



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

N\$4.00

WINDHOEK - 5 August 2014

No. 5527

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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 270 2014

NOTICE IN TERMS OF SECTION 67(3) OF THE COMPETITION ACT, 2003 (ACT NO. 2 OF 2003)

The Namibian Competition Commission, in terms of Section 67(3) of the Competition Act, 2003 (Act No. 2 of 2003), herewith gives notice that it has entered into an agreement with Namibia Financial Institutions Supervisory Authority ("NAMFISA"), dated 02nd of July 2014.

NAMFISA was established in terms of section 2 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001) as a juristic person with the functions to exercise supervision over the business of non-banking financial institutions and financial services in Namibia and to advise the Minister of Finance on matters related to non-banking financial institutions and financial services. An incidental mandate, though not stipulated in the NAMFISA Act, is to protect the interests of the users of financial services and to ensure the financial soundness of the non-banking financial industry.

Section 67 of the Competition Act, 2003 (Act No. 2 of 2003) mandates the Namibian Competition Commission with the responsibility to negotiate cooperation agreements with any regulatory authority with which it shares concurrent jurisdiction over competition matters in order to ensure consistent application of the principles of the Competition Act.

The purpose of the agreement is to enable the Authorities to coordinate and harmonise the exercise of their jurisdiction over matters of mutual interest and to secure the consistent application of their respective laws governing anti-competitive behaviour, mergers and acquisitions as well as amalgamations and transfers, where applicable, in the non-banking financial sector.

H. M. GAOMAB II
SECRETARY TO THE COMMISSION

MEMORANDUM OF AGREEMENT

entered into between

NAMIBIAN COMPETITION COMMISSION

A legal entity established under the Competition Act, 2003 (Act No 2 of 2003)
herein represented by Mr. Heinrich Mihe Gaomab II in his capacity as the Secretary to the
Commission, duly authorised thereto,
(hereinafter referred to as “**the Commission**”)

AND

NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY

A legal entity established under the Namibia Financial Institutions Supervisory Authority Act, 2001
(Act No 3 of 2001)

herein represented by Mr. Phillip Ndayooloka Shiimi in his capacity as Chief Executive Officer,
duly authorised thereto,
(hereinafter referred to as “**NAMFISA**”)

(Collectively referred to as “**the Authorities**”)

WHEREAS the Namibian Competition Commission was established in terms of section 4 of the Competition Act, 2003 (Act No. 2 of 2003) (“**the Competition Act**”) as an independent body with jurisdiction throughout Namibia in the area of competition in order to safeguard and promote enterprise competition in the Namibian market through the prevention and control of restrictive business practices and the regulation of mergers and acquisitions;

AND WHEREAS the Commission, in terms of section 67 of the Competition Act, has the responsibility to negotiate agreements with any regulatory authority with whom it exercises concurrent jurisdiction over competition matters in order to ensure the consistent application of the principles of the Competition Act;

AND WHEREAS the Namibia Financial Institutions Supervisory Authority (NAMFISA) was established in terms of section 2 of the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act No. 3 of 2001) (“**the NAMFISA Act**”) as a juristic person with the functions to exercise supervision over the business of non-banking financial institutions and financial services in Namibia and to advise the Minister of Finance on matters related to non-banking financial institutions and financial services. An incidental mandate, though not stipulated in the NAMFISA Act, is to protect the interests of the users of financial services and to ensure the financial soundness of the non-banking financial industry;

AND WHEREAS the Commission and NAMFISA seek to co-ordinate and harmonise the exercise of their jurisdiction over matters of mutual interest and to secure the consistent application of their respective laws governing anti-competitive behaviour, mergers, acquisitions, amalgamations and transfers where applicable as well as to ensure consumer protection, in the non-banking financial industry on the basis of the procedures outlined in this Memorandum:

NOW THEREFORE THE PARTIES RECORD THEIR AGREEMENT AS FOLLOWS:**1. INTERPRETATION**

- 1.1 Expressions in the singular also denote the plural, and *vice versa*;
- 1.2 Words and phrases denoting natural persons refer also to juristic persons, and *vice versa*;
- 1.3 Pronouns of any gender include the corresponding pronouns of the other gender;
- 1.4 Clause headings appear in this Agreement for purposes of reference only and shall not influence the proper interpretation of the subject matter hereof; and
- 1.5 This Agreement shall be interpreted and applied in accordance with the laws of the Republic of Namibia.

2. DEFINITIONS

In the Agreement, unless the context indicates otherwise, the words and phrases listed hereunder shall bear the meanings ascribed to them herein-

- 2.1 **“Agreement”**: means this agreement together with all schedules and appendices, including any future amendments;
- 2.2 **“Authority”**: means either the Commission or NAMFISA
- 2.3 **“Commencement Date”**: means the date of signature of the Agreement by the last signing Party;
- 2.4 **“Commission”**: means the Namibian Competition Commission, a juristic person established in terms of section 4 of the Competition Act, 2003 (Act No. 2 of 2003);
- 2.5 **“Competition Act”**: means the Competition Act, 2003 (Act No. 2 of 2003), or as amended;
- 2.6 **“Financial Institution”**: shall have the same meaning as defined under the NAMFISA Act;
- 2.7 **“NAMFISA”**: means the Namibia Financial Institutions Supervisory Authority, a juristic person established in terms of section 2 of the NAMFISA Act, 2001 (Act no. 3 of 2001);
- 2.8 **“NAMFISA Act”**: means the Namibia Financial Institutions Supervisory Authority Act, 2001 (Act 3 of 2001), or as amended;
- 2.9 **“Steering Committee”**: means a joint committee of representatives as assigned by the Authorities in accordance with Clause 4 of the Agreement.

3. PURPOSE AND BASIS OF THE AGREEMENT

- 3.1 The Agreement establishes a framework in terms of which both the Commission and NAMFISA will seek to:

- 3.1.1 promote and maintain fair competition and a stable environment within the non-banking financial industry;
 - 3.2.2 promote the development of competitive markets in the non-banking financial industry;
 - 3.2.3 promote co-operation and co-ordination between the Authorities when dealing with cases of anti-competitive behaviour, as well as to facilitate the treatment of mergers, acquisitions, amalgamations and transfers, where applicable, within the non-banking financial industry;
 - 3.2.4 undertake any joint investigations, market inquiries, consumer protection initiatives or research studies in the non-banking financial industry as the Authorities may identify and agree;
 - 3.2.5 minimise the duplication of activities, wherever possible;
 - 3.2.6 improve understanding of the Authorities' respective roles by undertaking general studies or research on the effectiveness of competition within the non-banking financial industry.
- 3.2 The Agreement is entered into in order to facilitate the manner in which the Authorities will interact and cooperate with each other, with the understanding that the laws applicable to each Authority are different, but complementary.
- 3.3 Given the complementarity of the powers and responsibilities of the Authorities relating to the regulation of competition in the non-banking financial industry, the Authorities must consult each other at least bi-annually to discuss competition policy and related matters.
- 3.4 Accordingly, on issues of concurrent jurisdiction and in addressing the matters:
- 3.4.1 NAMFISA agrees that primary authority should reside with the Commission to promote and safeguard matters of competition in the non-banking financial industry, and the Commission, after consultation with NAMFISA, shall make the final determination on such matters;
 - 3.4.2 The Commission agrees that primary authority should reside with NAMFISA to regulate and supervise the business of financial institutions and financial services and to oversee the efficient functioning and development of the non-banking financial industry and NAMFISA, after consultation with the Commission, shall make the final determination on such matters.
- 3.5 The Agreement is entered into on the basis of mutual respect and in a spirit of goodwill, does not affect the independence or limit the powers of the Authorities and does not effect a delegation of authority in any form or manner by an Authority.

4. GOVERNANCE ARRANGEMENT

- 4.1 Each Authority undertakes to appoint a minimum of two members to serve on the joint Steering Committee within two weeks from the signing of the Agreement and shall thereafter ensure the appointment of a minimum of 2 members at all times.
- 4.2 The Steering Committee shall by mutual consensus determine its own processes and procedures subject to the Agreement.

- 4.3 The primary role of the Steering Committee is to enact the Agreement and in so doing the Committee shall;
- 4.3.1 develop an annual action plan, endorsed by the Authorities, for the collaborative activities to be undertaken in each twelve month cycle;
 - 4.3.2 from time to time identify projects, including research studies or market inquiries, arising from the collaborative areas and as required, establish working teams to implement such projects;
 - 4.3.3 convene at least twice annually, or as and when the need arises and
 - 4.3.4 maintain a record of all meetings convened under the Agreement.
- 4.4 Collaboration shall be within the purview of the Authorities' respective legislation and the laws of the Republic of Namibia and shall be determined by the complementarity of needs.

5. COMPLAINTS RELATED TO RESTRICTIVE BUSINESS PRACTICES

- 5.1 Where a complaint is lodged pertaining to, or where the Authorities identify a restrictive business practice or anti-competitive conduct involving the non-banking financial industry, the following process shall be followed:
- 5.1.1 The Authority that receives the complaint (“**the Recipient Authority**”) shall ensure that the complaint is made available to the other Authority within seven (7) working days;
 - 5.1.2 The Recipient Authority shall inform the complainant(s) that the matter will be discussed jointly by the Authorities in order to establish how the complaint is to be dealt with;
 - 5.1.2 The Authorities shall consult with each other and evaluate the complaint in order to establish whether the matter will be dealt with by either or both of the Authorities;
 - 5.1.3 The Recipient Authority shall advise the complainant(s) of the decision resulting from the joint discussion between the Authorities;
 - 5.1.4 The Recipient Authority shall give the complainant(s) further directions regarding the outcome of the complaint in question;
 - 5.1.5 In the event that the matter is allocated to the Commission, delegates from NAMFISA may participate in an advisory capacity in the matter, and *vice versa*;
 - 5.1.7 The Authorities may through the Steering Committee establish joint working teams in the event that the matter will be dealt with jointly.
- 5.2 Circumstances that may indicate that the Commission will deal with the matter include the following:
- 5.2.1 The complaint relates primarily to Restrictive Business Practices or anti competitive conduct as set out in Parts I and II of Chapter 3 of the Competition Act; or
 - 5.2.2 The complaint does not relate to restrictions imposed by NAMFISA under the relevant provisions of the NAMFISA Act or any other applicable legislation pertaining to the financial institutions under its supervision.

- 5.3 Circumstances that may indicate that NAMFISA will deal with the matter include the following:
- 5.3.1 The complaint primarily relates to restrictions imposed by NAMFISA under the relevant provisions of the NAMFISA Act or any other applicable legislation pertaining to the financial institutions under its supervision;
- 5.3.2 The complaint primarily relates to a contravention of the NAMFISA Act or any other applicable legislation pertaining to the financial institutions under its supervision.
- 5.4 The procedure in clause 5.1 is adopted to ensure that proceedings pertaining to such complaints are not unduly duplicated and to avoid separate penalties being imposed, if not deemed appropriate in certain circumstances, in respect of the same dispute/matter.
- 5.5 If it is decided in the consultation process contemplated in clause 5.1 that NAMFISA deal with the matter, then the Commission may keep its investigation in abeyance, pending the preliminary outcome of NAMFISA's enquiry, and *vice versa*.
- 5.6 When the two Authorities consult each other as contemplated in the Agreement, they shall do so at no charge to each other.
- 5.7 During the consultative processes envisaged in the Agreement, the two Authorities shall act as expeditiously as circumstances permit and shall on both sides facilitate that the other Authority achieves a timely response.

6. APPLICATION FOR APPROVAL WITH REGARD TO MERGERS, ACQUISITIONS, AMALGAMATIONS AND TRANSFERS

- 6.1 Where a merger, acquisition, amalgamation or transfer transaction requires the approval of both Authorities, the merging parties shall submit separate and concurrent applications to the Commission (in accordance with the Competition Act) and to NAMFISA (in accordance with the relevant Act applicable to the financial institution in question) for their respective consideration.
- 6.2 The Authorities shall thereafter make independent determinations on the basis of the criteria and mandates of their respective and relevant legislation. In arriving at these determinations the Authorities may consult each other.

7. SHARING OF INFORMATION

- 7.1 Subject to clause 8 and any relevant provisions of applicable legislation, the Authorities may exchange such information as is necessary to give effect to the Agreement.
- 7.2 Where the situation necessitates close co-operation and information sharing between the Authorities, the situation shall be managed in such a way that each Authority shall endeavour to assist the other to the extent reasonably possible.

8. CONFIDENTIALITY AND USE OF INFORMATION

- 8.1 Any confidential information shared pursuant to the Agreement shall be used only for lawful regulatory and supervisory purposes by the Authorities.
- 8.2 The Authorities will maintain the confidentiality of all information received from each other and will not disclose any such information without first obtaining the prior written consent of the other Authority and then only in accordance with the conditions (if any) attached by the providing Authority.

- 8.3 All information provided pursuant to the Agreement will remain the property of the Authority providing such information.
- 8.4 The sharing of confidential information pursuant to the Agreement is done in reliance upon the foregoing assurances and shall not confer any legal privileges to any person, other than to the Authorities.

9. EXCLUSION OF LIABILITY

- 9.1 Neither Authority shall be liable for the fault or negligence of the other Authority in the execution of its obligations in terms of the Agreement and any damages suffered by third parties whether direct or indirect as a result of the conduct by the other Authority in the exercise of its functions in terms of the Agreement.
- 9.2 Neither Authority shall be liable for loss of profits or for incidental, special or consequential damages, including legal fees and expenses of whatsoever nature arising out of the conduct of each other in the execution of an Authority's obligations in terms of the Agreement.
- 9.3 The Authorities indemnify each other against any claim, loss or damages suffered by the other Authority and/or any third party to the extent that such claim, loss or damage arose out of or relates to the intentional or negligent misconduct of an Authority, its employees, agents, representatives or subcontractors in the performance of its obligations in terms of the Agreement.

10. SEVERABILITY

- 10.1 The provisions of the Agreement shall each be construed independent of each other. The Authorities hereby expressly agree that it is not the intention of any of them to violate any public policy, statutory or common law and that if any sentence, paragraph, clause, provision or combination of the same is in violation of the law, such sentence, paragraph, clause, provision or combination thereof shall be void in the jurisdiction where it is unlawful and the remainder of such sentence, paragraph, clause or provision shall remain binding upon the Authorities.
- 10.2 It is recorded that the provisions of the Agreement will be binding only to the extent that they may be lawful in terms of the applicable laws of the Republic of Namibia and in the event that any provision hereof is determined unenforceable, the Authorities agree to the modification of such provision as may be reasonably required to make it valid and enforceable.

11. GENERAL PROVISIONS

- 11.1 The provision of, or request for information under the Agreement may be denied:
- 11.1.1 where compliance would require the Commission or NAMFISA to act in a manner that would violate the law; or
 - 11.1.2 when compliance with a request for provision of information would interfere with an ongoing investigation in circumstances where prejudice to the investigation is likely to outweigh the adverse effects of denying the information.
- 11.2 No provision of the Agreement shall give rise to a right on the part of any person, entity or government authority other than the Authorities, directly or indirectly, to obtain any information or to challenge the execution of a request for information under the Agreement.
- 11.3 The provisions set forth under clauses 7 and 8 shall prevail with respect to any information provided or actions taken under the Agreement prior to its termination.

- 11.4 The Authorities may participate and make representations in each other's public hearings and may advise or receive advice from each other under the Agreement.

12. REVISION OR AMENDMENT

- 12.1 Either Authority may request in writing for revision of or an amendment to the Agreement.
- 12.2 A revision or amendment agreed to by both Authorities shall be reduced to writing and shall form part of the Agreement. Such revision or amendment shall come into effect on a date determined by the Authorities.

13. EFFECTIVE DATE AND DURATION OF THE AGREEMENT

- 13.1 The Agreement shall come into force upon the date on which it is signed by both Authorities.
- 1.3.2 The Agreement shall remain in force until terminated either by written mutual consent or by one month's prior written notice given by either of the Authorities to the other.

14. DISPUTE RESOLUTION

Should any dispute or difference arise between the Authorities with regard to interpretation and/or implementation of any one or more of the provisions of the Agreement, such dispute or difference shall be resolved by the Authorities through any alternative means that is reasonably acceptable to them, other than through arbitration or judicial proceedings.

15. WHOLE AGREEMENT

- 15.1 The Agreement constitutes the whole Agreement between the Authorities relating to the subject matter hereof and no amendment, alteration, addition, variation, or consensual cancellation thereof will be of any force or effect unless reduced to writing and signed by the Authorities.
- 15.2 The Authorities agree that no other terms or conditions, whether oral or written, and whether express or implied, apply unless contained in the Agreement.

16. AUTHORITY

Any person, who signs the Agreement for and on behalf of the Commission and NAMFISA, hereby warrants that he/she is duly authorised to sign the Agreement.

17. PUBLICATION

The Commission shall be responsible for the publication of the Agreement in the *Government Gazette* in terms of section 67(3) of the Competition Act as soon as it has been signed.

18. DOMICILIUM CITANDI ET EXECUTANDI

The Authorities choose the following addresses as their respective *domicilium citandi et executandi* for purposes of the Agreement:

18.1 NAMIBIAN COMPETITION COMMISSION

Mezzanine Floor, BPI House
269 Independence Avenue
Windhoek

18.2 NAMIBIA FINANCIAL INSTITUTIONS SUPERVISORY AUTHORITY
1st Floor, Sanlam Centre Building
154 Independence Avenue
Windhoek

THUS DONE AND SIGNED AT WINDHOEK ON THIS 2ND DAY OF JULY 2014.

Mr. Heinrich Mihe Gaomab II
Secretary to the Commission: The Commission

As witnesses:

1. _____ 2. _____

Mr. Phillip N. Shiimi
Chief Executive Officer: NAMFISA

As witnesses:

1. _____ 2. _____
