

COMPETITION ACT 2 OF 2003

[ASSENTED TO 3 APRIL 2003] [DATE OF COMMENCEMENT: 3 MARCH 2008*]

(Signed by the President)

as amended by

State-owned Enterprises Governance Act 2 of 2006

ACT

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.

ARRANGEMENT OF SECTIONS

CHAPTER 1

PRELIMINARY PROVISIONS

- 1 Definitions
- 2 Purpose of Act
- 3 Application of Act

CHAPTER 2

NAMIBIAN COMPETITION COMMISSION

- 4 Establishment of Commission
- 5 Constitution of Commission
- 6 Alternate members
- 7 Term of office
- 8 Vacation of office and filling of vacancies
- 9 Remuneration
- 10 Conduct of members and disclosure of interest
- 11 Meetings of Commission
- 12 Committees of Commission
- 13 Staff of Commission
- 14 Inspectors
- 15 Consultants
- 16 Functions, powers and duties of Commission
- 17 Funds of Commission
- 18 Bank accounts
- 19 Investment of money

- 20 Financial year, accounts and audit
- 21 Annual report
- 22 Power of Commission to make rules

CHAPTER 3 RESTRICTIVE BUSINESS PRACTICES

Part I: Restrictive Agreements, Practices and Decisions

- 23 Restrictive practices prohibited

Part II: Abuse of Dominant Position

- 24 Application of this Part
- 25 Criteria for determining dominant position
- 26 Abuse of dominant position

Part III: Exemption of Certain Restrictive Practices

- 27 Grant of exemption for certain restrictive practices
- 28 Determination of application for exemption
- 29 Revocation or amendment of exemption
- 30 Exemption in respect of intellectual property rights
- 31 Exemption in respect of professional rules
- 32 Notification of grant, revocation or amendment of exemption

Part IV: Investigation into Prohibited Practices

- 33 Investigation by Commission
- 34 Entry and search of premises
- 35 Power of Commission to take evidence
- 36 Proposed decision of Commission
- 37 Conference to be convened for oral representations
- 38 Action following investigation
- 39 Interim relief
- 40 Consent agreement
- 41 Publication of decision of Commission

CHAPTER 4 MERGERS

- 42 Merger defined
- 43 Control of mergers
- 44 Notice to be given to Commission of proposed merger
- 45 Period for making determination in relation to proposed merger
- 46 Conference in relation to proposed merger
- 47 Determination of proposed merger
- 48 Revocation of approval of proposed merger
- 49 Review of decisions of Commission on mergers by Minister
- 50 Compliance with other laws relating to mergers
- 51 Merger implemented in contravention of this Chapter

CHAPTER 5 JURISDICTION OF COURT

- 52 Jurisdiction of court
- 53 Pecuniary penalties

CHAPTER 6 GENERAL PROVISIONS

- 54 Civil actions and jurisdiction
- 55 Prohibition on disclosure of information
- 56 Disclosure of private interest by staff
- 57 Time within which investigation may be initiated
- 58 Limitation of liability
- 59 Standard of proof

CHAPTER 7 OFFENCES AND PENALTIES

- 60 Hindering administration of Act
- 61 Failure to comply with summons
- 62 Failure to comply with order of Court
- 63 Other offences
- 64 Penalties
- 65 Jurisdiction of magistrates' courts

CHAPTER 8 APPLICATION OF THIS ACT AND OTHER LEGISLATION RELATING TO COMPETITION

- 66 Definitions for this Chapter

67 Relationship with other authorities

CHAPTER 9 TRANSITIONAL

68 Transitional provisions

69 Repeal of laws

70 Short title and commencement

Schedule

Footnote -

* GN 54 in GG 4004 of 3 March 2008

* GN 54 in GG 4004 of 3 March 2008

CHAPTER 1 PRELIMINARY PROVISIONS (ss 1-3)

1 Definitions

In this Act, unless the context otherwise indicates-

"agreement" includes a contract, arrangement or understanding, whether or not legally enforceable;

"chairperson" means the chairperson of the Commission appointed under section 5(1);

"Commission" means the Namibian Competition Commission established by section 4;

"committee" means a committee of the Commission established under section 12;

"concerted practice" means deliberate conjoint conduct between undertakings achieved through direct or indirect contact that replaces their independent actions;

"confidential information" means 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;

"court" means the High Court of Namibia;

"goods" does not include-

(a) agricultural commodities which have not undergone a process of manufacture; and

(b) goods exempted under section 3(1)(c);

"historically disadvantaged persons" means persons who have been socially, economically or educationally disadvantaged by past discriminatory laws or practices;

"member" means a member of the Commission appointed under section 5(1);

"Minister" means the Minister of Trade and Industry;

"Ministry" means the Ministry of Trade and Industry;

"Part I prohibition" means the prohibition imposed by Part I of Chapter 3;

"Part II prohibition" means the prohibition imposed by Part II of Chapter 3;

"premises" includes land, any building, structure, vehicle, vessel, aircraft or container;

"prescribed" means prescribed by a rule made under section 22;

"Secretary" means the Secretary to the Commission appointed in terms of section 13(1);

"services" does not include-

- (a) the performance of work under a contract of service; and
- (b) services exempted under section 3(1)(c);

"small undertaking" means an undertaking which falls within a category prescribed;

"this Act" includes the rules made under section 22;

"undertaking" means 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.

2 Purpose of Act

The purpose of this Act is to enhance the promotion and safeguarding of competition in Namibia in order to-

- (a) promote the efficiency, adaptability and development of the Namibian economy;
- (b) provide consumers with competitive prices and product choices;
- (c) promote employment and advance the social and economic welfare of Namibians;
- (d) expand opportunities for Namibian participation in world markets while recognizing the role of foreign competition in Namibia;
- (e) ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and
- (f) promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons.

3 Application of Act

(1) This Act applies to all economic activity within Namibia or having an effect in Namibia, except-

- (a) collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 1992 (Act 6 of 1992);
- (b) concerted conduct designed to achieve a non-commercial socio-economic objective;
- (c) in relation to goods or services which the Minister, with the concurrence of the Commission, declares, by notice in the *Gazette*, to be exempt from the provisions of this Act.

(2) This 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, but the State is not subject to any provision relating to criminal liability.

(3) This Act applies to the activities of statutory bodies, except in so far as those activities are authorised by any law.

CHAPTER 2

NAMIBIAN COMPETITION COMMISSION (ss 4-22)

4 Establishment of Commission

There is established a juristic person to be known as the Namibian Competition Commission, which-

- (a) has jurisdiction throughout Namibia;
- (b) is independent and subject only to the Namibian Constitution and the law; and
- (c) must be impartial and must perform its functions without fear, favour or prejudice.

5 Constitution of Commission

(1) The Commission shall be constituted, and its members, including the chairperson and the vice-chairperson of the Commission, shall be appointed in accordance with, and for a period as determined under, sections 14 and 15 of the State-owned Enterprises Governance Act, 2006.

[Sec 5 substituted by sec 49 of Act 2 of 2006.]

6 Alternate members

(1) The Minister may appoint for each member a person to be the alternate of the member.

(2) The alternate to a member may, in the event of the member's absence from a meeting of the Commission, attend the meeting in the capacity of a member.

7

[Sec 7 repealed by sec 49 of Act 2 of 2006.]

8 Vacation of office and filling of vacancies

(1) 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).

(2) 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.

(3) If the office of a member becomes vacant, the vacancy must be filled by the appointment of another person as member for the unexpired portion of the term of office of the person who ceased to hold office.

9 Remuneration

The members of the Commission, and members of a committee who are not members of the Commission, must be paid such remuneration or allowances or other benefits as the Minister, with the concurrence of the Minister of Finance, may determine.

10 Conduct of members and disclosure of interest

(1) 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.

(2) Every member of the Commission must in writing disclose to the Minister any direct or indirect financial interest which the member has or acquires in any business carried on in Namibia or elsewhere or in any body corporate carrying on any business in Namibia or elsewhere.

(3) A member who has or acquires any financial or other personal interest, either directly or indirectly, in any matter which is before the Commission for discussion and determination must-

(a) immediately and fully disclose the interest to the Commission; and

(b) withdraw from any further discussion or determination by the Commission of that matter.

11 Meetings of Commission

(1) The first meeting of the Commission must be held at a place and time that the chairperson determines and any meeting of the Commission thereafter must be held at a place and time that the Commission determines.

(2) If for any reason a meeting determined by the Commission cannot take place, the Secretary, with the concurrence of the chairperson, must convene the next meeting of the Commission.

(3) The chairperson may at any time convene a special meeting of the Commission.

(4) The chairperson presides at all meetings of the Commission at which he or she is present.

(5) In the absence of the chairperson from a meeting, the members present must elect one of their number to preside at that meeting and perform the functions and exercise the powers of the chairperson.

(6) At a meeting of the Commission-

(a) a majority of the members of the Commission forms a quorum;

(b) all questions are decided by a majority of votes of the members present and voting; and

(c) the member presiding has a deliberative vote and, in the event of any equality of votes, also a casting vote.

(7) The Commission may invite any person who has expert knowledge of a matter before the Commission for determination to attend a meeting of the Commission and take part in discussions in relation to that matter, but such person has no vote.

(8) As soon as possible after a meeting of the Commission has taken place, the chairperson must cause a copy of the minutes of that meeting to be submitted to the Minister.

12 Committees of Commission

(1) The Commission may establish one or more committees to-

(a) investigate and report to the Commission on any matter which the Commission may refer to the committee for the purpose; or

(b) exercise any power or perform any function of the Commission which the Commission may delegate or assign to the committee, except the power under section 22 to make rules.

(2) A committee may consist of members, or members and other persons, as the Commission may determine.

(3) The Commission must designate a member to be the chairperson of a committee.

(4) The chairperson of the Commission may attend any meeting of a committee of which he or she is not a member and may take part in the proceedings thereof as if he or she were appointed as a member thereof.

(5) The Commission may at any time dissolve or reconstitute a committee.

(6) The Commission is not divested or relieved of a power or function which has been delegated or assigned to a committee.

(7) A decision by a committee in the exercise of a power delegated to the committee, is subject to approval by the Commission, and the Commission may at any time vary or set aside the decision.

(8) Subsections (1) and (3) of section 10, with the changes required by the context, apply to members of a committee who are not members of the Commission.

13 Staff of Commission

(1) The Commission must appoint a Secretary to the Commission and may appoint other employees as it deems necessary to assist in the performance of the functions of the Commission.

(2) The Secretary is, subject to the directions of the Commission, responsible for-

- (a) the formation and development of an efficient administration; and

- (b) the organisation, control, management and discipline of the staff of the Commission.

(3) Unless the Commission or a committee directs otherwise, the Secretary must attend the meetings of the Commission and of a committee, but the Secretary has no vote.

(4) Subject to section 22(3) of the State-owned Enterprises Governance Act, 2006, the Commission determines the remuneration and other conditions of service and benefits of the Secretary and other employees of the Commission.

[Subsec (4) substituted by sec 49 of Act 2 of 2006.]

14 Inspectors

(1) The Commission may-

- (a) designate any of its employees; or

- (b) appoint any other suitable person,

to be an inspector for the purposes of this Act.

(2) The Commission determines the remuneration and other conditions of engagement of an inspector who is not in the full-time service of the Commission.

15 Consultants

The Commission may engage persons to give advice to, and perform services for, the Commission on such terms and conditions of engagement as the Commission may determine.

16 Functions, powers and duties of Commission

(1) The Commission is responsible for the administration and enforcement of this Act and, in addition to any other functions conferred on the Commission, it has the following powers and functions:

- (a) to disseminate information to persons engaged in trade or commerce and the public with respect to the provisions of this Act and the functions of the Commission;

- (b) to liaise and exchange information, knowledge and expertise with authorities of other countries entrusted with functions similar to those of the Commission;

- (c) to carry out research into matters referred to the Commission by the Minister;

- (d) to advise the Minister on matters referred to the Commission by the Minister;

- (e) to implement measures to increase market transparency;
 - (f) to be responsible for investigating contraventions of this Act by undertakings and for controlling mergers between undertakings;
 - (g) either on its own initiative, or at the request of the Minister, to consult with the Minister on any matter which is of great economic or public interest;
 - (h) to advise the Minister, and any other Minister responsible for a relevant industry, in relation to international agreements concerning competition matters governed by this Act.
- (2) The Commission may-
- (a) acquire or hire such movable or immovable property as may be required for the effective performance of its functions, and dispose of property so acquired or hired; and
 - (b) enter into contracts in connection with the performance of its functions.

17 Funds of Commission

- (1) 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.
- (2) The Commission must submit to the Minister annually, at a time determined by the Minister, a statement of the Commission's estimated income and expenditure, and requested appropriation from Parliament, for its next financial year.
- (3) Expenditure incurred for the performance of the functions of the Commission, including remuneration, allowances or other benefits payable to members or other persons, must be defrayed from the funds of the Commission.
- (4) The Secretary is the accounting officer of the Commission and is responsible for-
- (a) all income and expenditure of the Commission; and
 - (b) all assets and the discharging of all liabilities of the Commission.

18 Bank accounts

- (1) The Commission must open and maintain such bank accounts at one or more banking institutions in Namibia, registered in terms of the Banking Institutions Act, 1998 (Act 2 of 1998) as are necessary for the performance of the functions of the Commission.
- (2) The Commission must ensure that-
- (a) all money received by or on behalf of the Commission is deposited into its bank account as soon as practicable after being received;
 - (b) any payment by or on behalf of the Commission is made from its bank account; and

- (c) no money is withdrawn, paid or transferred from its bank account without the Commission's authority.

(3) Cheques drawn on the Commission's bank account, or any other form or document to be completed for the withdrawal, payment or transfer of money from any of the bank accounts of the Commission, must be signed on the Commission's behalf by two persons authorised for that purpose by the Commission.

19 Investment of money

Any money of the Commission that is not immediately required for expenditure by the Commission may be invested at a banking institution referred to in section 18(1) or a building society registered in terms of the Building Societies Act, 1986 (Act 2 of 1986).

20 Financial year, accounts and audit

(1) The financial year of the Commission is as prescribed.

(2) The Commission must cause such records of account to be kept in accordance with general accepted accounting practices, principles and procedures as are necessary to represent fairly the state of affairs and business of the Commission and to explain the transactions and financial position of the Commission.

(3) Not later than three months after the end of each financial year of the Commission, the Secretary must prepare and submit to the Commission for approval, financial statements, comprising-

- (a) a statement reflecting, with suitable and sufficient particulars, the income and expenditure of the Commission during that financial year; and
- (b) a balance sheet showing the state of the Commission's assets, liabilities and financial position as at the end of that financial year.

(4) The accounting records and the financial statements of the Commission must be audited annually by the Auditor-General.

21 Annual report

(1) The Commission must submit 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.

22 Power of Commission to make rules

The Commission, with the approval of the Minister, may make rules by notice in the *Gazette*-

- (a) relating to the administration, organization and operations of the Commission;
- (b) prescribing the procedure to be followed in respect of applications and notices to, and proceedings of, the Commission;
- (c) prescribing forms of applications, notices, certificates and other documents required for the purposes of this Act;
- (d) prescribing fees to be paid for the purposes of this Act;
- (e) the manner for making a submission in relation to the subject matter of any application to, or investigation by, the Commission;
- (f) prescribing the procedures for investigations under this Act;
- (g) prescribing the requirements for a small undertaking;
- (h) relating to any other matter which is required or permitted to be prescribed under this Act, or considered necessary or expedient by the Commission in order to achieve the objects of this Act.

CHAPTER 3 **RESTRICTIVE BUSINESS PRACTICES (ss 23-41)**

PART I **RESTRICTIVE AGREEMENTS, PRACTICES AND DECISIONS (s 23)**

23 Restrictive practices prohibited

(1) 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, are prohibited, unless they are exempt in accordance with the provisions of Part III of this Chapter.

(2) Agreements and concerted practices contemplated in subsection (1), include agreements concluded between-

- (a) parties in a horizontal relationship, being undertakings trading in competition; or
- (b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.

(3) Without prejudice to the generality of the provisions of subsection (1), that subsection applies in particular to any agreement, decision or concerted practice which-

- (a) directly or indirectly fixes purchase or selling prices or any other trading conditions;
- (b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;
- (c) involves collusive tendering;
- (d) involves a practice of minimum resale price maintenance;

- (e) limits or controls production, market outlets or access, technical development or investment;
- (f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.

(4) Paragraph (d) of subsection (3) does not prevent a supplier or producer of goods or services from recommending a resale price to a reseller of the goods or a provider of the service, provided-

- (a) it is expressly stipulated by the supplier or producer to the reseller or provider that the recommended price is not binding; and
- (b) if any product, or any document or thing relating to any product or service, bears a price affixed or applied by the supplier or producer, the words "recommended price" appear next to the price so affixed or applied.

(5) It is presumed that an agreement or a concerted practice of the nature prohibited by subsection (1) exists between two or more undertakings if-

- (a) any one of the undertakings owns a significant interest in the other or they have at least one director or one substantial shareholder in common; and
- (b) any combination of the undertakings engages in any of the practices mentioned in subsection (3).

(6) The presumption created by subsection (5) may be rebutted if an undertaking or a director or shareholder concerned establishes that a reasonable basis exists to conclude that any practice in which any of the undertakings engaged was a normal commercial response to conditions prevailing in the market.

(7) For the purposes of subsection (5), "director" includes-

- (a) a director of a company as defined in the Companies Act, 1973 (Act 61 of 1973);
- (b) a member of a close corporation as defined in the Close Corporations Act, 1988 (Act 26 of 1988);
- (c) a trustee of a trust; or
- (d) in relation to an undertaking conducted by an individual or a partnership, the owner of the undertaking or a partner of the partnership.

(8) Subsection (1) does not apply in respect of an agreement entered into between, or a practice engaged in by-

- (a) a company and its wholly owned subsidiary, as contemplated in section 1 of the Companies Act, 1973, or a wholly owned subsidiary of that subsidiary company; or
- (b) undertakings other than companies, each of which is owned or controlled by the same person or persons.

PART II

ABUSE OF DOMINANT POSITION (ss 24-26)

24 Application of this Part

For the purposes of this Part, the Minister, with the concurrence of the Commission, must determine by notice in the *Gazette* in relation to undertakings in Namibia, either in general or in relation to a specific industry-

- (a) a threshold of annual turnover or value of assets below which this Part does not apply to an undertaking;
- (b) the method for calculating an undertaking's annual turnover or value of assets for the purposes of paragraph (a).

25 Criteria for determining dominant position

For the purposes of this Part, the Commission must prescribe criteria to be applied for determining whether an undertaking has, or two or more undertakings have, a dominant position in a market, which may be based on any factors which the Commission considers appropriate.

26 Abuse of dominant position

(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;
- (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.

PART III

EXEMPTION OF CERTAIN RESTRICTIVE PRACTICES (ss 27-32)

27 Grant of exemption for certain restrictive practices

(1) Any undertaking or association of undertakings may apply to the Commission to be exempted from the provisions of Part I or Part II of this Chapter in respect of-

- (a) any agreement or category of agreements;
- (b) any decision or category of decisions;
- (c) any concerted practice or category of concerted practices.

(2) An application for an exemption under subsection (1) must-

- (a) be made in the prescribed form and manner;

- (b) be accompanied by such information as may be prescribed or as the Commission may reasonably require.

(3) The Commission must give notice in the *Gazette* of an application received in terms of subsection (1)-

- (a) indicating the nature of the exemption sought by the applicant; and
- (b) calling upon interested persons to submit to the Commission, within 30 days of the publication of the notice, any written representations that they may wish to make in regard to the application.

28 Determination of application for exemption

(1) After consideration of an application in terms of section 27 and any representations submitted by interested persons, the Commission must make a determination in respect of the application, and may-

- (a) grant an exemption; or
- (b) refuse to grant an exemption, accompanied by a statement of the reasons for the refusal; or
- (c) issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the Part I or the Part II prohibition.

(2) The Commission may grant an exemption if the Commission is satisfied that there are exceptional and compelling reasons of public policy why the particular-

- (a) agreement or category of agreements;
- (b) decision or category of decisions; or
- (c) concerted practice or category of concerted practices,

ought to be excluded from the Part I or the Part II prohibition.

(3) In making a decision under subsection (2) the Commission must take into account the extent to which the agreement, decision or concerted practice, or the category of agreements, decisions or concerted practices concerned contributes to or results in, or will be likely to contribute to or result in-

- (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 or concerted practice or the category of agreements, decisions or concerted practices.

(4) The Commission may grant an exemption subject to such conditions and for such period as the Commission may think fit.

29 Revocation or amendment of exemption

(1) If the Commission, at any time after it has granted an exemption or issued a certificate of clearance under section 28, is satisfied that-

- (a) the exemption was granted or the certificate of clearance was issued on materially incorrect or misleading information;
- (b) there has been a material change of circumstances since the exemption was granted or the certificate was issued;
- (c) a condition upon which an exemption was granted has not been complied with,

the Commission may revoke or amend the exemption or revoke the certificate of clearance, as the case may be.

(2) If the Commission proposes to revoke or amend an exemption or to revoke a certificate of clearance under subsection (1), it must-

- (a) give notice in writing of the proposed action to the person to whom the exemption was granted or the certificate of clearance was issued, and to any other person who in the opinion of the Commission is likely to have an interest in the matter; and
- (b) call upon such persons to submit to the Commission, within 30 days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

(3) In the event of non-compliance with a condition of an exemption, and irrespective whether the Commission revokes or amends the exemption on account of the non-compliance, the Commission may make application to the Court for the imposition of a pecuniary penalty in respect of that non-compliance, either with or without any other order.

30 Exemption in respect of intellectual property rights

(1) 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, trade marks, plant varieties or any other intellectual property rights.

(2) Section 29, with the changes required by the context, applies to an exemption under this section.

31 Exemption in respect of professional rules

(1) 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).

(2) The Commission may exempt all or part of the rules of a professional association from the provisions of Part I of this Chapter for a specified period if, having regard to internationally applied norms, any restriction contained in those rules that has the effect of preventing or substantially lessening competition in a market is reasonably required to maintain-

- (a) professional standards; or
- (b) the ordinary function of the profession.

(3) Upon receiving an application in terms of subsection (1), the Commission must-

- (a) publish a notice of the application in the *Gazette*;
- (b) allow interested parties 30 days from the date of that notice to make representations concerning the application; and
- (c) consult the Minister responsible for the administration of any law governing the profession concerning the application.

(4) After considering the application and any submission or other information received in relation to the application, and consulting with the responsible Minister, the Commission must-

- (a) either grant an exemption or reject the application by issuing a notice in writing to the applicant;
- (b) give written reasons for its decision if it rejects the application; and
- (c) publish a notice of that decision in the *Gazette*.

(5) If the Commission considers that any rules, either wholly or any part thereof, should no longer be exempt under this section, the Commission, may revoke the exemption in respect of such rules or the relevant part of the rules, at any time after it has-

- (a) given notice in the *Gazette* of the proposed revocation;
- (b) allowed interested parties 30 days from the date of that notice to make representations concerning the exemption; and
- (c) consulted the responsible Minister referred to in subsection (3)(c).

(6) The exemption of a rule or the revocation of an exemption has effect from such date as may be specified by the Commission.

(7) In this section-

"professional association" means 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 professions governed by-
 - (i) the Medical and Dental Professions Act, 1993 (Act 21 of 1993);
 - (ii) the Nursing Professions Act, 1993 (Act 30 of 1993);
 - (iii) the Pharmacy Profession Act, 1993 (Act 23 of 1993);
 - (iv) the Veterinary and Para-veterinary Professions Proclamation, 1984 (Proclamation 14 of 1984);
 - (v) the Allied Health Services Professions Act, 1993 (Act 20 of 1993);
- (j) any other profession to which the provisions of this section have been declared applicable by the Minister by notice in the *Gazette*;

"rules" means rules regulating a professional association that are binding on its members, and includes codes of practice and statements of principle.

32 Notification of grant, revocation or amendment of exemption

The Commission must as soon as is practicable cause to be published in the *Gazette* notice of every exemption granted, and of every exemption revoked under any provision of this Part.

PART IV INVESTIGATION INTO PROHIBITED PRACTICES (ss 33-41)

33 Investigation by Commission

(1) The Commission may, either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any conduct or proposed conduct which is alleged to constitute or may constitute an infringement of-

- (a) the Part I prohibition; or
- (b) the Part II prohibition.

(2) If the Commission, having received from any person a complaint or a request to investigate an alleged infringement referred to in subsection (1), decides not to conduct an investigation, the Commission must in writing inform that person of the reasons for its decision.

(3) If the Commission decides to conduct an investigation, the Commission must in writing give notice of the proposed investigation to every undertaking the conduct of which is to be investigated and must in the notice-

- (a) indicate the subject-matter and purpose of the investigation; and
- (b) invite the undertaking concerned to submit to the Commission, within a period specified in the notice, any representations which the undertaking may wish to make to the Commission in connection with any matter to be investigated.

(4) For the purpose of an investigation, the Commission may by notice in writing served on any person in the prescribed manner require that person-

- (a) to furnish to the Commission by writing signed by that person or, in the case of a body corporate, by a director or member or other competent officer, employee or agent of the body corporate, within the time and in the manner specified in the notice, any information pertaining to any

matter specified in the notice which the Commission considers relevant to the investigation;

- (b) to produce to the Commission, or to a person specified in the notice to act on the Commission's behalf, any document or article, specified in the notice which relates to any matter which the Commission considers relevant to the investigation;
- (c) to appear before the Commission at a time and place specified in the notice to give evidence or to produce any document or article specified in the notice.

34 Entry and search of premises

(1) For the purpose of assisting the Commission to ascertain or establish 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 or the Part II prohibition, an inspector 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-
 - (i) the owner of the premises;
 - (ii) the person in control of the premises;
 - (iii) any person who has control of the document or article; or
 - (iv) 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-
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data; and
 - (iii) 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.

(2) Subject to subsection (8), an inspector may not enter upon and search any premises unless the inspector obtains a warrant authorising such entry and search in accordance with subsection (3).

(3) If a judge of the Court is satisfied, upon application made on oath or affirmation, that there is reasonable ground for believing that it is necessary, in order to ascertain or establish whether any person has engaged in or is engaging or is about to engage in conduct that constitutes or may constitute an infringement of the Part I or the Part II prohibition, for an inspector to exercise the powers conferred by subsection (1), the judge may grant a warrant authorising an inspector to exercise those powers in relation to any premises specified in the warrant.

(4) A warrant must-

- (a) identify the premises that may be entered and searched; and
- (b) authorise an inspector named in the warrant to enter and search the premises and exercise any of the powers conferred by subsection (1).

(5) A warrant continues in force for a period of 30 days from the date it is issued but lapses if-

- (a) the purpose for which it was granted is satisfied; or
- (b) it is cancelled by the judge by whom it was issued or by any other judge of the Court.

(6) A warrant may be executed on any day between 7:00 and 18:00 unless a different time that is reasonable in the circumstances is authorised and specified in the warrant by the judge granting the warrant.

(7) Upon first entering any premises under a warrant the person authorised by the warrant must-

- (a) provide to the owner or person in control of the premises proof of-
 - (i) his or her authority to enter the premises by handing a copy of the warrant to that person; and
 - (ii) his or her identity; or
- (b) if none of the persons mentioned in paragraph (a) is present, affix a copy of the warrant to the premises in a prominent and visible place.

(8) Notwithstanding subsection (2), an inspector may without a warrant enter any premises, other than a private dwelling, to exercise the powers conferred by subsection (1) 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.

(9) An inspector who removes anything from any premises under subsection (1)(g) must-

- (a) issue a receipt for that thing to the owner of, or person in control of, the premises; and

- (b) return that thing as soon as practicable after achieving the purpose for which it was removed.

(10) An inspector exercising the powers conferred by subsection (1) by virtue of a warrant or in terms of subsection (8) may be accompanied and be assisted by one or more police officers.

35 Power of Commission to take evidence

(1) The Commission may receive in evidence any statement, document, information or matter that may in its opinion assist to deal effectively with an investigation conducted by it, whether or not such statement, document, information or matter would otherwise be admissible in a court of law.

(2) The Commission may take evidence on oath or affirmation from any person attending before it, and for that purpose any member of the Commission may administer an oath or affirmation.

(3) The Commission may permit any person appearing as a witness before it to give evidence by tendering and, if the Commission thinks fit, verifying by oath or affirmation, a written statement.

(4) A person attending before the Commission is entitled to the same immunities and privileges as a witness before the High Court.

36 Proposed decision of Commission

(1) If, upon conclusion of an investigation, the Commission proposes to make a decision-

- (a) that the Part I prohibition has been infringed; or
- (b) that the Part II prohibition has been infringed,

it must give written notice of its proposed decision to each undertaking which may be affected by that decision.

(2) The notice referred to in subsection (1) must-

- (a) state the reasons for the Commission's proposed decision;
- (b) set out details of any relief that the Commission may consider to seek from the Court by way of the institution of proceedings in accordance with section 38;
- (c) inform each undertaking that it may, in relation to the Commission's proposed decision or any of the matters contemplated in paragraph (b), within the period specified in the notice-
 - (i) submit written representations to the Commission; and
 - (ii) indicate whether it requires an opportunity to make oral representations to the Commission.

37 Conference to be convened for oral representations

(1) If an undertaking indicates in accordance with section 36(2)(c)(ii) that it requires an opportunity to make oral representations to the Commission, the Commission must-

- (a) convene a conference to be held at a date, time and place determined by the Commission; and

- (b) give written notice of the date, time and place to-
 - (i) the undertaking or undertakings concerned;
 - (ii) any person who had lodged a complaint with the Commission concerning the conduct which was the subject-matter of the Commission's investigation; and
 - (iii) any other person whose presence at the conference is considered by the Commission to be desirable.

(2) A person to whom notice has been given of a conference in terms of subsection (1) may be accompanied by any person whose assistance at the conference is required by the person to whom notice has been given.

(3) At a conference the Commission must provide for as little formality and technicality as a proper consideration of the matters raised by persons participating in the conference permits.

(4) The Commission must cause such record of the conference to be kept as is sufficient to set out the matters raised by the persons participating in the conference.

(5) The Commission may terminate the conference if it is satisfied that a reasonable opportunity has been given for the expression of the views of persons participating in the conference.

38 Action following investigation

After consideration of any written representations made in terms of section 36(2)(c)(i) and of any matters raised at a conference held in accordance with section 37, the Commission may institute proceedings in the Court 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.

39 Interim relief

(1) If the Commission on reasonable grounds believes that an undertaking has engaged, is engaging, 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 the public interest,

the Commission may make application to the Court for an interim order restraining the undertaking or undertakings from engaging in such conduct.

(2) In proceedings under this section, the standard of proof is the same as the standard of proof in the Court on a common law application for an interim interdict.

(3) An interim order granted by the Court pursuant to subsection (1) is of effect until-

- (a) conclusion of any proceedings instituted in terms of section 38; or
- (b) expiry of the period of six months beginning on the date of issue of the interim order,

whichever is the earlier.

(4) Notwithstanding subsection (3), if a hearing in connection with proceedings instituted in terms of section 38 is not concluded within six months after the date of an interim order, the Court may, on good cause shown, extend the interim order for a further period not exceeding six months.

(5) An undertaking affected by an interim order that has a final or irreversible effect may appeal to the Supreme Court against that order.

40 Consent agreement

(1) The Commission may at any time, during or after an investigation into an alleged infringement of the Part I or the Part II prohibition, enter into an agreement of settlement with the undertaking or undertakings concerned setting out the terms to be submitted by the Commission by application to the Court for confirmation as an order of the Court.

(2) An agreement referred to in subsection (1) 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.

(3) After hearing a motion for confirmation of an agreement referred to in subsection (1) as an order of the Court, the Court may-

- (a) make the order as agreed to and proposed by the Commission and the undertaking or undertakings concerned;
- (b) indicate any changes that must be made in the draft order before it will make the order; or
- (c) refuse to make the order.

41 Publication of decision of Commission

(1) The Commission must cause notice to be given in the *Gazette* of any action to be taken under section 38 and of any consent agreement referred to in section 40 to be submitted to the Court for confirmation as an order of the Court.

(2) The notice referred to in subsection (1) must include-

- (a) the name of every undertaking involved; and
- (b) the nature of the conduct that is the subject of the action or the consent agreement.

CHAPTER 4

MERGERS (ss 42-51)

42 Merger defined

- (1) For the 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.
- (2) A merger contemplated in subsection (1) may be achieved in any manner, including-
- (a) purchase or lease of shares, an interest, or assets of the other undertaking in question; or
 - (b) amalgamation or other combination with the other undertaking.
- (3) 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 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 in paragraphs (a) to (f).

43 Control of mergers

- (1) This Chapter applies to every proposed merger not falling within a class which the Minister, with the concurrence of the Commission, has determined and specified by notice in the *Gazette* to be excluded from the provisions of this Chapter.
- (2) The Minister may under subsection (1) determine a class or classes of proposed mergers 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 of any one or more 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.

(3) No person, either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless-

- (a) the proposed merger is-
 - (i) approved by the Commission in accordance with the provisions of this Chapter; and
 - (ii) implemented in accordance with any conditions attached to the approval; or
- (b) the relevant period referred to in paragraph (a), (b) or (c) of subsection (1), or subsection (2), of section 45, as the case may be, has elapsed without the Commission having made a determination in relation to the proposed merger.

44 Notice to be given to Commission of proposed merger

(1) Where a merger is proposed each of the undertakings involved must notify the Commission of the proposal in the prescribed manner.

(2) If, after receipt of a notification in terms of subsection (1), the Commission is of the opinion that in order to consider the proposed merger it requires further information, it may, within 30 days of the date of receipt of the notification, request such further information in writing from any one or more of the undertakings concerned.

45 Period for making determination in relation to proposed merger

(1) Subject 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.

(2) If 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.

46 Conference in relation to proposed merger

(1) If the Commission considers it appropriate it may determine that a conference be held in relation to a proposed merger.

(2) If the Commission determines that a conference must be held it must, before expiry of the period referred to in paragraph (a) or (b) of subsection (1) of section

45 or subsection (2) of that section, as the case may be, give reasonable notice to the undertakings involved in writing-

- (a) convening the conference;
- (b) specifying the date, time and place for the holding thereof; and
- (c) stipulating the matters to be considered thereat.

47 Determination of proposed merger

(1) In making a determination in relation to a proposed merger the Commission may either-

- (a) give approval for the implementation of the merger; or
- (b) decline to give approval for the implementation of the merger.

(2) 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-

- (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;
- (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.

(3) For the purpose of considering a proposed merger the Commission may refer the particulars of the proposed merger to an inspector for investigation and a report in relation to the criteria referred to in subsection (2), and must inform the undertakings involved of such referral.

(4) As soon as practicable after a referral in terms of subsection (3), the inspector concerned must-

- (a) investigate the proposal so referred; and
- (b) before the date specified by the Commission, furnish the Commission with a report of the investigation.

(5) Any person, including a person not involved as a party in the proposed merger, may voluntarily submit to an inspector or the Commission any document, affidavit, statement or other relevant information in respect of a proposed merger.

(6) The Commission may give approval for the implementation of a proposed merger on such conditions as the Commission may consider appropriate.

(7) The Commission must-

- (a) give notice of the determination made by the Commission in relation to a proposed merger-
 - (i) to the parties involved in the proposed merger, in writing; and
 - (ii) by notice in the *Gazette*; and
- (b) issue written reasons for its determination-
 - (i) if it prohibits or conditionally approves a proposed merger; or
 - (ii) if it is requested to do so by any party to the merger.

48 Revocation of approval of proposed merger

(1) The Commission may at any time, after consideration of any representations made to it in terms of subsection (2), 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.

(2) If the Commission proposes to revoke its decision under subsection (1), it must-

- (a) give notice in writing of the proposed action to every undertaking involved in the merger, and to any other person who in the opinion of the Commission is likely to have an interest in the matter; and
- (b) call upon such persons to submit to the Commission, within 30 days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.

49 Review of decisions of Commission on mergers by Minister

(1) Not later than 30 days after notice is given by the Commission in the *Gazette* in terms of section 47(7) of the determination made by the Commission in relation to a proposed merger, a party to the merger may make application to the Minister, in the form determined by the Minister, to review the Commission's decision.

(2) Within 30 days after receiving an application in terms of subsection (1), the Minister must by notice in the *Gazette*-

- (a) give notice of the application for a review; and
 - (b) invite interested parties to make submissions to the Minister in regard to any matter to be reviewed within the time and manner stipulated in the notice.
- (3) Within 4 months after the date that an application for a review was made, the Minister must make a determination either-
- (a) overturning the decision of the Commission;
 - (b) amending the decision of the Commission by ordering restrictions or including conditions; or
 - (c) confirming the decision of the Commission.
- (4) The Minister must-
- (a) give notice of the determination made by the Minister in relation to the review-
 - (i) to the Commission and to the parties involved in the proposed merger, in writing; and
 - (ii) by notice in the *Gazette*; and
 - (b) issue written reasons for that determination to the Commission and the parties involved.
- (5) The Minister may determine the procedure for a review in terms of this section.

50 Compliance with other laws relating to mergers

Approval 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.

51 Merger implemented in contravention of this Chapter

If a merger is being, or has been, implemented in contravention of the provisions of this Chapter, the Commission may make application to the Court for-

- (a) an interdict restraining the parties involved from implementing the merger;
- (b) an order directing any party to the merger to sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger;
- (c) declaring void any agreement or provision of an agreement to which the merger was subject;
- (d) the imposition of a pecuniary penalty.

CHAPTER 5 JURISDICTION OF COURT (ss 52-53)

52 Jurisdiction of court

Without prejudice to the powers vested in the Court, the Court has jurisdiction to hear and determine any matter arising from proceedings instituted in terms of this Act.

53 Pecuniary penalties

- (1) The Court may impose a pecuniary penalty-
 - (a) for contravention of the Part I or the Part II prohibition;
 - (b) for contravention of, or non-compliance with, a condition attached to an exemption granted under Part III of Chapter 3;
 - (c) for contravention of, or non-compliance with, an order of the Court;
 - (d) for the implementation of a merger to which Chapter 4 is applicable-
 - (i) without the approval of the Commission as required by that Chapter;
 - (ii) in contravention of a decision of the Commission prohibiting the merger under that Chapter; or
 - (iii) in a manner contrary to a condition under which approval for the merger was given by the Commission under that Chapter.

(2) A pecuniary penalty may be imposed under subsection (1) for any amount which the Court considers appropriate, but not exceeding 10 percent of the global turnover of the undertaking during its preceding financial year.

(3) In determining an appropriate penalty, the court must have regard to all relevant matters concerning the contravention, including-

- (a) the nature, duration, gravity and extent thereof;
- (b) the nature and extent of any loss or damage suffered by any person as a result thereof;
- (c) the behaviour of any undertaking involved;
- (d) the market circumstances in which it took place;
- (e) the level of profit derived therefrom;
- (f) the degree to which the undertaking involved has co-operated with the Commission and the Court; and
- (g) whether the undertaking has previously been found by the Court to have engaged in conduct in contravention of this Act.

(4) An order imposing a pecuniary penalty, including a pecuniary penalty arising from a consent agreement confirmed as an order of the Court in accordance with section 40, has the effect of, and may be executed as if it were, a civil judgment granted by the Court in favour of the Government of Namibia.

(5) A pecuniary penalty payable in terms of this Act must be paid into the State Revenue Fund.

CHAPTER 6 GENERAL PROVISIONS (ss 54-59)

54 Civil actions and jurisdiction

(1) A person who has suffered damage as a result of an infringement of the Part I or the Part II prohibition may not commence an action in any court for an award of damages or for the assessment of damages if that person has been awarded damages in a consent agreement confirmed in accordance with section 40.

(2) If a person who has not been awarded damages in a consent agreement contemplated in subsection (1) institutes proceedings in a court for an award of damages allegedly suffered as a result of an infringement of the Part I or the Part II prohibition, that person must file with the Registrar of the Court or the Clerk of the Court a notice from the chairperson of the Commission in the prescribed form certifying, either-

- (a) that the conduct on which the action is based has been found by the Court, following proceedings instituted by the Commission in terms of section 38, to be an infringement of the Part I or the Part II prohibition, and stating the date of that finding; or
- (b) that a consent agreement was confirmed in accordance with section 40 in relation to the conduct on which the action is based, and that no award for damages is provided for in that agreement for the benefit of the plaintiff, and stating the reasons therefor; or
- (c) that, following an investigation by the Commission in accordance with Part IV of Chapter 3 into the conduct on which the action is based, the Commission has decided not to take any action contemplated in section 38, and stating the reasons for the Commission's decision; or
- (d) that the Commission, having received a complaint or a request to investigate an alleged infringement of the Part I or the Part II prohibition in respect of the conduct on which the action is based, has in terms of section 33(2) decided not to conduct an investigation, and stating the reasons for the Commission's decision.

55 Prohibition on disclosure of information

(1) A member of the Commission or of a committee, the Secretary, any other employee of the Commission and any other person required or permitted to be present at any meeting of the Commission or of a committee or at any investigation in terms of this Act, may not publish or communicate or in any other way disclose any information relating to the affairs of any person or undertaking that has come to such person's knowledge-

- (a) in the exercise of any power or performance of any duty or function under this Act; or
- (b) as a result of such person's attendance at such meeting or investigation.

(2) Subsection (1) does not apply to information disclosed-

- (a) for the purpose of the proper administration or enforcement of this Act;
- (b) for the proper administration of justice; or
- (c) at the request of an inspector, the chairperson or any other member entitled to receive the information.

56 Disclosure of private interest by staff

(1) The Secretary, an inspector or any other person employed by the Commission who has a financial or other personal interest in any matter which is the subject of an investigation by the Commission-

- (a) must disclose that interest to the chairperson; and
- (b) unless the Commission otherwise directs, may not participate or assist in the investigation of that matter.

(2) The Secretary, an inspector or any other person employed by the Commission may not use any confidential information obtained in the performance of their functions to obtain, directly or indirectly, a financial or other advantage for himself or herself or any other person.

57 Time within which investigation may be initiated

An investigation into an alleged infringement of the Part I or the Part II prohibition may not be initiated after three years from the date the infringement has ceased.

58 Limitation of liability

Neither the Commission nor any member, the Secretary, any employee of the Commission or any other person engaged by the Commission in connection with any function of the Commission is liable in respect of anything done in good faith in terms of this Act.

59 Standard of proof

In any proceedings in terms of this Act, other than proceedings in terms of section 39(2) or criminal proceedings, the standard of proof is on a balance of probabilities.

CHAPTER 7 OFFENCES AND PENALTIES (ss 60-65)

60 Hindering administration of Act

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.

61 Failure to comply with summons

A person commits an offence who-

- (a) having been duly summoned to attend before the Commission, without reasonable excuse fails to do so; or
- (b) being in attendance as required-
 - (i) refuses to take an oath or affirmation lawfully required by the Commission;
 - (ii) refuses, after having taken the oath or an affirmation, to answer any question to which the Commission may lawfully require an answer or gives evidence which the person knows is false;
 - (iii) fails to produce any document or thing in his or her possession or under his or her control lawfully required by the Commission to be produced to it.

62 Failure to comply with order of Court

A person commits an offence who contravenes or fails to comply with an interim or final order of the Court given in terms of this Act.

63 Other offences

A person commits an offence who-

- (a) does anything calculated to improperly influence the Commission or any member concerning any matter connected with the exercise of any power or the performance of any function of the Commission;
- (b) anticipates any decision of the Commission concerning an investigation in a way that is calculated to influence the proceedings or decision;
- (c) does anything in connection with an investigation that would constitute contempt of court had the proceedings occurred in a court of law;
- (d) knowingly provides false information to the Commission;
- (e) defames a member in his or her official capacity;
- (f) contravenes section 10(1) or (3);
- (g) contravenes section 55;
- (h) contravenes section 56.

64 Penalties

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.

65 Jurisdiction of magistrates' courts

Notwithstanding any other law, a magistrate's court has jurisdiction to impose any penalty provided for in section 64.

CHAPTER 8 APPLICATION OF THIS ACT AND OTHER LEGISLATION RELATING TO COMPETITION (ss 66-67)

66 Definitions for this Chapter

(1) In this section-

"public regulation" means any law, or any licence tariff, directive or similar authorisation issued by a regulating authority or pursuant to any statutory authority; and

"regulating authority" means an entity established by or under any law which is responsible for regulating an industry or sector of an industry.

67 Relationship with other authorities

(1) If a regulatory authority, in terms of any public regulation, has jurisdiction in respect of any conduct regulated in terms of Chapter 3 or 4 within a particular sector, the Commission and that authority-

- (a) must negotiate an agreement to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to secure the consistent application of the principles of this Act; and
- (b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

(2) In addition to the matters contemplated in paragraph (a) of subsection (1), an agreement in terms of that subsection must-

- (a) identify and establish procedures for the management of areas of concurrent jurisdiction;
- (b) promote co-operation between the regulatory authority and the Commission; and
- (c) provide for the exchange of information and the protection of confidential information.

(3) An agreement referred to in subsection (1) must be published in the *Gazette*.

CHAPTER 9 TRANSITIONAL (ss 68-70)

68 Transitional provisions

(1) For twelve months after the date this Act comes into force, or such longer period as the Minister may determine by notice in the *Gazette*, and, if an application for exemption under section 27 is submitted to the Commission within that period, until the Commission takes a decision on that application, the Part I prohibition does not apply to any agreement, decision or concerted practice in existence on that date which is of a nature contemplated by the Part I prohibition.

(2) If, during the period between the publication of this Act in the *Gazette* and the date of its commencement, a transaction is concluded whereby a merger is effected to which Chapter 4 of this Act would have applied had the transaction been concluded after the date of commencement, such merger is regarded for a period of 12 months from the date of commencement to be a merger implemented in contravention of that Chapter, unless the parties to the merger, within three months of the date of commencement of this Act, notify the Commission of the transaction in terms of section 44 as if it were a proposed merger.

(3) Subject to subsection (4), the provisions of Chapter 4, with the changes required by the context, apply to a merger that is notified to the Commission in terms of subsection (2).

(4) The provisions of section 51 do not apply to a transaction referred to in subsection (2) until-

- (a) the period of three months referred to in that subsection expires without notification of the transaction in accordance with the subsection; or

- (b) if notification of the transaction is given in accordance with that subsection, a determination in relation to the merger is made by the Commission pursuant to subsection (3).

69 Repeal of laws

The following laws are repealed:

- (a) the Regulation of Monopolistic Conditions Act, 1955 (Act 24 of 1955);
- (b) the Regulation of Monopolistic Conditions Amendment Act, 1958 (Act 14 of 1958);
- (c) the Regulation of Monopolistic Conditions Amendment Act, 1975 (Act 48 of 1975); and
- (d) the Regulation of Monopolistic Conditions Amendment Act, 1976 (Act 23 of 1976)

70 Short title and commencement

(1) This Act is called the Competition Act, 2003, and comes into operation on a date to be determined by the Minister by notice in the *Gazette*.

(2) Different dates may be determined under subsection (1) in respect of different provisions of this Act.