
Namibian Competition Commission

Ensured Effective Cooperation between the Competition Commission and Sector Regulators – A Namibian Perspective

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1. Introduction

Competition regulation in Namibia is governed by the Namibian Competition Act, (Act No. 2 of 2003). The Act establishes the Namibia Competition Commission (NaCC) which has jurisdiction across all economic sectors of the country. In addition to the Commission as a regulator, Namibia has several other statutes governing the regulation of certain sectors. Through these statutes, institutions were established to regulate these sectors. The Bank of Namibia (BoN), the Namibian Financial Institutions Supervisory Authority (NAMFISA), the Communication Regulatory Authority of Namibia (CRAN) and the Namibia Ports Authority (Namport) are examples of such institutions. This paper will focus on the aforementioned four regulators and looks at ways of ensuring effective cooperation between sector regulators and the competition authority.

Section 2 of the paper introduces the Commission and the four sector regulators and outlines their mandates especially where it concerns competition issues. Section 3 outlines various types of regulation while Section 4 compares sector regulation and competition regulation. Section 5 outlines possible approaches to dealing with issues of concurrent jurisdiction. Section 6 explains how issues of concurrent jurisdiction are dealt with in Namibian, Section 7 shares the international experience and Section 8 provides the conclusion.

2. Regulators in the Namibian Economy

As previously mentioned, Namibia has several authorities regulating specific sectors as well as the Commission which is responsible for regulating competition across all sectors. This section focuses on the aforementioned regulators, their objectives, duties and functions especially those pertaining to competition issues.

2.1 The Namibian Competition Commission

The Namibia Competition Act, (Act No. 2 of 2003) provides for the establishment of Namibia's competition authority; the (NaCC), hereafter referred to as "the Commission". The Act seeks to enhance the promotion and safeguarding of competition in the Namibian economy. The Act has jurisdiction over all economic sectors except "collective bargaining activities or collective agreements negotiated or concluded in terms of the Labour Act, 1992 (Act No. 6 of 1992), concerted conduct designed to achieve a non-commercial socio-economic objective or goods" and services declared by the Minister in concurrence with the Competition Commission as exempt.

The Commission's role is thus to safeguard competition in the country across all sectors of the country's economy. As per Section 2 of the competition Act, the purpose of the Act is to enhance the promotion and safeguarding of competition in Namibia in order to:

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

2.2 The Bank of Namibia

The Central Reserve Bank of Namibia, also referred to as the Bank of Namibia (BoN) is vested with the power to supervise and regulate banking financial institutions through the BoN Act, (Act No. 15 of 1997) and the Banking Institutions Act (BIA), Act No. 2 of 1998. The BIA gives the BoN with the power; “to authorize persons to conduct business as a banking institution, to control, supervise and regulate banking institutions so as to protect the interests of persons making deposits with banking institutions”.

The BIA further vests in the BoN the powers for the winding up or judicial management of banking institutions and for the cancellation of authorization. In performing this function, “the Bank, through the Banking Supervision Department strives to ensure compliance with the BIA by banking institutions under its jurisdiction. In order to achieve the role of protecting the interests of depositors, the department has crafted a number of prudential requirements to be complied with by banking institutions. The prudential requirements advised on banking institutions are designed to limit risk taking to levels that are manageable and that do not place the individual banking institution and the banking system at risk” (BoN, 2011).

Section 54 of the Banking Institutions Act states that:

- (1) A banking institution shall not, without the prior written approval of the Bank –*
 - (a) enter into a merger or consolidation;*
 - (b) transfer, or otherwise dispose of, the whole or part of its property, whether situated in or outside Namibia, other than in the ordinary course of business;*

2.3 The Communications Regulatory Authority of Namibia

CRAN is the body responsible for regulating the communication sector which includes telecommunications services and networks, broadcasting, postal services and the use and allocation of radio spectrum. The authority was established by an Act of Parliament; the Communications Act, (Act No. 8 of 2009). Amongst its many functions, it is tasked with the

responsibility of establishing the general framework for the opening of the telecommunication sector in Namibia to competition, to provide for the regulation and control of communications activities by an independent regulatory authority.

Section 2 of the Communications Act states that the objectives of the Act are:

- (a) to establish the general framework governing the opening of competition of the telecommunication sector in Namibia to competition;*
- (b) to provide for the regulation and control of communications activities by an independent regulatory authority;*
- (k) to ensure competition and consumer protection in the telecommunications sector*

2.4 The Non-Banking Financial Institutions Supervisory Authority

NAMFISA is responsible for the regulation and supervision of non-banking financial institutions in the country. The authority is in charge of regulating institutions and activities such as pension funds, medical aid funds, friendly societies, long and short term insurance, investment managers, unit trusts, stock brokers and sponsors, the Stock Exchange and micro-lenders. This was initially done by the Ministry of Finance prior to the establishment of NAMFISA. The government commercialized this function in order to improve the financial soundness of the Namibian non-banking financial industry and to secure protection for all stakeholders in the industry, including consumers. NAMFISA was established by an Act of Parliament, the NAMFISA Act, (Act No. 3 of 2001).

2.5 Namibia Ports Authority

Namport was established in terms of the Namibian Ports Authority Act, (Act No. 2 of 1994) and is responsible for operating and managing the country's ports, namely; the Port of Luderitz and the Port of Walvis Bay. The authority is tasked with the duties of managing the port facilities in order to cater for current trade needs and develop the ports for future demands as well as contribute to the competitiveness of the SADC region's trade through the efficient, reliable and cost-effective supply of port services. Furthermore, Namport has the duty to facilitate economic growth in Namibia by enabling regional development and cross-border trade, promote the Ports of Walvis Bay and Lüderitz as preferred routes for sea-borne trade between SADC, Europe and the Americas. As the founding architects of the Walvis Bay Corridor Group the authority is also responsible for assisting with developing cross-border trade as part of its duties (Namport, 2011).

Both CRAN and the BoN have clear overlaps with the Commission in terms of competition issues. The Namport and the NAMFISA Acts do not specify any clear competition mandate for the two institutions. Even in that case, situations can arise which create overlaps between the agencies' functions and make it difficult for them to carry out their respective mandates.

3. Types of Regulation

According to the Consumer Unity and Trust Society (CUTS), there are three distinct aspects of regulation in terms of regulatory roles. These are; technical regulation, economic regulation and competition enforcement.

3.1 Technical Regulation

According to the Organisation for Economic Cooperation and Development (OECD), cited in CUTS (2003), “technical regulation involves setting and enforcing product and process standards designed to deal with safety, environmental and switching cost externalities; and allocating publicly owned or controlled resources such as spectrum or rights of way.”

3.2 Economic Regulation

Economic regulation implies directly controlling or specifying production technologies (other than those linked with setting common technical product standards); eligible providers (granting and policing licenses); terms of sale (i.e. output prices and terms of access); and standard marketing practices (e.g. advertising and opening hours). “Economic regulations intervene directly in market decisions such as pricing, competition, market entry, or exit. Reform aims to increase economic efficiency by reducing barriers to competition and innovation, often through deregulation and use of efficiency-promoting regulation, and by improving regulatory frameworks for market functioning and prudential oversight” (CUTS, 2003).

3.3 Competition Regulation

Competition regulation generally entails the control of abuse of dominance, anti-competitive agreements and anti-competitive mergers & acquisitions, using provisions of competition law.

4. Competition vs Sector Regulation

In many jurisdictions, it is the role of competition authorities to promote and safeguard competition across all sectors of the economy as provided for in the relevant legislation. Sector regulators regulate within their specific sectors on issues pertaining mainly to technical and economic regulation. In some cases however, sector regulation impacts on competition and affects the regulatory function of the competition authority. In some cases, competition regulation is provided for in the statutes which govern the operations of sector regulators. This gives rise to issues of concurrent jurisdictions between sector regulators and the competition authorities.

As with many countries and Namibia not being an exception, there is often a battle for primacy between sector regulators and the competition authority. It is even more likely in a country where sector regulation has been in existence before competition regulation, sector regulatory agencies are tasked with functions relating to competition and no proper guidelines have been

established on how to deal with issues of concurrent jurisdictions. “Concurrent jurisdiction implies that both competition authorities and sector regulators have mandates in regulatory matters, regardless of the issue. This implies that the two regulators have to find a way of harnessing their respective expertise” (CUTS, 2008). This is especially the case for Namibia considering that the Commission is fairly new, having been in existence for approximately two years while as most of the sector regulatory agencies have been in existence for many more years with the exception of CRAN which is also a fairly new.

Competition law and sector regulation are typically applied in different contexts, and employ differing methods, instruments and institutional structures. Competition law generally operates in circumstances in which the existing structure of markets and even their performance is a priori satisfactory. Sector-specific regulation is reserved for markets whose structure and economic characteristics is expected to produce unsatisfactory conduct and performance (Cawley, 2008). Sector regulation typically operates ex-ante while as competition regulation operates ex-post.

Ex-ante versus ex-post regulation

“In the ex-ante intervention, regulatory agencies have to take forward looking view of different business conducts and place restrictions on certain conducts. Thus, enterprises face less uncertainty due to regulation interventions. The competition approach usually operates ex-post and it is basically a harm-based approach. Whilst there are no ex-ante restrictions on business conduct, enterprises face the risk to be penalized if their business conduct is found to be an abuse of dominant position or market power” (Decker and Yarcobots, cited in Buigues, n.d.).

The Commission regulates competition through merger and acquisition control. It restricts the abuse of dominance by firms and other types of restrictive business practices. The Commission thus takes an active role reviewing merger and acquisition proposals by firms and approving only those which are not likely to be detrimental to competition in the specific markets. It also ensures that restrictive business practices such as cartels and collusion are curbed and in cases where it is found to exist, the firms responsible are subjected to retribution.

Sector regulators on the other hand are concerned with the technical and economic issues within and amongst the firms in their respective sectors. The BoN for instance regulates commercial banks through the control of minimum reserves to be kept. It also regulates entry into the banking sector by ensuring that banks that plan to enter the market meet the minimum capital requirement. NAMFISA has certain regulations such as that of prescribing to firms what portion of any planned investment to invest in the local economy before investing abroad. CRAN has several regulations in place such as those pertaining to the transfer of control, assignment of broadcasting licenses, prescribing interconnection rates and allocation of

spectrum. Namport is responsible for controlling the movement of goods or passengers within the ports, regulating access to the ports and prescribing tariffs for the provision of port services. All these regulatory functions are clearly either technical or economic except where sector regulators are given competition functions. Table 1 highlights differences in institutional characteristics between competition authorities and sector regulators in terms of their mandates and approaches.

Table 1. Institutional characteristics of sector regulators and competition authorities

	Sector Regulator	Competition Authority
A. Mandate	Substitute for lack of competition; broad range of socio-economic goals	Protect and enhance process of competition; emphasis on efficiency goals
B. Approach	<ul style="list-style-type: none"> - attenuate effects of market power wielded by natural or network monopoly - impose and monitor behavioural conditions - <i>ex-ante</i> prescriptive approach - frequent interventions requiring continual flow of information 	<ul style="list-style-type: none"> - reduce market power whenever possible - impose structural (and behavioural) remedies - <i>ex-post</i> enforcement (except with merger review) - information gathered in case of investigation; more reliant on complaints

Source: OECD (1999)

Despite their different objectives and the different methods to attaining those objectives however, what competition authorities and sector regulators have in common is the goal of protecting and enhancing social and economic welfare. The one does not substitute for the other; there is a need for both. Amitabh Kumar, in his presentation titled “Relationship between Competition authority and sector regulator” at SAFIR WORKSHOP, LAHORE India 25-26 March 2006, argues the need for both sector regulation and competition regulation and outlines it as indicated in Table 2 below. Kumar highlights that sector regulation and competition law are complimentary in the sense that sector specific regulations prevent inefficient use of resources and protect consumers while as competition law aims at prevention of market power and thus ensures efficiency as well as consumer welfare.

Table 2 - Why the need for competition law and sector regulation

Why have competition law?	Why have sectoral regulators?
Promotes efficiency	These prevent inefficient use of resources and protect consumers
Encourages innovation	Technical expertise necessary to determine access, maintain standards, ensure safety and determine tariffs (especially for merit goods)
Ensures abundant availability of goods and services of acceptable quality at affordable price. Offers wider choice to consumers	
Preserves economic and political democracy	

Source: Kumar (2006)

5. Possible Approaches to Resolving Conflicting Mandates

The United Nations Conference on Trade and Development (UNCTAD) cited in CUTS (2008) identified five possible frameworks that can be used in resolving conflicting mandates between competition authorities and sector regulators. These are summarized in Table 3 below.

Table 3. Five possible approaches to resolving conflicting mandates

Approach I	Combining technical and economic regulation in sector regulator and leaving competition enforcement exclusively in the hands of the competition authority
Approach II	Combining technical and economic regulation in a sector regulator and give it some or all competition law enforcement functions
Approach III	Combining technical and economic regulation in a sector regulator and give it competition law enforcement functions which are to be performed in coordination with the competition authority
Approach IV	Organizing technical regulation as a standalone function for the sector regulator and include economic regulation within the competition authority
Approach V	Relying solely on competition law enforced by the competition authority for all aspects of regulation

Source: UNCTAD 2006

6. Resolution of Conflicting Mandates in Namibia

Section 67 of the Namibian Competition Act deals with issues of concurrent jurisdiction and relationships with other regulatory authorities. It states that:

- *(1) If a regulatory authority, in terms of any public regulation, has jurisdiction of any conduct regulated in terms of Chapter 3 or 4 within a particular sector, the commission and that authority –*
 - (a) must negotiate an agreement to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector and to ensure the consistent application of the principles of this Act; and*
 - (b) in respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.*

It further states that:

- *(2) In addition to the matters contemplated in paragraph (a) of subsection (1), an agreement in terms of that subsection must -*
 - (a) identify and establish procedures for the management of areas of concurrent jurisdiction;*
 - (b) promote co-operation between the regulatory authority and the Commission; and*
 - (c) provide for the exchange of information and the protection of confidential information.*

According to CUTS (2008), Namibia uses Approach III of the OECD's approaches listed in Table 2. In many of the cases handled by the Commission however, more than one of these approaches have been used depending on the sector regulator involved, the mandate it has over competition issues and its specific interest in the case. Most sector regulatory agencies in Namibia have been in existence long before the establishment of the Commission and the enforcement of competition law in the country may not have been forecasted then. For this reason, there was no coordination as to which approach is best suited for the country and hence the use of different approaches as deemed appropriate.

As many competition authorities faced with the same situation may agree, Approach I is considered the ideal approach to resolve conflicting mandates. It is ideal as it leaves all competition issues with the competition authority while the technical and economic regulation issues are left to the sector regulators. Due to the existence of sector regulation prior to that of competition regulation, implementing this approach has proven difficult for Namibia. This is because by the time competition laws were set in place, some of the country's sector regulators have already been mandated with competition functions. The Commission is in the process of

implementing efforts to reach this approach however, as per Section 67 of the Competition Act. The Commission is in the process of drafting and concluding Memoranda of Understanding (MoU) or Memoranda of Agreement (MoA) with the sector regulators in the country. So far, the Commission and Namport have in place an MoU and MoU / MoA discussions with the BoN, CRAN and Namfisa are at an advance stage.

Approach II entails that in addition to the technical and economic regulation function, the sector regulator is also tasked with some or all of the competition law enforcement functions. In the absence of cooperation between the Commission and sector regulators, particularly during the drafting of the respective legislations, this appears to be the approach inadvertently taken. This is especially the case with the BoN and CRAN which are mandated with competition functions in addition to their technical and economic regulation functions. The approach is not preferred as it implies sharing jurisdiction over competition with the sector regulator.

In the event of shared jurisdiction, the Commission and the concerned regulator may not employ the same methods in dealing with competition cases. This would create inconsistencies in the handling of cases dealt with by the Commission and those dealt with by the sector regulator. It also leads to forum shopping whereby firms choose to turn to the agency which is likely to address their cases in their best interests. In the absence of an MoU which sets out clear terms of agreement, and because of the mandate these agencies have over competition matters in their respective sectors, competition issues are best resolved using approach III rather than II. The ideal situation however which Commission and these agencies are in the process of working towards is the conclusion of MoUs which places competition matters with the Commission and leaving technical and economic regulation issues with the sector regulatory agencies.

NaCC / Namport Memorandum of Understanding

Negotiations for the Memorandum of Understanding between the Namport and Commission started out in March 2009. The MoU between the two agencies was concluded October in 2010. The main objective of the MoU is to set out an agreed basis for policy implementation and coordination and information sharing between the Commission and the Authority (Namport), with the aim of establishing a framework for cooperation between the two regulatory bodies on competition issues within the jurisdiction of Namport.

The MoU provides the following:

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Consistency of Regulatory Policy

4. Commission and the Authority are both obliged to conduct their regulatory responsibilities in the public interest. In doing so, they recognise the importance of mutual consultation across a wide range of issues relevant to competition in the ports areas.

5. To promote co-operative decision making, the Commission and the Authority agrees that:

5.1. When the Commission is investigating or examining a case involving restrictive business practices or mergers and acquisition in the Authority's area of jurisdiction, or considering the applications for exemption in the ports areas, it will consult the Authority:

provided that the consultations referred to above will not hinder or prevent the Commission from concluding and making determinations on the investigations, examinations or considerations.

5.2 The Authority in making its regulatory decisions on issues such as access request, tariff prescriptions, and standards setting that have competition implications, may consult the Commission on the effects of the decisions on competition in the ports areas.

5.3 In determining regulatory policy that may affect competition in the ports areas, the Commission and the Authority will, where appropriate:

- (a) *notify the other of broad policy questions being considered, and advise the other of the approach it proposes to take in seeking information and formulating policy, and the date by which it anticipates a policy decision will be reached; and*
- (b) *provide the other with the opportunity to for private discussions on the proposed policy, prior to any public consultation period. Discussions will be on the basis of material prepared by the regulatory body with prime responsibility for the policy;*

Information Sharing

6. Where appropriate, the Authority shall be obliged to share information relevant to the competition, efficiency and general enterprise welfare in the ports areas with the Commission:

provided that the two regulatory bodies acknowledge the conditions under which certain commercially sensitive data are supplied to the Commission by the Authority and concerned market participants, and the respective confidentiality and secrecy requirements of the Acts under which they operate.

It is of extreme importance that a good working relationship is maintained between the Commission and sector regulators. In as far as possible, unnecessary litigation is avoided and other ways of resolving disputes are looked into. One possible way to resolve such disputes in the case where MoUs and MoAs fail to yield the desired results for both parties is by resolving it at ministerial level. This entails that the Ministers of the sectors concerned sit down with the ministry of Trade and Industry, which is the custodian ministry of the Commission. The issue is then discussed to reach the most amicable solution for all the parties involved. In the event where the concerned ministers cannot resolve the disputes another possible avenue is through the Law Reform and Development Commission (LRDC).

Another possible avenue to explore could be that of arbitration. The Arbitration Foundation of Southern Africa (AFSA) provides appropriate dispute resolution for cases of all nature including competition related cases. In the event where sector regulators and the competition authority fail to come to an agreement by means of an MoU or MoA, the parties can approach AFSA for arbitration. AFSA uses an independent panel of arbitrators to look over and review specific cases and come to the most amicable solution possible.

7. International Experience

Table 4 outlines the approaches used by several countries across Africa and the world as according to UNCTAD (2006). Like Namibia, some of the countries in the table use a variation of more than one approach while some countries use just one approach throughout.

Table 4 - Country Approach to Sector Regulation and Competition

COUNTRY	TYPE	COMMENTS
Australia	IV, V	The Australian Competition and Consumer Commission's (ACCC) regulatory role covers access regulation, regulation of prices of public utilities and a variety of other regulatory tasks. Australia has tended to favour general rather than industry-specific regulation, but where State Regulators exist; these bodies have technical and economic regulatory responsibilities across a range of industries and have a close association with the ACCC.
Brazil	I	The competition law is fully applicable to regulated sectors and the competition authorities are in charge of its enforcement in cooperation with sector regulators.

Kenya	II	The Competition Authority has neither jurisdiction over regulated sectors nor advocacy powers. However, sector regulators increasingly coordinate with the competition authority, although they are not obliged to do so.
Malawi	II	The competition law does not exempt regulated sectors. Sector regulators have the mandate to promote efficiency and competition. The separation of jurisdiction and clarification of the respective roles of the agencies may become an issue when the competition law is enforced (although in existence since 1998, the law has yet to be enforced).
South Africa	III	Sector regulators have concurrent jurisdiction. However, the Competition Act neither explicitly refers to other regulation nor explicitly claims precedence over it. The competition authority is required to negotiate agreements with sector regulators to coordinate the exercise of jurisdiction over competition matters in regulated sectors (in those sectors where the regulator has an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). At present, the competition authority has agreements with regulators in the broadcasting and electricity sectors, and under these agreements the Competition Authority is the lead investigator in concurrent jurisdiction matters. The competition authority also has an advocacy function.
United Republic of Tanzania	I	Article 96 of the Fair Competition Act, 2003 excludes conduct that is provided for in sector legislation (which legislation is specified in the Act).
United States of America	I, II	Sector regulators do not have a formal antitrust enforcement role; however, the mandate in some sectors extends beyond enhancing competition, thus leading to an overlap. In such cases the Congress makes decisions on a case-by-case basis and the competition authority has an advocacy function.

Zimbabwe	I, II	The Competition Act gives primacy to the Competition Authority on competition issues in regulated sectors. Section 3 of the Act requires all sector regulators to apply for clearance from the Competition Authority for all mergers in regulated sectors.
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Adapted from UNCTAD 2004

The Commission is a fairly new institution having been in existence only for the past 2 years. There is a lot Namibia can learn from the experiences of other countries within the Southern Africa region and beyond whose competition laws have been in enforcement for longer.

7.1 South Africa

Due to the strong ties, economic and otherwise, between South Africa and Namibia, South Africa is perhaps one of Namibia's largest mentors in a variety of areas including competition law. The Namibian Competition Act closely replicates that of South Africa. The South African Competition Act (Act No. 89 of 1998), over the years has seen new amendments which have empowered the Competition Commission of South Africa (CCSA) with more jurisdiction over competition matters across sectors whether subject to sector regulation or not. Before the first amendments, section 3(1) of the Act provided that:

This Act applies to all economic activity within, or having effect within, the Republic, except –

(d) acts subject to or authorised by public regulation

This caused major discrepancies and made it easy for firms within sectors subjected to sector regulation to evade regulation by the South African competition authorities. To correct this problem, the Competition Second Amendment Act of 2000 deleted Section 3 (1) (d) and introduced a new Section 3 (1) (a) which provided that:

(a) in so far as this Act applies to an industry, or sector of an industry that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.

(b) the manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of section 21(1)(h) and 82(1) and (2)

Section 21 (1) (h) provides that:

“the Commission is responsible to negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act”.

“The Commission subsequently concluded MOAs with a number of sector regulators including:

- The Independent Communications Authority of South Africa (ICASA)
- The National Energy Regulator of South Africa (NERSA)
- National Liquor Authority (NLA)” (Weeks, 2009)

The experience with Telecommunications: CCSA vs. Telkom SA Ltd

The case between the Competition Commission of South Africa and Telkom South Africa Ltd provides a perfect example of cases of concurrent jurisdiction between competition authorities and sector regulators. The case dealt with the concurrent jurisdiction of the Competition Commission and the Independent Communications Association of South Africa (ICASA). The Commission investigated a complaint against Telkom for an alleged contravention of the Competition Act. Telkom was of the opinion that neither the Commission nor the Tribunal had either the power or the competence to adjudicate the conduct of Telkom.

Telkom, which was established by the Post Office Act, Act 44 of 1958, had the exclusive power to conduct the telecommunications service. Telkom was however obliged under the Post Office Act to lease the facilities to a person providing a telecommunication service. Should Telkom refuse to grant such a lease, ICASA was entitled and tasked with the adjudication of the dispute. There were four complaints lodged against Telkom with the Commission and all related to the failure by Telkom to grant a licence of its facilities to the prospective licensees. The issue of Jurisdiction was raised when Telkom sought to rely on the defence that the four complaints laid against Telkom related to conduct which it was by the Telecommunications Act or alternatively by ICASA.

Section 3 of the Competition Act provides that the Act “shall apply to all economic activity within, or having an effect within, the Republic”. Originally a regulatory body such as ICASA would have had jurisdiction, since section 3(1) (d) which has now been repealed provided that the Act did not apply to acts which were subject to or authorised by public regulation. The acts of Telkom were authorised by the Telecommunications Act, however this section has been repealed and the Act has jurisdiction granted to it by Section 3 of the Competition Act.

The Supreme Court of Appeal affirmed that the Competition Act applies to all economic activity within or having effect within South Africa and that ICASA cannot and does not have exclusive jurisdiction with regard to Telkom and went further to hold that the Competition authorities are the appropriate authorities to deal with the complaint. (De Bruyn and Gibson, 2010)

7.2 Zimbabwe

The Competition Act of Zimbabwe applies to all economic activities within or having an effect within the Republic of Zimbabwe. The merger control provisions of the Act override any powers given to any sector regulator in considering and approving mergers and acquisitions. Accordingly, any sector regulator that regulates mergers and acquisitions are required under the Act to apply to the Commission for the final authorisation of the merger (Kukuba, 2009).

7.3 Kenya

Similar to Namibia, often the law creating sector regulators in Kenya contain portions dealing with competition in the sector. The Kenyan regulatory authorities thus opt for deliberate harmonisation of sectoral laws with the competition law. “Recent experience has shown that sector regulators are increasingly consulting with Kenya’s competition Authority. For example, in the area of mergers and takeovers, the Central Bank of Kenya liaises with the Monopolies and Prices Commission. The Civil Aviation Board has been liaising with the Commission in the area of Restrictive Trade Practices. The Communications Commission of Kenya has also been cooperating with the competition authority in the investigation of Restrictive Trade Practices and in the area of mergers and takeovers. The Capital Markets Authority cooperates with the Competition Authority in matters concerning listed companies” (Njoroge, n.d.).

8. Conclusion

In Namibia, the battle for primacy has not intensified despite the serious overlap in the function of the sector regulators and the competition authority. In each of the cases reviewed by the Commission where issues of concurrent jurisdictions arose, both authorities were able to work together and come to a decision which resulted in the best possible outcome.

According to CUTS (2003), international experience shows that interaction between sector and competition regulators can be managed through the institutional approaches: giving primacy to the sector regulatory law or the competition law or requiring consultation between both the regulators. Where the economy-wide competition law takes precedence, the sector regulator may still have a role in assisting the competition authority to conduct analysis of the competitive effects of agreements in the regulated industry, especially with their natural advantage over technical issues. Sector Regulation and Competition Law should not be seen as hostile to each other but rather as complementary. There is a need to promote synergies and cooperation between regulators to ensure coordination and information exchange and to promote awareness of competition as well as technical and economic regulation matters amongst all stakeholders.

9. List of Abbreviations

AFSA	Arbitration Foundation of southern Africa
BIA	Banking Institutions Act
BoN	Bank of Namibia
CCSA	Competition Commission of South Africa
CRAN	Communication Regulatory Authority of Namibia
CUTS	Consumer Unity and Trust Society
ICASA	Independent Communications Authority of South Africa
LRDC	Law Reform and Development Commission
MoA	Memorandum of Agreement
MoU	Memorandum of Understanding
NaCC	Namibian Competition Commission
NAMFISA	Namibian Financial Institutions Supervisory Authority
NamPort	Namibia Ports Authority
NERSA	National Energy Regulator of South Africa
NLA	National Liquor Authority
SA	South Africa
UNCTAD	United Nations Conference on Trade and Development

10. List of Tables

Table 1 - Institutional characteristics of sector regulators and competition authorities

Table 2 - Why the need for competition law and sector regulation

Table 3 - Five possible approaches to resolving conflicting mandates

Table 4 - Country Approach to Sector Regulation and Competition

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