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COMPETITION ALERT

IN THIS ISSUE

Proposed Namibian Competition Bill set to introduce sweeping amendments

The Namibian Competition Commission (Commission) recently issued a request for written submissions on the Namibian Competition Draft Bill (Bill) ([accessible here](#)). The Bill seeks to repeal the existing Competition Act 2 of 2003 (Current Act) in its entirety and introduces a number of important amendments to competition law in Namibia.

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Some of the Bill's significant proposed amendments are discussed below:

Application of the Bill

- **Broadened Scope:** The Bill does away with certain express exclusions from the ambit of the Current Act, such as concerted conduct designed to achieve a non-commercial socio-economic objective and agricultural commodities which have not undergone a process of manufacture, such that this conduct will no longer be able to escape the application of the legislation. Rather than excluding certain activities upfront and without evaluation, the Commission now has the discretion to exempt these activities following an application by the party concerned.
- **The definition of 'undertaking':** The definition of 'undertaking' (the South African legislation's equivalent of a 'firm') has been considerably expanded to include, amongst others, an association, partnership and other entities or juristic persons. The Bill includes all entities engaged in commercial activity, regardless of whether such entities have a

distinct profit motive or not, and notwithstanding whether such entities are active or dormant. Inclusion of non-profit entities in the definition of an *undertaking* recognises that these entities can engage in commercial activity in competition with private sector, profit seeking undertakings. In a further effort to ensure competitive neutrality, the proposed new definition also expressly includes state-owned entities.

Statutory Bodies

Currently all prohibited conduct cases are referred to the High Court of Namibia (High Court) for adjudication and mergers, determined by the Commission, may be referred to the Minister of Industrialisation, Trade & SME Development (Minister) for review.

- **Establishment of the Executive:** The Bill envisages the establishment of the Executive, as an additional decision-making structure within the Commission, which will exercise an investigative role and be directly empowered to, among other things, conduct investigations of all mergers, exemption applications and prohibited conduct; make decisions on phase 1 mergers; and initiate/conduct market inquiries.
- **Refined role of the Board of Commissioners (Board):** The Board will, among other things, determine the outcome of phase 2 and 3 mergers and exemption applications, and refer prohibited practice matters for adjudication to the newly contemplated Competition Adjudicative Panel (CAP).



Proposed Namibian Competition Bill set to introduce sweeping amendments...continued

The Bill provides for the establishment of the CAP, as an independent structure appointed by the President, to adopt the roles currently played by the High Court in respect of prohibited practice matters and the Minister in respect of mergers.

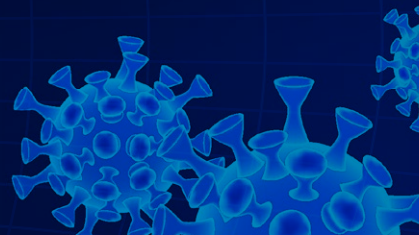
- **Establishment of the CAP:** The Bill provides for the establishment of the CAP, as an independent structure appointed by the President, to adopt the roles currently played by the High Court in respect of prohibited practice matters and the Minister in respect of mergers. The CAP will be similar to the South African Competition Tribunal and it is to, among other things, adjudicate prohibited practice complaints, review decisions to prohibit mergers or approve mergers subject to conditions, revoke approvals of mergers, or amend conditions imposed on mergers. The CAP's decisions regarding prohibited practices may, however, still be appealed to the High Court and its decisions on the review of mergers may be reviewed by the High Court. The intention is for the CAP to be comprised of specialist lawyers and economists, and the aim is for matters to be dealt with more expeditiously than the High Court is able to, due to its varied and heavy case load.

Merger control

- **Expanded definition of 'merger':** The definition of 'merger' has been expanded to include a joint venture between two or more undertakings. While joint ventures have long been recognised as legitimate business arrangements, the Commission considers that they may lead to competition concerns, especially where they function as fully fledged businesses. Presumably, if it is clear that a given joint venture does not result in an acquisition or establishment of control and/or does not meet the financial thresholds for notification, then there would be no need to notify the joint venture as a merger.
- **Categorisation of mergers:** The Bill empowers the Commission to prescribe criteria for categorising mergers into various phases, for efficiency purposes. Phase 1 mergers being regarded as non-complex and likely not to raise competition concerns, should be considered within

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a relatively shortly period compared to phase 2 and 3 mergers. As such, phase 1 mergers can be decided by the Executive, while phase 2 and 3 mergers are decided by the Board, upon recommendation by the Executive. The criteria for the phasing of mergers has not yet been published for comment.

- **Determination of mergers:** In line with emerging trends, the Bill proposes two tests for merger analysis, namely: (i) whether the proposed merger is likely to substantially prevent or lessen competition in the relevant market and if so, whether there are gains that outweigh the anti-competitive effects (SLC Test) (the Bill also lists factors that can be taken into account in this regard); and (ii) whether the merger is justified on public interest grounds. Examples of new public interest grounds include: local procurement of goods and services; value addition in downstream markets; and a greater spread of ownership in the merging undertakings, in particular to increase ownership stakes of historically disadvantaged persons. It appears from the wording of the Bill that both the SLC test and the public interest test must be passed (albeit the Commission's summary suggests that only if the merger fails on the SLC test, is the public interest test invoked).

Prohibited Conduct

- **Horizontal/Vertical relationships:** The Bill, in a welcome departure from the Current Act, makes a clear distinction between conduct involving undertakings in a horizontal relationship (between competitors)

and a vertical relationship (involving undertakings at different stages of the value chain). The current lack of a delineation can cause confusion when it comes to compliance.

- **Per se prohibitions:** The Bill similarly draws an express distinction between *per se* prohibitions against anticompetitive practices that cannot be justified and are outright prohibited; and those that can be justified, taking into account technological, efficiency or other pro-competitive or public interest benefits. From a vertical and horizontal perspective, the *per se* prohibitions relate to price fixing and other cartel conduct (horizontal conduct), as well as the practice of minimum resale price maintenance (a specific vertical practice).
- **Abuses of Dominance:** The Bill expressly categorises an abuse of dominance offence as a *per se* violation. In the Commission's view, there can be no justification for such conduct. Additionally, abuse of dominance practices are not subject to the exemption provisions of the Bill. This amendment is of potential concern insofar as it proposes that undertakings alleged to have abused their dominance are no longer able to put forward efficiency or other effects-based defences.
- **Prior implementation of mergers:** Where a merger has been implemented without approval in circumstances where an approval was required, or otherwise in contravention of the Bill, the Commission may investigate the matter as an alleged prohibited conduct.

Proposed Namibian Competition Bill set to introduce sweeping amendments...*continued*

The Commission has requested that stakeholders provide written submissions on the Bill on or before 25 September 2020, after which, a stakeholders' workshop will be convened to discuss the Bill before a final draft can be submitted to the Minister for consideration.

Other

- Market inquiries: The Bill grants the Commission extensive new powers relating to undertaking market inquiries (the Current Act makes no provision for market inquiries).
- Interim relief: The Bill allows a complainant to apply for interim relief which may be granted in order to prevent serious or irreparable damage to the complainant or applicant. In the Current Act, the responsibility to apply for interim relief lies only with the Commission.
- Consent orders: The Current Act empowers the Commission to enter into consent agreements only in relation to cartels and abuse of dominance cases. The Bill now allows the Commission to enter into a consent agreement for merger contraventions (i.e. mergers implemented prior to approval by the Commission or contrary to conditions imposed by the Commission).
- The calculation of 'days': The Bill provides that where a particular number of days are prescribed for doing an act, the period from 16 December to 15 January is not counted. Should this provision be implemented, it will be an important consideration in terms of transaction planning in circumstances where merger investigations occur over this time period.

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Susan Meyer, Preanka Gounden and James Wewege

OUR TEAM

For more information about our Competition practice and services, please contact:



Chris Charter
National Practice Head
Director
T +27 (0)11 562 1053
E chris.charter@cdhlegal.com



Albert Aukema
Director
T +27 (0)11 562 1205
E albert.aukema@cdhlegal.com



Naasha Loopoo
Senior Associate
T +27 (0)11 562 1010
E naasha.loopoo@cdhlegal.com



Lara Granville
Director
T +27 (0)11 562 1720
E lara.granville@cdhlegal.com



Kitso Tlhabanelo
Senior Associate
T +27 (0)11 562 1544
E kitso.tlhabanelo@cdhlegal.com



Andries Le Grange
Director
T +27 (0)11 562 1092
E andries.legrange@cdhlegal.com



Preanka Gounden
Associate
T +27 (0)21 481 6389
E preanka.gounden@cdhlegal.com



Susan Meyer
Director
T +27 (0)21 481 6469
E susan.meyer@cdhlegal.com



Duduetsang Mogapi
Associate
T +27 (0)11 562 1068
E duduetsang.mogapi@cdhlegal.com



Craig Thomas
Associate
T +27 (0)11 562 1055
E craig.thomas@cdhlegal.com

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Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH

14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

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