

VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY: NAMIBIA

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Presentation By
Alexander J. Kububa

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INTRODUCTION

- Namibia – a country in Southern Africa, which shares borders with:
 - Angola and Zambia to the north; Botswana to the east; and South Africa to the south.
- Competition law enacted in Namibia in 2003 under Competition Act, 2003 (Act No.2 of 2003):
 - enactment of competition law however preceded formulation and adoption of a comprehensive national competition policy.
- Before granting of Independence in 1990, competition issues in Namibia regulated by Regulation of Monopolistic Conditions Amendment Act, 1958 (Act 14 of 1958) of South Africa.
- Competition Act, 2003 signed into law in April 2003:
 - enforcement agency, Namibia Competition Commission (NaCC) however only came into operation in December 2008.

SUBSTANTIVE CONTENT OF COMPETITION LAW (1)

- Purpose of the Act stated as to enhance the promotion and safeguarding of competition in Namibia:
 - while some of the stated objectives of that purpose are efficiency and competition related, others are related to achievement of other socio-economic benefits of a public interest nature.
- Application of the Act is economy-wide:
 - the Act generally applies to all economic activity within Namibia or having an effect in Namibia;
 - it also binds the State in so far as the State engages in commercial activities;
 - It further applies to the activities of Statutory Bodies:
 - however subject to the exception of those activities of Statutory Bodies that are authorised by any law.

SUBSTANTIVE CONTENT OF COMPETITION LAW (2)

- NaCC established as an independent juristic person that is subject only to the Namibian Constitution and the law:
 - Commission has jurisdiction throughout Namibia, and required to be impartial and to perform its functions without fear, favour or prejudice.
- Commission has statutory functions of investigating and remedying anti-competitive practices, inclusive of RBPs and anti-competitive mergers, and of opening up markets:
 - It also has 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.

Restrictive Business Practices (1)

- Anti-competitive agreements are prohibited under the Competition Act:
 - Act however does not distinguish between horizontal and vertical agreements, and those that should be *per se* prohibited or considered using the 'rule-of-reason' approach.
- Abuse of a dominant position in a market in Namibia is also prohibited:
 - practices that constitute abuse of dominant position are both of an exploitative and exclusionary nature.
- Application for exemption from provisions of the Act can be made for restrictive agreements, practices and decisions, and for abuse of dominant position:
 - exemption can be given for: (i) all anti-competitive agreements, of both horizontal and vertical nature; and (ii) all forms of abuse of dominance.

Restrictive Business Practices (2)

- Commission has powers to investigate RBPs either upon receipt of complaint or on its own:
- Commission required to give written notice of proposed investigation to every undertaking the conduct of which is to be investigated:
 - indicating subject matter and purpose of investigation; and
 - inviting concerned undertaking to submit any representations on the matter.
- Remedial action against RBPs under the Act numerous, and include 'cease and desist' orders, restitution and damages, and imposition of fines.
- Commission may also apply to High Court for interim order restraining an undertaking from engaging in a RBP pending conclusion of its investigation.

Mergers (1)

- Merger control provisions of Act extensive and cover pertinent issues such as: (i) change of control; (ii) pre-merger notification; and merger notification thresholds:
 - definition of term 'merger' covers all the three common types of mergers, as well as joint ventures;
 - merger notification thresholds based on 'size-of-the-transaction' factors of assets and/or turnovers of merging parties with strong local nexus.
- Commission must consider and make determination in relation to a proposed merger within 30 days after notification, or:
 - if further information is required, within 30 days after date of receipt of the information;
 - if conference on the proposed merger is required, within 30 days after date of conclusion of the conference; and
 - if complexity of the issues involved demands, by not more than 60 days.

Mergers (2)

- Substantive test in merger control in Namibia is substantial lessening of competition:
 - Commission may however base its determination of a proposed merger on any criteria which it considers relevant to the circumstances, including public interest issues.
- Minister of Trade and Industry may review decisions of Commission on mergers, on application for such review by a party to the merger:
 - Minister may overturn decision of the Commission, amend the decision by ordering restrictions or including conditions, or confirm the decision.

SECTOR REGULATION

- Namibia has number of sector regulators in key sectors, such as:
 - financial services sector (Bank of Namibia (BoN), and Namibia Financial Institutions Supervisory Authority (NAMFISA));
 - communications services sector (Communications Regulatory Authority of Namibia (CRAN));
 - ports (Namibian Ports Authority (NAMPORT)); and
 - electricity (Electricity Control Board (ECB)).
- Some sector regulators have clear overlaps with the Commission on prevention and promotion of competition in the regulated sectors (BoN, CRAN and ECB):
- Commission negotiated and concluded cooperation agreements with four sector regulators (CRAN, BoN, ECB and NAMPORT):
 - agreements with CRAN, BoN and ECB in form of MoAs on concurrent jurisdiction over competition;
 - agreement with NAMPORT in form of MoU on general cooperation.

INSTITUTIONAL FRAMEWORK (1)

- Competition Act of Namibia provides for a number of institutions in enforcement of competition law:
 - Namibian Competition Commission (NaCC);
 - Minister of Trade and Industry; and
 - High Court of Namibia.
- NaCC has many powers and duties under the Act, including powers to make rules, to make determinations on exemptions applications, to make decisions on RBPs, and to make determinations on mergers and acquisitions.
- Commission has two operating arms: (i) a Board of Commissioners of part-time members; and (ii) a Secretariat of full-time professionals:
 - the Secretariat is basically the Commission's investigative arm, while the Board of Commissioners is the adjudicative arm.

INSTITUTIONAL FRAMEWORK (2)

- Commission is largely dependent on Government for funding of its operations:
 - in 2012/2013 financial year, government grants contributed 77% of total funding, with merger filing fees contributing 18%.
- Minister of Trade and Industry reviews decisions of the Commission on mergers and acquisitions.
- High Court of Namibia has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of the Competition Act.

COMPETITION LAW ENFORCEMENT (1)

- As at end of October 2013, Commission had handled over 291 competition cases and market investigations since its effective coming into operation in 2009:
 - 234 were mergers and acquisitions;
 - 54 involved restrictive business practices, including exemptions; and
 - 3 were market investigations
- Of the 234 mergers and acquisitions that were examined by the Commission: (i) 206 (88.0%) were approved unconditionally; (ii) 20 (8.5%) were approved with conditions; (iii) 3 (1.2%) were prohibited; (iv) 1 (0.4%) was not challenged for lack of jurisdiction; and (v) 4 (1.7%) were withdrawn by the merging parties.
- Of the 54 RBPs that were investigated: (i) 16 were requests for advisory opinions; (ii) 31 were complaints received; (iii) 5 were investigations initiated by the Commission; and (iv) 2 were exemption applications.
 - Commission had however not found from its investigations a contravention of the provisions of the Act on RBPs.

COMPETITION LAW ENFORCEMENT (2)

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

FINDINGS AND RECOMMENDATIONS (1)

- Namibia has fairly good competition law enshrined in the Competition Act, 2003:
 - law covers all three major competition concerns of anti-competitive agreements, abuse of dominance and anti-competitive mergers;
 - it also takes into account special requirements of the country's economy, characterised by small undertakings and those owned and controlled by historically disadvantaged persons.
- Provisions of Act on anti-competitive agreements however found to contain some hindrances to effective control and prevention of RBPs:
 - they do not provide for clear distinction between treatment of horizontal agreements and vertical agreements, and between hard-core cartel and other 'softer' horizontal mergers.
- While Commission's enforcement of merger control provisions of Act found to be impressive, its enforcement of the RBPs provisions has lagged far behind.

FINDINGS AND RECOMMENDATIONS (2)

- Total of 27 recommendations on issues that need to be addressed or improved in the enforcement of competition law in Namibia were made, concerning, *inter alia*:
 - the Competition Act, 2003:
 - definition of some common competition terms, such as ‘relevant market’, ‘dominant position’ and ‘essential facility’;
 - exemption of some activities of statutory bodies from application of the Act, and exercise of the Minister’s exemption powers;
 - clear distinction between horizontal and vertical agreements and their competitive effects.
 - Merger Control:
 - review upwards of merger notification thresholds;
 - involving of the Minister in the review of the Commission’s decisions on mergers.
 - Control and Prevention of RBPs:
 - provision of maximum investigations periods;
 - development of necessary case handling skills.

FINDINGS AND RECOMMENDATIONS (3)

- Institutional Issues:
 - Staggered appointment of members of the Board of Commissioners;
 - Clear separation of the Commission's investigative and adjudicative functions.
- Other Relevant Issues:
 - Funding for introduction of competition policy and law courses at institutions of higher learning;
 - Development of the Commission's library and documentation centre.
- The recommendations were directed to: (i) NaCC; (ii) Ministry of Trade and Industry; (iii) the Legislature; (iv) the Attorney-General's Office; (v) sector regulators; and (vi) cooperating partners.



Thank You