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**THE POWERCOM JUDGEMENT: A CRITICAL ANALYSIS OF ITS IMPACT
ON COMPETITION AND CONSUMER WELFARE IN NAMIBIAS MOBILE
TELECOM INDUSTRY.**

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I hereby declare that I have read and understood the regulations governing the submission of LLM Commercial Law dissertation including those relating to length and plagiarism as included in the rules of this University, and that this dissertation conforms to those regulations.

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1. INTRODUCTION

On 9 January 2012, the Competition Commission of Namibia (to be referred to as the NaCC) received a notification of a proposed merger from Telecom Namibia Ltd (to be referred to as Telecom Namibia/respondent) indicating that it intended acquiring Powercom (Pty) Ltd trading as “Leo” (to be referred to as Powercom/Leo) as contemplated by section 44(1) of the Namibian Competition Act 2 of 2003 (to be referred to as the Namibian Competition Act).

The particular, provision prescribes that:

‘Where a merger is proposed, each of the undertakings involved must notify the Commission of the proposal in the prescribed manner’¹

The ‘NaCC’ handed down its determination on the 27 April 2012 as prescribed by the above stated provision. The merger was approved on condition that, from the effective date of the implementation of the merger, the merging parties would put in place a separate and independent shareholding structure for Telecom Namibia Ltd and that of MTC.² This structure was to be effected within a period of two (2) years from the date of the notice.³ The Commission’s decision was based on grounds that the proposed transaction is likely to substantially prevent competition in Namibia as the responded was acquiring the only other mobile service provider in the country.⁴ The conditions were said to be imposed to mitigate the negative impact that the merger may have on the mobile telecommunication market in the future.⁵

Because the Communication Regulatory Authority of Namibia (to be referred to as CRAN) had concurrent jurisdiction over competition matters empowered both by section 33 and 34 (1) of the Namibian Communications Act 8 of 2009 (to be referred to as the Communications Act) and enabled by section 67 of the

¹ Namibian Competition Act 2 of 2003.

² Notice of determination from the Namibian Competition Commission at 2.

³ Ibid.

⁴ Ibid.

⁵ Notice of determination from the Namibian Competition Commission at 2.

Namibian Competition Act⁶. Simultaneously they had to make an independent determination of the proposed merger. This determination was also enforced by a memorandum of agreement concluded between the two authorities on the 11 December 2011.⁷

On the 7 June 2012, CRAN board of directors approved the application for the transfer of Powercom's Telecommunication licenses to Telecom but subjected it to certain conditions, which will be discussed in chapter 3 of this paper.

The conditions were stated to be supporting the objectives of the Communications Act, specifically the objective of encouraging private investments in the telecommunications sector.⁸

Very soon after CRAN's determination, "Leo" approached the High Court to review and set aside the conditions imposed: contending that the powers exercised by CRAN were unauthorised by the Communications Act.⁹ The Court asserted that CRAN misconceived its powers under section 2 (i) of the Communications Act¹⁰, which refers to encouraging "*private investment*". The court affirmed that CRAN had no power under section 2 to force private investment or to prohibit further public investment in the telecommunications sectors.¹¹

The court subsequently set aside the decision on the 24 September 2012 asserting that the conditions were in fact unauthorised by the Communications Act 2009¹² and therefore invalid.¹³ The case was referred back to CRAN to reconsider before or on the 19 October 2012.¹⁴

⁶ Namibian Competition Act 2 of 2003.

⁷ Memorandum of Agreement available at http://www.cran.na/downloads/Regulations/Government%20Gazettes/4868-Gen_N17%5B3%5D.pdf accessed on 28 October 2012.

⁸ *Powercom v The Communication Regulatory Authority* (2012) HCN (A) 158 at 5.

⁹ *Powercom v The Communication Regulatory Authority* (2012) HCN (A) 158 at 14.

¹⁰ Act 8 of 2009.

¹¹ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 14.

¹² Namibia Communications act 8 of 2009.

¹³ Namibia Communications act 8 of 2009.

¹⁴ *Powercom v The Communication Regulatory Authority* (2012) (A) HCA 158 at 22.

CRAN was reluctant to appeal against the judgement gave the case no further consideration and issued an unconditional approval on the 19 October 2012.¹⁵

This paper is going critique the approach adopted by the regulators when they assessed the merger and critically deconstruct the possible competition concerns which could emanate from the merger. First, the paper will start off with a brief overview of the telecommunication industry in Namibia followed by a long discussion of the theoretical foundation underpinning general worldwide competition policy. Second, the paper will briefly discuss and analyse the theory of consumer and total welfare standard and establish which view is fit for a developing country. Third, an analysis of the relationship between competition law and consumer protection will be discussed. Thereafter, the paper will solely focus on the Powercom's case decision, particularly the effect of the possible abuse of dominance and anti-competitive effects which could emanate from the merger.

In view of the above, the paper establishes that the merger shouldn't have been approved under the prevailing telecommunications market conditions. The paper explains that both the "NaCC" and "CRAN" should have conducted a thorough examination of the market under study and should have questioned whether the prevailing "market structure" in the telecommunications market was really conducive to allow for a merger between the only two market participant in the mobile telecommunication industry. The paper further prescribes that first, the authorities should have conducted an extensive market and quantitative analysis to determine whether the proposed merger would stimulate and leverage competition in the market. Second, scrutinise above all odds whether the merger serves the best interest and conforms to the consumer welfare standard prescribed. The paper then proposes possible stringent requirements that should have been considered by both authorities before handing down their notice of determination.

¹⁵ *Powercom v The Communication Regulatory Authority* (2012) (A) HCA 158 at 22.

The last part of the paper briefly discusses why incorporating the Consumer and Competition Commission under one regulatory authority should be favourably considered by a developing country and establishes that “CRAN” as a telecommunications, postal and broadcasting statutory body should not even be allowed to review mergers in the future as far as competition matters are concerned.

1. Brief background of the telecommunication industry in Namibia

Subsequent to independence in 1990 the telecommunication sector in Namibia was to a very large extent regulated by the state through the Namibian Post and Telecommunications holding Ltd “to be referred to as” NPTH. This institution was a classic post, telephone and telegraph service similar to The South African Post and Telecommunications “to be referred to as” SAPT which was prevalent in South Africa pre-1990 and later commercialised into Telkom SA.¹⁶ In line with the government of Namibia’s declared policy to embark on a new economic approach by deregulating certain functions of the state and opening up the markets to encourage competition, the Post and Telecommunication Act of 1992 was promulgated.¹⁷ This piece of legislation led to the incorporation of Telecom Namibia Ltd which was later going to become the only fixed line telecommunication service provider in the country. To this day they remain a monopolist firm with all its shares wholly owned by the state. Mobile Telecommunications Limited (to be referred to as MTC) a mobile service provider was established in 1995 as a joint venture between NPTH, Telia¹⁸ and Swedlund¹⁹. During May 2004, NPTH concluded a transaction whereby it acquitted 100% of the shares in MTC by acquiring the 49 per cent held by Telia and Swedlund.²⁰ In 2006, MTC sold 34 per cent of its shares to a Portugal

¹⁶ *The Competition Commission v Telekom* (2012) 11 (CT) at 5.

¹⁷ Telecommunications in Namibia available at <http://www.klausdierks.com/Telecommunication/2.htm> accessed 12 January 2012).

¹⁸ Telia is a Swedish telecommunication Company.

¹⁹ Swedlund is a Swedish Investment company.

²⁰ MTC Namibia website available at <http://www.mtc.com.na/about/vision-mission> accessed on 09 November 2012.

Telecom company and now currently holds 66 per cent shares.²¹ Today MTC is currently the largest and dominant mobile operator in Namibia with over two million active subscribers.²²

On the 16 May 2007, Namibia's second mobile and cellular service provider was commercially launched under the trading name of Cell One.²³ It was later rebranded to become "Leo" when new shareholders acquired shares in the firm.²⁴ The establishment of Leo was triggered by investors interested on winning a share over from the monopolist MTC.²⁵ Contrary to the expected outcome, consumers were very reluctant to switch to the new cellular network provider some questioning whether Cell One had the infrastructure to keep abreast with the technology and infrastructure MTC spend year's developing and questioning whether if they had to switch how the new service provider will respond to or mitigate the cost associated with switching service providers.

²¹ MTC Namibia website available at <http://www.mtc.com.na/about/vision-mission> accessed on 09 November 2012.

²² Ibid.

²³ Powercom v The Communication Regulatory Authority (2012) (A) 158 at 5.

²⁴ Powercom v The Communication Regulatory Authority (2012) (A) 158 at 5.

²⁵ MTC Namibia website available at <http://www.mtc.com.na/about/vision-mission> accessed on 09 November 2012.

2. Foundation of Competition Law

'Of all human powers operating on the affairs of mankind, none is greater than that of competition' Henry Clay²⁶

There is a misconception in the society that competition law and competition policy mean one and the same thing. The two although used interchangeably belong to different schools of thought. The concept of competition law is rooted under the foundation of competition policy which has a much broader meaning as Dimbga asserts:

'Competition policy covers all aspects of government actions that affect the conditions under which firms compete in a particular market. Thus, trade policy, investment regulations, intellectual property rights, regulation on service providers and product distributors, bankruptcy laws, subsidies and other aids, deregulation and privatisation programmes and procurement services are all components of competition policy.'²⁷

'Competition law on the other hand, is 'that set of rules, disciplines and judicial decisions maintained by governments relating either to agreements between firms that restrict competition or to the concentration or abuse of market power on the part of private firms'.²⁸ 'While competition policy is concerned with economic development, competition law seeks to protect the competitiveness of the economy.'²⁹ This is done in three ways:

first by preventing agreements that could potentially harm competition in the economy, second by ensuring that a dominant firm in the market does not abuse its position to anti competitive gain and third by regulating combinations and mergers of enterprises that if allowed would

²⁶ Clay H, American Statesman, Secretary of State and Presidential Candidate, Speech to the American Senate, 1832.

²⁷ Dimbga N, 'Introduction to Competition Law: a sine qua non to a Liberalised Economy' P 7, paper presented on 24-26 May 2006, Lagos, Nigeria available <http://www.globalcompetitionforum.org/regions/africa/Nigeria/INTRODUCTION%20TO%20COM%20PETITION%20LAW.pdf> accessed 14 October 2012.

²⁸ Dimbga, 'Introduction to Competition Law: a sine qua non to a Liberalised Economy' P 4 , paper presented on 24-26 May 2006, Lagos, Nigeria available <http://www.globalcompetitionforum.org/regions/africa/Nigeria/INTRODUCTION%20TO%20COM%20PETITION%20LAW.pdf> accessed 14 October 2012.

²⁹ Singh, 'The implementation of Competition Law and Policy-Economic Development Concerns for the Developing World and India p P6, paper submitted to the Competition Commission of India. Available at <http://cci.gov.in/images/media/ResearchReports/MalvikaReport260411.pdf> accessed 14 October 2012.

substantially reduce competition in the relevant market(s) implicated by the transaction.³⁰

For countries like Namibia, South Africa, Zambia and many other developing nations for example, competition concerns form a very important part of their economic transformation process. This is not only due to reasons of being developing nations, but because they have a mixed economy which is comprised both of capitalist and socialistic characteristics. ‘These concerns point to a developmental aspect of the economy which policy and law makers must take into account before implementing a policy in its full vigour’³¹. Competition policies need to take into account the socio-economic circumstances of the country as well as the degree of liberalisation and privatisation reform which has taken place. As Joseph Stiglitz pointed out “Markets are shaped by laws, regulations and institutions. Every law, every regulation every institutional arrangement has distributive consequences”³² Singh asserted that:

‘There are strong links between competition policy and numerous basic pillars of economic development. There is persuasive evidence from all over the world confirming that rising levels of competition have been unambiguously associated with increased economic growth, productivity, investment and increased average living standards’³³

A question that various scholars keep exploring is who does this economic growth, productivity, investment and an increased average living standard benefit? Do they work to the advantage of everyone or do they only advantage those at the top and disadvantage the rest? How do they display an equal level playing field for both tiers to benefit from? Joseph Stiglitz explained that

³⁰ Singh, ‘The implementation of Competition Law and Policy-Economic Development Concerns for the Developing World and India at 6, paper submitted to the Competition Commission of India. Available at <http://cci.gov.in/images/media/ResearchReports/MalvikaReport260411.pdf> accessed 14 October 2012.

³¹ Singh, ‘The implementation of Competition Law and Policy-Economic Development Concerns for the Developing World and India at 19, paper submitted to the Competition Commission of India available at <http://cci.gov.in/images/media/ResearchReports/MalvikaReport260411.pdf> accessed 14 October 2012.

³² Stiglitz, *the Price of Inequality* New York Penguin Books (2012) at 52.

³³ Singh Ajit, *Competition Law, Development and Developing Countries* at 1, available at <http://www.icrier.org/pdf/wto7.pdf> accessed 11 November 2012.

Widely unequal societies do not function effectively and their economies are neither stable nor sustainable in the long term. When one interest group holds too much power, [which is usually the case in most developing countries] it succeeds in getting policies that benefits itself rather than policies that would benefit the society as a whole³⁴

This is a serious concern for developing countries, which calls into question, what type of competition policy design is needed for a developing country which will seek to benefit the collective society as a whole?

When South Africa was in the process of drafting up a competition policy, it was faced with deep socio-economic concerns. As a newly independent nation coming out of a period of apartheid which saw a disproportionate amount of income concentrated in the hands of a white minority; it had to adopt a policy which was going to reverse the apartheid agenda and progressively try to allow more people previously denied an equal opportunity to participate in the economy. The question then was, where do they begin?

The policy document had four major issues to address

Paragraph 2.4.11³⁵ fore grounded core competition objective: This section stressed the importance of property rights, the need for greater economic efficiency and the objective of ensuring optimal allocation of resources all within the developmental context that consciously attempts to correct structural imbalances and past economic injustices.³⁶

Paragraph 2.4.12³⁷ focused on the broader social and industrial policy objectives which were ultimately to be identified as the public interest content of the act. The interest of consumers, workers, emerging entrepreneurs and other corporate competitors had to be incorporated.³⁸

Paragraph 2.4.13³⁹ addressed the procedural aspects: competition policy to assume that the resolution of competition law cases be conducted in a procedurally fair, coherent, expeditious manner.⁴⁰

³⁴ Stiglitz, J. *The Price of Inequality* (2012) at 82.

³⁵ Lewis D *Thieves at the Dinner Table*, (2012) at 31.

³⁶ Lewis D *Thieves at the Dinner Table*, (2012) at 31.

³⁷ Lewis note 20.

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

Paragraph 2.4.14⁴¹ addressed the compatibility between competition policy and other policy fields, by incorporating existing policies and future modes of market regulation across other governmental policies.⁴²

It is evident that the proposed competition policy guidelines adopted by South Africa took a holistic approach. Taking into consideration the idea that competition law cannot operate in isolation and the need for public policy and public interest reform is especially necessary to structure the market in a way that will accommodate everyone especially the previous disadvantaged to participate in the economy. Thus, concerns that need to be taken into account when drafting a competition policy for a developing nation are public welfare which is at the heart of policy makers, the presence of abject and systematic poverty which encompasses a large section of the society, poor population indulging in farming, education, social development and access to academia.⁴³

2.1 The Consumer Welfare v Total Welfare Paradox

The general objective of competition law is rooted under the foundation of consumer welfare, a paradox loosely defined and widely debated by competition scholars. One can contend that consumer welfare informs competition law to design a legislative framework which ultimately leads to the effect of reducing prices, increasing output, improving quality and stirring innovation. One might also simply demonstrate that it is a framework designed to cater for the needs of consumers as a means to an end. However, the term [consumer welfare] has several interpretations and it has often been 'misinterpreted or even misunderstood in competition law analyses.'⁴⁴ 'It has been argued that competition should be preserved and encouraged as it is in the interest of

⁴¹ Ibid.

⁴² Ibid.

⁴³ Singh, 'The implementation of Competition Law and Policy-Economic Development Concerns for the Developing World and India' at 32 available at <http://cci.gov.in/images/media/ResearchReports/MalvikaReport260411.pdf> 14 October 2012.

⁴⁴ Csere KJ 'The Controversies of the Consumer Welfare Standard' (2007) 3 *Competition Law Review* 121 at 121.

consumers'.⁴⁵ Alternatively, it has also been suggested that in competition law the primary role of the consumer welfare standard is to verify the goals of competition and to delineate the general legal framework of competition law enforcement by establishing the basis for the standard of proof.⁴⁶ Depending on how one might interpret the term [consumer welfare], from an outside observers point of view, it could be implied that there is a strong view among scholars that consumers should be the object and the predominant concern of a competition law regime.

Muris states that:

Antitrust goals are to protect consumers. Antitrust law should care intensely about sustaining the effectiveness of competition and display indifference about the identities or fortunes of individual market participants. A well functioning market serves consumers because competition presses producers to offer lower prices or to improve product quality to succeed. Competition also motivates sellers to provide truthful information about their products and drives them to fulfil their promise to consumers. Through improved theoretical understanding and painful practical experience, antitrust now finally regards enhancing consumer welfare as its single unifying goal. Antitrust relies on sound economics, both theoretical and empirical.⁴⁷

There are still a substantial number of scholars who refuse to subscribe to this school of thought some inferring that the goal of competition law should not be isolated from economics and should be interpreted from a more general neoclassical total welfare perspective. 'Economists traditionally favour a welfare standard on the basis that it generates the most for society as a whole and strives for the maximisation of efficiency'.⁴⁸ This is not surprising because the standard benchmark of a consumer welfare paradox is to ultimately benefit consumers. 'Total welfare standard refers to the aggregate value that an

⁴⁵ Hargalou 'Competition Law, Consumer Policy and the Retail Sector; the systems relations and the effects of a strengthened consumer protection policy on competition.' (2007) 3 *Competition Law Review* 175 at 175 .

⁴⁶ Cseres KJ 'The Controversies of the Consumer Welfare Standard' (2007) *CLR Volume* 3 121 at 121.

⁴⁷ Muris TJ 'Principles for a successful Competition Agency' (2005) 72 *University of Chicago Law Review* 165 at 169.

⁴⁸ Cseres KJ 'The Controversies of the Consumer Welfare Standard' (2007) 3 *Competition Law Review* 121 at 126.

economy produces, without regard for way that gains and or losses are distributed'.⁴⁹ Proponents of this welfare standard believe that most of the surplus goes to consumers anyway because competition in the market gives consumers a choice allowing them the consideration to eliminate firms who do not add value to their choice of products and services.⁵⁰ Moreover, they criticise the consumer welfare standard stating that the paradigm only looks at the surplus that goes to consumers ignoring that which goes to sellers.⁵¹ Generally in a developing country context this paradigm might find little favour because of the way markets are structured and corporations are arranged. 'Market failures are still prevalent, many caused among others as a result of inadequate regulation, ineffective competition law enforcement and insufficient consumer protection'.⁵²

The total welfare paradox in nature also has a very stringent mode of application and generally tends to favour large corporations to the expense of consumers. Thus, It would be inappropriate to fully apply this school of thought in developing countries merely because it disregards market failures, excludes consumer consideration and promotes the notions that markets are all the same and therefore be regulated the same. The total welfare argument may be better suited or applied in third world countries because they had the time to develop their economies and structure their markets to a point that allows their firms to compete freely beyond industrial intervention. Eleanor Fox posed a very relevant question when she asked "what the foundational perspective should be which should inform competition law in developing countries?"⁵³ This question was both critical and vital for developing nations at the time because it really questioned the deficit in the corporate dynamics, queried the relevance of the authorities

⁴⁹ Hovenkamp H 'Distributive Justice and Consumer welfare in antitrust' (2011) he illustrated an example by stating that if a product costs \$5 to make and is sold for \$8, the \$3 surplus goes to the seller. On the other side, if a customer was willing to pay \$10 for a product and buys it for \$8, then this \$2 Surplus is value added to the consumer.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Cseres KJ 'What has Competition done for Consumers in Liberalized markets' (2008) 4 *Competition Law Review* 77 at 77.

⁵³ E M Fox 'Economic Development Poverty and Antitrust; the other path (1991) 13 *Southwestern Journal of Law and Trade in the Americas* 211 at 214.

that regulate them and criticised level of consumer education which existed. In comparing third world countries from developing ones, she adopted two models. First one was based on the principle of liberalization and free enterprise and the second one was based on the principles that centrally take account of the opacity, blockage and political capture of markets and includes some measure of helping to empower people economically to help themselves.⁵⁴

Observing the two models Eleanor adopted, one could easily assume that her first model correlates with the total welfare standard and the second model more with the consumer welfare paradox. However; she noted that even if the second model might seem more legitimate to a developing economy in the abstract, the first model is a path well-travelled, and reinventing a path is difficult and costly.⁵⁵ Obviously, market structures differ from country to country but for developing countries to correct certain market failures which have plagued their economies for years, they will have to adopt policies that go beyond mere application of the second model and adopt guidelines which should address the socio economic issues prevalent in the country without compromising the efficiency model.

Besides, it is relevant to illustrate that competition policy falls within the ambit of two academic branches, namely law and economics. Fundamentally, these are two different disciplines founded on entirely two different ideals. Lawyers become lawyers by partly studying legal traditions and becoming familiar with the underlying values underpinning their systems.⁵⁶ Economists on the other hand are much more concerned with efficiency arguments.⁵⁷ Thus, the differences articulated by the above academic branches create the distinction, which distinguishes consumer welfare from a total welfare approach.

Accordingly, it is important to note that globalisation has also set another obstacle in the way we view and assess economies. It has opened up markets

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Cseres KJ 'The controversies of the consumer welfare standard' (2007) 3 *Competition Law Review* Issue 121 at 128.

and reduced barrier to entry, which subsequently means that the idea of establishing a universal welfare standard may prove to be quite a challenge. 'European competition policy has recently come to acknowledge that besides market integration the enhancement of consumer welfare is the ultimate goal of the enforcement of competition rules'.⁵⁸ Whether this premise works or not, depends entirely on the mechanisms and schemes put in place by competition authorities to pay prudence to the socio-economic needs of their country.

2.2 The relationship between Competition and Consumers

The view across many competition law academics is that consumers are the backbone of any functioning market. Competition by definition is only enabled because consumers are willing to buy. Eliminating consumers from the market will most certainly render competition law irrelevant and pointless. 'Competition enforcement can therefore be seen as a means of protecting consumer options in the market place'.⁵⁹ Andriychuk tends to disagree with the above stated analysis, stating that:

Competition should not be seen as a zero sum game. 'Even in sports where the parties are fighting for the trophy, which by definition presupposes only one winner and the rest losers, there are other ancillary benefits (positive externalities) aside from the trophy'.⁶⁰

Yes, this argument will make sense if competitors were competing in a market which did not require consumers to pay? Besides, it would be a meaningless exercise to enable and protect competition [in this case play the game] without any sort of monetary return. The above analysis therefore suggests that without protecting consumers one would not be able to enable and protect competition.

⁵⁸ Cseres KJ 'The controversies of the Consumer Welfare Standard' (2007) 3 *Competition Law Review* 121 at 123. This recognition has taken place parallel to the decentralization of the European Competition Law enforcement.

⁵⁹ Haracohou I 'Competition Law, Consumer Policy and the Retail Sector; the systems relations and the effects of a strengthened consumer protection policy on competition.' (2007) 3 *Competition Law Review* 175 at 176.

⁶⁰ Andriychuk O 'Can we Protect Competition without Protecting Consumers? (2010) 6 *Competition Law Review* 77 at 80.

Smith reinforced this idea by stating that:

‘Consumption is the sole end and purpose of production and the interest of the producer ought to be attended to only so far as it may be necessary for promoting that of the consumer’.⁶¹ The same sentiments were also echoed by a press release issued by the European Commission stating that:

Waterson further pointed out that there are two features of consumers which impact directly on competition: ‘First, the nature of their search behaviour-how much do they search and how many players do they search amongst? Second, how do they respond to differences in prices between players in the industry?’⁶²

These characteristics modify competition and have a direct impact on the competitiveness of any industry; mainly because it is common practice in any industry that consumers become loyal to certain suppliers, this translates into switching costs implication which may distort competition.

2.3 Competition Policy in Telecommunications

The World Bank defines Competition policy as:

Government measure that directly affects the behaviour of enterprises and the structure of industries. An appropriate competition policy includes both: (a) policies that enhance competition in local and national markets, such as liberalized trade policy, relaxed foreign investments and ownership requirements, and economic deregulation, and (b) competition law, also referred to as antitrust or antimonopoly law, designed to prevent anticompetitive business practices by firms and unnecessary government intervention in the marketplace.⁶³

Until recently in most countries, telecommunications service providers were to a very large extent state owned and state operated, and often protected in

⁶¹ Smith A, *The Wealth of Nations*, Book 4 chapter 8 London (1776).

⁶² Michael Waterson ‘The role of Consumers in Competition and Competition Policy’ (2001) available at <http://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2008/twerp607.pdf>, at 1, accessed on 12 July 2013.

⁶³ ‘Competition Policy’ available at <http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf> accessed 16 July 2013.

monopolistic markets.⁶⁴ Today, with the drastic reform of the telecommunication sectors and the increasing awareness of the importance competition in a market many of these institutions are now being privatised and moved into private hands. Opinions differ among scholars on whether privatisation of telecommunications service providers do indeed improve overall economic efficiency, hence improving general welfare or that privatisation reduces services available and increases prices⁶⁵. Nevertheless, 'a successful competition policy in the telecommunications sector can be a catalyst to obtaining lower prices, new and better services, greater consumer choice and increased investment in the telecommunications market'⁶⁶. For this to be successful a country needs to establish a regulatory approach which will take into account market failures, imperfect competition in a way that will distribute the benefits of liberalization to consumers in a liberalised telecommunications industry.⁶⁷ This would mean having to thoroughly study the market, consider the amount of market players in the industry, and distinguish between state owned and private owned service providers and the size of the market. While consumer welfare is considered the ultimate objectives of liberalising markets 'if demand is inelastic and switching costs are high or unfair trade or abusive practices prevent them from acting within their best interest, they [consumers] will not be able to enjoy the advantages of a competitive market'⁶⁸ Cseres points out that:

Deregulation and liberalization have the potential to increase competition and benefit consumers but this assumption will only hold when consumers have the legal and economic competence, the capacity,

⁶⁴ Lixin Xu, Wei Li 'The impact of Privatisation and Competition in the Telecommunications sector' (2004) at 2 available at <http://faculty.darden.virginia.edu/liw/papers/jle2004proof.pdf> accessed on 16 June 2013.

⁶⁵ Raul Gonzalez Pietrogiovanna 'The Benefits of Privatisation? The Mexican Experience in the Telecommunications Industry' at 1 available at <http://faculty.darden.virginia.edu/liw/papers/jle2004proof.pdf>, accessed on 16 June 2013.

⁶⁶ Anjan Dasgupta 'Competition Policy in Telecommunications- A Case Study of India' (2005) at 1, available http://papers.ssrn.com/sol3/papers.cfm?abstract_id=651681, accessed on 16 June 2012.

⁶⁷ K J Cseres 'What has competition done for consumers in liberalized markets?' (2008) 4 *Competition Law Review* 77 at 79.

⁶⁸ Cseres (note 51) at 79.

opportunity and motivation to take on the responsibilities shifted from the state to private individuals in the course of liberalisation⁶⁹

Poiese, also agreed and pointed out that:

‘As a starting point consumers will have the capacity and opportunity to assume responsibility for their own transactions and enforce their rights when markets are transparent, information costs are affordable and abuse of market power and unfair trade practices are controlled.’

These can only be achieved with effective competition law enforcement, strong competition and consumer protection agencies and assertive consumers.

Cseres posed a very relevant question, when she asked:

“Whether and to what extent do market imperfections influence competition law enforcement and whether competition law enforcement can remedy these market failures?”⁷⁰

Misinformed consumers can be subject to market power. ‘A consumer who is unaware of alternative choices before his purchase who might be subject to a seller’s pressure is in fact subject to market power’⁷¹ this is usually prevalent in situation where consumers get complacent with the service provider or were the cost of searching for an alternative service provider is too high. Otherwise, a consumer entering a contract with unfair contract terms can also be subject to the exploitation of market power, especially if the term and conditions of the contract prevents them from switching to another service provider within a specified period of time.⁷² Thus ‘Imperfect information may make a market that appears competitive behave anti-competitively because it can provide a basis for market power’⁷³

The analysis of the above assertion informs the dominating notion that competition law is there to serve consumers, protect them against anti-

⁶⁹ Cseres (note 52) at 80.

⁷⁰ Cseres (note 52) at 80

⁷¹ Cseres (note 52) at 80

⁷² Ibid.

⁷³ Cseres (note 52) at 81.

competitive practices to ensure that the concept of consumer welfare is realised. Imperfect information deprives consumers from lower prices, better products and more choices.⁷⁴ it should also be noted that the opening up of markets do not by itself encourage consumers to make an active choice between suppliers, policies to address this need to be implemented to ensure that markets do indeed become competitive.⁷⁵

2.4 Consumer Protection Issues

For effective competition law enforcement to be realised and consumer welfare benefits to accrue certain legislative requirements also need to be met. First, consumer protection and competition legislation need to be in place. Second, institutional frameworks which will enforce these pieces of legislation need to be established. South Africa enacted a Consumer Protection Act⁷⁶ in 2008. This piece of legislation has been proposed in Namibia and the Ministry of Trade and Industry in consultations with the Namibian Competition Commission have been researching in putting the law in place. At present, the public can only complain or make its voice heard via the media. They have no recourse to the law. The only piece of legislation which indirectly addresses their concerns is the Namibian Competition Act, and even this act operates in isolation because there is no consumer protection legislation to compliment it as far as consumer grievances are concerned.

'Liberalization and Privatisation efforts will only be effective if consumers are empowered to make informed choices and if consumers feel that they are protected from the market abuses and unfair trade practice'⁷⁷. The absence of a

⁷⁴ Robert Lande, John Kirkwood 'The fundamental goal of Antitrust: Protecting consumers not increasing efficiency' (2008) 84 *Notre Dame Law Review* 191 at 192.

⁷⁵ Michael Waterson 'The role of Consumers in Competition and Competition Policy' (2001) available at <http://www2.warwick.ac.uk/fac/soc/economics/research/workingpapers/2008/twerp607.pdf> at 1, accessed on 12 July 2013.

⁷⁶ Consumer Protection Act 68 of 2008.

⁷⁷ 'Southern Africa Development Community Telecommunications Regulatory Association of Southern Africa' 'Consumer Protection Guidelines' (2004) at 2, available at <http://www.itu.int/ITU->

consumer protection legislation to ensure that the rights of consumers are protected from unfair business practices will limit the enforcement of competition law because these two pieces of legislation work hand in hand to bring about full consumer welfare benefits. Leary points out that:

Antitrust offenses like price fixing or exclusionary practices, distort the supply side because they restrict supply and elevate prices. Consumer protection offenses, like deceptive advertising, unfair standard term contracts and imperfect information distort the demand side because they create the impression that a product or service is worth more than it really is.⁷⁸

The relationship between competition law and consumer protection is therefore important in this regard because when markets fail these are the only two pieces of legislation that we can rely on to mitigate the effect caused by market failures.

Table 1: Adopted by Muris illustrates a perfect interface between competition and consumer protection.⁷⁹

Policy	Competition policy and law	Consumer protection policy and law
AIM	Protect/competitive processes/supply of options	Protect ability to choose
Target Group	Fairness between trading parties/interest of consumers.	Fairness between traders and consumers mostly/empowering consumers.
Practices covered	Cartels, abuse of dominance,	Unfair and deceptive

[D/projects/ITU_EC_ACP/hipssa/docs/SADC_Consumer_Protection_Guidelines.pdf](#), accessed on 19 June 2013.

⁷⁸ Thomas Leary 'Competition Law and Consumer Protection Law; Two wings of the same House' (2004) 72 *Antitrust Law Journal* 1147 at 1148.

⁷⁹ TJ Muris 'the interface of competition and consumer protection' (2001) at 183, available at <http://www.ftc.gov/speeches/muris/021031fordham.pdf> , accessed on the 16 June 2013.

	anticompetitive mergers.	advertising, fraud.
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The table shows us that consumer protection is limited only so far as consumer choices are concerned.⁸⁰ The production of these choices is regulated by competition law.⁸¹ This distinction however does not mean that these fields of law are unrelated. If there are any two pieces of legislation which have a direct impact on how consumer welfare benefits accrue, it is the consumer protection law and competition. These pieces of legislation are also related in as far as certain practices are concerned for example Tying and resale price maintenance.⁸² Tying refers to ‘An agreement in which a vendor conditions the sale of a particular product on a vendee's promise to purchase an additional, unrelated product’.⁸³ For example assuming the vendee [consumer] wants to purchase a bar of chocolate, tying would involve a situation in which the vendor conditions the vendee [consumer] to purchase a lip balm before it can sell the bar of chocolate. Resale Price maintenance refers to ‘the effect of rules imposed by a manufacturer on wholesale or retail resellers of its own products, to prevent them from competing too fiercely on price and thus driving profits down from the reselling activity’⁸⁴ for example an agreement between the manufacturer and the retailer that the retailer would sell toothpaste at R8 in order to make a profit. If the retailer refuses to oblige, the manufacture may threaten to cease doing business with the retailer.

Haracoglou contends that:

Tying may not only involve an anticompetitive effect insofar as it may involve leveraging market power from one market to another, but it may also directly affect consumer choice by making it difficult for consumers to

⁸⁰ Irina Haracoglou ‘Competition Law, Consumer Policy and the Retail Sector: the systems’ relation and the effects of a strengthened consumer protection policy on competition law’ (2007) 3 *The Competition Law Review* 171 at 183.

⁸¹ Haracoglou (note 59) at 184.

⁸² Ibid.

⁸³ “Definition of Tying” available at <http://legal-dictionary.thefreedictionary.com/Tying+Arrangement> , Accessed on 01 June 2013.

⁸⁴ “Definition of Resale Price Maintenance” <http://economics.about.com/od/economicsglossary/g/resalep.htm> , Accessed on 01 June 2013.

evaluate or price either two of the two tied products separately. Similarly, resale price maintenance can restrict the pricing option of dealers and raise anticompetitive concerns. It can also however distort consumer choice, insofar as it may be used to guarantee large retail margins, which will give salespeople an incentive to push certain brands of products, even if those brands are not superior (and indeed may be inferior) to competing products in the same range⁸⁵

The above illustrated examples together with the contention affirmed by Haracoglou indicate that although consumer protection and competition law are two separate pieces of legislation they may overlap and impact the same conduct.⁸⁶

Lande and Averitt came up with the term known as “Consumer Sovereignty” to explain this relationship. The term is summarised below.

There must be a range of consumer option made possible through competition, and consumers must be able to choose effectively among these options. The boundary between antitrust and consumer protection is best defined by reference to these two elements of consumer sovereignty. The antitrust laws are intended to ensure that the marketplace remains competitive, so that meaningful range of options is made available to consumers, unimpaired by practices such as price fixing or anticompetitive mergers, The consumer protection laws are then intended to ensure that consumers can choose effectively from among those options, with their critical faculties impaired by such violations as deception or the withholding of material information.⁸⁷

This term again reinforces the notion that competition law and consumer protection are complimentary.⁸⁸ Competition law safeguards competition and ensures that there are enough competitors in the market. They remove barriers to entry and regulate restrictive business practices which may distort competition i.e. tying and resale price maintenance. ‘Consumer law ensures that consumers are informed enough to be able to switch’.⁸⁹ The absence of competition creates a backlog and can possibly increase prices and limit choice options to the

⁸⁵ Haracoglou (Note 59) at 184

⁸⁶ Ibid.

⁸⁷ NW Averitt & RH Lande, ‘Consumer Sovereignty: A unified Theory of Antitrust and Consumer Protection Law’ (1997) 65 *Antitrust Law Journal* at 713.

⁸⁸ Haracoglou (note 59) at 185.

⁸⁹ Ibid.

detriment of consumers. 'Absent sufficient information, consumers won't be able to make informed decision despite the existence of competition'⁹⁰. The interdependency of these two legislation indicate that one cannot operate without the other and although they regulate different conducts they both have the same objective and that is to increase consumer welfare.

'Competition rules can challenge established market players and make the entry of a greater number of suppliers possible, consumer tools can assist consumers to make rational, well-informed choices on the market and subsequently intensify competition'⁹¹ An example would be situation in which a dominant firm enters into an aggressive advertising campaign.⁹² 'If this advertising campaign compares prices or makes false contentions on the quality of the competitors product- a barrier to entry may be created'.⁹³ This barrier to entry although regulated by the competition rules may be mitigated by consumer protection law in as far as strict measures can be imposed with regard to the substantiation of claims in the adverts.⁹⁴

It is difficult to imagine a situation where competition rules could fulfil the objective of consumer welfare without taking into consideration consumer protection laws. 'Within the spirits of strengthening and empowering consumers, competition law is increasingly being called to address consumer protection issues.'⁹⁵ This movement may shift the substantive application of Competition and sector regulators in establishing 'harm to consumers' as compared to 'harm to competition as a possible alternative benchmark to competition enforcement.'⁹⁶ Question posed by Haracoglou is:

⁹⁰ Irina Haracoglou 'Competition Law, Consumer Policy and the Retail Sector: the systems' relation and the effects of a strengthened consumer protection policy on competition law' (2007) 3 *The Competition Law Review* 171 at 185.

⁹¹ Haracoglou (note 59) at 186.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Haracoglou (note 78) at 189.

⁹⁶ Haracoglou (note 78) at 192.

Could harm to consumers justify a finding of anti-competitiveness? Could harm to consumers constitute a sufficient condition for antitrust control? Is ‘harm to consumers’ a necessary precondition of a finding of anti-competitiveness?⁹⁷

This questions merit some useful appreciation especially in an era where consumers form the backbone of many antitrust legislations. With the increased movement of consumer protection and awareness across the globe and a concerted effort to integrate these two areas of laws; the possibility of ‘consumer harm’ becoming a possible benchmark for antitrust regulation cannot be entirely ruled out. ‘This view has found the most application in the European Union where certain practices which may otherwise violate competition law may sometimes be upheld because of the benefits they provide to consumers’.⁹⁸ For example article 81 (3) excluded Article 81(1) applicability to:

Agreements or categories of agreements that contribute to the improvement of the production or distribution of goods, or promote technical or economic progress, that pass fair share of the benefits to the consumers, and do not impose restrictions that are not indispensable for achieving these benefits or afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question. The consumer in this regard is not limited to the final end-user but extends to entities acquiring products or services in the course of business.

‘The European Commission has not quantified what share to consumer is fair.’⁹⁹ Haracoglou inferred that a consideration of whether there is a sufficiently high level of competition in the market to ensure that a reasonable amount of benefit is likely to accrue to consumers may be taken into account.¹⁰⁰ Haracoglou suggested a more consumer- focused competition law which should consider

⁹⁷ Irina Haracoglou ‘Competition Law, Consumer Policy and the Retail Sector: the systems’ relation and the effects of a strengthened consumer protection policy on competition law’ (2007) 3 *The Competition Law Review* 171 at 203.

⁹⁸ Irina Haracoglou ‘Competition Law, Consumer Policy and the Retail Sector: the systems’ relation and the effects of a strengthened consumer protection policy on competition law’ (2007) 3 *The Competition Law Review* 171 at 197.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

more explicitly harm to consumers as compared to harm to competition.¹⁰¹ This approach will be discussed in more detail in Chapter 4 which deals with the effect of the Powercom decision on competition and consumer welfare.

2.5 Liberalisation of the Telecommunications industry

It is widely understood across the globe and within international trades that opening up markets increases competition and consumer benefits. For many years' governments across the world embarked on liberalisation policy frameworks and reform policies to structure their telecommunications sectors in a way that will attract competition and simplify regulation.¹⁰²

Cseres points out that:

The economic rationale behind this new approach was that by removing barriers to entry, and allowing consumers' free choice among several providers of goods and services, competition and innovation will be fostered, leading to cost effectiveness, lower consumer prices and improved quality and variety, and ultimately economic growth."¹⁰³

Competition in the Namibian telecommunications sector pre-2007 was almost non-existent. There was only one fixed-line service provider [Telecom] and one cellular service provider [MTC]. Telecom was and still wholly owned by the state through NPTH and the state still owns 66 per cent shares in MTC. With the recent acquisition of 'Powercom' by Telecom it can be viewed that although there are two mobile service providers in the industry, competition may be compromised because both these service providers are indirectly owned by the state. The effect of the Merger will be discussed in more detail in Chapter 4 which looks at the effect the approved merger will have on competition.

Meanwhile, Cseres points out that:

¹⁰¹ Haracoglou (note 97) at 202.

¹⁰² KJ Cseres 'What has Competition done for Consumers in Liberalized Markets' (2008) 4 *The Competition Law Review* 77 at 78.

¹⁰³ KJ Cseres 'What has Competition done for Consumers in Liberalized Markets' (2008) 4 *The Competition Law Review* 77 at 78.

The widespread liberalisation has transferred relevant parts of law making and law enforcing to private parties. Consumers have been entrusted with tasks that used to belong to the public law realm. The task of disciplining the market has been shifted from the state to private individuals who became responsible for making decisions and enforcing their rights in markets where previously they were dependent on the state. More competition and regulation has been expected to lead to increased consumer welfare in terms of price, quality and choice but experience has not yet showed evidence of more optimal market functioning for consumers.¹⁰⁴

It could be that part of the reason why some of the above stated consumer welfare benefits were not realised, because deregulation mostly favoured the supply side of the market. 'The role and function of private consumers were largely neglected.'¹⁰⁵ Having examined the relationship between competition law and consumer protection it is clear that market failures are indeed prevalent on both the supply side and demand side of the market and to realise the full benefit of consumer welfare they should both be regulated. 'If demand is inelastic and switching costs are high, unfair trade or abusive prevent them from acting in their best interest they will not be able to enjoy the advantages of a competitive market.'¹⁰⁶ A typical example is the standard term contracts which telecommunications service providers conclude with consumers. 'One consequence is that suppliers would create preferential tariff packages that rational consumers opted for and subsequently service providers would conclude long term contracts which would lock them in'¹⁰⁷ This regulatory shortcomings have a direct impact on how the market performs as they increase switching costs and increases barriers to entry and to effectively combat this practices would require establishing strong competition and consumer protection laws.

¹⁰⁴ KJ Cseres 'What has Competition done for Consumers in Liberalized Markets' (2008) 4 *The Competition Law Review* 77 at 79.

¹⁰⁵ Ibid.

¹⁰⁶ KJ Cseres 'What has Competition done for Consumers in Liberalized Markets' (2008) 4 *The Competition Law Review* 77 at 79.

¹⁰⁷ Ibid.

3 Detailed analysis of the “Powercom” case.

This part of the paper will outline the development that led to the acquisition of Leo by Telecom Namibia Ltd. First, an overview of defining a market and the characteristics of at he telecommunications market in Namibia will be discussed. Second, A brief discussion of how the proposed merger was instigated and the manner in which the competition authorities were notified will be outlined. Third, a discussion of the approach taken by the authorities when they reviewed the merger will be examined and a final review of the judgement will be summarized.

3.1 Defining the relevant market.

The process of defining any market in competition law is based on the foundation of economical analysis.¹⁰⁸ The United States of America as well as the European Union are avid users of this approach. Although, the adaptation is slightly different from one another to some degree, both are rooted on the same principal of hypothetical monopoly.¹⁰⁹ ‘ The principle states that a product (or geographic) market should be defined as the minimum set of products (or areas) which could be successfully monopolised.’¹¹⁰ There is currently no universal definition for the term ‘relevant market’, competition authorities across the globe seem to have adopted the conventional “by product by geographic’ market definition. Peter defines a market as ‘ a tool that is used to define and outline the competition between enterprises’.¹¹¹ The Swedish Competition Authority website defines it [relevant market] as ‘a market in which one or more goods compete’¹¹² and the European Commission on the notice of the definition of relevant market

¹⁰⁸ Jordi Gual ‘Market definition in the Telecoms Industry’ (2002) at 1, available at http://ec.europa.eu/competition/sectors/telecommunications/archive/telecom/market_definition.pdf, accessed on 19 July 2013.

¹⁰⁹ Gual (note 108) at 2.

¹¹⁰ Gual (note 108) at 3.

¹¹¹ India Competition Commission paper, Concept Paper: Definition and Delineation of “Relevant Market” in Competition Analysis, at 10, available at http://cci.gov.in/images/media/ResearchReports/surabhi_20090119114030.pdf, Accessed 19 July 2013.

¹¹² Swedish Competition Authority website ‘Relevant Market’, available at http://www.kkv.se/t/Page_907.aspx , accessed on 19 July 2013.

for the purpose of Community competition law simply define 'relevant market' as a combination of both relevant product and relevant geographic market.¹¹³ Analysing the observed differences in definition, there seem to be a general consensus across competition law jurisprudence that the competitive aspects of a product and its relevant geographical area play a critical role in the definition of a 'relevant market'.¹¹⁴ The Namibian Competition Act does not define the term 'relevant market'¹¹⁵ nor does it provide any guideline or structure by which to define a relevant market.¹¹⁶ At present the NaCC seem to have adopted the United States and European Union economical analysis approach of defining a market by 'product and geographic analysis' whether this approach is best fit for a developing state only time can tell. Gasparikova asserts that: the definition of a relevant market plays a crucial role in competition law analysis of any merger because the definition in both its product and geographic dimension ' has a decisive influence on the assessment and outcome of a competition law case.¹¹⁷ The analysis determines market share and defines competitors.¹¹⁸ This makes sense because when a merger is involved, especially one, which raises significant competition concerns defining a market incorrectly or compiling an incorrect number of competitors and products, could detrimentally result in a culmination of anticompetitive effects if the merger is approved. Gasparikova further asserts that:

Failure to have a definition in the Act can result in stakeholders failing to understand the context in which 'relevant market is used and decisions made by the competition authority may be unnecessarily challenged on the ground that there is no definition of 'relevant market' in the relevant competition act.

¹¹³ Europa 'Relevant Market' , available at http://europa.eu/legislation_summaries/competition/firms/l26073_en.htm , accessed on 19 July 2013.

¹¹⁴ S Gasparikova 'Enforcing the competition law in Namibia- A toolkit (2003) at 11, available at http://cci.gov.in/images/media/ResearchReports/surabhi_20090119114030.pdf , accessed 19 July 2012.

¹¹⁵ Gasparikova (note 114) at 12.

¹¹⁶ Ibid.

¹¹⁷ Gasparikova (note 114) at 12.

¹¹⁸ Gasparikova (note 114) at 11.

Taking into consideration that Namibia is only 11 years into its competition law regime. A development of a concrete jurisprudence in the initial years of the authority's establishment, is not only necessary for any emerging economy, but also prudent in developing a strong and persuasive set of precedent that will guide and inform future mergers and competition law analysis. The NaCC should therefore follow the European Commission's direction and issue a detailed guideline, which should prolifically set out the criteria to take into account when defining a 'relevant market'.

The Indian Competition Act¹¹⁹ is one piece of legislation, which has codified not only the definition for 'Relevant market', but that of 'Relevant geographic market' and 'Relevant Product market' as well. The definitions are outlined below.

Article 2 of the Indian Competition Act¹²⁰ section:

(r) '**Relevant market**' means the market, ***which may be determined by the Commission*** with reference to the relevant product market or the relevant geographic market or with reference to both markets.

(s) '**Relevant Geographic market**' means a market comprising the area in which the conditions of competition for supply of goods or provisions of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbourhood areas.

(t) '**Relevant product market**' means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.

The striking aspect of the above-enumerated provisions is how widely the act defines the relevant terms. The definition for relevant market is so wide that it empowers the authority to identify the relevant geographic and product market by allowing them to prescribe guidelines and factors to be taken into account when defining a market. This important distinction of [determination of the market by the commission] is crucial for any competition law jurisprudence

¹¹⁹ Competition Act 2 of 2003.

¹²⁰ Ibid.

because it confers the competition authority's flexibility to amend their directives and guidelines in way that takes into account the countries developmental needs as far as competition matters are concerned. The NaCC can benefit enormously from codifying the above enumerated terms as Gasparikova asserted 'It will limit unnecessary competition law challenges' which could be detrimental for a small competition authority like Namibia taking into account the little human and financial resources available.¹²¹

The process of defining a market is really one fundamentally embedded in economic principles. Legal scholars have in the past done very little in defining a market. This is not surprising because the definition of a market really goes beyond the scope of legal analysis, requiring a determinative quantitative analysis, which only economists can quantify. Economists have therefore overtime employed complex statistical calculations in defining a market in order to determine market power.¹²² This is mainly because the determination of market power can only be ascertained through the process of market definition, which is the sole end purpose of defining a market. This is particularly imperative for lawyers because they are guided by this statistical analysis when making determinations in merger and competition law cases. Gual, formulated features which give prudence to the definition of a relevant market through the principal of hypothetical monopolist. He said:

First, if one of the key goals of antitrust analysis is to assess whether the relative position of one or more firms in a market gives them the power to raise prices, it makes sense to measure that position in the marketplace relative to an aggregate which-if fully controlled by a single entity-would provide a monopoly position and therefore full control over prices.

Second, the process of determining the relevant market is carried out through a gradual increase of the number of products or areas under

¹²¹ Gasparikova (note 114) at 12.

¹²² Willem H Boshoff 'why define markets in competition cases' Stellenbosch Economic Working Paper 10/13 (2013), at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=2&ved=0CDIQFjAB&url=http://www.ekon.sun.ac.za/wpapers/wp2013/wp102013/wp-10-2013.pdf&ei=w-3sUbWWHoiAhQe3x4GoCw&usq=AFQjCNExfOQiT48IMaOmyshQ8whS9nEZJA&bvm=bv.49478099.d.ZG4>, at 3, accessed 19 July 2013.

consideration, starting from the smallest possible set. This again makes sense, since increasing the collection of products controlled by a firm or a group of firms acting jointly increases the potential for monopoly as alternative substitute products are eliminated by their gradual inclusion in the set under examination.

Third, the framework is explicitly designed for quantitative analysis. The profitability of higher prices refers to a five or ten per cent mark-up, sustained for a period of about one year. Even if the quantitative information needed to compute this is not available, the precise definition offers in practice a useful framework, which guides the analysis of the data at hand.

Fourth and finally, hypothetical monopolist principle requires a thought experiment, which refers to the competitive benchmark. That is to say the analyst should undertake a counterfactual experiment, trying to assess what would happen if a single firm provided all these goods. The goal is to determine whether the hypothetical monopolist would be able to profitably increase prices by 5% or 10%. Since the current prices may not correspond to those of a perfectly competitive market, the analysis will often imply a two-fold counterfactual: assessing the pricing of both the hypothetical monopoly and the competitive regime.

Given the complexity of the methodical application of hypothetical monopolist, Gual further states that:

‘Consideration is given to the forces of groups of products or areas, which could refrain a firm from increasing prices if it were to control the sale of all the products under consideration. These forces are referred to as demand and supply substitution.’¹²³

Demand substitution ‘is defined as the products, services or geographical areas to which consumers could turn to for a substitute of the monopolised good or collection of goods.’¹²⁴ This is probably best described by exploring a few questions?

*Which products or services will the consumer consider switching to if the hypothetical monopolist were to increase its prices? More importantly are goods and services good alternative in consumption?*¹²⁵

¹²³ Gual (note 108) at 5.

¹²⁴ Ibid.

¹²⁵ Gual (note 108) at 5.

This [switched to] goods and services are referred to as ‘Demand substitution’¹²⁶

Simultaneously, supply substitution,

‘is defined to include all the producers which, if the hypothetical monopolist were to exercise its powers by raising prices, would have the capability-in the short run-to enter the market providing new output and thus limiting the ability of the monopoly to restrain production.’¹²⁷

Again, questions to be explored here are, are new firms able to enter the market if the hypothetical monopolist were to increase its prices? More importantly are they able to generate enough power to produce competitive goods and services?

These [new entrants] producers are referred to as ‘Supply Substitution’¹²⁸

It should be observed that the definition of Supply substitution could possibly vary from Jurisprudence to Jurisprudence. For example, the United States Trade Commission has prescribed guidelines to be used when assessing the relevance of entry barriers into its market.¹²⁹ The Commission has formulated the definition of supply substitution, to include both firms that can without incurring sunk cost be relevant competitors at short notice¹³⁰ and those that could be established within the medium and long term¹³¹

The distinction of supply substitution is probably best illustrated by revenue generation.¹³² Short notice firms being those that are currently generating revenue in the market and medium term firms being those that are not currently generating revenue in the market but are committed in entering the market in the near future.¹³³ ‘Consideration is also given to those firms that are not current

¹²⁶ Ibid.

¹²⁷ Gual (note 108) at 5.

¹²⁸ Ibid.

¹²⁹ Gual (note 108) at 5.

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Ibid.

¹³³ Federal Trade Commission website ‘United States Horizontal merger guidelines ‘ (2010) at 15, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> , accessed on 20 July 2013.

producers in the relevant market but very likely to provide rapid supply responses with direct competitive impact without incurring significant sunk cost [this firms are known as rapid entrants].¹³⁴ Sunk Costs are entry or exist cost that could not be recovered outside the relevant market.¹³⁵

Below is an example illustrating a 'rapid entrant':

*Cellular service provider A is situated in [Alpha] 700 kilometres from cellular Provider B [Omega]. Currently, cellular provider B only provides services in its respective geographical area [Omega] because prices there are 3 per cent higher. Cellular provider B could be a rapid entrant in Cellular A's geographical area [Alpha]*¹³⁶

This approach of supply substitution adopted by the Unites States can prove to be both beneficial and problematic at the same time, a) beneficial because firms which could be established within the medium term are considered in competition analysis. This approach pays prudence to the fact that market structures can indeed change and consideration of firms to be established in the next two to five years is crucial in assessing and defining a market, b) problematic because, the analysis is based on uncertainty, chances that this [rapid firms] will be established or enter into the market is improbable and can lead to erroneous results resulting in incorrectly defining the market and giving rise to the possibility of anti-competitive conducts.

The groundbreaking question is, how relevant market definition is in modern competition law.

The retention of market definition although criticised by many scholars is still relevant in today's modern competition policy. 'Apart from merger evaluation, investigations related to anticompetitive conduct, restrictive business practices,

¹³⁴ Federal Trade Commission website 'United States Horizontal merger guidelines ' (2010) at 15, available at <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> , accessed on 20 July 2013.

¹³⁵ Ibid.

¹³⁶ Gual (note 108) at 5.

including abuse of dominance and vertical restraints still require markets to be defined.¹³⁷ The formal model of hypothetical monopolist as information intensive as it is, does provide some useful guidelines, which could not possibly be employed or analysed any other way. The analysis is certainly quite demanding in terms of information available but it has nevertheless been tried and tested and applied across industries by many competition authorities.¹³⁸ The underlying objective of any market definition is to determine market share, market share informs market power and market power empowers firms to engage in anti-competitive practices.

‘Proponents concede that market shares are, at best, a very rough proxy for determining actual market power, but useful because if a firm is not dominant in a specific market (according to market share threshold) it is less likely that that the firms conduct could have significant anticompetitive effects’¹³⁹

‘Defining a market also ranks competitors and provides substitution information central to the evaluation of competitive effects.’¹⁴⁰ This is especially useful to the regulatory authorities because they provide a basis to identify the strongest competitors in the market, which consumers will consider and switch to. Boshoff, however concludes that, market definition should not be economically analysed in isolation, a broad set of other useful evidence is also required in defining a market and this can only be established by going beyond the scope of defining the market through the traditional ‘hypothetical monopolist framework to include ranking of substitutes.’¹⁴¹

3.2 Market definition in the telecommunications industry

When considering market definition in an industry such as telecommunications for example, Gual asserts that the formal framework of hypothetical monopolist can only shed partial light on the analysis. This is due to three facts:

¹³⁷ Boshoff (note 122) at 10.

¹³⁸ Gual (note 108) at 17.

¹³⁹ Carlton 2007.

¹⁴⁰ Boshoff (note 122) at 11.

¹⁴¹ Boshoff (note 122) at 18.

First, the telecommunications industry is characterised by the pervasive presence of fixed (sunk) costs.¹⁴²

Second, the telecommunication industry comprises a wide array of very different services, ranging, from conventional local or long distance voice telephony to high-speed Internet access.¹⁴³

[For some of these services, in particular those that are provided with mature technologies; the framework will prove fairly adequate, once the fixed cost problem is properly taken into account. For others, however, the rapid pace of technological change means that quite often competition takes place through dimensions other than price (for example the introduction of new services with improved performances)].¹⁴⁴

In those instances, the framework of static oligopoly, which is the basis of 'hypothetical monopolist', may not be appropriate and authorities will have to adopt a broader perspective.¹⁴⁵

Third, the telecommunication services are typically, although not necessarily consumed in bundles. Moreover, they are often provided by multi-service firms in a joint production process where cost of stand-alone services may be hard to ascertain.¹⁴⁶

Therefore, when defining a telecommunications markets, authorities should pay prudence to supply substitutability, because these will allow them to compile and compute the number of producers that are able to provide a good substitute for a product or service.¹⁴⁷ 'Secondly, authorities should consider the existence of complimentary products cause most telecommunications products are consumed in bundles¹⁴⁸ and finally competition authorities should not be discouraged from employing other methodical analysis in addition to the 'hypothetical monopolist' when defining telecommunications market. The industry is characterised by advanced innovation and technology, which can only make future telecommunications market definition a challenging task.

¹⁴² Boshoff (note 122) at 18.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Boshoff (note 122) at 18.

¹⁴⁷ Gual (note 122) at 49.

¹⁴⁸ Boshoff (note 122) at 18.

3.3 The telecommunications market structure in Namibia

Namibia was one of the last few countries in Africa in 2009 to enact a Communications Act.¹⁴⁹ This act provided for the establishment of an independent regulatory authority, which oversaw the regulation of telecommunications service, networks, broadcasting, postal services and the use and allocation of radio uses and other electronic functions. Before then, this function fell under the auspices of the Ministry of Information Communication and Technology, which regulated the tariffs, interconnection rates as well as anti-competitive practices. The mobile telecommunication sector only witnessed competition in 2007 when “Leo”, the first wholly privately owned mobile service provider entered the market. The country’s population is currently recorded at 2 165 828 making it one of the least populated countries in Africa, with a gross domestic product recorded at \$12.81 billion¹⁵⁰ At present, The country only has two Global Systems Mobile service providers MTC boasting 2 187 923¹⁵¹ active subscribers, Leo covering 270 000¹⁵² active subscribers and one fixed line service provider [Telecom] covering 145 360 active subscribers.¹⁵³ Telecom is currently a state monopoly owned by NPTH which is 100% government owned.¹⁵⁴ There is little or no private ownership in the GSM sector. The state currently holds controlling shares of 66 per cent in MTC through the NPTH and Telecom wholly owns Leo through the recent approval of the Telecom/Leo merger. The effect of this major on competition and consumer welfare has been received with enormous criticism which will be discussed in more detail in chapter 5 dealing with ‘impact of the approved merger on competition’. Meanwhile, the internet and broadband market ‘Despite being reasonably

¹⁴⁹ Act 8 of 2009.

¹⁵⁰ Namibia's Population available at http://www.indexmundi.com/namibia/demographics_profile.html , accessed on 19 July 2012.

¹⁵¹ MTC Annual Financial Statement (2012) at 8, available at http://www.mtc.com.na/annual_report/2012/Annual_Report_2012.pdf , accessed 19 July 2013.

¹⁵² Leo website, available at <http://www.cellone.com.na/About%20Us/AboutUs.htm>, accessed on 19 July 2013.

¹⁵³ Telecom Namibia website at <http://www.telecom.na/index.php/company/corporate-profile> accessed on 19 July 2013.

¹⁵⁴ Telecom Namibia website at <http://www.telecom.na/index.php/company/corporate-profile> accessed on 19 July 2013.

competitive, has been held back by high prices for international bandwidth, caused by the lack of direct connection to international submarine fibre optics cables'.¹⁵⁵ This situation however changed in early 2011 when the West Africa Cable System was constructed in the West African coast linking Namibia from Swakopmund to the global submarine cable network.¹⁵⁶ Currently all three entities provide Internet and broadband services.

The previous institutional framework of the telecommunications industry in Namibia set the development of telecommunication significantly behind.¹⁵⁷ Up until the enactment of the communications act in 2009, the ministry of Information Communications and Technology held the sole mandate of the regulating and supervising the functions and conduct telecommunications sector.¹⁵⁸ 'The absence of an independent regulatory authority meant that Leos entrance into the telecoms market in 2007 could have been a risky move'¹⁵⁹

Table 2: Shows the composition of market share in in the telecommunications industry in Namibia as at September 2012.¹⁶⁰

	Sep 2006	Sept 2007	Sept 2008	Sept 2009	Sept 2011	Sept 2012
Leo	0%	5%	17%	24%	24%	24%
MTC	100%	95%	83%	76%	76%	76%
Telecom	100%	100%	100%	100%	100%	100%

¹⁵⁵ 'Namibia's telecommunications market structure' available at <http://www.giswatch.org/country-report/20/namibia> , accessed on 19 July 2013.

¹⁵⁶ Ibid.

¹⁵⁷ 'Namibia's telecommunications market structure' available at <http://www.giswatch.org/country-report/20/namibia> , accessed on 19 July 2013.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

¹⁶⁰ MTC Annual Financial Statement (note 149) at 8.

It is clear from the table that MTC dominated the mobile telecommunication sector since 2006. Although its market share gradually decreased over the years since the establishment of Leo in 2007, MTC shares still remained consistently stable over 3 years since 2009. With the recent approval of the Telecom /Leo merger changes could be expected in the near future.

3.4 Merger control in Namibia

Generally speaking implementing mergers and acquisitions take several forms, first, through sales of shares, second, through sale of business and assets and third through a scheme of arrangements.¹⁶¹ These forms may differ from one jurisdiction to the other; irrespective of the form of merger pursued the presumption is that it would still have an effect on the market structure and the need to evaluate its impact need to be scrutinised by the authorities. Lewis mentioned that ‘merger regulation is substantively important because of the long term impact that these combinations, the most powerful and permanent form of inter firm cooperation, may have on the structures of markets’.¹⁶² In South Africa mergers and acquisitions are regulated and fall within the ambit of section 12 (1) of the SA Competition Act¹⁶³

S12 (1)¹⁶⁴ of the SA Competition Act¹⁶⁵ articulates that a

“Merger” means the direct or indirect acquisition or direct or indirect establishment of control by one or more persons over all 45 significant interests in the whole or part of the business of a competitor, supplier, customer or other persons. Whether that control is achieved as a result of

- (a) Purchase or lease of the shares, interest or assets of a competitor, supplier customer or other persons:
- (b) Amalgamation or combination with that competitor, supplier and customer or 50 other person or

¹⁶¹ Henning, JJ Corporate Acquisitions and Merger Hague, Netherlands: Kluwer Law International (2002) at 656.

¹⁶² Lewis D Thieves at the Dinner Table Auckland South Africa (2012) at 76.

¹⁶³ South African Competition Act 89 of 1998.

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

(c) Any other mean

However in Namibia with a slightly restrictive definition although similar in part, mergers fall within the ambit of section 42 of the competition act¹⁶⁶.

S42 (1)¹⁶⁷ stipulates that merger occurs when one or more undertakings directly or indirectly acquires or establish direct or indirect control over the whole or part of the business of the other undertaking.

S42 (2)¹⁶⁸ extends the scope of the definition to include the forms which constitutes mergers and acquisitions as contemplated by subsection (1);

- (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 undertakings

When a merger is proposed in Namibia, the constituent undertakings are required to notify the competition authority of their proposal to merge as informed by s 44 (1)¹⁶⁹ of the Namibian competition act. The commission would then exercise its discretion and conduct a due diligence enquiry based on empirical evidence and market analysis drawn up by the parties involved. The empirical evidence usually includes a statement of the effect that the proposed merger would have on the market and a substantial report of any anticompetitive effect which could arise post-merger. If the competition authority after detailed investigation of the merger find that the merger may result in anticompetitive effect; an explanation of how they intend to remedy the effect will be requested if not already included in the merger file.

At the same time, the market analysis would include a detailed study of the market, products and services, financial information, composition of competitors involved and the market share that each one of the competitors hold pre-merger and will possibly hold post merger.

However, when evaluating mergers, competition authorities are usually only concerned with two scenarios, namely, unilateral conduct which can empower the merged companies the ability to set prices and coordinated

¹⁶⁶ Namibian Competition Act 2 of 2003.

¹⁶⁷ Namibian Competition Act 2 of 2003.

¹⁶⁸ *Ibid* .

¹⁶⁹ Namibian Competition Act 2 of 2003.

effects which can prevent or lessen competition. Lewis elaborated that “Mergers may also result in single firm dominance, thus strengthening the prospect of abusive unilateral conduct, or they may enhance the prospect of anticompetitive horizontal agreements.”¹⁷⁰ From a developing countries perspective to alleviate market failures and structure our markets in a way that will encourage competition we need to pay close attention to the effect of unilateral conduct when regulating or investigating mergers.

Realising the fact that Namibia is only composed of less than 2.5 million people, the requirement to notify the authority on every single merger could be seen as a pointless exercise. It is time consuming and might delay and frustrate the business of those undertakings that do not pose any competition threats at all. Accordingly an amendment was made to the merger control threshold in late December 2012. The Government Gazette¹⁷¹ published 24 December 2012 articulated that:

The Namibian Competition Act¹⁷² does not apply to a merger if the value of that merger equals or does not exceed the values set out below.

- a) The combined annual turnover in, into or from Namibia at the acquiring undertaking and target undertaking is equal to or valued below N\$ 20 million.
- b) The combined assets in Namibia of the acquiring undertaking and target undertaking are equal to or valued below N\$ 20 million
- c) The annual turnover in, into or from Namibia of the acquiring undertaking plus the assets in Namibia of the target undertaking is equal or valued below N\$ 20 million.

¹⁷⁰ Lewis, D. (2012) *Thieves at the Dinner Table*, Auckland, South Africa (2012) at 76.

¹⁷¹ The ‘Determination of threshold of annual turnover which part II of chapter 3 of Competition Act, 2003 does not apply to’ (published in GG 5107 of 24 December 2012).

¹⁷² Namibian Competition Act 2 of 2003.

- d) The annual turnover in, into or from Namibia of the target undertaking is equal to or valued below N\$ 20 million.
- e) The annual turnover in, into or from Namibia, of the target undertaking are equal to or valued below N\$ 10 million; and
- f) The asset value of the target undertaking is equal to or valued below N\$ 10 million.¹⁷³

Note: N\$ is equivalent to R.

It follows therefore that if the threshold of the values enumerated above are exceeded, the threshold triggers a compulsory notification to be submitted to the NaCC.

Section 49 of the Namibian Competition Act brings about a contentious provision avoided by many competition authorities. It provides that any merger decision imposed by the NaCC may be subject to a ministerial review. This implies that the Minister of Trade and Industry [which is the executive arm] is tasked with a judicial role, which traditionally falls within the ambit of the Judiciary in many jurisdictions. Principally, The provision allows for extensive involvement of the Government in the merger review process and could play a decisive role in the outcome of a case. Critics assert that although the provision may be seen as undesirable, it does provide for some considerate merit especially as far as public interest issues are concerned. Although many legal scholars might agree that the task is probably better off left to the judiciary for independence sake.

Acting Judge of Appeal O'Regan remarked in a landmark case of *Massmart/Walmart*¹⁷⁴ that

‘Section 49¹⁷⁵ contemplates an important role for the minister in determining whether mergers should be approved or prohibited...’¹⁷⁶

¹⁷³ The ‘Determination of threshold of annual turnover which part II of chapter 3 of Competition Act, 2003 does not apply to’ (published in GG 5107 of 24 December 2012).

¹⁷⁴ *Namibian Competition Commission v WalMart stores incorporated* (2011) 41 SCA at 26.

¹⁷⁵ Namibian Competition Act 2 of 2008.

¹⁷⁶ *Namibian Competition Commission v WalMart stores incorporated* (2011) 41 SCA at 26.

She articulated that:

‘A court does not bear any special competence that enables it to balance the competing interest in the Namibian Competition Act nor is this task assigned to court, Rather, the legislation reserves this task first for the NaCC and the for the minister.’¹⁷⁷

Nevertheless, she also added that:

‘That section 49¹⁷⁸ provides that a party to the merger ‘may’ make application to the minister for a review of the Commissions decision. The language of the section cannot be said expressly to prohibit access to court for in terms it does not state that a party may approach a court for relief until the review has been completed. It simply states that the parties may approach the minister for review.’¹⁷⁹

This provision can prove to be problematic in the future because it places a heavy duty on the ‘minister’ to decide on important merger cases.

Gasparikova stated that:

‘The formulation of section 49¹⁸⁰ is not considered prudential as it confers the discretion power upon the minister. This may lead to arbitrary decisions, as well as open door for political interventions and business levying.’¹⁸¹

O’Regan however reiterated that.

First, there is the fact that it is the Minister of Trade and Industry who is responsible for deciding the review. As the member of the Cabinet he is directly accountable to the President and Parliament for the performance of these duties. The review power has thus been entrusted to a democratically accountable and senior member of government.¹⁸²

¹⁷⁷ *Namibian Competition Commission v WalMart stores incorporated* (2011) 41 SCA at 26.

¹⁷⁸ Namibian Competition Act 2 of 2003.

¹⁷⁹ *Namibian Competition Commission v WalMart stores incorporated* (2011) 41 SCA at 25.

¹⁸⁰ Namibian Competition Act 2 of 2003.

¹⁸¹ S Gasparikova ‘Enforcing the competition law in Namibia- A toolkit (2003) at 67, available at http://cci.gov.in/images/media/ResearchReports/surabhi_20090119114030.pdf, accessed 19 July 2012.

¹⁸² *Namibian Competition Commission v WalMart stores incorporated* (2011) 41 SCA at 26.

Second, section 49(2)¹⁸³ requires the Minister to publish by notice in the *Gazette* the fact of the review and invite interested parties to make submissions on the matter. This process provides an important opportunity for interested members of the public to make relevant submissions to the Minister on the proposed merger.¹⁸⁴

Third, section 49(3)¹⁸⁵ makes plain that the Minister is not only empowered to confirm or overturn the decision of the Commission but is also empowered to amend the decision of the Commission by ordering restrictions or including conditions to the approval of the proposed merger. The Minister therefore has extensive powers to alter the decision of the Commission in the light of the information he receives, which a court reviewing the Commission's decision does not. In making his decision on the proposed merger, the Minister, like the Commission will have to take into account the considerations set out in section 2¹⁸⁶ of the Act, as well as those set out in section 47(2).¹⁸⁷

Fourthly, the range of considerations set out in both section 2¹⁸⁸ and section 47(2)¹⁸⁹ make plain that the decision whether to approve a proposed merger involves questions relating to the promotion and safeguarding of competition in Namibia, as the title of the Act suggests, but also other public interest considerations relating to the promotion of employment opportunities, the protection and promotion of small and medium-sized enterprises and the expansion of the participation of historically disadvantaged people in the Namibian economy. The decision is one that requires "an equilibrium to be struck between a range of competing interests or considerations." Precisely how these differing goals should be balanced within the framework of the Act in relation to each proposed merger is a question that both the Commission and the Minister will have to address in the exercise of their statutory powers. This is a decision that the Act specifically assigns first to the Commission and then to the Minister. As the Commission is an institution specially constituted to consider competition matters, and the Minister bears both constitutional and democratic responsibility for trade and industry, these are assignments that should not lightly be bypassed.¹⁹⁰

The above four factors articulated by justice Reagan seem to provide

¹⁸³ Namibian Competition Act 2 of 2003.

¹⁸⁴ *Namibian Competition Commission v WalMart stores incorporated* (2011) 41 SCA at 26.

¹⁸⁵ *Ibid.*

¹⁸⁶ Namibian Competition Act 2 of 2008.

¹⁸⁷ *Namibian Competition Commission v Wal-Mart stores incorporated* (2011) 41 SCA at 27.

¹⁸⁸ Namibian Competition Act 2 of 2003.

¹⁸⁹ *Ibid.*

¹⁹⁰ Namibian Competition Act 2 of 2003.

assurance that an exhaustive amount of procedural requirement is prescribed, which can limit the ‘minister’ for imposing an arbitrary outcome and allowing for political influence. Also, these factors confirm that, when properly considered and decided, the effect of section 49¹⁹¹ of the Namibian competition act may very well be beneficial to the outcome of a case. Whether, this provision will be effective and consistently applied in future merger analysis cases remains to be seen.

3.5 Background and development of the “Powercom t/a Leo case.

This part of the paper is going to outline the development that led to the acquisition of Powercom by Telecom Namibia Ltd. First, a brief discussion of how the proposed merger was instigated and the manner in which the competition authorities were notified will be outlined. Second, a discussion of the application of the failing firm doctrine which was relied upon by the parties when they filed the merger will be examined and a final review of the judgement will be summarized.

Powercom’s initial mobile operations brand, Cell One was launched on the 16th March 2007 with the sole intention of competing against the monopolist mobile service provider MTC. This formation was not a commercial success and it suffered significant losses.¹⁹² Powercom thus breached its debt covenants to Investec and Nedbank Namibia.¹⁹³ As a result of the losses suffered, Nedbank and Investec in 2008 sought to introduce into Powercom a shareholder with a strong technical background.¹⁹⁴ The Predecessor of the authority (the Namibian Communication Commission) and the Minister of Trade and Industry at the time approved the sale of Powercom to a foreign company, Telecel Globe Ltd which acquired the entire issued share capital in Powercom with effect from 2009.¹⁹⁵ Telecel Globe Ltd is a subsidiary of the Egyptian telecommunications company,

¹⁹¹ Namibian Competition Act 2 of 2003.

¹⁹² *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 3.

¹⁹³ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 3.

¹⁹⁴ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 3.

¹⁹⁵ Ibid.

Orascom Telecom Holding SAE. Orascom rebranded 'Cell One' as 'Leo'. An estimated N\$ 900 million equivalent to South African Rand was said to be invested in Powercom but the company was still a failure. When Orascom realized the failure of Leo it attempted, as from February 2010, to sell its interest in Powercom.¹⁹⁶

By March 2011 Orascom claimed they failed to secure a purchaser for its interest in Powercom. Oracom then agreed with Investec and Nedbank that Orascom shareholding in Powercom would be sold to 'Guinea Fowl' (to be later referred to as the applicant'.¹⁹⁷ On June 2011 Powercom issued a press release in which it gave indication that a process to purchase Powercom commenced. The applicant prepared an information memorandum¹⁹⁸ and sent them to MTN, Vodacom, Econet, France Telecom (Orange), Bharti, Telecom Namibia, Delta Partners, Sattatt Holdings, Hardiman Technologies, and Instone Capital.¹⁹⁹ At the End of the Process only Telecom reached agreement with respect to the transfer of all ordinary shares in Powercom to Telecom.²⁰⁰

¹⁹⁶ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 3.

¹⁹⁷ The first Applicant to which Powercom was sold to facilitate the shares to a new operational shareholder.

¹⁹⁸ An information memorandum is defined by the applicant as a marketing document as it seeks to evince interest from potential purchasers. The information memorandum further sets out the process which potential purchasers had to follow to submit their offers.

¹⁹⁹ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 3.

²⁰⁰ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 5.

3.6 Notification to the Namibian Competition Commission

So, on the 9 January 2012 the applicant filed a merger notification as prescribed by s47 (7) of the Competition Act 2 of 2003. The authority approved the merger subject to certain conditions.

- First, from the effective date of the implementation of the merger, the merging parties should put in place a separate and independent shareholding structure for Telecom Namibia Ltd and that of MTC. This separation structure must be implemented within a period of two (2) years from the date of the notice of determination.²⁰¹
- Second, the NPTH Chief Executive officer who is also the Managing Director of Telecom Namibia, as well as the NPTH Company secretary who is also the Head of Legal Services and Company Secretary of Telecom Namibia, should resign from their respective positions at NPTH with immediate effect. No person who is a director of Telecom Namibia or an employee of Telecom Namibia may serve as a director of either NPTCH or MTC and likewise, no person who is a director of MTC or an employee of MTC may serve as a director of either NPTH or Telecom Namibia.²⁰²

The Commission's decision was based on grounds that the proposed transaction is likely to substantially prevent or lessen competition in Namibia, as envisaged by s 47(2)²⁰³ of the Competition Act 2 of 2003. The Conditions

²⁰¹ Notice of determination from the Namibian Competition Commission.

²⁰² Notice of determination from the Namibian Competition Commission.

²⁰³ Namibian Competition Act 2 of 2003.

were said to be imposed to mitigate the negative impact that the merger may have on Competition in the mobile telecommunication market.²⁰⁴

3.7 Notification to the Communication Regulatory Authority of Namibia

On 12 December 2011 the applicant submitted an application to CRAN for approval of transferring Powercom's telecommunications licence to Telecom.

On the 20 March 2012 the Authority indicated that it was willing to further consider the application as soon as certain technical requirements were met.

On 7 June 2012 the authority's Board of Directors held a meeting and at that meeting the Board of Directors resolved to approve the application for the transfer of Powercom's telecommunication licenses to Telecom but subject to certain suspensive conditions. The conditions were:

1. Amendment of section 2 (10) (a) (IV) of the Post and Telecommunications Companies Establishment Act No.17 of 1992 to allow for the partial privatisation of Telecom Namibia Limited with not less than 25% private shareholding.²⁰⁵
2. Following the above amendment, the actual partial privatization of Telecom Namibia Limited with not less than 25%.²⁰⁶

The above conditions were stated to be supporting the objectives of the Communications Act No.8 of 2009, specifically the objective of encouraging private investments in the telecommunications sector.

Very soon after the Communications Authorities determination, Powercom approached the High Court to review and set aside the conditions imposed: contending that the powers exercised by the authority were unauthorised by the Act.²⁰⁷ The Court subsequently set aside the decision on the 24 September 2012 agreeing that that the conditions were in fact unauthorised by the

²⁰⁴ Namibian Competition Act 2 of 2003.

²⁰⁵ *Powercom v The Communication Regulatory Authority* 2012) (A) 158 at 4.

²⁰⁶ *Ibid* .

²⁰⁷ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 4.

Communications Act 2009 and therefore invalid.²⁰⁸The case was referred back to the authority to reconsider before or on the 19 October 2012.²⁰⁹

The Communications Authority reluctant to appeal on the judgement gave the case no further contemplation and issued an unconditional approval on the 19 October 2012.

3.8 The Namibian Competition Commissions approach

It appears as if the NaCC based their approach on the presumption that Powercom was technically in a failing firm position and if they had not approved the merger, believed the incumbent firm might exit the market. It comes thus as no surprise that the regulator took a strange approach to not only consider the detrimental impact it would have on consumers and competition but also the damaging possibility of the firm exiting the market if the merger was to be disapproved. The question is:

Did the “NaCC” act rationally in imposing such weak conditions in the context of such an important merger – particularly where it found that the transaction would substantially lessen competition?

The failing firm doctrine was first introduced in the United States Jurisprudence by the Supreme Court in 1930 in the case of *International Shoe v FTC*²¹⁰ The merging parties in this case were McElwain & International Shoe. McElwain manufactured shoes in Boston and distributed them across the states.²¹¹ This case was brought before the court by the Federal Trade Commission and the relevant law relied upon was section 7 of the Clayton Act²¹² which states

‘No Corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation also engaged in commerce, where the effect of such acquisition may be to substantially lessen competition between the

²⁰⁸ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 22.

²⁰⁹ *Ibid.*

²¹⁰ 280 U.S. 291 (1930).

²¹¹ *Ibid.*

²¹² Clayton Antitrust Act U.S 730 (1914).

corporation whose stock is also acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.’

The Federal trade Commission argued that

- (a) The Capital stock of the Mc Elwain Company had been acquired by International Shoe at the time charged in the complainant.²¹³
- (b) The two companies were at the time in substantial competition with one another²¹⁴
- (c) The effect of the acquisition was to substantially lessen competition between them and to restrain commerce.²¹⁵

The first circuit court affirmed. However on appeal the Supreme Court maintained that because Mc Elwain faced grave probability of business failure and lacked any alternative purchaser the transaction did not substantially lessen competition.²¹⁶

The decision of this case was reaffirmed in *Citizen Publishing Co v United States*²¹⁷ citing the international shoe case, the court confirmed that the failing firm defence applies only where it can be proven that

- (1) The target company is in imminent danger of failure²¹⁸
- (2) The failing firm has no realistic prospect for a successful reorganisation²¹⁹
- (3) There is no viable alternative purchaser posing less anticompetitive risk.²²⁰

²¹³ *International Shoe v FTC* 280 U.S. 291 (1930) at 4.

²¹⁴ *Ibid.*

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ 394. U.S 131 (1969).

²¹⁸ *Citizen Publishing co v United States* 394. U.S 131 (1969) at 5.

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

Pursuant to the above cases and several others which preceded. The European Merger Guidelines²²¹ established four requirements for the failing firm defence:

1. The alleged failing firm would be unable to meet its financial obligations in the near future.
2. The alleged firm is prone to bankruptcy
3. It has made unsuccessful good faith efforts to elicit reasonable alternative offers of acquisition.
4. Absent the acquisition, the assets of the failing firm would exit the relevant market.

Before Powercom filed for a merger notification it claimed it had elicited reasonable alternative offers to interested buyers to no avail.²²² At the end of the Process only Telecom Namibia reached an agreement. “Powercom” claimed it was in dire financial trouble evident by the N\$ 900 million which was invested in it by Orascom with no success.²²³ In addition, the company claimed it kept suffering loses of between two to five million a month.²²⁴

Question is:

Are those allegations enough to warrant and declare “Powercom t/a Leo” a failing firm?

On the face of the case, it could be construed that Powercom t/a Leo exhibited all the characteristics of the failing firm doctrine and although this doctrine was never really enforced and applied in the Namibian courts to provide some sort of precedent, question arise as to whether this was the correct approach to consider in the context of the merger.

²²¹ Commission Communication, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 31, 05.02.2004, p. 5-18).
available at

http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html#hor_guidelines ,
accessed on 12 June 2012.

²²² *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 3.

²²³ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 10.

²²⁴ The Namibian Available at www.allafrica.com/stories/201208220412.html accessed on 12 November 2012.

Proponents of liberalisation might reject the approach of the “failing firm doctrine” supposing that the decisions might reinforce and empower the state to dominate the telecommunication industry in the future. Above all other concerns, the argument merits some thoughtful consideration, but the application of the failing firm doctrine is not only based on competition concerns but on sound economic principle to take into account the innovative efficiency, social and public cost as well as the preservation of employment.²²⁵ Those factors need to be taken into account as well.

3.9 The Communications Regulatory Authority’s Approach

Central to the approach taken by the Competition Authority was the concept of “Privatisation”. Primarily privatisation is the process of transferring ownership of a business, enterprise, agency, public service or public property from the public sector (a government) to the private sector.²²⁶ The idea is to liberalise the market and stimulate competition and growth. This is what the Communications Regulatory Authority was intending to do when they reviewed the merger. They took the view that because the telecommunication industry is indirectly controlled by the state, they had to make a concerted effort to open up and liberalise the market to support the objective of the Communications Act²²⁷ of encouraging foreign investment. Accordingly, the authority imposed the following conditions:

1. Amendment of section 2 (10) (a) (IV) of the Post and Telecommunications Companies Establishment Act No.17 of 1992 to allow for the partial privatisation of Telecom Namibia Limited with not less than 25% private shareholding.²²⁸
2. Following the above amendment, the actual partial privatization of Telecom Namibia Limited with not less than 25%.²²⁹

²²⁵ Fahim, M. An exemption not a rule in merger control legislation (Thesis. Department of Law, Lund University, 2012)

²²⁶ Fahim, M. An exemption not a rule in merger control legislation (Thesis. Department of Law, Lund University, 2012)

²²⁷ Act 8 of 2009.

²²⁸ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 4.

²²⁹ *Ibid*.

The conditions imposed were contended by “Powercom” who argued that the conditions were nothing but irrational, unreasonable, impossible to comply and otherwise unlawful.²³⁰ The Communication Regulatory Authority disputed and argued that the market reality of Powercom’s losses and their consequences did not impose an obligation to keep Powercom in business. They were perfectly within their rights and said they cannot be criticised nor can its decision be subject to review simply because Powercom is likely to suffer liquidation.²³¹ The High Court disagreed and handed down the following judgement.

3.10 The Judgement

The central issue of the case concerns the validity of conditions imposed by the Communications Authority. The arguments brought forth by “Powercom” were that the conditions were *ultra vires* and simply go beyond the powers enabled by the Communications Act.²³² Powercom argued that the decision of the Authority was in conflict with the principle of legality, was taken without due regard to the ‘*audi alteram*’ principle and as a result is in breach of the separation of powers doctrine.²³³

²³⁰ The Namibian “Leo goes to court to prevent liquidation” available at www.allafrica.com/stories/201208220412.html accessed on the 14 February 2013.

²³¹ Ibid.

²³² The Namibian “Leo goes to court to prevent liquidation” available at www.allafrica.com/stories/201208220412.html accessed on the 14 February 2013.

²³³ *Powercom v The Communication Regulatory Authority* (2012) (A) 158 at 10.

The authority denied the allegations and argued that the applications of the conditions were enabled by the following acts and provisions of the Communications Act 8 of 2009.²³⁴

S2 (i)²³⁵ “To encourage private investment in the telecommunications sector.”

S33 (3)²³⁶

“The Authority may review any proposed acquisition of an interest conferring control in competing providers of telecommunications or broadcasting services and any proposed major transaction between such providers and their affiliates for conformance with this act and to ensure that the transaction will result in no reduction in competitive markets not offset by sufficient benefits to the public.

S33 (4)²³⁷

“The Authority may impose conditions before or after such acquisitions or transactions to maintain competitive telecommunication or broadcasting markets”

s35²³⁸

- (1) No telecommunications service licence or broadcasting licence may be assigned by any person and control of any person holding such a licence may not be transferred without the prior consent of the authority, which consent may be given if the authority finds that the transfer or assignment would not be prejudicial to the objects of this act.
- (2) The parties to any transaction transferring an interest in (or conferring/transferring a right to appoint or dismiss a director of any holder of a licence referred to in subsection (1) must notify the authority of that transaction within 15 days from the conclusion of that transaction whether it transfers control in the licensee or not.
- (3) If the transfer has ultimately resulted in a change of control the authority may impose necessary measures to annul the transfer or alleviate the change of control.

²³⁴ Namibian Communications Act 8 of 2009.

²³⁵ Namibian Communications Act 8 of 2009.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Namibian Communications Act 8 of 2009.

The court questioned whether the Authority properly understood sections 2, 33 and 35 of the Communications Act²³⁹:

The court held that the condition that the Post and Telecommunications Companies Establishment Act 17 of 1992 be amended so that telecom be partially privatized goes beyond the power conferred by the act.²⁴⁰ The court applied article 44 of the Namibian Constitution²⁴¹ and articulated that²⁴²

‘The legislative powers of Namibia shall be vested in the National assembly with the powers to pass laws with the assent of the president as provided in this constitution subject where applicable to the powers and functions of the National Council as set out in the constitution’²⁴³

Accordingly the court held that it is only the parliament, who can amend legislation and held that the condition imposed by CRAN were in direct conflict with the objective and functions of the legislature.²⁴⁴

In interpreting s 33²⁴⁵ and 35²⁴⁶ of the Communications Act²⁴⁷, the court expressed that CRAN is a statutory body established by an Act of parliament, it is a creature of statute with no jurisdictional powers or functions beyond those granted by the statute creating it. ‘The authority can thus not claim power, which cannot be found within the four corners of its act’.²⁴⁸

Thus, the court concluded that that the authority misconceived its powers under section 2²⁴⁹, 33²⁵⁰ and 35²⁵¹. The conditions imposed were therefore unauthorised and thus invalid and set aside.²⁵²

²³⁹ Namibian Communications Act 8 of 2009.

²⁴⁰ *Powercom v The Communication Regulatory Authority* (2012) (A) HCA158 at 15.

²⁴¹ Constitution of the Republic of Namibia, 1990.

²⁴² *Powercom v The Communication Regulatory Authority* (2012) (A) HCA158 at 15.

²⁴³ *Ibid.*

²⁴⁴ *Powercom v The Communication Regulatory Authority* (2012) (A) HCA158 at 18.

²⁴⁵ Namibian Communications Act 8 of 2009.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ *Powercom v The Communication Regulatory Authority* (2012) (A) HCA158 at 19.

²⁴⁹ Namibian Communications Act 8 of 2009.

²⁵⁰ *Ibid.*

²⁵¹ *Ibid.*

²⁵² *Powercom v The Communication Regulatory Authority* (2012) (A) HCA158 at 22.

4 Critical legal analysis of the “Powercom” judgement.

4.1 Competition analysis of the telecommunications structure in Namibia.

Before examining the judgement and the notice of determination brought forth by the respective authorities, it will first be useful to study the telecommunications market structure, scrutinise the level of dominance in the market, establish what constitutes market power and predict how the approval of this merger will impact competition and consumer welfare in the relevant market.

In an effort to formulate a graphic understanding of the market structure an overview of the respective market shares will be discussed in a form of charts.

Table 3: Below displays a composition of the market share in the telecommunications market based on revenue.²⁵³

Licensee	Type of License	Date License was first issued	Market Share	Control essential infrastructure?	Market power/dominance in a related market able to exercise power in the telecommunications market??	Dominant?
Telecom Namibia Limited	Individual (ECNS and ECS)	11 June 2012	41.4 percent	Yes, owns a CDMA, national backbone, (PSTN), WACS	NO	YES
Mobile Telecommunications Limited	Class Comprehensive (ECNS and ECS)	14 March 2012	52.6 percent	Yes, owns a national GSM network and WACS	NO	YES

²⁵³ The 'Communications Regulatory Authority of Namibia: Determination of dominant position: Telecommunication service licenses' (Published in GG 5201OF 29 May 2013).

Powercom (Pty) Ltd	Class Comprehensive (ECSN and ECS)	16 June 2012	4.7 per cent	Yes, owns a national GSM network and WACS	NO	NO
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At present, the Namibian Competition Act ²⁵⁴ has no provisions, which outlines criteria's to be applied when determining whether an undertaking has market dominance or not. The act [Namibian Competition Act] is however empowered by the provision of section 25²⁵⁵ which stipulates that:

For the purpose 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.

The NaCC has not prescribed those criteria's yet. As far as market dominance in the telecommunication sector is concerned, the NaCC relies on the criteria's established by CRAN, which are encapsulated under section 78 (4)²⁵⁶ of the Communications Act, which states that a licensee is dominant;

- If it has a share of the market in the class of telecommunications services in question, that it is able to act independent of its competitors.
- Controls some infrastructures that are necessary for the provision of the services in question.
- Is dominant in a related market and is therefore able to exercise power in the market for the telecommunications services in question:
or

²⁵⁴ Namibian Competition Act 2 of 2003.

²⁵⁵ Namibian Competition Act 2 of 2003.

²⁵⁶ Namibian Communications Act 8 of 2009.

- Has a position in a market of another country or a relationship which providers in another country that can be used to exercise market power in respect of the relevant class of telecommunications services in Namibia.

In addition, section 78 (5)²⁵⁷ of the Communications Act further prescribes that 'CRAN' must also consider the market power that may be exercised by a competitor of the licensee concerned in order to give meaning and substance to the criteria's established under section 78(4)²⁵⁸

The following definition for market power for the purpose of the Communications Act²⁵⁹ was established.

A licensee is dominant in a market if:

- It has at least 35 per cent of market share based on revenues;
- It has less than 35 per cent market share but controls some infrastructure that is necessary for the provision of the services in question.
- It has less than 35 per cent market share but controls some infrastructure that is necessary for the provision of the services in question.
- It has less than 35 per cent market share but has a position in a market in another country or a relationship with providers in another country that can be used to exercise market power in respect of the relevant class of telecommunications services in Namibia.

²⁵⁷ Ibid.

²⁵⁸ Ibid.

²⁵⁹ Namibian Communications Act 8 of 2009.

Applying the above-established criteria's of market power establishes the following results.

Assessment of dominance in the Telecommunications Market				
		Telecom Namibia Limited	Mobile Telecommunications Limited	Powercom (Pty) Limited
1	Above 35 per cent Market Share	YES	YES	NO
2	Controls some infrastructure necessary for the provision of the services in question;	YES	YES	YES
3	Is able to exercise power in the market for the services in question	Requires detailed analysis	Requires detailed analysis	Requires detailed analysis
4	Has a position in a market in another country or relationship with	Requires Detailed Analysis	Requires Detailed Analysis	Requires Detailed Analysis

	providers in another country that can be used to exercise market power in respect of the relevant class of services in Namibia.			
Dominant (yes/No)		YES	YES	YES

Studying the table above, the analysis seems to indicate that first, all three incumbents display some degree of market dominance; the enquiry is to determine whether they all possess market power? .‘Factors frequently considered in determining whether a firm has market power include vertical integration,’ barriers to market entry, market share, pricing behaviour and profitability.’²⁶⁰ An increase in the above factors should raise competition concerns.

Second, the analysis also indicates that both Telecom Namibia and Powercom’s displayed the highest revenue share among the three incumbents. This suggests that the two entities make the most profit, therefore indicating that they possess the potential market power to abuse their dominance.

Nevertheless, studies have shown that regulatory authorities should not be so much concerned with dominance in competition law; dominance only becomes a competition concern when it is abused, it does not necessarily dictate market

²⁶⁰ Thulasoni Kaira ‘State of Competition in Zambia’s Telecommunications Sector’ (2011) 11 *The African journal of information and communication issue 23* at 25.

power. Thus, dominance can only be used as a proxy to determine whether a firm is abusing its dominant position or not. Hence “a service provider only has market power if it is able to durably charge more and/or give less to consumers than they would obtain in a competitive market”.²⁶¹ ‘Firms without market power are simply not able to cause serious problems in the economy because if they raise their prices above market levels, they will simply lose customers and profits.’²⁶² This might be the reason why Powercom hold such a trifling share of the mobile telecommunication market.

Section 26 (2) of the Namibian Competition Act²⁶³ defines “abuse of dominance” as being;

- Directly or indirectly imposing unfair purchases or selling prices or other unfair trading conditions.
- Limiting or restricting production, market outlets or market access, investment, technical development or technological process.
- Applying dissimilar conditions to equivalent transactions with other trading parties.
- Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions, which by their nature or according to commercial usage have no connection with the subject matter of the contracts.

The Executive Director Thulasoni Kaira of the Zambian Competition and Consumer Protection Commission reiterated that:

While there are many possible responses to market dominance, regulators need to carefully select among the range of mechanisms that may or may not revolutionise the telecommunications industry and aid in the reduction of high market concentrations and abuse of dominance. In the absence of effective substitutability, owing largely to behavioural

²⁶¹ Ibid.

²⁶² Ibid.

²⁶³ Namibian Competition Act 2 of 2003.

rather than structural impediments, there would be little if any effective competition in the mobile telephony subsector in particular.²⁶⁴

From the prevailing market structure, it can be eluded that Powercom exhibited a risky move when they entered the mobile telecommunication market in 2006. The market was highly monopolised by MTC at the time and lacking effective competition. MTC enjoyed fruitful and consistent revenue streams over their years of existence, they had absolute control over consumer choice and they could limit production and innovation to the detriment of consumers. The challenge for Powercom was to address how quickly were they going to convince consumers to switch from the only mobile service provider the country has ever known to Powercom?

The reality was that MTC were 12 years ahead when Powercom entered the market in 2006. Thus, Powercom were faced with every disadvantage factor coming from being a second entrant in a low competitive and highly concentrated market. Moreover, NPTH had controlling shares of 66 per cent in MTC, which subsequently meant huge financial assistance from the government. Thus, this could have been the reason why MTC and Telecom reaped record profits from their respective relevant markets leading them to acquire such a substantial degree of market power.

Telecom Namibia on the other hand being the only fixed line service provider in the country was and remain a state monopoly. They have never been subjected to competition. Naturally, this gave them an incentive to control and set the prices they wished and they still continue to do so today.

In merger analysis cases 'many competition jurisdictions have...presumed illegality when merging firms market shares are significant in the industry with

²⁶⁴ Thulasoni Kaira 'State of Competition in Zambia's Telecommunications Sector' (2011) 11 *The African journal of information and communication issue 23* at 25.

high entry barriers.²⁶⁵ In the *United States v Philadelphia National Bank*²⁶⁶ case, the Supreme Court held that:

A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially and that it must be disapproved in the absence of evidence clearly showing that the merger is not likely to produce anticompetitive effects.²⁶⁷

Considering the fact that the Namibian Competition Commissions determination of the proposed merger was based on section 47 (2)²⁶⁸ on grounds that “the proposed transaction is likely to prevent or lessen competition in the relevant market” especially more in a market characterised by high entry barriers, the merger should have been rejected or at least approved with the most stringent conditions.

In the case of *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd*²⁶⁹ the courts outlined a solid assessment and gave meaning to the term “substantially lessening of competition”. The court substantiated that:

To apply the concept of substantially lessening of competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening. One must look at the relevant significant portion of the market, as oneself how and to what extent there would have been competition therein but for the conduct, assess what is left and determine whether what has been lost in relation to what would have been, is seen to be a substantially lessening of competition,²⁷⁰

²⁶⁵ Maurice E. Stucke , Akken P, Grunes ‘ The AT & T/Mobile Merger: What might have been?’ (2012) 3 *Journal of European Competition Law and Practice* 196 at 197.

²⁶⁶ *United States v Philadelphia National Bank* 374 U.S, 363 (1963).

²⁶⁷ *United States v Philadelphia National Bank* 374 U.S, 363 (1963).

²⁶⁸ Namibian Competition Act 2 of 2003.

²⁶⁹ *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* 1982 (64) FLR 238.

²⁷⁰ *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* 1982 (64) FLR 238.

Thus, The Commission should have paid thoughtful attention to these particular factors when they applied the incipency standard.

- The small telecommunications market size particularly the mobile service sector,
- MTC and Telecom Namibia's number of subscribers,
- Prevailing market failures in the telecommunications sector,
- Lack of effective competition
- And most importantly the significant amount of subsidisation that MTC and Telecom Namibia enjoyed from the state.

The thought provoking question is?

Did the "NaCC" act rationally in imposing such weak conditions in the context of such an important telecommunication merger – especially where it found that the sector is highly concentrated and characterised by a significant barrier to entry.

Operationally, the mobile service sector has lacked effective competition for a very long time it has also for the same period of time been impeded by huge market failures. The market is characterised by 'inadequate regulation, ineffective competition law enforcement and most of all insufficient consumer protection'.²⁷¹ The state controls the fixed line telecommunication market [Telecom Namibia]; they own majority shares in MTC competing against a small mobile service provider [Powercom] hardly covering 10 per cent of the market share. The charts below gives an illuminating picture of the telecommunication market share in Namibia based on revenue and number of subscribers.

²⁷¹ Cseres KJ 'What has competition done for consumers in liberalised markets?' (2008) 4 *The Competition Law Review* 77 at 80.

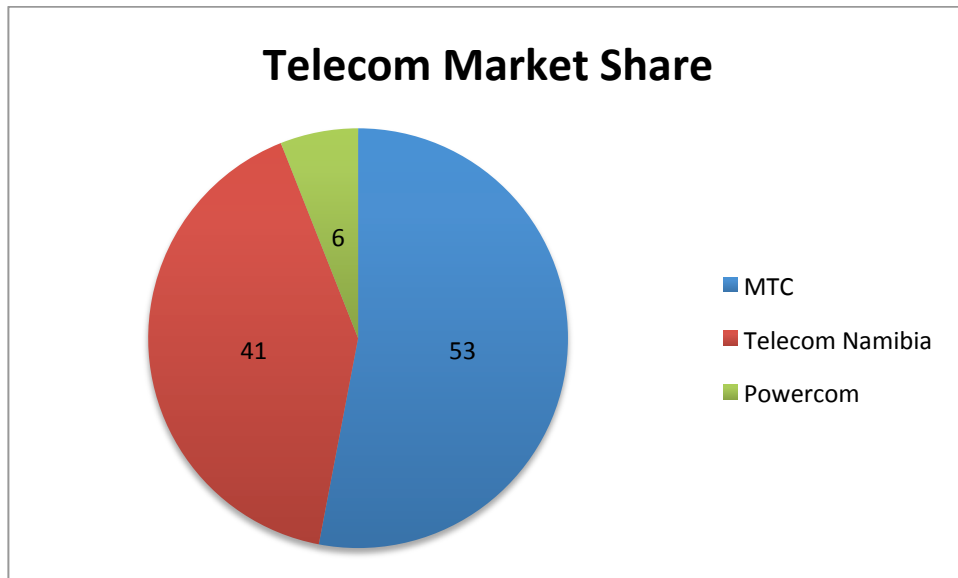
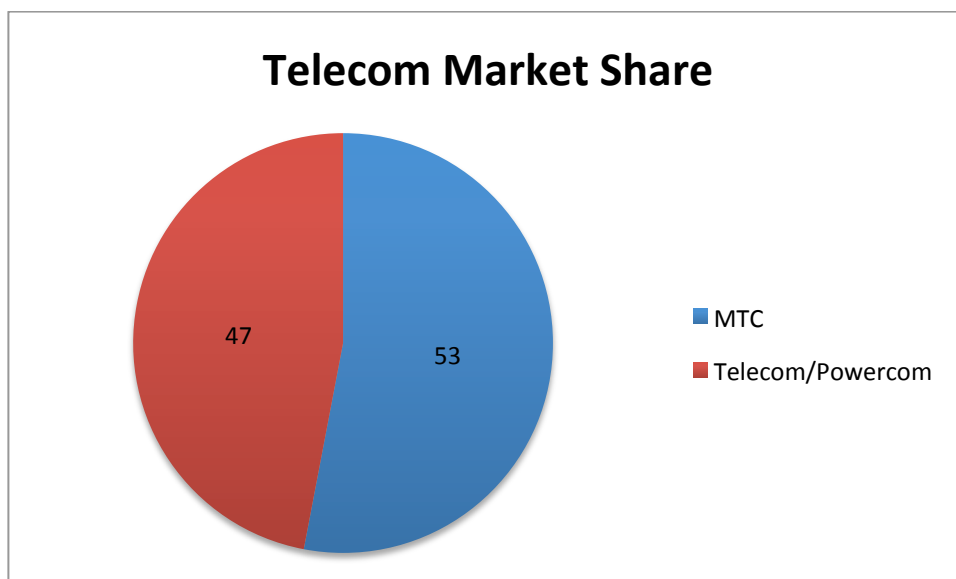
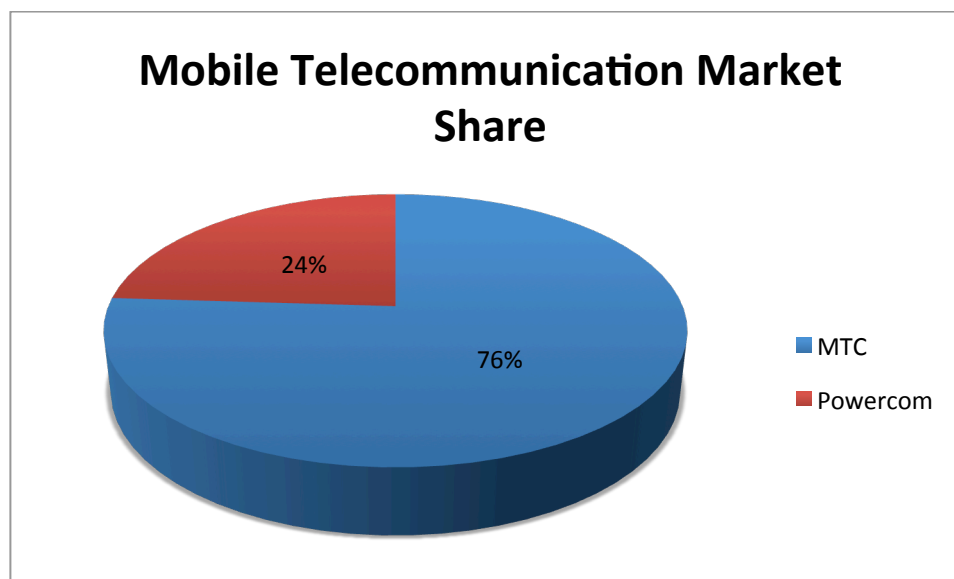
Table 4: Pre-Merger Revenue Market Share**Table 5: Post Merger-Revenue market share.**

Table 6: showing the composition of market share in in the telecommunications industry in Namibia as at September 2012.²⁷²

	Sep 2006	Sept 2007	Sept 2008	Sept 2009	Sept 2011	Sept 2012
Leo	0%	5%	17%	24%	24%	24%
MTC	100%	95%	83%	76%	76%	76%
Telecom	100%	100%	100%	100%	100%	100%

Table 7: Mobile service sector market share based on the number of subscribers



²⁷² MTC Annual Financial Statement (note 143) at 8.

First and foremost, there's a disproportionate allocation of market share in the market. The charts illustrate that the two service providers who hold the majority amount of shares in the telecom market are MTC and Telecom Namibia. Both these entities were founded by the state and benefited incredibly from state subsidy under NPTH. The charts also illustrate that MTC dominates the respective mobile service sector owning 76 per cent of the market share and capturing 53 per cent revenue shares. Telecom owns 100 per cent of the fixed line telecommunications market and captured 41 per cent of revenue shares. Both these entities could be said to be making an incredible amount of profit, which can only reinforce their market power, by allowing them to leverage their technological infrastructure to the detriment of new entrants.²⁷³

The above concentration of markets shares could also stem from the fact that both these entities gained first mover advantage when they entered their respective telecommunications sectors. MTC was the first mobile service provider in the country historically established by the state owned NPTH, this gave them a "defensible ground, to capture a large proportion of the market share, create brand loyalty, expand their network systems and grow their clientele base to the detriment of Powercom who only entered the market in 2006. Thus, Powercom risked penetrating into an unregulated market, not only characterised by high barriers to entry but one infused with uninformed consumers and lack of consumer protection.

In addition, MTC and Telecom had for a very long time enticed consumers to conclude unfavourable long-term standard contracts with their business. These contracts usually ran for a period of between 12 months and 24 months. During this period consumers would be "locked in" unable to switch from one mobile service provider to another. Besides the contracts being abusive they were also

²⁷³ Philippe Brussick, Simon J. Evenett 'Should developing countries worry about abuse of dominant power?' (2008) 270 at 276, available at http://www.antitrustinstitute.org/files/Brusick%20&%20Evenett_053020080956.pdf, accessed on 19 June 2013.

extremely overpriced making consumers pay up to double the price at the end of the contract period. This together with a lack of consumer protection legislation and strong market brand created a significant barrier to entry and gave MTC substantial market power in the mobile telecom sector.²⁷⁴

What challenges were Powercom faced with entering the monopolised mobile Telecom industry?

First and foremost, Financial Capital. Brusick and Evenett²⁷⁵ affirmed that:

‘Difficulties in securing financial capital in poor countries typically result in some industries being characterised by a few large enterprises that enjoy a de facto monopolistic position. Such firms can use their profits to amass financial resources that might deter entry by other firms’²⁷⁶

In a market characterised by high switching cost and high barriers to entry not only was Powercom faced with the challenging task of convincing consumers to switch from MTC to Powercom. Consumer education, needed to be invested in to educate the population on the freedom of choice and in particular their right to choose any mobile service provider they wished. MTC abused their position of knowing consumers had no other alternative choice and this gave them a huge competitive advantage

Powercom had to heavily invest in finance to leverage their technological infrastructure and position their brand in a way that will not only foster consumer loyalty but increase their network and distributional coverage to reach even the most remote of regions. They had to engage in an aggressive marketing campaign to position their brand in a market typified by significant information problems and high capital cost. All of this meant a huge financial burden

²⁷⁴ Ibid (note 211) at 82.

²⁷⁵ Philippe Brussick, Simon J. Evenett ‘Should developing countries worry about abuse of dominant power?’ (2008) 270 at 276, available at http://www.antitrustinstitute.org/files/Brusick%20&%20Evenett_053020080956.pdf, accessed on 19 June 2013.

²⁷⁶ Philippe Brussick, Simon J. Evenett ‘Should developing countries worry about abuse of dominant power?’ (2008) 270 at 276, available at http://www.antitrustinstitute.org/files/Brusick%20&%20Evenett_053020080956.pdf, accessed on 19 June 2013.

especially more so because Powercom had no existing assets. It comes thus as no surprise that Powercom failed to secure funding and suffered huge financial losses in the initial stage of their business. The emergence of Powercom only reinforced the notion that state owned monopolies would always have an advantage over private owned entities entering the telecommunication markets.

Cseres also pointed out that

Consumers facing significant information problems will always make less rational decisions and make the market perform sub-optimally. This is especially so in markets of non-homogenous, complex products. Where such consumer behaviour can often create significant barriers to entry and therefore influence the way markets operate.²⁷⁷

She further elaborated that:

A poorly informed consumer who is not aware of alternative choices before his purchase and who might be subject to the sellers pressure is in fact subject to market power. Or a consumer entering a contract with unfair contract terms is subject to the exploitation of market power.²⁷⁸

4.2 Comparative Analysis of the Regulatory Authorities Decisions and Judgement

The question of whether the NaCC acted irrationally in approving the Telecom/Powercom merger amidst all of the above factors is a controversial one. But, in light of the prevailing market failures, it wouldn't be surprising to learn that Powercom could have filed for a "failing firm defence" as a justification to merge with Telecom. Whether this doctrine could be used as a defence or as only one of a list of criteria's to assess a merger is one that the Namibian Competition authorities will need to clarify.

²⁷⁷ Cseres KJ 'What has competition done for consumers in liberalised markets?' (2008) 4 *The Competition Law Review* 77 at 80.

²⁷⁸ *Ibid.*

The European Commission established that for a failing firm to be accepted three requirements need to met.

- First, the allegedly failing firm would in the near future be forced out of the market because of financial difficulties if not taken over by another undertaking.²⁷⁹
- Second, there are no less anti- competitive alternative purchases than the notified merger.²⁸⁰
- Third, In the absence of a merger the assets of the failing firm would inevitably exit the market²⁸¹

Did Powercom fulfil all the established requirements of a failing firm?

Financial difficulty:

Powercom's original established brand name was 'Cell One'. Powercom ran under the auspices of this name for a full year until they suffered significant loses.²⁸² In an effort to save the firm from further financial distress they introduced in a new shareholder with strong technical background, Telecel, which acquired the entire, shared capital in Powercom and rebranded the firm to 'Leo'.²⁸³ Powercom alleged that Telecel invested N\$ 900 000 but the firm was still a failure.²⁸⁴ They have also alleged that if the merger was not approved the entity will be liquidated given its existing exposure of N\$450 million and monthly operational loses of between N\$ 2 million and N\$5 million.²⁸⁵ Under this specific requirement "it is not required that bankruptcy proceedings or similar restructuring proceedings be initiated but rather that [likely] absent the merger the company will enter into such proceedings."²⁸⁶ It is likely that Powercom exhibited all the characteristics of a firm in financial difficulty. They issued a

²⁷⁹ The OECD Competition Committee paper (2009) at 3, available at http://ec.europa.eu/competition/international/multilateral/ec_submission.pdf

²⁸⁰ Ibid.

²⁸¹ Ibid (note 279) at 3..

²⁸² Powercom Namibia v The Communication Regulatory Authority (2012) A 158 (HC) at 3.

²⁸³ Powercom Namibia v The Communication Regulatory Authority (2012) A 158 (HC) at 3.

²⁸⁴ Ibid.

²⁸⁵ Powercom Namibia v The Communication Regulatory Authority (2012) A 158 (HC) at 6.

²⁸⁶ Ibid (note 279) at 3.

press release to sell their shares to various firms but in the end only Telecom Namibia submitted a bid to purchase. This requirement was therefore met.

No less anticompetitive solution:

Powercom claims there were no interested buyers when they issued a press release²⁸⁷ an information memorandum was prepared and send to MTN, Vodacom, ECONET, France Telecom, Telecom (Orange) , Bharti, Telecom Namibia, Delta Partners, SATTATT, Holdings, Hardiman Technologies and Istone Capital and ONLY Telecom Namibia submitted a bid to purchase. The authority should have asked the following questions:

- *Where the selected potential buyers chosen by Powercom credible purchasers?*
- *And to what extent where efforts made by Powercom to reach an agreement with other investors?*

Exit from the market:

Was Powercom going to completely discontinue business and exit the market in the absence of the merger?

Powercom were competing in a highly concentrated market dominated by a monopolist who not only possessed market power but strong reputation and brand positioning. The mobile telecommunication market was also highly saturated, controlled by political force and imbued with expensive start-up capital.

Moreover, MTC has a strong loyal client base of over 2 million subscribers coupled with an extensive outlet distribution system. With Powercom's 4 per cent market share based on revenue and 6 per cent total market share based on the number of subscribers, it was highly unlikely that if Powercom were truly in financial distress would have been able to compete with MTC's rapidly

²⁸⁷ Ibid (note 279) at 3.

developing technological infrastructure. It is thus possible that absent the merger, Powercom would probably have suffered further losses and exited the market.

In light of the above and disregarding the uncertainty of whether the second requirement of the failing firm doctrine was met or whether it could be used as a defence. The NaCC should have at least imposed further stringent conditions.

The reality is:

Many developing economies are dominated by the state, acting directly as the owner of state monopolies or indirectly through the close links it entertains with national champions, which the state often seeks to promote. The dominance of the state can be at the expense of other domestic or foreign firms and can result in heavy handed anticompetitive practices, damaging the very economy that it purports to nurture and safeguard.²⁸⁸

The approval of the proposed merger indirectly establishes that that the state will in essence end up controlling the entire telecommunication sector. It would result in the prevention or lessening of competition in the relevant market, because presently the majority shareholder in all this entities is NPTH. The only private stake or investors in the sector are the 34 per cent shares by MTC held by a Portugal telecom company. This structure 'can provide a gateway through which the state can heavily intervene in the competitive process, distorting free competition political or other more opaque reason.'²⁸⁹

Meanwhile, in an effort to mitigate the negative effect of the proposed merger in the mobile telecommunications market, the NaCC imposed the following conditions in its merger determination:

1. From the effective date of the implementation of the merger. The merging parties should put in lace a separate and independent shareholding structure for Telecom Namibia and that of MTC.

²⁸⁸ Philippe Brusick, Simon J. Evenett ' Should developing countries worry about abuse of dominant power?' (2008) 270 at 293 , available at http://www.antitrustinstitute.org/files/Brusick%20&%20Evenett_053020080956.pdf , accessed on 19 June 2013.

²⁸⁹ Ibid (note 288) at 278.

2. This separation of the holding structure must be effected within a period of two (2) years from the date of the notice of determination.
3. In the interim of the two (2) year period.
 - 3.1 The NPTH Chief Executive Officer who is also the Managing Director of Telecom Namibia, a well as the NPTH Company Secretary who is also the head of legal services and Company Secretary of Telecom Namibia, should resign from the respective positions at NPTH with immediate effect.
 - 3.2 No person who is a director of Telecom Namibia or NPTH or MTC and likewise no person who is a director of MTC or an employee of MTC may serve as a director of either NPTH or Telecom Namibia.

In addition to the above-numerated conditions, the NaCC should have at least imposed the following additional conditions.

1. Immediately following the merger, Telecom Namibia was to block 30 per shares of capital of Powercom in a Special purpose vehicle (SPV) for private ownership.
2. Telecom Namibia was to within six months of taking over Powercom, identify a senior compliance officer to oversee the facilitation of the bidding process.
3. 'Telecom Namibia was to cap all local telephone residential rates for at least three years after the approval of the merger.'²⁹⁰
4. NPTH was to induce all its telecom subsidiaries to cancel all long standard term contract agreements with all its subscribers in the mobile telecommunications market to unlock consumers.
5. Telecom Namibia and Powercom are to submit detailed plans to the NaCC staff before transitioning to any new computer operating systems that affect customer services like billing or filling new phone orders.'²⁹¹

The above conditions would have aimed at opening up the mobile telecommunication sector for private investments and stimulate effective

²⁹⁰ 'State approves CenturyLink-Quest Telecom mergers' at 1, available at <http://www.wutc.wa.gov/webimage.nsf/0/D3DDB0C3A0D7FD318825785300730102>.

²⁹¹ 'State approves CenturyLink-Quest Telecom mergers' at 1, available at <http://www.wutc.wa.gov/webimage.nsf/0/D3DDB0C3A0D7FD318825785300730102>.

competition in the relevant telecommunications market. As much as the emergence of future anti-competitive conduct especially between Telecom and Powercom cannot be ruled out. These conditions would have inhibited the possibility of NPTH having dominant control over the telecommunication sector in general.

As for the conditions imposed by CRAN, The court was technically correct in affirming that ‘the amendment of section 2(10) (a) (iv) of the Post and Telecommunications Companies Establishment Act No 17 of 1992 to be amended to allow for partial privatisation of Telecom Namibia²⁹² was

1. In conflict with the principal of legality,²⁹³
2. Taken without due regard to the ‘audi alteram ‘principle,²⁹⁴
3. In breach of the separation of powers doctrine and²⁹⁵
4. Has no rational basis.²⁹⁶

It appears from the approach taken by CRAN that central to its decision was the determination of opening up the telecommunications market for Private investment. Fundamentally, the idea seems to have been properly understood but in substance entirely misconceived and wrongly applied.

Section 2 (10) (a) (iv)²⁹⁷ of the Post and Telecommunications Companies Establishment Act explicitly states that:

‘No person except the holding company shall whether directly or indirectly hold any shares in the company’

The companies referred to in section 2 (10) (a) (IV)²⁹⁸ are defined in section (2) (1) (a) to (c)²⁹⁹ and specifically refer to:

²⁹² Powercom Namibia v The Communication Regulatory Authority (2012) A 158 (HCA) at 4.

²⁹³ Powercom Namibia v The Communication Regulatory Authority (2012) A 158 (HCA) at 10.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Namibia Post and Telecommunications Companies Establishment Act 17 of 1992.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

- (a) Namibia Post Limited;
- (b) Telecom Namibia Limited and
- (c) Namibia Post and Telecom Holdings limited.

The golden rule of legal interpretation stipulates that ‘the words of a statute must prima facie be given their ordinary meaning.’³⁰⁰

In this case, the term “company” should not by rule of interpretation include Powercom t/a Leo. The term [Company] should strictly be defined and restricted to the meaning prescribed by the Telecommunications Companies Establishment Act.³⁰¹ Telecom Namibia purchased controlling interest in Powercom with the intention of running it as a mobile telecommunications company. Therefore, Powercom is technically a subsidiary of Telecom Namibia with an entirely separate legal entity separated from that of Telecom Namibia.

The provision does not clearly stipulate whether subsidiaries of the companies created by the statute form part of the definition of company. Thus, if this were the case then MTC would still have 100 per cent of its shares wholly owned by NPTH.

To have produced the same effect and outcome, CRAN should have prescribed that condition to be imposed on Powercom t/a Leo and conditioned that:

1. At least 25 per cent of Powercom capital shares be reserved in a special purpose vehicle (SPV) for private ownership.

This condition could have been justified by section 33 (4)³⁰² of the Communications Act, which empowers CRAN to impose conditions that:

- (i) Are aimed at ensuring that the transfer of Powercom’s telecommunications licence to telecom will result in no reduction in competitive markets not offset by sufficient benefits to the public; and

³⁰⁰ Golden Rule Definition, available at <http://www.lawyersclubindia.com/articles/GOLDEN-RULE-OF-INTERPRETATION-3105.asp#.UhI9ErSBK8o> .

³⁰¹ Post and Telecommunications Companies Establishment Act 17 of 1992.

³⁰² Namibian Communications Act 8 of 2009.

- (ii) Are aimed at ensuring that the transfer of Powercom's telecommunications licence to Telecom will maintain competitive telecommunications or broadcasting markets.

The court was therefore legally correct in affirming that CRAN misconceived its powers in imposing a condition, which required a law to be amended.

Article 44 of the constitution clearly stipulates that;

'The legislative powers of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President as provided in this constitution subject, where applicable to the powers and functions of the National council as set out in this constitution.'³⁰³

CRAN has no powers under the Namibian Communications act to impose conditions, which requires a law to be amended in order to approve a merger or acquisition for the purpose of promoting private investments.

³⁰³ The Constitution of the Republic of Namibia 1991.

4.3 Effect of the Decision on Competition and Consumer Welfare

The approval of this merger might result in Telecom abusing its dominant position by creating:

1. The Possibility of Bundling Packages ³⁰⁴

Telecom Namibia and Powercom serve completely two different markets, fixed line telecommunications and mobile telecommunication services respectively. Telecom Namibia enjoys perfect monopoly in its respective fixed line telecom markets and hold 41 per cent revenue share in the entire telecom sector. Powercom only holds a trifling 6 per cent of the revenue market share. Post-merger the combination of these two entities revenue market share can increase to 47 per cent.

This is concerning for two reasons. First, Telecom Namibia might establish an agreement with Powercom and consolidate packages which bundles both fixed line and mobile service products. Second, these packages may be sold on a discount. This can raise significant anti-competitive concerns because 'one of the issues with bundling in the telecommunication sector is the possibility that a monopolist in one market may be able to use that position to extend its power into a market for products where it competes with other firms.'³⁰⁵ Powercom in this case may benefit from an increase number of subscribers who would like to use both services at a reduced rate but this might present a situation where Powercom uses bundling to disguise predatory pricing and induce MTC clients to make use of their services instead. Strategically, this might seem like the perfect way to stimulate competition in the mobile telecommunication sector but in actual effect this could impair competition in so far as entry into the mobile market is

³⁰⁴ Jongho Kim 'Deep Impact on the mobile telecommunications market' at 4.1.4 , available at <http://www2.law.ed.ac.uk/ahrc/script-ed/vol5-2/kim.asp> , accessed on 21 August 2013.

³⁰⁵ Franco Papandrea , Natalie Stoecl , Anne Daly 'Bundling in the Australian Telecom sector' (2003) 36 *The Australian Economic Law Review* 41 at 48.

concerned. The mobile telecommunication sector is already infused with ineffective competition the incentive of these bundling packages may perpetuate abuse by Powercom and place MTC at a competitive disadvantage especially because MTC wouldn't have the infrastructure to create the same service.³⁰⁶

2. The possibility of Cross-subsidization

The Revenue market share discussed in in the previous subsection clearly highlights that Powercom holds the least portion of the market share. Thus, because Telecom makes record profits in the fixed line telecom sector this might induce them to cross subsidise the mobile telecom sector. 'Cross subsidy assumes that a multi-product firm sells outputs at a lower price in a competitive market while charging higher prices from consumers in a market in which it enjoys an effective monopoly'³⁰⁷ Telecom might charge more for their fixed line service product and create cheap contract packages in the mobile sector in an effort to increase their client base. This cross-subsidisation may distort competition in the mobile telecom sector because Telecom is already dominant in the fixed line telecom market and they will always be in demand for as long as they remain a monopoly. Thus, this may provide telecom an incentive to invest more in the mobile telecom sector to the detriment of consumers in the fixed line telecom sector.

Since the establishment of Powercom in 2006, the Namibian mobile telecommunication market has been pervaded with aggressive advertising practices. MTC has resorted to all sorts of marketing

³⁰⁶ Joshua Gans, Stephan Kings 'Potential anti-competitive effects of bundling' (2002) at 9, available at <http://www.core-research.com.au/Papers/Bundling%2002-06-28.pdf> , accessed on 19 August 2013.

³⁰⁷ Sumit K. Majumdar ' On the determinants of non-market strategy: The separation mechanism and cost shifting in the telecommunication industry (2012) 34 *The telecommunication policy* 711 at 712.

strategies to ensure that they retain their number of subscribers. Whether this decision will stimulate competition and open up the market in the near future, remains to be seen. The decision however clarifies that the need to retain market players is especially necessary to introduce effective competition in any relevant market. What is doubtful is whether Telecom Namibia was the best incumbent to acquire Powercom.

Nevertheless, in the absence of a Consumer Protection Act, Namibian consumer will never be fully legally protected from ant-competitive conduct. The need for a consumer enforcement agency is needed to ensure that consumers are not misled and deceived. As Cseres pointed out, 'consumers in the telecommunication sector lack experience of exercising their choice or switch to a service provider whose offers are more advantageous.'³⁰⁸ For as long as this gap exists, consumers will always be reluctant to switch to any service provide irrespective of how persuasive their advertising and marketing campaigns are.

Klemper further affirms his by stating that:

'In markets characterised by repeat consumption, consumers who have previously purchased a good or service from one firm would incur certain costs if they purchase the competitors product. In order to avoid these costs consumers remain loyal to their previous supplier and as a result firms retain a certain degree of market power over repeat purchases.'³⁰⁹

In order to promote effective competition in the telecommunication sector the relationship between sector regulators, consumer law and competition law need to be fully analysed. And this would require asking the following questions:

³⁰⁸ Cseres KJ 'What has competition done for consumers in liberalised markets?' (2008) 4 *The Competition Law Review* 77 at 80.

³⁰⁹ P Klemperer, 'Competition when consumers have switching costs: an overview with applications to industrial organization, macro-economics and international trade (1995) 62 *Review of economics study* 515-537.

1. **Could harm to consumers justify a finding of anti-competitiveness?**³¹⁰
2. **Could harm to consumers constitute a sufficient condition for antitrust control?**³¹¹
3. **Is 'harm to consumers' a necessary precondition of a finding of anti-competitiveness?**³¹²

Haracoglou asserts:

While the role of the consumer may be central to the definition of the relevant a market and the determination of dominance, the *effect* of conduct on consumers is not traditionally directly considered in competition enforcement. Harm to consumers is not necessary to a finding of anti-competitive conduct; the absence of harm to consumers in itself will not exempt anticompetitive conduct, in the absence of a clear benefit. In most cases, harm to consumers is presumed from harm to the competitive process. While in some cases consumers are more obviously affected and directly considered, that has more to do with the nature of the conduct in question than with a belief that competition policy and enforcement should depend on an actual or potential harm to consumers.³¹³

It follows thus, that to realise the full effects of consumer welfare standard and to address the issues of long standard term contracts and misleading advertising campaigns, consumers would be best served by consumer protection legislation. Competition law can only regulate and safeguard competition, whether the benefits immediately accrue to consumers is an aspect that falls outside the competition acts legislative powers. To have competition law protect consumers, as its sole objective will completely negate the objective of competition law, which is to protect competition.

³¹⁰ Irina Haracoglou 'Competition Law, Consumer Policy and the Retail Sector: the systems' relation and the effects of a strengthened consumer protection policy on competition law' (2007) 3 *The Competition Law Review* 171 at 203.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Irina Haracoglou 'Competition Law, Consumer Policy and the Retail Sector: the systems' relation and the effects of a strengthened consumer protection policy on competition law' (2007) 3 *The Competition Law Review* 171 at 207.

4.4. Legal enforcement and Regulatory Framework

With the recent worldwide movement of consumer and competition laws being viewed as complimentary, competition authorities around the world are being called to consider the idea of merging the respective agencies under one regulatory authority.³¹⁴ Commissioner Kovacic of the US Federal Trade Commission even ones reiterated that “consumer protection laws are important complements to competition policy”.³¹⁵

Question is, in a developing country like Namibia, is it feasible to combine these two enforcement agencies under one regulatory umbrella?

The process of establishing regulatory agencies involves making laws that empowers these institutions. For one, they require suitably qualified personal and second finance for procedural and administrative duties to be carried out.

Haracoglou affirms that:

Competition rules establish market players and make the entry of a greater number of suppliers possible. Consumer tools assist consumers to make rational, well-informed choices on the market and subsequently intensify competition.³¹⁶

But can these functions not be integrated under one institution?

Cseres asserts that:

While both legal fields strive for well-functioning markets they address different market failures respectively on the supply or demand side

³¹⁴ KJ Cseres ‘Intergrate or separate: Institutional design for the enforcement of competition law and consumer law’ (2013)

³¹⁵ WE Kovacic, Competition Policy, Consumer Protection, and Economic Disadvantage (2007) 25 *Journal of Law & Policy* 101 at 114.

³¹⁶ Irina Haracoglou ‘Competition Law, Consumer Policy and the Retail Sector: the systems’ relation and the effects of a strengthened consumer protection policy on competition law’ (2007) 3 *The Competition Law Review* 171 at 207.

and apply different enforcement tools in different enforcement environment³¹⁷

She further states that:

The main focus of competition law is market failures originating from collusive or exclusionary practices. By prohibiting anti-competitive behaviour competition law enhances the competitive structure of markets for goods and services..... Consumer protection addresses information failures like imperfect information and information asymmetries. Its objective is to provide good quality and cost of consumer information and to enable consumers to make well informed decisions.³¹⁸

A large scale of Namibia's economic sectors is still dominated by state monopolies and regulated by sectoral legislation. The country is still in its early stages of developing competition law jurisprudence. Thus, the establishment of a Consumer Commission could only add unnecessary cost and complicate regulatory matters between the two authorities. Establishing effective competition can only improve in a presence of a consumer protection act to offset market failures. Thus, Namibia can benefit from a combined regulatory agency through:

- Saving costs
- Reducing over and under regulation³¹⁹
- Consumer access to justice
- Harmonisation of competition and consumer objectives and
- Administrative efficiency

In addition, the integration will also allow the NaCC to effectively deal with market failures perpetuated by state monopolies and simultaneously allow an

³¹⁷ Irina Haracoglou 'Competition Law, Consumer Policy and the Retail Sector: the systems' relation and the effects of a strengthened consumer protection policy on competition law' (2007) 3 *The Competition Law Review* 171 at 186.

³¹⁸ KJ Cseres 'Integrate or separate: Institutional design for the enforcement of competition law and consumer law, working paper, *Amsterdam Centre for European law and governance* (2013) at 27.

³¹⁹ KJ Cseres 'Integrate or separate: Institutional design for the enforcement of competition law and consumer law, working paper, *Amsterdam Centre for European law and governance* (2013) at 27.

opportunity for sectoral regulators such as CRAN and Bank of Namibia to fully understand the importance of consumer protection and integrate it within their broader policies.

In contrast, as far as the approval of mergers and acquisitions are concerned. The NaCC should be the only regulatory authority certified to reject and approve mergers. The Powercom case illustrated to us how ineffective and time consuming it is to subject a merger to concurrent review; it creates 'inefficiencies, encourages collusion between the agencies, and ultimately frustrates the objectives of antitrust law'.³²⁰ As far as sectoral regulators merger determination is concerned it should only be limited in so far as it is to provide technical expertise and anti-competitive opinions of sector competition issues.

³²⁰ Laura Kaplan , 'One Merger, Two Agencies: Dual Review in the Breakdown of the AT&T / T-Mobile Merger and a Proposal for Reform' (2012) 53 *Boston College Law Review* 1571 at 1588.

5. Conclusion

The underlying theme of my study was undertaken to critique the approach adopted by the regulatory authorities when they assessed the Telecom/Powercom merger. The purpose was to determine how the proposed merger was going to affect the telecommunication industry particularly the mobile telecommunication sector.

The dissertation briefly discussed the structure of the telecommunication industry in Namibia, starting from the enactment of the Post and Telecommunications act of 1992 which created three holding companies, namely, Namibia Post Limited, Telecom Namibia Limited and Namibia Post and Telecom Holdings Limited. What followed then was the controversial aspect of Telecom Namibia limited merging with the only other market player in the mobile telecommunication sector. The dissertation revealed that almost the entire telecom industry is controlled by the by state through the majority of shares held by the Namibia Post and Telecommunication Holding, the only other private shares held are the 33 per cent stake in the Mobile Telecommunication Industry owned by a Portugal Telecom Company.

The dissertation also discussed the theoretical foundation underpinning general worldwide competition policy, particularly discussing the distinctive characteristic that distinguishes competition policy and competition law apart. The dissertation revealed that developing countries faced with systematic poverty, substantial number of unemployment need to take these public interest concerns into account if they are to develop effective competition law jurisprudence. The dissertation also revealed that consumer welfare should be the pre-determining goal of competition law enforcement without overlooking the efficiency standard.

Furthermore, the dissertation suggests that, competition law and consumer protection law are complimentary. Without a consumer protection law market failures perpetuated by state monopolies will continue to evolve and reinforce state monopolies as champion players. Complete liberalisation of these sectors

can only improve with an enactment of a policy, which will eliminate market failures from both the demand, and supply side of the market.

In terms of merger control, the dissertation showed that the involvement of the minister in merger review can prove to be problematic in the near future as it places a heavy duty on the minister to decide on cases which can lead to a bias and arbitrary outcome.

The dissertation further affirms that the merger should not have been approved or at least approved with the most stringent conditions. It revealed that the approach taken by the NaCC was not clear although it seems like the merger was approved on the basis of Powercom being a failing firm; whether Powercom was in fact a “a failing firm” the paper reveals it’s a controversial one. What is clear is that the conditions imposed were rather weak and more stringent conditions should have been prescribed by the authority. The Approach taken by CRAN was clear. To promote private investment. Nevertheless, the authority seem to have misconceived its powers by imposing conditions which went beyond the scope of the Communications Act of 2009. The dissertation reveals that instead of imposing a condition which required a law to be amended to allow Telecom Namibia to be privatised; a condition to privatise Powercom should have imposed instead.

The dissertation further showed that, the decision will ultimately reinforce the Namibia Post and Telecommunication holding to control the Telecom industry. Anti-competitive concerns such as the possibility of bundling packages and cross subsidisation might emanate from the approved merger. To mitigate this effect the dissertation suggests that a more consumer and competition law integrated agency need to be established to offset market failures and limit the role of sector regulators as far as consumer issues are concerned. The paper suggests that Consumer welfare needs to be the backbone of developing countries competition law legislation.

Finally, the paper concludes that the procedural requirement that the Communication Regulatory Authority be allowed to approve mergers encroaches the competition authorities legislative powers and frustrates the objective of competition law. Thus, the paper suggests that communication regulatory authorities powers should only go so far as to provide opinion advice and technical expertise in the industry concerned.

Thus, In view of the above analysis I recommend that In addition to the enactment of a strong consumer protection law. Namibia needs to establish a strong Consumer protection agency to enforce this piece of legislation. Given the populations and the small size of the industry, the country will benefit and save cost from integrating the two agencies under one regulatory authority. The role of sector regulators also needs to be revaluated to ascertain whether the power of these authorities to approve mergers is really necessary. Finally the power of the minister to approve mergers also need to be considered to reduce the power of political interference which can lead to biased and arbitrary outcomes as far as mergers are concerned.

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EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF DIRECTORS OF THE COMMUNICATIONS REGULATORY AUTHORITY OF NAMIBIA (CRAN) HELD ON 07 JUNE 2012.

REF: TOL/05/2012/POWERCOM

In the *ex parte* application by:

GUINEA FOWL INVESTMENTS TWO (PTY) LTD

APPLICANT

APPLICATION(S) FOR:

- (1) TRANSFER OF TELECOMMUNICATIONS SERVICE LICENCES, AND**
- (2) APPLICATION FOR CHANGE OF OWNERSHIP AND TRANSFER OF CONTROL OF POWERCOM (PTY) LTD IN TERMS OF SECTIONS 33 AND 35 OF THE COMMUNICATIONS ACT NO. 8 OF 2009 IN FAVOUR OF TELECOM NAMIBIA LIMITED BY GUINEA FOWL INVESTMENTS TWO (PTY) LTD.**

The Board Resolved as follows:

WHEREAS Guinea Fowl Two (Pty) Ltd on 15 December 2011 (Applicant) applied in terms of section 35 of the Communications Act, Act No. 8 of 2009, for:

- (1) Transfer of telecommunications service licences, and
- (2) Application for change of ownership and transfer of control of Powercom (Pty) Ltd t/a Leo in terms of sections 33 and 35 of the Communications Act No. 8 of 2009 (the Act) in favour of



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Telecom Namibia Limited by Guinea Fowl investments Two (Pty) Limited.

Whereas Telecel Globe Ltd obtained permission from the Minister of Information Communication Technology to transfer the shares of PowerCom (Pty) Ltd t/a Leo to Guinea Fowl Investments Two (Pty) Ltd.

1. On the 8th of March 2012 the Board resolved to dismiss the application on the basis that the Applicant lacked *locus standi*.
2. In a letter dated 15 March 2012 the Applicant indicated to the Authority that once the matter of *locus standi* is rectified that the Applicant is requesting that the initial application be reinstated. In essence what the applicant was requesting was that the process of publishing the application in the Gazette, as set out above should not be restarted and that the Board considers their application again based on their submissions to correct the issue of *locus standi*. The Authority in a letter dated 20 March 2012 to the Applicant stated that it noted that once the application is reinstated the Applicant is requesting the Authority to consider the already submitted documents, without having to start the process anew and that the Applicant waives any rights they may have in law in that regard by specifically requesting that the Authority not start the proceedings afresh. Therefore, in terms of section 31 of the Communications Act No. 8 of 2009 (the Act), the Board resolves to reconsider and change its decision taken on the 8th of March 2012 as follows:
 - a. "The application for transfer of control of PowerCom (Pty) Ltd t/a Leo is deferred on the following grounds:
 - i. The transfer of the shares of PowerCom (Pty) Ltd to the Applicant did not take place;
 - ii. The Applicant is not the lawful owner of the shares in PowerCom (Pty) Ltd t/a Leo and therefore, does not have legal standing (*locus standi*) to bring the



application for the transfer of control before the Authority;

- iii. The lawful owner of PowerCom (Pty) Ltd t/a Leo must meet the following conditions in order for the Authority to proceed to further consider the application:
 1. The PowerCom (Pty) Ltd t/a Leo shares must first be transferred to Applicant so that it is the lawful owner of the shares.
 2. The lawful owner of PowerCom (Pty) Ltd t/a Leo needs to pay all outstanding licence fees and PowerCom (Pty) Ltd t/a Leo's licence needs to be converted into a new licence in terms of the Authority's licence transition procedures.
 3. The lawful owner of PowerCom (Pty) Ltd t/a Leo needs to apply for transfer of the service licences as well as the relevant spectrum licences.
 4. The lawful owner of PowerCom (Pty) Ltd t/a Leo needs to provide documentary evidence for the sales negotiations with other potential purchasers.
 5. The lawful owner of PowerCom (Pty) Ltd t/a Leo needs to submit the complete sales agreement and any other documents mentioned therein."

3. After the above reconsideration, the Board hereby resolves as follows:
 - a. The proposed transfer of control transaction is prejudicial to the objects of the Act, specifically objective 2(1), i.e. encouraging private investment. CRAN may only approve such a transaction if it is not prejudicial to the objects of



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this Act in terms of section 35(1). However, if CRAN were not to grant the application, the probable result would be equally prejudicial to the objects of the Act, i.e., liquidation of Powercom (Pty) Ltd t/a Leo.

b. Therefore, in terms of sections 33 and 35 of the Act and the Regulations Regarding Licensing Procedures for Telecommunications and Broadcasting Service Licenses and Spectrum Use Licenses, published in Government Gazette, No. 4785, Notice No. 272, dated 29 August 2011:

- i. the Board approves the application for the transfer of control of the class comprehensive telecommunications services licence (electronic communications service (ECS) and electronic communications network service (ECNS)), issued to and held by Powercom (Pty) Ltd t/a Leo to Telecom Namibia Limited as the sole shareholder, with effect from the date of this decision,
- ii. the Board approves the application for the transfer of control of the spectrum use licences issued to and held by Powercom (Pty) Ltd t/a Leo to Telecom Namibia Limited as the sole shareholder of Powercom (Pty) Ltd t/a Leo, with effect from the date of this decision,
- iii. the Board does not approve the transfer of the licences from Powercom (Pty) Ltd t/a Leo to Telecom Namibia Limited. In the event that Telecom Namibia Limited desires to transfer such licences, it must submit an application in terms of the Act and relevant regulations in force at the time,
- iv. The approvals set out in (i) and (ii) above are subject to the following suspensive conditions, as a means to striking a balance that favours the approval of the transaction, as measured by the goal of achieving the objects of the Act:

1. Amendment of section 2(10)(a)(iv) of the Post and Telecommunications Companies Establishment Act No. 17 of 1992 to allow for the



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partial privatisation of Telecom Namibia Limited with not less than 25% private shareholding.

2. Following the above amendment, the actual partial privatisation of Telecom Namibia Limited with not less than 25%.

The above conditions are supporting the objectives of the Communications Act No. 8 of 2009, specifically the objective of encouraging private investment in the telecommunications sector.

4. The Applicant is informed that in terms of Section 31 of the Act, it may file a petition to the authority for reconsideration, if it is aggrieved by the above decision, within 90 days from the date of this decision.

Certified a true extract from the minutes.

Signed at Windhoek on the 7th day of June 2012.

A handwritten signature in black ink, appearing to read "Lazarus Jacobs", written over a horizontal line.

LAZARUS JACOBS
CHAIRPERSON
BOARD OF DIRECTORS



NAMIBIAN COMPETITION COMMISSION
NOTICE OF DETERMINATION MADE BY COMMISSION
IN RELATION TO PROPOSED MERGER

Competition Act, 2003 (Act 2 of 2003)

(Section 47(7), Rule 30)

TO: MRS. P KANGUEEHI - KANALELO
TELECOM NAMIBIA
9 LUDERITZ STREET
TORINO SUITE
WINDHOEK
NAMIBIA

Concerning:

(Name and file number of proposed merger): PROPOSED MERGER NOTICE – TELECOM NAMIBIA LTD // POWERCOM (PTY) LTD T/A LEO CASE NO.: 2011DEC0124MER

1. The Commission has received notification of the abovementioned proposed merger on the 9th January 2012.
2. Please note that the Commission has approved the proposed merger with the following conditions.
 - 2.1 From the effective date of the implementation of this merger, the merging parties should put in place a separate and independent shareholding structure for Telecom Namibia Ltd and that of MTC. This separation of the holding structure must be effected within a period of two (2) years from the date of this notice of determination.
 - 2.2 In the interim of the aforementioned two (2) year period,
 - a) The NPTH Chief Executive Officer who is also the Managing Director of Telecom Namibia, as well as the NPTH Company Secretary who is also

the Head of Legal Services and Company Secretary of Telecom Namibia, should resign from their respective positions at NPTH with immediate effect. No person who is a director of Telecom Namibia or an employee of Telecom Namibia may serve as a director of either NPTH or MTC and likewise, no person who is a director of MTC or an employee of MTC may serve as a director of either NPTH or Telecom Namibia.

3. The Commission's decision is based on grounds that the proposed transaction is likely to substantially prevent or lessen competition in Namibia, as envisaged by section 47(2) of the Competition Act, 2003. The Conditions are therefore imposed to mitigate the negative impact that the merger may have on Competition in the relevant market/ mobile telecommunication market.
4. Note that the Commission has the authority in terms of section 48(1) of the Act to 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.*

Name and title of person authorized to sign on behalf of the Commission:

Mr. Lucius Murorua

Chairperson: Namibian Competition Commission

Authorised signature:

Signed by candidate

 Date:

27/04/2012
