



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

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WINDHOEK - 18 November 2021

No. 7688

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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 675 2021

NOTICE IN TERMS OF SECTION 67(3) OF THE COMPETITION ACT, 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 the Electricity Control Board, dated 26 October 2021.

Section 67 of the Competition Act mandates the Namibian Competition Commission to negotiate cooperation agreements with regulatory authorities, with which it shares concurrent jurisdiction over competition matters, 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 restrictive business practices as well as mergers and acquisitions in the electricity supply industry.

V. NDALIKOKULE
CHIEF EXECUTIVE OFFICER AND
SECRETARY TO THE COMMISSION

Windhoek, 17 November 2021

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. Vitalis Ndalikokule in his capacity as the Chief Executive Officer and Secretary to the Commission, duly authorized thereto, (hereinafter referred to as “the Commission”)

AND

THE ELECTRICITY CONTROL BOARD

A legal entity established under the Electricity Act, 2007 (Act No. 4 of 2007) herein represented by **Mr. Pinehas Mutota** in his capacity as Acting Chief Executive Officer, duly authorised thereto, (hereinafter referred to as “**the ECB**”)

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

WHEREAS the Namibian Competition Commission is 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 Electricity Control Board is established in terms of section 2 of the Electricity Act, 2007 (Act No. 4 of 2007) (“**the Electricity Act**”) as a juristic person with the powers to exercise over and regulate the provision, use and consumption of electricity in Namibia, to oversee the efficient functioning and development of the electricity industry and security of electricity provision, to ensure the efficient provision of electricity, ensure a competitive environment in the electricity industry, and to promote private sector investment in the electricity industry;

AND WHEREAS the Commission and the ECB 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, as well as mergers and acquisitions, where applicable, in the electricity industry on the basis of the procedures outlined in this Memorandum;

AND WHEREAS the Parties entered into a Memorandum of Agreement in March 2013, and now wish to revise and replace the 2013 Memorandum with this Agreement;

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.
- 1.5 This Agreement shall be interpreted and applied in accordance with Namibian law.

2 DEFINITIONS

In this Agreement, unless the context indicates otherwise;

- 2.1 **“Agreement”**: means this agreement together with all schedules and appendices, including any future amendments;
- 2.2 **“Authorities”**: means both the ECB and the Commission;
- 2.3 **“Commencement Date”**: means the date of signature of this Agreement by the last signing Party;
- 2.4 **“Competition Act”**: means the Competition Act 2 of 2003, as amended from time to time;
- 2.5 **“Electricity Act”**: means the Electricity Act 4 of 2007, as amended from time to time;
- 2.6 **“Parties”**: means both the ECB and the Commission;
- 2.7 **“Party”**: means either the ECB or the Commission.

3 PURPOSE AND BASIS OF THE AGREEMENT

- 3.1 This Memorandum of Agreement establishes a framework in terms of which both the Commission and the ECB will seek to:
- 3.1.1 promote and maintain fair competition and a stable environment within the electricity sector;
- 3.1.2 promote the development of competitive markets in the electricity industry;
- 3.1.3 promote co-operation and co-ordination between the parties when dealing with cases of anti-competitive behaviour, as well as to facilitate the treatment of mergers and acquisitions within the electricity industry;
- 3.1.4 undertake any joint investigations, market enquiries or research studies in the electricity industry as the parties may agree;
- 3.1.5 minimise the duplication of activities, wherever possible;
- 3.1.6 ensure that ECB exercises primary authority to set prices and tariffs, enforce performance and compliance and take appropriate steps in case of non-performance and establish conditions within the electricity industries and the Commission exercises primary authority to detect and investigate the alleged prohibited practices not covered by the Electricity Act and to review mergers within the electricity industry; and
- 3.1.7 improve understanding of their respective roles by undertaking general studies on the effectiveness of competition within the electricity industry.
- 3.2 This Agreement is entered into in order to facilitate the manner in which the parties 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 two Authorities relating to the regulation of competition in the electricity sector, the Authorities must consult each other at least annually to discuss competition policy or related issues.

- 3.4 Accordingly, on issues of concurrent jurisdiction and in addressing the matters:
- 3.4.1 The ECB agrees that primary authority should reside with the Commission to promote and safeguard matters of competition in the electricity sector, and the Commission after consultation with the ECB shall make the final determination on such matters;
- 3.4.2 The Commission agrees that primary authority should reside with the ECB to oversee the efficient functioning and development of the electricity industry and security of electricity provision and the ECB after consultation with the Commission shall make the final determination on such matters.
- 3.5 This Agreement is entered into on the basis of mutual respect and in a spirit of goodwill, and does not affect the independence, or limit the powers of the two authorities.

4 COMPLAINTS RELATED TO RESTRICTIVE BUSINESS PRACTICES

- 4.1 Where a complaint is lodged pertaining to, or where the Authorities identify a restrictive business practice involving the electricity sector, the following process shall be followed:
- 4.1.1 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;
- 4.1.2 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;
- 4.1.3 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 Authorities;
- 4.1.4 The Recipient Authority shall advise the complainant(s) of the decision resulting from the joint discussion between the Authorities;
- 4.1.5 The Recipient Authority shall give the complainant(s) further directions regarding the outcome of the complaint in question;
- 4.1.6 In the event that the matter is allocated to the Commission, delegates from the ECB may participate in an advisory capacity in the matter, and vice versa;
- 4.1.7 The Authorities may establish joint working committees in the event that it is decided to deal with a matter jointly.
- 4.2 Circumstances that may indicate that the Commission will deal with the matter include the following:
- 4.2.1 The complaint relates primarily to Restrictive Business Practices as set out in Parts I and II of the Competition Act;
- 4.2.2 The complaint does not relate to restrictions imposed by the ECB for the security of electricity provision or for public interest.
- 4.3 Circumstances that may indicate that the ECB will deal with the matter include the following:
- 4.3.1 The complaint primarily relates to restrictions imposed by the ECB for the security of electricity provision or for public interest;
- 4.3.2 The complaint primarily relates to a contravention of the Electricity Act.

- 4.4 The procedure in clause 4.1 is adopted to ensure that proceedings of such complaints are not unduly duplicated and to avoid separate penalties being imposed in respect of the same dispute/matter.
- 4.5 If it is decided in the consultation process contemplated in clause 4.1 that the ECB will deal with the matter, then the Commission may keep its investigation in abeyance, pending the preliminary outcome of the ECB's enquiry, and vice versa.
- 4.6 When the two Authorities consult each other as contemplated in this memorandum, they shall do so free of charge to each other.
- 4.7 During the consultative processes envisaged in this memorandum the two Authorities shall act as expeditiously as circumstances permit and shall on both sides facilitate that the other Party achieves a timely response.

5 APPLICATION FOR APPROVAL WITH REGARD TO MERGERS AND ACQUISITIONS

- 5.1 Where a merger transaction requires the approval of both Authorities, the merging entities shall submit separate and concurrent applications to the Commission (in accordance with the Competition Act) and to the ECB (in accordance with the Electricity Act) for their respective consideration.
- 5.2 The Authorities shall thereafter make independent determinations on the basis of the criteria and mandates of their respective legislation. In arriving at these determinations the Authorities may consult each other.

6 SHARING OF INFORMATION

- 6.1 The Authorities may exchange such information as may be necessary to give effect to this Agreement.
- 6.2 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 possible.
- 6.3 The Parties agree to share information regarding proposed legislation, policies, tariff changes, etc. in the electricity sector that may affect competition.

7 RESEARCH

- 7.1 Where a market study or research is initiated pertaining to, or where the Parties identify the need for market research pertaining to, competition in the electricity sector, the following process shall be followed:
 - 7.1.1 The Party that initiates the research ("**the Initiating Party**") must make available the Terms of Reference (ToR) to the other Party for consideration and input before the project commences;
 - 7.1.2 The other Party must provide inputs within ten (10) working days, unless a longer period is agreed between the Parties. If no inputs are received within the period provided, the Initiating Party may proceed with the research;
 - 7.1.3 The Parties must consult with each other and evaluate the proposed research in order to establish areas of collaboration and data sharing;
 - 7.1.4 In the event that the research is entirely carried by the Commission, delegates from the ECB may participate in an advisory and peer review capacity, and vice versa;

- 7.1.5 The Parties may establish joint working committees in the event that it is decided to jointly undertake research.
- 7.2 Circumstances indicative of joint research projects may include the following:
- 7.2.1 When the objectives of the research study are:
- 7.2.1.1 To determine the market structure, supply chain, and profile of industry players involved in the electricity sector;
 - 7.2.1.2 To assess the conduct of entities engaged in the electricity sector;
 - 7.2.1.3 To assess the conduct of suppliers and consumers to enterprises involved in the electricity sector;
 - 7.2.1.4 To assess competition in the sector;
 - 7.2.1.5 To identify anti-competitive practices of enterprises involved in electricity sector;
 - 7.2.1.6 To determine the extent of market distortion and whether intervention is necessary for curbing anti-competitive conduct in the sector;
 - 7.2.1.7 To recommend improvements to minimise the actual or potential restrictive effect of regulations on competition in the sector; And
 - 7.2.1.8 To develop policies toward creating a conducive environment for the growth and development of the sector.
- 7.3 It is envisioned that the Parties may enter into further agreements involving or related to the collaborative research activities above (“**Further Agreements**”) before commencing any joint research activity. Further Agreements may:
- 7.3.1 delineate the Parties’ rights and obligations, and
 - 7.3.2 address, among other things, sources of funding and approach.
- 7.4 Where a research project is carried out by one Party, that Party must share its research with the other Party for validation and/or peer review before it is disseminated to other stakeholders. The Party carrying out the research is, however, not bound by the inputs received from the other Party.
- 7.5 The Parties may arrange workshops or meetings where the final research paper, and the impact thereof on the operations of the Parties, is discussed.

8 MEETINGS

Pursuant to the clause 3.3, the Parties agree to:

- 8.1 Meet at executive level at least once annually to discuss matters pertaining to competition and the electricity industry. Nothing shall preclude the Parties from calling meetings at executive level as and when the situation requires such meetings.
- 8.2 Establish a Steering Committee comprising of at least three members of each Party to meet twice annually to discuss pertinent issues in the respective sectors. Each Party must inform the other Party of the identity of its representatives within two weeks of signature of this Agreement.
- 8.3 The Terms of Reference for the Steering Committee are set out in Annexure A attached hereto.

- 8.4 The Parties agree to meet on an ad hoc basis if and when required. Such meetings will be at technical level.

9 CONFIDENTIALITY AND USE OF INFORMATION

- 9.1 Any confidential information shared pursuant to this Memorandum shall be used only for lawful regulatory purposes.
- 9.2 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.
- 9.3 All information provided pursuant to this Memorandum will remain the property of the Authority providing such information.
- 9.4 The sharing of confidential information pursuant to this Memorandum is done in reliance upon the foregoing assurances and shall not confer any legal privileges to any person, other than to the Parties to this Memorandum.

10 EXCLUSION OF LIABILITY

- 10.1 Neither Party shall be liable for fault or negligence by another Party in execution of its obligations in terms of this Agreement as well as any damages suffered by third parties whether direct or indirect as a result of the conduct by the other Party in the exercise of its functions in terms of this Agreement;
- 10.2 Neither Party 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 a Party's obligations in terms of this Agreement.
- 10.3 The Parties indemnify each other against any claim, loss or damages suffered by another Party and/or any third party to the extent that such claim, loss or damage arise out of or relate to the criminal, wilful misconduct or negligence of a Party, its employees, agents, representatives or subcontractors in the performance of its obligations in terms of this Agreement.

11 SEVERABILITY

- 11.1 The provisions of this Agreement shall each be construed independent of each other. The Parties 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 Parties.
- 11.2 It is recorded that the provisions of this 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 Parties agree to the modification of such provision by their legal advisors as may be reasonably required to make them valid and enforceable.

12 GENERAL PROVISIONS

- 12.1 This Agreement is entered into on the basis of mutual respect, in a spirit of goodwill and does not affect the independence of the Parties hereto.
- 12.2 The provision of or request for information under this Agreement may be denied:

- 12.2.1 where compliance would require the Commission or ECB to act in a manner that would violate the law;
 - 12.2.2 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.
- 12.3 No provision of this Agreement shall give rise to the right on the part of any person, entity or government authority other than the Parties, directly or indirectly, to obtain any information or to challenge the execution of a request for information under this Agreement.
- 12.4 The provisions set forth under clauses 6 and 9 shall prevail with respect to any information provided or actions taken under this Agreement prior to its termination.
- 12.5 The Parties may participate and make representations in each other's public hearings and may advise or receive advice from each other under this Agreement.
- 12.6 When the Parties consult each other in either circumstance covered under this Agreement, such consultation shall be at no cost to each other.
- 12.7 In either circumstance contemplated under this Agreement, the Parties shall act as expeditiously as reasonably possible.

13 VARIATION OF THE AGREEMENT

No variation of this Agreement shall have any legal effect, nor be binding upon the Parties, unless reduced to writing and signed by both Parties.

14 EFFECTIVE DATE AND DURATION OF THE AGREEMENT

- 14.1 This Agreement shall come into force upon the date on which it is signed by both Parties.
- 14.2 The Agreement shall remain in force until amended or terminated by one month's prior written notice given by either of the Parties to the other.

15 DISPUTE RESOLUTION

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

16 WHOLE AGREEMENT

- 16.1 This Agreement constitutes the whole Agreement between the Parties 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 Parties.
- 16.2 The Parties agree that no other terms or conditions, whether oral or written, and whether express or implied, apply unless contained in this Agreement.
- 16.3 No variation of this Agreement shall have any legal effect, nor be binding upon the Parties, unless reduced to writing and signed by both Parties.

17 AUTHORITY

Any person who signs this Agreement for and on behalf of a Party, hereby warrant that he/she is duly authorized to sign this Agreement.

18 PUBLICATION

This Agreement shall be submitted by the Commission for publication in the Government Gazette for public information as soon as it has been signed.

19 DOMICILIUM CITANDI ET EXECUTANDI

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

NAMIBIAN COMPETITION COMMISSION

Trade House
145 Marien Ngouabi Street
Windhoek
Contact person: Vitalis Ndalikokule

ELECTRICITY CONTROL BOARD

ECB House,
35 Dr Theo-Ben Gurirab Street
Windhoek
Contact person: Pinehas Mutota

THUS DONE AND SIGNED AT WINDHOEK ON THIS 26 DAY OF OCTOBER 2021.

V. NDALIKOKULE
CEO & SECRETARY TO THE COMMISSION
NAMIBIAN COMPETITION COMMISSION

As witnesses:

1 _____

2 _____

P. MUTOTA
ACTING CHIEF EXECUTIVE OFFICER ECB
ELECTRICITY CONTROL BOARD

As witnesses:

1 _____

2 _____