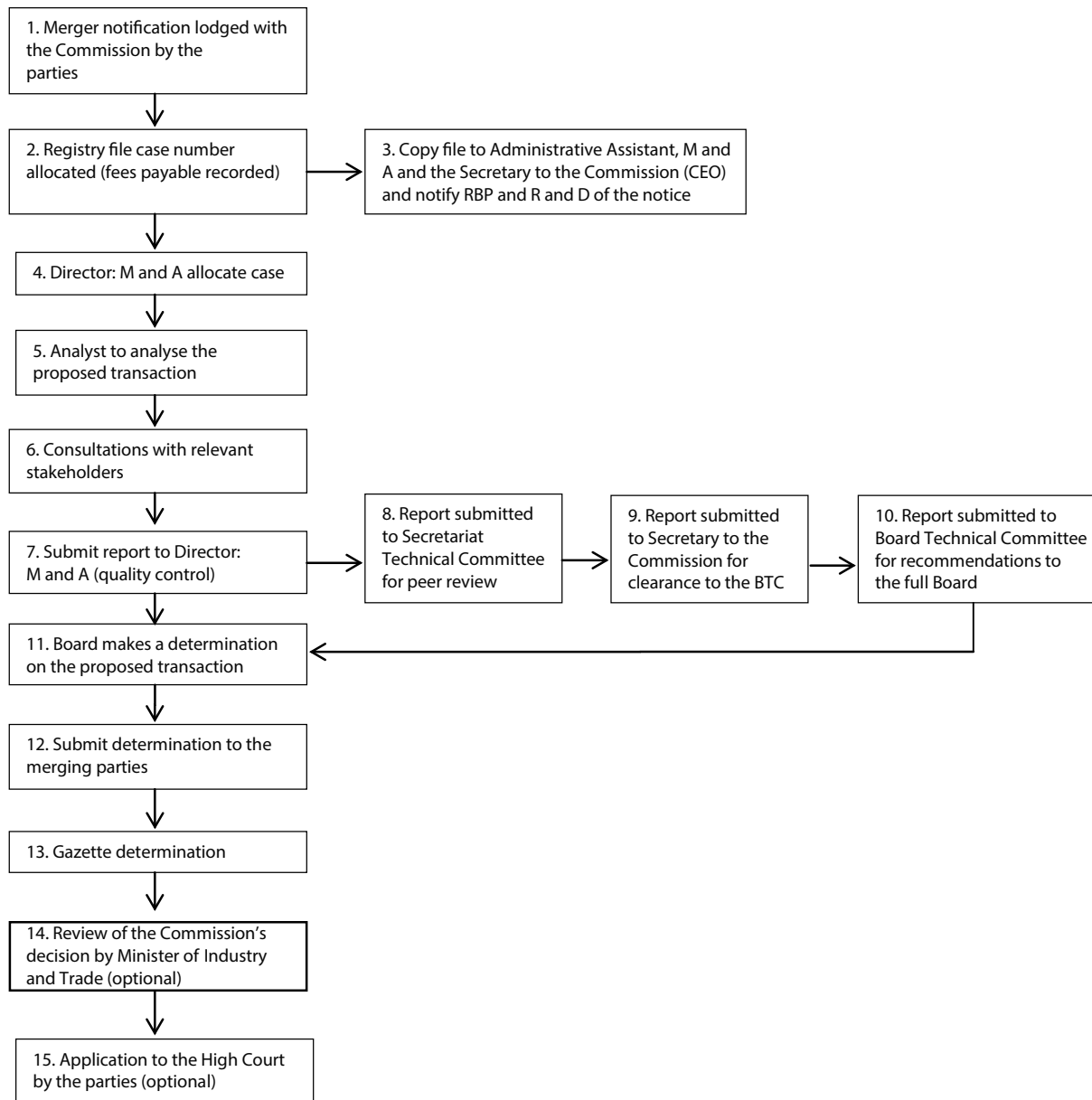
For guidance and transparency in its merger control activities, the Commission’s Mergers and Acquisitions Division issued its *Internal Merger Guidelines* in December 2012. The *Guidelines* have a total of 10 chapters, dealing with pertinent issues in merger examination such as (i) investigation techniques and procedures (chapter 1); (ii) competitive assessment (chapter 2); (iii) market concentration (chapter 3); (iv) unilateral effects (chapter 4); (v) coordinated effects (chapter 5); (vi) barrierstoentry(chapter6);(vii)efficiencies(chapter 7); (viii) countervailing buyer power (chapter 8);

Table 8 Sectoral merger interventions

Sector	Number of interventions	Percentage interventions
Wholesale and retail trade	56	23.93%
Real estate and business services	49	20.94%
Mining and quarrying	31	13.25%
Transport and communications	28	11.97%
Hotel and restaurant services	15	6.41%
Financial services	12	5.13%
Manufacturing	12	5.13%
Health services	9	3.85%
Utilities (electricity and water)	4	1.71%
Fishing and fish processing	4	1.71%
Agriculture and forestry	3	1.28%
Construction and repairs	2	0.85%
Security services	1	0.43%
Other	8	3.42%
Totals	234	100%

(ix) non-competition specific factors (chapter 9); and (x) investigation administration (chapter 10). Annexed to the *Guidelines* document is a *Public Interest Manual*.

The *Guidelines* also outline the Commission’s mergers and acquisitions business processes, as shown in diagram 3 below:

Diagram 3 NaCC mergers and acquisitions business processes

Two landmark mergers that were examined by the Commission, and illustrated the Commission's application of the merger control provisions of the Competition Act, 2003, were the *Seesa Namibia/RTZ Zelpy and Others merger* and the *Walmart/Massmart merger*. The *Seesa Namibia/RTZ Zelpy and Others merger* was not only the first notifiable merger under the Competition Act, 2003, to be examined and determined by the Commission, it was also the first such transaction to be deter-

mined following the holding of a stakeholder conference under the terms of section 46 of the Act. It also led to the conclusion of the Commission's first competition compliance programme and agreement with an undertaking. The *Walmart/Massmart merger* showed the Commission's application of the public interest provisions of the Competition Act, 2003, in its examination and determination of mergers. It also fully taxed the Commission's reaction abilities and capabilities since its decision was

challenged by one of the world's most powerful corporations.⁸⁴

Many stakeholders that were consulted during the fact-finding visit indicated satisfaction with the Commission's handling of mergers and acquisitions. The Electricity Control Board (ECB) was of the opinion that the performance of the Commission since its establishment had been impressive in the area of mergers and acquisitions. The Walmart case was given as an example. A law firm submitted that it had been involved in at least eight merger notifications made to the Commission, and that the Commission's handling of the

merger transactions was facilitative of business in terms of the fees paid, examination time and level of consultation. It also did not have any objections to the determinations made by the Commission on the transactions.

The time taken by the Commission in making determinations on mergers however received mixed opinions by the other stakeholders that were consulted. A law firm raised concerns over the time taken by the Commission. It was advised that the determination time was sometimes unreasonably extended by the Commission. An example was given that at one point the law firm was requested by the Commission to supply additional information on a merger transaction, which it did within a day but the Commission nevertheless extended the determination period by 30 days. Another law firm however was satisfied with the time taken by the Commission in determining mergers, which it felt was comparable to international best practices.

A senior member of the Commission's Mergers and Acquisitions Division advised that in order to solve the problem of long merger determination periods, the Commission has agreed in its *Internal Merger Guidelines* to examine mergers in three phases, depending on their complexities. Phase 1 examination is for fast-tracking simple and non-problematic mergers, and decisions on such mergers can be made within 25 days of notification. The Board of Commissioners can also make determinations on urgent mergers on a round-robin basis for ratification at the next Board meeting.

A law firm suggested the following other improvements in the Commission's merger control operations: (i) the Commission should hold more consultations with the affected parties on the conditions intended to be imposed on the approval of mergers; and (ii) parties to mergers should have access to the Commission's merger examination reports or at least to detailed reasons upon which the determinations are made, subject to non-disclosure of confidential information.

On the whole, the Commission's handling of mergers and acquisitions received stakeholder approval. A law firm that had been involved in not less than eight merger notifications to the Commission was of the opinion that the handling of the examination of the mergers by the Commission was facilitative of business in terms of the fees

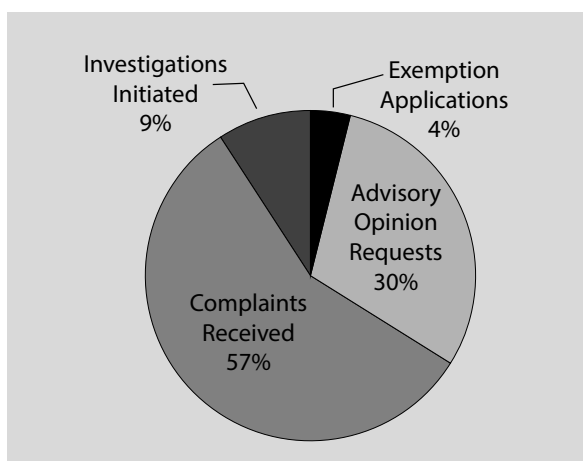
⁸⁴ The Commission approved the merger with the following conditions: (i) that the merger should allow for local participation in accordance with section 2(f) of the Competition Act, 2003, in order to promote a greater spread of ownership, in particular, to increase the ownership stakes of historically disadvantaged persons; (ii) that there should be no employment losses as a result of the merger; (iii) that the merger should not create harmful effects on competition that may give rise to risk of a market becoming foreclosed for competitors, especially for small and medium enterprises (SMEs); and (iv) that this being a retail business transaction, the approval of the Minister of Trade and Industry is required under the terms of section 3(4) of the Foreign Investment Act, 1990 (Act No.27 of 1990). Walmart was dissatisfied with the conditions imposed by the Commission and, in March 2011, filed an Application for Review with the Minister of Trade and Industry under the terms of section 49(1) of the Competition Act, 2003. Walmart requested that the Minister finalize the review within a period of 10 days on an urgent basis, whereas the Act prescribes a period of up to four months. The Minister was reluctant to deviate from the Act and as a result Walmart approached the High Court of Namibia on an urgent basis to seek the invalidation of the conditions that were imposed by the Commission. The Commission opposed that application. The High Court judgement was in favour of Walmart as it invalidated all the conditions that had been imposed by the Commission on the approval of the merger. The Commission decided to appeal the High Court judgement by way of a Notice of Appeal filed in June 2011. The appeal filed by the Commission had the effect of suspending the High Court judgement, and on that basis, the merger parties brought an interlocutory application under the terms of Rule 49(11) of the High Court Rules seeking implementation of the merger pending the outcome of the appeal. The application was argued by the same judge who had also heard the original application, and the judgement was again in favour of Walmart. The Supreme Court, on appeal by the Commission and the Minister, in November 2011 reinstated three of the four conditions imposed by the Commission on the merger and remitted the matter to the Minister for review under the terms of section 49 of the Competition Act, 2003. The Minister accordingly reviewed the Commission's decision and accepted certain conditions imposed on the approval of the merger, as well as added new conditions (on local suppliers of Namibian products to the merged entity). The Minister's review decision was accepted by Walmart.

paid, examination time and level of consultation, and that they did not have any objections to the determinations made by the Commission in the transactions. The Electricity Control Board also felt that the overall performance of the Commission since its establishment had been impressive, particularly in the area of mergers and acquisitions.

6.3. Restrictive business practices

Of the 54 cases involving restrictive business practices that were received and handled by the Commission since 2009 as at the time of the fact-finding visit, 16 were requests for advisory opinions, mostly on the application of the provisions of the Act, which were given. Only one such case turned into a competition investigation. The rest of the cases were complaints received (31 cases), investigations initiated (5 cases) and exemption applications (2 cases).

Graph 3 Restrictive business practices cases handled by NaCC



A number of the cases handled (totalling 13) were closed for various reasons, including lack of jurisdiction and withdrawal by the complainants. Most of the cases (24) were still being investigated by the time of the fact-finding visit. A senior member of the Commission's Restrictive Business Practices Division advised that the Commission had not had a finding of contravention of part I (restrictive agreements, practices and decisions) and part II (abuse of dominance) prohibitions. However, recommendations had been made to the Commission's Board of Commissioners on one case on restrictive business practices, but the respondents had still to be informed of the finding.

The competition complaints and investigations that were undertaken by the Commission were mostly in the agro-industrial sector (seven interventions), followed by the financial services sector (including insurance services) and the communications sector (three interventions each) and then by the health services sector and mining and quarrying sector (two interventions each). Other interventions were in the construction and repairs sector, tourism and hospitality sector and legal services sector.

The handling by the Commission of competition cases involving restrictive business practices is cause for concern in as far as the time it is taking the Commission to complete investigations and take the necessary remedial action. In that regard, it is noted that a case involving the exemption application by the Law Society of Namibia was still under investigation by the time of the fact-finding visit even though the application had been made to the Commission as far back as March 2009. Regarding the other cases that were still active at the time of the fact-finding visit, the times spent on investigations ranged from three months to as long as three years and six months.

CRAN, which has concurrent jurisdiction with the Commission over competition in the communications sector, was also of the view that the Commission's decision-making process is very slow. The example given was that the Commission was still investigating a complaint on restrictive business practices which CRAN had also received, but the Authority made a decision on the complaint in seven months while the Commission had still not done so, almost three years after the submission of the complaint. It was felt that such decision-making delays could drive the aggrieved complainants, especially small operators, out of the market. A consultant/business advised that the Commission took about three years to make a ruling on a restrictive business practices complaint that he gave advice on, and that had affected his client's business.

It is recommended that provision should be made in the Competition Act, 2003, or in the Rules Made under the Act, stipulating the times that should be spent on investigating restrictive business practices and considering applications for exemption, as is done in merger examinations. In that regard, a study should be undertaken to determine the

most appropriate investigation period(s) for Namibian conditions.

Also of concern is the fact that the NaCC by the time of the fact-finding visit had still not found from its investigations a restrictive business practices contravention, given the prevalence of such practices in Namibia. In consultations with consumer groups during the fact-finding visit to Namibia, the Executive Director of the Namibia Consumer Trust expressed concern that even though the Competition Act, 2003, had provisions against price-fixing,

the Commission had not done anything about price-fixing arrangements in the economy. A law firm also submitted that the Commission seemed reluctant to investigate cases involving State-owned enterprises (SOEs), even though a number of such enterprises were operating as monopolies and were abusing those monopolies.

The Restrictive Business Practices Division of the Commission follows elaborate processes in handling competition cases involving restrictive business practices. The processes are outlined in box 3 below.

Box 3. NaCC case-handling processes on restrictive business practices

1. The Commission, of its own initiative or upon receipt of information or a complaint from any person, can start an investigation into any conduct or proposed conduct (section 33 of the Act).
2. In respect of complaints, once a complaint is received at the front desk, it will be passed over to Registry for record purposes, opening of a file and allocation of a case number. A copy of the file is then made available to the Secretary to the Commission's Office. Registry will then hand it over to the Administrative Assistant RBP to prepare an acknowledgement of receipt letter. The Administrative Assistant then passes it on to the Director of RBP. The Director reviews the file and the nature of the complaint, magnitude and the urgency of the matter. In respect of small cases, an Analyst will be assigned the case for a quick response. In complex cases, the Division usually has a meeting where the allocation of work to the members is assessed. Complicated cases will be allocated to more experienced members, who will be assigned other team members to deal with the case. The lead Analyst is expected to lead the team and is responsible for drafting an Action Plan in conjunction with his/her team members.
3. Once the case is allocated, the Analyst commences with the screening process, resulting ultimately in a screening memorandum being drafted with recommendations. The screening memorandum is sent to the Director for review. The Director then makes comments or recommendations on technical issues, structure, proposed findings, etc. If the screening memorandum is drafted properly, the Director signs it and, together with the relevant form (Form 3, decision not to conduct investigation or Form 4, notice of proposed investigation), these are forwarded to the Office of the Secretary to the Commission for approval. If recommendations are made, the document is sent back to the Analyst for improvement, who then sends it back to the Director once the recommendations made are inserted or included in the screening memorandum.
4. At times the screening memorandum is distributed among members of the Technical Committee (made up of all staff within the technical Divisions) for discussion at a Technical Committee meeting prior to it being passed to the Secretary to the Commission's Office.
5. The Office of the Secretary to the Commission reviews the documents if certain changes or recommendations are made. The documents are referred back to the Divisions to incorporate the changed proposed. If the Secretary to the Commission is satisfied with the screening memorandum, the relevant form(s) are signed and thereafter sent to the concerned parties. Where an investigation is approved, the Division serves the prescribed form on the respondents who should provide a written submission, if any, to the allegations contained therein within a stipulated period of time.
6. When the written submissions are received, assuming that no further information is needed, the Analyst and the team assigned to the case start preparing an investigation report where the findings of the investigation are set out. The investigation report is also forwarded to the Director for review. The Director, if satisfied, forwards the report with the relevant form to the Secretary to the Commission for further review. If the Secretary to the Commission is satisfied with the report, the report is then tabled for the next Board meeting for a decision.
7. If recommendation of an infringement is made and approved, the Commission will notify the interested parties, who will be given a chance to make oral representations to the Commission. The Commission is then expected to consider any representations made and adopt a final decision after which the Commission is to institute proceedings in court against the respondents (for RBP cases, the Commission is yet to get to this stage).

Source: Restrictive Business Practices Division of NaCC.

It is noted that much time is spent, with numerous procedures followed, at the case screening stage before the commencement of actual investigations. This should be looked at in the determination of suitable statutory time periods of investigating restrictive business practices.

The Technical Committee of the NaCC's Board of Commissioners has not had many investigation reports on restrictive business practices for consideration and recommendation to the full Board. As a result, the Board at times takes it upon itself to follow up on outstanding cases of restrictive business practices. For instance, the agenda of the Board's meeting held on Monday, 22 July 2013 included discussions on progress updates on four cases of restrictive business practices under investigation. Consideration by the Board of outstanding competition cases still at the investigation stage compromises the effective separation of the Commission's investigative and adjudication functions. The member of the Board of Commissioners who was consulted on the matter during the fact-finding advised that in most cases progress updates to the Board on outstanding restrictive business practices cases are on areas that the Board would have requested further investigations from the Secretariat. In any case, such updates could be reported to the Technical Committee of the Board, leaving the Board to concentrate on adjudicating the findings without guiding the investigations.

Some reservations on the Commission's handling of restrictive business practices cases were expressed by the stakeholders that were consulted during the fact-finding visit to Namibia. The Namibia Consumer Protection Group (NCPG) felt that the Commission had failed to prevent and control price fixing, which was rampant in the retail sector, and advised that the enforcement of the restrictive business practices provisions of the Competition Act, 2003, had caused some consumer concerns. CRAN was of the opinion that the Commission had not been able to decisively handle cases involving restrictive business practices in the communications sector. A consultant/businessman advised that the Commission's ruling on the abuse of dominance/price-fixing complaint that he was involved in had been in favour of the respondent with no remedial action. While he appreciated the diligence with which the complaint was handled, he was gravely disappointed that an independent econometric study was not made available.

6.4. Sectors prone to anticompetitive practices

Economic sectors in Namibia that are mostly prone to anticompetitive practices, based on the competition cases handled by the Commission so far that involve both mergers and restrictive business practices, include the following: (i) the wholesale and retail trade sector; (ii) the mining and quarrying sector; (iii) the transport and communications sector; (iv) the manufacturing and agro-industrial sector; (v) the financial services sector; and (vi) the health services sector.

6.5. Competition enforcement challenges

Enforcement of Namibia's competition law remains one of the major challenges of the NaCC, as submitted by the Chief Executive Officer and Secretary to the Commission in consultations held during the fact-finding visit. It was advised that the major constraint facing the Commission is being rushed by its clients, mostly law firms, in investigating competition cases.

With the notable exception of the *Walmart/Massmart merger*, whose determination decisions were appealed against to as high as the Supreme Court of Namibia, the country's competition law has still not been tested in law courts. As such, there is lack of jurisprudence and case law on competition to guide the Commission in its operations.

Stakeholders that were consulted during the fact-finding visit expressed mixed views on the lessons learned from the Walmart case. A senior member of the Commission's Mergers and Acquisitions Division admitted that the case had been the Commission's greatest challenge in merger control. Another senior member of staff of the Commission also agreed that the High Court judgement clearly showed that the case was a great legal challenge to the Commission. The consulted member of the Commission's Board of Commissioners also felt that many lessons had been learned from the case. The case came when the Commission was very inexperienced. It therefore did not understand the law well and did not interpret the Act properly, particularly with regard to the provisions of section 2 of the Act, the section on which its merger approval conditions are based. The three conditions imposed by the Commission were

criticized by the High Court Judge as not being appropriate. The criticism could have seriously affected the credibility of the Commission had it not been appealed against to the Supreme Court. In a way, the Supreme Court rescued the Commission by referring the matter back to the Minister for review under the terms of the Act. The lesson learned by the Commission from the case was therefore that the enforcement of competition law is not easy and that thorough consideration is required. A law firm was of the opinion that the lesson learned from the Walmart case was that competition law should not be used to address public interest issues since that led to uncertainty and inconsistency. The law firm also felt that the case exposed the lack of independence of the NaCC in that the actions of the Commission were directed by the Minister.

Members of the media that were consulted during the fact-finding visit were however of the opinion that the case showed that the Commission and the Minister followed the correct procedures as laid out in the law despite intimidation from a large and powerful multinational company seeking a shortcut to the procedures. That showed similar companies that in Namibia the correct procedures must be followed. It was also good that the case resulted in Namibian products being sold in the Wal-Mart acquired shops in Namibia.

Unfortunately the Office of the Attorney General in the Ministry of Justice declined to comment on the lessons learned from the Walmart case in as far as the applicability of the Competition Act, 2003, is concerned.

While most of the stakeholders that were consulted during the fact-finding visit were generally satisfied with the Commission's enforcement of the Act's merger control provisions, many showed dissatisfaction with its enforcement of the restrictive business practices provisions. Already discussed in this report were the views expressed by the consumer groups on the NaCC's inability to deal with price-fixing arrangements in the economy, and those of CRAN that the Commission's decision-making process in investigating complaints of restrictive business practices is very slow. CRAN further felt that the Commission seems to lack the necessary technical knowledge of investigating restrictive business practices involving communications issues.

The Commission's Restrictive Business Practices Division defended its inability to conduct dawn raids, which are necessary for gathering evidence on hard-core cartel activities, including price-fixing arrangements, on the basis of the non-designation or appointment of Inspectors under the Competition Act, 2003. The member of the Commission's Board of Commissioners who was consulted during the fact-finding visit admitted that even though some cases of restrictive business practices had been investigated by the Commission, the progress had been very slow. He felt that one of the reasons was that at the Secretariat level, the Commission lacked the necessary capacity to do a good economic analysis of anticompetitive practices, with well-analysed findings to make determinations on the cases. Because of that lack of internal capacity, the Commission is doing a lot of contracting out, particularly to law firms, as is being done in South Africa, and this delays decision-making. The other reason is that restrictive business practices are very tricky, and the Commission sometimes gets cold feet in handling such cases. The example given was of an investigation in the medical health sector where the Commission expressed concern over the adverse impact of a public interest nature of a decision. Also, the Commission would not be sure whether its findings on restrictive business practices would stand the stringent evidence tests of law courts.

The fact remains however that stakeholder concerns were expressed during the fact-finding visit that the Commission seems oblivious of the existence of restrictive business practices in the economy, particularly those related to price fixing. Regardless of the findings of the study on the retail sector, and depending on its terms of reference, the concerns of the stakeholders should be investigated by the Commission to prove the existence or otherwise of restrictive practices. Failure to undertake such investigations by the Commission would perpetuate stakeholder perceptions that the NaCC does not have the necessary teeth to tackle restrictive business practices.

A senior member of the Commission's Restrictive Business Practices Division advised during the fact-finding visit that the Commission's draft corporate leniency rules had been pending since 2011 because they were still being considered by the Ministry of Justice and the Attorney Gen-

eral's Office. The problem was that leniency programmes were not provided for under the Act but had to be entered into as rules enacted with the approval of the Minister of Trade and Industry. Bureaucratic red tape in Government requires the involvement of other Ministries in such exercises, which delays the making of the rules. A corporate leniency programme would be instrumental in increasing cartel cases for investigation by the Commission's Restrictive Business Practices Division. It should however be noted that for a leniency programme to be effective, penalties for engaging in the prohibited restrictive business practice must be very high and enough of a deterrent to induce members of an anticompetitive cartel to seek the offered leniency in exchange for information on the operation of the cartel. The competition authority must also have shown and demonstrated to the business community that it is an efficient competition investigator. Fines under Namibia's Competition Act, 2003, for engaging in anticompetitive practices are deterrent enough, but the NaCC has still not shown that it is an efficient investigator of restrictive business practices. The Commission has however nothing to lose, and everything to gain, in having in place a corporate leniency programme.

It is recommended that the Commission's draft corporate leniency rules be approved by the relevant government authorities as a matter of urgency and that corporate leniency programmes be provided for in the Competition Act, 2003, as a statutory requirement.

It should be noted that the Commission's Restrictive Business Practices Division is manned by a total of seven professional staff, all of whom have the requisite qualifications in law and economics, with some of the qualifications at Masters level. The capacity of the staff for the effective analysis of restrictive business practices can therefore be built and developed. In that regard, it is noted that a number of the staff are being exposed to international best practices in the handling of competition cases from attendance and participation at various international competition events, such as the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, OECD Global Forum on Competition, ICN Annual Conferences and Working Groups and SADC regional training workshops on competition and consumer law

and policy. Other capacity-building initiatives undertaken were in the form of staff exchanges with the Competition Commission of South Africa and the Bunderskartellamt of Germany.

It is however also noted that merger examination is made somewhat easier than a restrictive business practices investigation in that in a pre-merger situation, information on the merger is easily gathered and available from the merging parties in their quest to have the transaction approved, albeit the need to thoroughly verify the information. The merging parties also cooperate with the competition authority in the examination of the merger. On the other hand, information-gathering in a restrictive business practices investigation is made difficult by the fact that the respondents are most likely not to cooperate with the competition authority. In both circumstances, extensive stakeholder consultations are required in the assessment of the competitive effects. Merger analyses however tend to be more intense in the evaluation of the "substantial lessening of competition" substantive test.

Capacity-building in the Commission's Restrictive Business Practices Division would increase the Division's confidence in making well-analysed competition recommendations that withstand legal challenges. The Division is supported in the handling of competition cases by the Economics and Sector Research Division, and the Unit responsible for corporate secretarial services and legal advice, which are manned respectively by a highly qualified economist and lawyer.

It is recommended that the investigative and analytical capacity of staff members of NaCC's Restrictive Business Practices Division be further developed to speed up the handling of competition cases and build confidence in the Division on the handling of any competition case involving restrictive business practices. Such capacity-building can take the form of secondments to other more experienced competition authorities and the accelerated accumulation of practical investigative and analytical experience at home.

Stakeholder sentiments were also expressed during the fact-finding visit that the Commission seems to be concentrating more on mergers and acquisitions than on restrictive business practices. The Electricity Control Board (ECB) identified the

particular area in which the Commission has been impressive since its establishment as being in merger control. The member of the Commission's Board of Commissioners who was consulted during the fact-finding visit also confirmed that the Commission concentrates more on mergers and acquisitions than on restrictive business practices. The Commission's Corporate Communications Officer admitted that the Commission is publicizing its merger control activities more than its restrictive business practices activities.

The Commission's concentration on mergers and acquisitions more than on restrictive business practices is an admitted fact. The reasons for that have more to do with the human element in that more successful operations are more recognized and better appreciated. The under-performance in the Commission's operations also has the human element related to the attitude of the staff members of the Restrictive Business Practices Division regarding the identification of potential competition cases and investigation of competition complaints. Restrictive business practices are however an equally important aspect of the promotion of competition in an economy and should therefore be given equal concentration. The Commission has the necessary instruments to do so. As has already been analysed above in the part dealing with Staffing and Human Resources, the Commission's Economics and Sector Research Division can be instrumental in the proactive identification of restrictive business practices for investigation. It will also be noted that the Division has drafted a sector prioritization framework paper in which identification has been made of sectors that need market studies for the purposes of investigating restrictive business practices. The identified sectors include wholesale and retail trade, manufacturing, transport and communications, mining and public utilities. It has also been recommended above that the investigative and analytical capacity of staff members of the Commission's Restrictive Business Practices Division should be further developed, not only to speed up the handling of competition cases, but also to build confidence in the Division on the handling of cases.

It is recommended that the Commission should give equal concentration to restrictive business practices and mergers and acquisitions, which are

its core operations, in the form of policy, strategic and operational direction.

As has already been outlined above, the Commission's Economics and Sector Research Division, which commenced operations less than one year ago as a technical and policy unit, has become an important competition operational division. A senior member of the Division in consultations held during the fact-finding visit advised that the Division has its own core functions, which are market enquiries and price monitoring. On market enquiries, the Division has completed a study on the retail sector and is undertaking studies, under an African Competition Forum (ACF) project, into the poultry and cement industries and is about to undertake a study into the automotive industry. The studies are undertaken both at the request of the Ministry of Trade and Industry and at the Commission's initiative. On price monitoring, the aim is to monitor changes in producer input costs. The key sectors and industries that are under price monitoring include the poultry industry, the dairy industry and the cement industry. Price monitoring by the Commission is not provided for under the Competition Act, 2003, but the Ministry of Trade and Industry has requested this.

Supporting issues of the Division include industrial sector database development and management to know how many companies Namibia has per sector. These also include economic analyses of complex competition cases for the Commission and a sector prioritization framework for the Commission. The Division is drafting a comprehensive competition policy for Namibia, upon which the review of the Competition Act, 2003, will be based. Other policy and research support to Government include the industrial policy and determination of utility prices.

The market enquiries activities of the Division are very important since they can identify competition concerns in researched markets. That would facilitate the initiation of investigations by the Commission's Restrictive Business Practices Division into the identified competition concerns or probes by the Mergers and Acquisitions Division into the conclusion of merger transactions that may not have been notified to the Commission.

The price monitoring and surveillance activities of the Commission are a new development at the request of the Ministry of Trade and Industry and are not specifically provided for in the Competition Act, 2003. However, one of the purposes of the Act under the terms of its section 2 is “to provide consumers with competitive prices”, and included as some of the functions of the Commission under the terms of section 16(1) of the Act are the responsibilities “(c) to carry out research into matters referred to the Commission by the Minister” and “(d) to advise the Minister on matters referred to the Commission by the Minister”. In consultations with the Ministry during the fact-finding visit to Namibia in November 2013, it was advised that in requesting the Commission to get involved in price monitoring activities, the intention was not to turn the Commission into a price control agency but merely to get the Commission’s opinion on the matter to assist the Ministry in its decision-making processes, particularly on products that are being subsidized by the State.

There is therefore nothing wrong with the Commission getting involved in price monitoring activities, as long as that does not transform it into a price control agency, which would contradict the basic principle of competition of the independent setting of prices by market players. The involvement in price monitoring activities would also equip the Commission to identify instances of excessive pricing for abuse of dominance investigations. This function is not beyond the scope and capability of the NaCC since some other competition authorities from both developed and developing countries are performing similar functions. The Australian Competition and Consumer Commission (ACCC) does have price monitoring functions, which it is undertaking without compromising its competition activities. Nearer to home, one of the statutory functions of the Competition and Tariff Commission of Zimbabwe under the terms of section 5 of the Competition Act [Chapter 14:28] is “to monitor prices, costs and profits in any industry or business that the Minister directs the Commission to monitor, and to report its findings to the Minister”. What is required, as suggested by the senior member of the NaCC’s Economics and Sector Research Division, is to formalize the function in the Act so that it is given the necessary resources for its effective undertaking.

It is recommended that the Commission’s “unofficial” function of price monitoring and surveillance be formalized in the Competition Act, 2003, with clear guidelines on its undertaking to avoid conflicts with the basic independent operation principle of competition.

The Commission’s Economics and Sector Research Division has strong linkages with the NaCC’s other operational Divisions and, at the time of the fact-finding visit, was carrying out a Merger Impact Study that could have implications for the work of the Mergers and Acquisitions Division. The sector prioritization framework for the Commission, which the Division was working on by the time of the fact-finding visit, involves and requires the active participation of all the Commission’s operational Divisions.

The executive summary of the sector prioritization framework’s draft document, which amply outlines the aim and objectives of the framework, is reproduced in box 4 below.

The Commission’s sector prioritization framework identifies those strategic areas that need concentration in the promotion of competition in Namibia. The identified priority areas more or less correspond to those sectors that the Reviewer identified from the Commission’s competition interventions as prone to anticompetitive practices. The prioritization, and its effective implementation, should therefore go a long way in meeting the Commission’s challenges in the enforcement of the competition provisions of the Competition Act, 2003, particularly the provisions on the control and prevention of restrictive business practices.⁸⁵

⁸⁵ Prioritization has become a much recommended best practice by organizations such as the ICN and the OECD. The concept has also been discussed under the auspices of UNCTAD’s IGE. Most competition authorities operate under severe resource constraints and therefore need to direct the limited resources to those areas that have greater economic impact. For competition authorities in developing countries, this not only guarantees their relevance with policymakers, but also ensures that competition policy is being implemented in coherence with the Government’s other socioeconomic policies. Prioritization however does not, and should not, mean that all the authorities’ resources should be directed to the prioritized areas. Competition authorities still have a duty to investigate and remedy all competition complaints submitted to them. What it means is that the prioritized areas are given greater concentration.

Box 4. Executive summary of NaCC first draft sector prioritization framework paper

This is the first sector prioritization paper since the establishment of the Namibian Competition Commission (NaCC) in 2009. Like any other government agency, given its limited resources the Commission anticipates challenges related to effectiveness. It has therefore identified criteria for prioritizing sectors in order to effectively promote competition in the Namibian economy. With investigations becoming more complex due to the expanding body of knowledge on competition policy and law, and with some investigations absorbing a significant amount of time and capital, the NaCC cannot fulfil its mandate properly unless it deploys its financial and human resources to appropriate priorities.

The NaCC recognizes that many similar regulatory organizations are faced with resource constraints, and that it is no exception. Therefore, it saw the need to prioritize sectors that were more significant to Namibian consumers and the economy. Clearly, some contraventions are more crucial than others, and some sectors are more important to consumers and the economy than others. Since allocating equal resources to all sectors would quickly exhaust such means and could result in inefficiency, it was important to identify priority sectors. Such prioritization does not imply that sectors not identified as being of high priority would be neglected or ignored: it is simply a strategic method of sharpening the agency's focus.

The methodology for selecting sectors was derived from the Competition Assessment Framework paper published by the United Kingdom's Department for International Development (DFID) and modified to fit the Namibian context. A scoring mechanism was developed and each selection criterion and area – i.e. market studies, mergers and acquisitions (M and As) and restrictive business practices (RBPs) – was weighted accordingly. The following priority sectors in the economy were identified in each of the three respective areas of focus and are subject to revision every five years:

Area 1: Market studies

- Wholesale and retail trade, repairs
- Real estate and business services
- Mining
- Transport and communications
- Financial intermediation
- Manufacturing
- Hotels and restaurants

Area 2: Mergers and acquisitions

- Wholesale and retail trade, repairs
- Financial intermediation
- Transport and communications
- Real estate and business services
- Manufacturing
- Electricity

Area 3: Restrictive business practices

- Wholesale and retail trade, repairs
- Manufacturing
- Transport and communications
- Mining
- Electricity

Source: NaCC Economics and Sector Research Division.

The challenge that could face the Commission would be ensuring the effective coordination and cooperation of its operational Divisions in the implementation of sector prioritization for the purposes of promoting competition in Namibia.

7. OTHER RELEVANT ISSUES

The other relevant issues that were reviewed were: (i) advocacy and awareness of the Commission's operations and activities; (ii) competition courses at Namibian universities and other institutions of higher learning; (iii) the Commission's strategic

planning; (iv) the Annual Report; and (v) the Commission's office accommodation.

7.1. Advocacy and awareness

The Corporate Communications Section of the Commission's Corporate Services Division plays a leading role in the Commission's advocacy and outreach programmes. In consultations with a senior member of that Section during the fact-finding visit, it was advised that the visibility of the Commission in Namibia's capital city of Windhoek is fairly good and acceptable, with most of

the business undertakings in both the private and public sectors of the economy being aware of the existence of the Commission.⁸⁶ The Commission is aiming at reaching out at the school and college levels to bring awareness of its operations to the students who will grow up to be businesspersons.⁸⁷ The Commission is also engaging with the University of Namibia by giving lectures on competition policy and law at that institution of higher learning.

It was also advised that the Commission's focus last year in 2012 was on participating at trade fairs, conferences, workshops and public lectures aimed at building awareness and advocacy. It also started publishing and distributing its newsletter, the *NaCC Competition NEWS*, as a quarterly publication. The newsletter is targeted at the business community and the Commission's other stakeholders in both the private and public sectors of the economy. The recipients of the newsletter also include schools, the national library and other competition authorities. The regional offices of the Ministry of Information are also being used to distribute the newsletter to villagers in remote rural areas. The newsletter started as a mere information sheet on the role of the Commission, but now has articles on various aspects of competition policy and law, including summaries of concluded competition cases. It is edited by the Commission's Corporate Communications Officer. The latest edition as at the time of the fact-finding visit (Vol. 3 No. 2 May/July 2013) covered

the following articles written by the Commission's members of staff: (i) NaCC Promotes Competition Culture (written by the Chief Executive Officer and Secretary to the Commission, Mr. Mihe Gaomab II); (ii) The Current Stance of Product Liability Law in Namibia as a Component of Consumer Protection (former Director, Corporate Services, Mr. Coenraad Nolte); (iii) The Benefits of Competition Law and Policy in Economic Development (Researcher, Mr. Josel Hausiku); (iv) NaCC Defines Undertakings (Director, Mergers and Acquisitions, Mr. Vitalis Ndalikokule); (v) The NaCC and Electricity Control Board Signs Agreement (Corporate Communications Officer, Ms. Dina Gowases); (vi) African Competition Law Enforcers Speak (Technical Adviser to the Secretary, Mrs. Bridget Dundee); and (vii) CEO Pays Courtesy Calls to the Namibian Judiciary (Corporate Communications Officer, Ms. Dina Gawases). The publication also covered the visit to the Commission by Bachelor of Accounting students of the University of Namibia, and had a section on Frequently Asked Questions on the Commission.

It was further advised that the Commission is also venturing into publicizing itself through radio, to complement what it is already doing on television, since radio programmes are aimed at rural areas. It is also planning outreach programmes in rural areas to put it in touch with the grassroots.

The Reviewer during his fact-finding visit witnessed the close relationship between the Commission and the media. His consultative meeting with the media was attended by over 10 journalists from both the print and electronic media. At that meeting, all the journalists present advised that they had a very good working relationship with the Commission, and that press interviews were always given at the highest possible levels in the Commission, with the Chief Executive Officer having an open door policy to the media.

The Reviewer's meeting with the media was reported in at least three newspapers the following day, and the comments made on the undertaking of the voluntary peer review of competition policy and law in Namibia were positive.

However, while the media advised that the Commission is always ready and willing to give information on its operations, the information given is mostly highly restricted because of the confidentiality provisions of the Competition Act, 2003. The

⁸⁶ The Commission has still not undertaken a scientific survey of its visibility in Windhoek. However, its assertion that most of the business undertakings in the capital city are aware of its existence seem plausible given the fact that it has so far handled over 288 competition cases since its effective coming into operations in 2009 (of which 234 were mergers and acquisitions and 54 involved restrictive business practices). On the basis that each competition case involves at least 8 interested parties who are consulted by the Commission (i.e., the major parties to the case (at least 2 principle parties, i.e. the complainant and the respondent in the case of a restrictive business practices case, or the acquiring party and the target firm in the case of a merger and acquisition), at least 2 other affected interested parties (competitors, customers, suppliers, etc.) and at least 4 other interested parties (relevant government ministries and departments, sector regulators and business and consumer associations), over 2,300 stakeholders in Namibia are aware of the existence of the Commission (of course taking note that some stakeholders are involved in more than one competition case).

⁸⁷ The Commission's Three-Year Strategic Plan: 2010/2011–2012/2013 provides for extensive outreach programmes.

necessary transparency in the Commission's operations is thus absent. It was also advised that while the Commission has a website, it is not being updated regularly in as far as information dissemination is concerned, particularly on competition cases handled by the Commission, for the purposes of media research on articles related to the operations and activities of the Commission.

The NaCC's website gives general information on the Commission, its Board of Commissioners and staff complement. Information given in the website is in six major sections: (i) the Home section; (ii) the About Us section (mission statement, Board of Commissioners, staff complement, and tenders and vacancies); (iii) the Technical Overview section (Competition Act and Rules, economics and sector research, memorandums of understanding, mergers and acquisitions, restrictive business practices and thresholds); (iv) the Template Forms section (merger filing forms, etc.); (v) the Media Centre section (news archive, and speeches and interviews); and (vii) publications (research papers and newsletters). Information related to FAQs (frequently asked questions), events and notices is also given.

Documents that can be downloaded from the website include the Competition Act, 2003, and all regulations made under the Act, research papers and MoUs with sector regulators.

While in some areas the website is very informative, the information on competition cases handled is however scanty, as stated by members of the media that were consulted during the fact-finding visit. The notices section of the website referred to the notice of determination made by the Commission in relation to one proposed merger and only stated the conditions imposed on the approval of the merger and the statutory grounds upon which the decision was based.

The Chief Executive Officer and Secretary to the Commission regularly gives interviews to members of the press on issues related to the implementation of competition policy and law in Namibia, including to influential publications such as the *Business Journal* and *Consumer News*. All the interviews given have so far been positively reported in the publications.

An important advocacy and awareness activity that the Commission is undertaking is the observance of a Competition and Consumer week during which both the business community and the general public are made aware of the Commission's competition and consumer protection activities.

7.2. Competition courses at universities

Namibia has a number of institutions of higher learning, comprising universities and polytechnics. None of the institutions is however offering any full-time courses on competition policy and law.

In consultations held during the fact-finding visit, the head of the Marketing Department of the Polytechnic of Namibia advised that the Polytechnic, which will be transformed in 2014 into a full university to be named the Namibian University of Science and Technology (NUST), related to competition policy and law, offers industrial economics and commercial and business law through its Department of Economics and the Department of Law, respectively. Business ethics is also being taught at the Polytechnic, but only as a first-year subject.

It was felt that not only law and economics students, but also marketing students should be a catchment for competition work, and advised that the Polytechnic would be ready and willing to introduce a full-time course on competition policy and law, depending on funding.

The member of the Commission's Board of Commissioners who was consulted during the fact-finding visit, who is also a lecturer of economics at the University of Namibia, advised that there is at the University a part-time course on economics on competition that was designed by the NaCC and is being taught by Commission officials. The problem is that the course is being taught by non-specialists, and also that the competition law nexus is missing.

It is recommended that funding be found for the introduction of full-time courses on competition policy and law at either or both the University of Namibia and Polytechnic of Namibia to provide a catchment of competition practitioners for the Commission, as well as to build a culture of competition in the Namibian economy.

7.3. Strategic planning

The NaCC in September 2010 formulated the Commission's Three-Year Strategic Plan: 2010/2011–2012/2013. The Commission engaged in a highly pragmatic strategic planning process to identify the core strategic imperatives that would enable it to achieve its strategic mandate, through directly working to achieve the National Development Plan 3 (NDP3) development goals, which in turn when achieved should ultimately contribute to the achievement of the Commission high-level statements and Vision 2030.⁸⁸ In that regard, the Commission aims at striving to substantially contribute towards Vision 2030 within its mandate: "to safeguard and promote competition in the Namibian market".

The Commission defined its Vision as "professional and dynamic institution contributing to Namibia's socioeconomic development through enhanced market competition". The manner in which this should be achieved would be through the Commission's Mission as crafted from its strategic mandate: "to safeguard and promote competition in the Namibian market". However, the Commission also acknowledged that it would need to achieve its Mission by working within an acceptable behaviour framework which is expressed through the Commission's four fundamental values of (i) integrity, (ii) accountability, (iii) competency and (iv) team performance.

The Commission would focus on 12 strategic objectives defined within three themes: (i) capacity-building, (ii) regulatory and operational excellence and (iii) stakeholder relations.

The Commission Scorecard reflected that the organization needed to implement, manage and report quarterly on 12 objectives, 17 performance indicators/measures and 28 strategic initiatives/projects, which should be sufficiently resourced. The projected strategic monetary resource requirements to implement the various strategic initiatives as reflected in the Commission Scorecard was estimated at N\$8,120,000 for the 2010/11 financial year, N\$11,130,000 for the 2011/12 financial year and N\$14,120,000 for the 2012/13 financial year.

As stated in the Commission's draft Inaugural Annual Report, which was still not completed by the time of the fact-finding visit, and quoted from an internal progress report, the Strategic Plan was however not implemented, and therefore its performance targets not met, because its subsequent review proved it to be overly complex and not sufficiently integrated to provide a focused response to the legislative mandate of the Commission – in tandem with the Namibian economy in pursuit of Vision 2030. It was found that inappropriate enforcement of the balanced scorecard approach created unnecessary confusion and delivered on a Strategic Plan that, by admission of Commission staff, no one in the organization really understood, was not aligned and could therefore not be bought into. The net effect was an unusable Strategic Plan with attractive but confusing diagrams.

Given that a Performance Management System is only as good as the Strategic Plan that informs the former, it was a foregone conclusion that the Performance Management System would not work for the Commission in those circumstances, made even worse if the Performance Management System was also overly complex. Since the focus of the Commission is to respond to the legislative mandate and related challenges with which it has been tasked, with a deep desire to "get their job done" with the least amount of clutter and fuss, a simplified yet logically integrated approach to Strategic Planning, Performance Management and Business Process Mapping and Management was recommended.

To ensure a logical and easy-to-follow Strategic Plan that a relatively new team could buy into and take ownership of, it was necessary to literally start with a clean sheet of paper while keeping some of the good thinking that was contained in the original "confusing" plan close at hand for input. The process of revising the Strategic Plan was ongoing by the time of the fact-finding visit. The Secretariat envisages the development of a new strategic plan before March 2014. Its emphasis is on monitoring and evaluating the implementation of its strategic objectives.

7.4. Annual report

Section 21 of the Competition Act, 2003, with regard to the Commission's annual reports, provides for the following: "(1) The Commission must sub-

⁸⁸ Vision 2030 envisages making Namibia a prosperous and industrialized country, developed by its human resources, enjoying peace, harmony and political stability.

mit to the Minister an annual report of its activities within six months of the end of each financial year, or such longer period as the Minister may determine, which report must be accompanied by: (a) the audited financial statements of the Commission for that financial year; and (b) the auditor's report relating to those financial statements. (2) The Minister must lay upon the Table of the National Assembly the annual report and financial statements submitted to the Minister in terms of subsection (1) within 30 days from the date of their receipt or, if the National Assembly is not then in ordinary session, within 14 days after the commencement of its next ordinary session. (3) The Commission must, if the Minister at any time so requires, furnish to the Minister a report and particulars relating to the performance of the functions of the Commission in relation to any matter as the Minister may require".

The Commission, by the time of the fact-finding visit, had not submitted to the Minister in accordance with the provisions of section 21 of the Act any consolidated annual report on its operations since the commencement of operations in 2009. The Chief Executive Officer and Secretary of the Commission explained the situation as follows:

As for the delay in the drafting and submission of the Annual Report in accordance with the provisions of the Act, I have to admit that we have not given its due attention and did not treat it as prioritized as it should have been. We did commence this process quite earlier on but got compromised due to the case/operational and institutional demands placed on the Commission. But it was further for the following reasons:

The Commission started off with just one employee in 2009 September. There was not much activity during 2009 to 2010 except to get the institutional design going. We did make an attempt to draft an Annual Report 2011 and we did not finalize it although we have a draft.

The Annual Financial Statements are ready and promptly up to date. We have Financial Statements available since the operationalization of the Commission. Hence the financial aspects are ready, and have also been positively commended in the press. The NaCC received special recognition by the former Deputy Auditor General of Namibia for exemplary financial management and

adoption of best financial practice standards in 2013.

It is only the activity part and the finalization of the Annual Report that is outstanding. The statutory requirement of the Annual Report in the Act is well noted and acknowledged but one should have regard to the case driven and operational/institutional demands of the Commission that was pronounced during the past three years. Not only did we have to contend with the WalMart/MassMart Supreme Court challenge but we have close to 300 mergers under the belt at the Commission. That translated to 8 to 10 mergers per month, and we have further faced with the client demands and getting the institutional harmony going at the Commission.

I did make some concerted attempts to get the finalization of the Annual Report going and we are now in a position to finalize it.

Annual reports are a statutory requirement. They not only increase the visibility of a competition authority to its stakeholders but also provide the necessary accountability of the authority's operations and activities.

It is recommended that the Commission expedites the drafting of its Inaugural Annual Report covering the years of its operations, and ensures that future reports are drafted and submitted to the Minister of Trade and Industry within the time scales stipulated in section 21 of the Competition Act, 2003, to enable the Minister to meet his statutory obligations.

7.5. Office accommodation

The NaCC has offices in a modern office and shop complex building situated in the Windhoek central business district (CBD) along the main Independence Avenue. The offices are on the office block's mezzanine floor and are therefore easily accessible.

The Commission's office space is extensive, and all current 28 members of staff can comfortably be accommodated, with room for accommodating at least 5 additional staff members. There are three conference rooms, including the spacious Boardroom, and some open spaces, where meetings with clients can be held. A senior member of the

Commission's Corporate Services Division however advised in consultations held during the fact-finding visit that since the intention is to grow the Commission's staff complement to 45, the existing office premises would not accommodate the expansion. Plans are therefore to buy premises, but the Ministry would prefer to have all the statutory bodies under it to be housed in the same complex.

While the housing in the same office complex of Statutory Bodies falling under a Ministry is being practiced elsewhere, such as in South Africa, and has the advantages of promoting cooperation and coherency in the implementation of government policies, the disadvantage for the NaCC is that it would perpetuate the perception held by some of its stakeholders that the Commission is under the direct supervision of its parent Ministry, and therefore not an impartial decision maker.

When the Commission moves out of its present office premises to meet the demands of an expanded number of staff, preference should be given to moving into its own premises for the purposes of maintaining its independence, both actual and perceived.

The Commission's library is however small and mainly contains publications on competition policy and law produced by organizations such as UNCTAD, OECD, ICN and the European Commission. Very few academic books on the relevant subjects of economics and law were seen in the library for reference purposes. While the Internet is increasingly being used to access research material, a well-stocked reference library is still required.

It is recommended that the NaCC be given assistance in the stocking of its library with reference books on subjects dealing with competition policy and law.

8. FINDINGS AND RECOMMENDATIONS

8.1. Findings

The amply qualified professional staff of the Commission was found to be highly motivated with a keen sense of teamwork, which can further be developed for the maximum attainment of the organization's objectives. The recently established

Economics and Sector Research Division has great potential to develop the Commission's competition activities through its market enquiries operations.

The Commission has done reasonably well in the area of advocacy and awareness and is extending its outreach programmes into the rural areas. It has a good relationship with the media, as well as with academia, and is particularly known in the legal fraternity by law firms that advise their clients on the provisions of the Competition Act.

Stakeholders that were consulted and interviewed during the Reviewer's fact-finding visit were varied, and consisted of government ministries and departments, sector regulators, consumer groups, law firms, the media and academia. They were all generally satisfied with the performance of the NaCC, and expressed wishes to continue cooperating with the Commission. In particular, the Polytechnic of Namibia advised that it was inviting the Commission to sit on its Curricular Advisory Board. A law firm advised that it has a very good relationship with the Commission and has started an informal group of competition law practitioners for the purpose of furthering the good relations with the Commission. The Electricity Control Board (ECB) advised that it hoped to learn a lot from the Commission during the implementation of the cooperation agreement between the two regulators. The Communications Regulatory Authority of Namibia (CRAN) advised that it has excellent working relationships with the Commission.

The Office of the Attorney General in the Ministry of Justice however advised that there is an apparent lack of communication between the Commission and that Office, as discussed earlier on in this report.

Namibia has a fairly good competition law as enshrined in the Competition Act, 2003. The law not only covers the three major competition concerns of anticompetitive agreements, abuse of dominance and anticompetitive mergers, it also takes into account the special requirements of the country's economy, which are the protection and promotion of small undertakings, particularly those owned or controlled by "historically disadvantaged persons". More importantly, the country's competition legislation provides for the establishment of a number of institutions and bodies for the enforcement of the law.

The provisions of the Act on anticompetitive agreements were however found to contain some hindrances to the effective control and prevention of restrictive business practices in that they do not provide for a clear distinction between the treatment of horizontal agreements and vertical agreements, whose effect on competition are not the same, and between hard-core cartel and other “softer” horizontal agreements.

While it was found that the Commission’s enforcement of the merger control provisions of the Act has been impressive, its enforcement of the re-

strictive business practices provisions has lagged far behind, with no contravention found since the effective coming into operation of the Commission in 2009. This is cause for serious concern for a Commission that has to show and demonstrate its relevance to the economy.

8.2. Recommendations

Recommendations on issues that need to be addressed or improved were made throughout the report in the parts to which they relate. These are summarized below in table 9.

I. Recommendations concerning the Competition Act, 2003			
	Observation	Recommendation	To whom directed
1	The term “relevant market” is not defined in Namibia’s Competition Act, 2003, even though the notion of market is prominent in the parts of the Act dealing with abuse of a dominant position and mergers.	The term “relevant market” should be defined under section 1 of the Act to give a clear guideline on the identification of markets under competition investigations	NaCC/ MTI/ Legislature
2	Some other common competition terms that have relevance to the enforcement of some provisions of the Competition Act, 2003 are not defined in the Act.	The common competition terms that are not defined in the Act, such as “dominant position”, “essential facility”, “negative clearance” and “statutory monopoly”, should be defined under section 1 of the Act in line with international best practices.	NaCC/ MTI/ Legislature
3	While section 3(3) of the Competition Act, 2003, provides that the “Act applies to the activities of statutory bodies”, the application is subject to the exception of those activities that “are authorized by any law”. This effectively means that most of the economic and commercial activities of such bodies that have statutory monopolies would be exempted from the application of the Act, which is contrary to the general provision of section 3 that the Act “applies to all economic activity within Namibia or having an effect in Namibia”.	Section 3(3) of the Act should be amended to remove the exemption from the application of the Act of those activities of statutory bodies that are authorized by any law. Alternatively, the whole of section 3(3) of the Act could be deleted since statutory bodies can be covered under section 3(2) which deals with the applicability of the Act to the State.	NaCC/ MTI/ Legislature
4	The exception to the general applicability of the Competition Act, 2003, under section 3(1)(c) of the Act that goods or services which the Minister declares can be exempted from the provisions of the Act can also be contrary to the basic principle that competition law should be general law of general application. The Minister however has the responsibility of ensuring the implementation of competition policy in coherence with the Government’s other socioeconomic policies.	The exercise of the Minister’s exemption powers under section 3(1) (c) of the Act should be subject to clear statutory guidelines aimed at meeting public interest objectives of a socioeconomic nature as provided for in the Constitution of Namibia.	MTI
5	There is no clear distinction under section 23 of the Competition Act, 2003, between the treatment of horizontal agreements and vertical agreements, whose harmful effects on competition are not the same. Among horizontal agreements, there is also no clear distinction between those that constitute hard-core cartels, which should be per se prohibited because of their serious effects on competition, and those that have some efficiency and/or pro-competitive elements, which should be considered using the “rule of reason” approach.	There should be a clear distinction in the Act between horizontal and vertical agreements that are anticompetitive, and their treatment as either per se prohibited offences or those considered using the “rule of reason” approach. The terms “horizontal agreement” and “vertical agreement” should also be defined in the relevant part of the Act to which the terms apply, i.e., part i (restrictive agreements, practices and decisions) of chapter 3 on restrictive business practices.	NaCC/ MTI/ Legislature

6	Excessive pricing is included as one of the abusive practices of a dominant firm under section 26(2) of the Competition Act, 2003 (imposing unfair selling prices). Proving excessive pricing is extremely difficult for most competition authorities and can be highly subjective. Remedying excessive pricing can also lead to price controlling, an activity that runs counter to the basic principle of competition. The term "excessive pricing" therefore needs to be clearly defined, and the resultant price regulation remedy has to be made subject to direct connection to the elimination of the responsible restrictive business practice and not to be used for unrelated price controls.	The term "excessive pricing" should be defined in chapter 3 (restrictive business practices) of the Act to which it applies, and its price regulation remedy should be clearly linked to the elimination of the responsible restrictive business practice.	NaCC/ MTI/ Legislature
7	Exemption from the provisions of part I (restrictive agreements, practices and decisions) of chapter 3 of the Competition Act, 2003, on restrictive business practices can be applied for all anticompetitive agreements falling under section 23 of the Act, including horizontal agreements, some of which are of a hard-core cartel nature and should therefore be per se prohibited. Exemption from the provisions of part II (abuse of a dominant position) of chapter 3 of the Act can also be applied for restrictive practices connected with abuse of dominance, most of which have serious effects on competition and consumer welfare because of their exclusionary and exploitative nature.	Those restrictive business practices that seriously affect competition, such as anticompetitive horizontal agreements of a hard-core cartel nature and abuse of dominant position, should not be eligible for exemption from the provisions of part I (restrictive agreements, practices and decisions) and part II (abuse of a dominant position) of chapter 3 of the Act.	NaCC/ MTI/ Legislature
8	The definition of the term "merger" in chapter 4 (mergers) of the Competition Act, 2003 caused some stakeholder concerns in that it is not comprehensive and clear enough. A concern was raised that it is not clear what exactly "undertakings" are in the definition for the purposes of notifying merger transactions. It was also submitted that the definition should specifically exclude intergroup restructures.	A clearer definition of the term "merger" be found to meet the concerns of the stakeholders. In that regard, consideration could be given to adopting the definition in the UNCTAD Model Law on Competition, which is that "mergers and acquisitions" refers to situations where there is a legal operation between two or more enterprises whereby firms legally unify ownership of assets formerly subject to separate control. Those situations include takeovers, concentrative joint ventures and other acquisitions of control such as interlocking directorates".	NaCC/ MTI/ Legislature

II. Recommendations concerning merger control

	Observation	Recommendation	To whom directed
9	The merger notification thresholds under the Competition Act, 2003 as determined by the Minister in terms of section 43(2) of the Act were under the December 2012 published in the Government Gazette as Government Notice No. 307 of 24 December 2012. The gazetted thresholds were: (i) the combined annual turnover, or assets in Namibia, of the merging undertakings equal to or valued below N\$20 million; and (ii) the annual turnover, or the asset value of the target undertaking equal to or valued below N\$10 million. Stakeholder concerns, including those of the Commission, were that the thresholds are too low to serve their intended purpose of screening those transactions that might not cause serious competition concerns.	The merger notification thresholds that were gazetted in December 2012 should be reviewed upwards to ensure that they serve their intended purpose of screening those transactions that might not cause serious competition concerns.	NaCC/ MTI
10	The Minister has powers under the terms of section 49(1) of the Competition Act, 2003, to review the Commission's decisions on mergers. In doing so, the Minister may (i) overturn the decision of the Commission; (ii) amend the decision of the Commission by ordering restrictions or including conditions; or (iii) confirm the decision of the Commission. While there is nothing wrong with the Minister acting as an appeal body to the Commission's decisions on mergers, the Act does not give clear guidelines on the exercising of the Minister's review powers.	The provisions of section 47(2) of the Competition Act, 2003, which outlines specific factors that have to be taken into account by the Commission in determining mergers should be extended to section 49 of the Act that gives the Minister powers to review the Commission's decisions on mergers.	MTI

III. Recommendations concerning control and prevention of restrictive business practices			
	Observation	Recommendation	To whom directed
11	The handling by the Commission of competition cases involving restrictive business practices is cause for serious concern in as far as the time it is taking the Commission to complete investigations and take the necessary remedial action. The Commission's investigations into restrictive business practices have taken as long as over three years, and this puts the aggrieved parties at grave risk.	The Competition Act, 2003, or the Rules Made under the Competition Act, should have provisions on the maximum periods that the Commission should spend in investigating restrictive business practices and considering applications for exemption, as is the case with the examination of mergers and acquisitions.	NaCC/ MTI/ Legislature
12	The Commission's Restrictive Business Practices Division is manned by professional staff that are amply qualified in the relevant fields of law and economics for the effective handling of competition cases involving restrictive business practices. The Division however lacks the necessary case-handling experience and the confidence to conduct competition analyses that can withstand legal challenges, which is required for speedy investigation and analysis of competition cases.	The investigative and analytical capacity of staff members of Commission's Restrictive Business Practices Division should be further developed to speed up the handling of competition cases and build confidence in the Division in making recommendations on restrictive business practices that withstand challenges. Such capacity-building can take the form of secondments to other more experienced competition authorities and accelerated accumulation of practical investigative and analytical experience at home.	NaCC
13	Sentiments were expressed by various stakeholders that the Commission seems to be concentrating more on mergers and acquisitions than on restrictive business practices. This might contribute to the slow development of the Commission's enforcement of the provisions of the Competition Act, 2003, on restrictive business practices.	The Commission should give equal concentration to restrictive business practices and mergers and acquisitions, which are its core operations, in the form of policy, strategic and operational direction.	NaCC
14	The Commission's draft corporate leniency rules are pending from 2011 because they are still being considered by the relevant government authorities (Attorney General's Office) since they are not provided for under the Competition Act, 2003. Corporate leniency programmes are instrumental in increasing cartel cases for investigation by the Commission's Restrictive Business Practices Division.	The Commission's draft corporate leniency rules should be approved by the relevant Government authorities as a matter of urgency, and corporate leniency programmes should be provided for in the Competition Act, 2003 as a statutory requirement.	Attorney General's Office, NaCC, MTI, Legislature
IV. Recommendations concerning markets investigations and industry surveillance			
	Observation	Recommendation	To whom directed
15	The Commission's price monitoring and surveillance activities are a new development at the request of the Ministry of Trade and Industry, which are not specifically provided for in the Competition Act, 2003. There is nothing wrong with the Commission getting involved in price monitoring activities, as long as that does not transform it into a price control agency, which would contradict the basic principle of competition of independent setting of prices by market players. The involvement in price monitoring activities would also equip the Commission to identify instances of excessive pricing for abuse of dominance investigations. This function is not beyond the scope and capability of the NaCC since some other competition authorities from both developed and developing countries are performing similar functions.	The Commission's "unofficial" function of price monitoring and surveillance should be formalized in the Competition Act, 2003, with clear guidelines on its undertaking to avoid conflicts with the basic independent operation principle of competition.	NaCC, MTI, Legislature

V. Recommendations concerning relations with sector regulators

	Observation	Recommendation	To whom directed
16	While the cooperation agreements between the NaCC and those sector regulators with competition functions seem to be working well, with the parties having good working relationships in the promotion of competition in the regulated sectors, the parties emphasized the need for greater exchange of information, including confidential information, between them for more effective undertaking of competition investigations.	The exchange of confidential information between the NaCC and those sector regulators that have competition functions should be provided for in the Competition Act, 2003, and the enabling Acts of the sector regulators.	NaCC, Sector Regulators, Legislature

VI. Recommendations concerning institutional issues

	Observation	Recommendation	To whom directed
17	Under the terms of section 7 of the Competition Act, 2003, members of the Commission's Board of Commissioners hold office for terms of three years and are eligible for reappointment but should not hold office for more than two consecutive terms. Of the present five members of the Board of Commissioners, three of them are serving their second terms of office, which end in December 2014 and therefore with no possibility of reappointment. That will leave the Board with members that have less than two years' experience in the Commission, and therefore lacking the necessary institutional memory for informed and effective decision-making.	In appointing members to the Board of Commissioners the Minister should ensure that not more than one member is retired at the same time for effective continuity in decision-making.	MTI
18	In certain areas, the NaCC is a quasi-judicial body with investigative and limited adjudicative functions under the Competition Act, 2003. The Act however does not clearly apportion the Commission's investigative and adjudicative functions between its Secretariat and Board of Commissioners and does not lucidly define when and what sort of actions should be taken by the Secretariat and by the Board. It is however inferred in the Act that the Secretariat is the Commission's investigative arm, and it has also become established practice in the Commission that the Secretariat investigates competition cases and submits reports on the findings to the Board of Commissioners for determination. These arrangements are however not specifically provided for in the Act. Unclear statutory separation of a competition authority's investigative and adjudicative functions has grave legal implications, particularly on issues related to natural justice or due process.	The separation of the NaCC's investigative and adjudicative functions should be clearly provided for under the Act, with the Commission's Secretariat being formally given statutory investigative functions and the Board of Commissioners retaining adjudicative functions, with well-defined responsibilities and spheres of operation.	NaCC/ MTI/ Legislature
19	The Commission is heavily dependent on government grants for the funding of its operations. Experiences of other competition authorities in the region show that heavy reliance on government funding for operations inhibits expansion. The Commission therefore needs to identify alternative sources of funding for its expansion programmes, which should however not compromise its independence and put it in conflict of interest positions. In that regard, the Act gives the Commission some leeway in seeking funds from sources other than the Government, including from various administrative fees.	The Commission should identify alternative sources of funding for its operations, subject to the provisions of section 17(1) of the Competition Act, 2003.	NaCC

20	The Commission presently has over 10 vacant posts on its staff establishment, while all its Divisions are in need of additional staff for effective operation. The Restrictive Business Practices Divisions also needs more economists at senior levels.	The Commission should adequately resource all its Divisions in terms of human resources by filling all the vacant posts on its staff establishment, and recruiting more staff in the Corporate Communications Section of the Corporate Services Division, the Mergers & Acquisitions Division, and the Economics & Sector Research Division, as well as recruiting more economists at senior levels in the Restrictive Business Practices Division.	NaCC
21	The Commission has a staff development programme under which it assists its employees in advancing their academic and professional qualifications and capabilities, which is producing the desired results.	The NaCC should continue with, and further develop, its staff training programme. The programme should include study tours of more developed competition authorities and staff exchanges with other authorities in the region.	NaCC
22	The Commission has still not submitted to the Minister, in accordance with the provisions of section 21 of the Act, any annual reports on its activities since it commenced operations in 2009. It is however noted that the draft Inaugural Annual Report covering all the years of the Commission's operations is currently being worked on. Annual reports not only increase the visibility of a competition authority to its stakeholders but also provide the necessary accountability of the authority's operations and activities.	The Commission should expedite the drafting of its Inaugural Annual Report covering all the years of its operations and ensure that future reports are drafted and submitted to the Minister of Trade and Industry within the time scales stipulated in section 21 of the Competition Act, 2003, to enable the Minister to meet his statutory obligations.	NaCC

VII. Recommendations concerning consumer protection

	Observation	Recommendation	To whom directed
23	While Namibia has an enforceable competition law and is in the process of formulating a comprehensive competition policy, it still does not have such law and policy related to consumer protection. A consultant was assigned by the Ministry of Trade and Industry the task of looking at the formulation of a consumer protection policy first and then the law, but the process is taking too long. Namibian consumer groups highlighted the need for a consumer protection law and an agency to enforce that law. The Law Reform and Development Commission (LRDC) of Namibia has also lobbied for the enactment of a consumer protection law and has prepared a draft discussion paper on consumer protection in Namibia. An increasing number of competition authorities worldwide are also enforcing consumer protection laws and doing so successfully. In the SADC region, the Competition and Consumer Protection Commission of Zambia, the Fair Competition Commission of the United Republic of Tanzania and the Fair Trading Commission of Seychelles enforce both the competition and consumer protection laws of their countries. In the case of Namibia, the finalization of the national consumer protection policy and law is taking too long, delayed now by almost a year and a half since the terms of reference were advertised.	The process towards the formulation and enactment of a consumer protection policy and law in Namibia should be speeded up, and serious consideration should be given to having the NaCC be the primary implementer and enforcer of that policy and law.	MTI

VIII. Recommendations concerning interface between competition and intellectual property laws

	Observation	Recommendation	To whom directed
24	<p>The issue of the interaction between intellectual property (IP) and competition is very topical because of the inherent tensions between the two. Intellectual property rights create monopolies, while competition law battles monopolies. IP and competition law are however complementary in that they both aim at achieving the same objective, i.e., the promotion of consumer welfare and innovation.</p> <p>The Competition Act, 2003, of Namibia recognizes IPRs in its exemption provisions of section 30.</p> <p>A Business and Intellectual Property Authority Act is in the process of being enacted by the Parliament of Namibia, which provides for the establishment of a Business and Intellectual Property Authority (BIPA). BIPA was launched by the Minister of Trade and Industry in May 2013, and it has been expressed that the NaCC intends to conclude a cooperation agreement with that Authority when it becomes fully operational.</p> <p>A Subregional Workshop on Intellectual Property and Competition Policy for Certain African Countries was held in Harare, Zimbabwe, in November 2013. The objective of the workshop, which was organized by the African Regional Intellectual Property Organization (ARIPO) and the World Intellectual Property Organization (WIPO), was to bring together intellectual property (IP) and competition agencies to discuss various aspects concerning the interface between the protection of intellectual property and the enforcement of competition and/or consumer protection rules. The NaCC was unfortunately not represented at that workshop.</p>	<p>The NaCC should involve itself in international events on the important interface between the protection of intellectual property and the enforcement of competition and/or consumer protection law and should seriously consider implementing the recommendations made at the ARIPO/WIPO subregional workshop on intellectual property and competition policy that was held in Harare, Zimbabwe, in November 2013.</p>	NaCC

IX. Recommendations concerning other relevant issues			
	Observation	Recommendation	To whom directed
25	<p>No formal courses on competition policy and law are being taught at Namibia's institutions of higher learning, even though both the Polytechnic of Namibia and the University of Namibia teach some related subjects.</p> <p>The introduction of full-time courses on competition policy and law at Namibia's institutions of higher learning would not only provide a catchment of competition practitioners for the Commission, but would also facilitate the building of a culture of competition in the Namibian economy.</p> <p>Both the University of Namibia and the Polytechnic of Namibia have indicated willingness to include formal courses on competition policy and law on their curricula on a full-time basis, subject to availability of funding.</p>	<p>Funding should be found for the introduction of full-time courses on competition policy and law at either or both the University of Namibia and Polytechnic of Namibia.</p>	Cooperating Partners
26	<p>The Commission has a small library, which doubles as a documentation centre. It mainly contains publications on competition policy and law produced by organizations such as UNCTAD, OECD, ICN and the European Commission, with relatively few academic books on the relevant subjects of economics and law for reference purposes.</p> <p>While the Internet is increasingly being used to access research material, a well-stocked reference library is still required.</p>	<p>The NaCC should be given assistance in the stocking of its library with relevant reference books on subjects dealing with competition policy and law.</p>	Cooperating Partners
27	<p>The review identified a number of areas in which the NaCC requires technical assistance in the enforcement of Namibia's competition law, such as the following: (i) revision of the Competition Act and the Rules; (ii) consumer protection policy and law and the Commission's role in the implementation of that policy and enforcement of the law; (iii) the roles of the NaCC's Board and Commissioners and Secretariat; and (iv) capacity-building and staff training and development, particularly in enforcement.</p>	<p>The Commission should be given technical assistance in the identified areas, some of which require expert studies.</p>	Cooperating Partners

Annex I

LIST OF STAKEHOLDERS INTERVIEWED DURING THE FACT-FINDING VISIT

	Organisation		Interviewee	Position
1	Namibian Competition Commission	1	Dr. Omu Matundu-Kakujaha	Commissioner
		2	Mr. Mihe Gaomab II	Chief Executive Officer and Secretary to the Commission
		3	Mrs. Bridget Dundee	Technical Adviser: Office of the CEO
		4	Mr. Vitalis Ndalikoule	Director (Mergers and Acquisitions)
		5	Dr. Michael Hmavindu	Director (Economics and Sector Research)
		6	Mr. Dartago Liswaniso	Acting Director (Restrictive Business Practices)
		7	Mr. Gideon Garoeb	Acting Director (Corporate Services)
		8	Ms. Ashley Tjipitua	Company Secretary/ Legal Adviser: Office of the CEO
		9	Ms. Dina Gowases	Corporate Communications Officer
		10	Ms. Roswindis Amushila	Administration Officer
2	Ministry of Trade and Industry	11	Mrs. Maria Pogisho	Deputy Director (Consumer Protection)
3	Attorney General's Office	12	Mr. Chris W.H. Nghaamwa	Chief Legal Adviser
		13	Mr. E. Victor Bok	Deputy Chief Legal Adviser
		14	Ms. Rowwitha Gamachas	Deputy Chief Legal Adviser (Legal Advice)
		15	Ms. Dinah Kauraisa	Principal Legal Officer (Legal Advice)
		16	Ms. Eliana Orrin	Chief Legal Officer (Legal Advice)
4	Polytechnic of Namibia	17	Mr. Victor Somosu	Head (Marketing Department)
5	Engling, Stritter and Partners Law Firm	18	Mr. Hans-Bruno Gerdes	Managing Partner
		19	Ms. Axel Stritter	Partner
		20	Mr. Alet Louw	Professional Assistant
6	Namibia Consumer Trust	21	Mr. Michael Gaweseb	Executive Director
7	Namibia Consumer Protection Group	22	Mr. Milton Louw	Volunteer Director
8	Electricity Control Broad	23	Mr. Rojas Manyame	General Manager (Regulation)
		24	Mr. Tonateni Amakutuwa	Financial Analyst
9	Communications Regulatory Authority of Namibia	25	Ms. Helene Vosloo	Head (Economics and Sector Research)
10	Koep and Partners Law Firm	26	Mr. Koep	Managing Partner
		27	Mr. Huga Meyer van den Berg	Lawyer
		28	Mr. Joos Agenbach	Lawyer
11	Prime Focus Magazine/ The Villager	29	Honorine Kaze	Business Reporter
12	Vision2013	30	Laimi Mbago	Business Reporter
13	Consumer News	31	Willem Gariseb	Reporter
14	Crossborder News	32	Jimmy Julie	Reporter
18	NBC TV	33	Steven Ndjorokaze	Reporter
19	Star Magazine	34	Doctor Kandjavera	Founding Editor
20	Namibian Sun	35	Denver Isaacs	Business Reporter
21	Indi Post Newspaper	36		Reporter
22	Allegmeine Zeitung	37		Reporter

