



GOVERNMENT GAZETTE

OF THE

REPUBLIC OF NAMIBIA

NS\$7.20

WINDHOEK - 12 October 2018

No. 6732

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General Notice

NAMIBIAN COMPETITION COMMISSION

No. 562

2018

CORPORATE LENIENCY PROGRAMME: COMPETITION ACT, 2003

The Namibian Competition Commission herewith gives notice that it has with effect from the date of publication of this notice in terms of section 16(1)(e) and 16(1)(f) of the Competition Act, 2003 (Act No. 2 of 2003) introduced a Corporate Leniency Programme as set out below:

1. Introduction

- 1.1 The Commission was established in terms of the Competition Act, 2003 (Act No, 2 of 2003) (“the Act”) to, *inter alia*, investigate, control and evaluate restrictive practices and abuse of dominance.¹ The prevailing purpose of the Act is to enhance the promotion and safeguarding of competition in Namibia and to prevent any form of anti-competitive conduct by an undertaking or a group of undertakings arising from agreements, concerted practices or decisions by an association of undertakings.

¹ See Section 16(1)(f) and 23 (1) (2) and (3) of the Act.

- 1.2 This Corporate Leniency Programme (“CLP”) is a recognition of the fact that cartels by their very nature are often carried out in secret and as such are difficult to detect and investigate without the cooperation of undertakings or individuals implicated in them. The Namibian Competition Commission (“Commission”) therefore considers that it is in the interest of the Namibian economy to reward undertakings involved in this type of illegal practices who are willing to put an end to their participation and co-operate in the Commission’s investigation, independently of the rest of the undertakings involved in the cartel.
- 1.3 The CLP becomes effective on the date of publication in the Government Gazette and may be amended by the Commission as the need arises.
- 1.4 The purpose of the Act as set out in section 2 is to enhance the promotion and safeguarding of competition in Namibia. To that end, the Commission is empowered to increase market transparency (section 16(1)(e)) and to investigate contraventions of Chapter 3, under which cartel activities fall (section 16 (1) (f)).

2. Objectives

- 2.1 In its attempt to detect, stop, and prevent cartel behaviour, the Commission has in line with international best practice developed this CLP to facilitate the process through which undertakings participating in cartels are encouraged to disclose information on cartel conduct in exchange for leniency.
- 2.2 This CLP is prepared and issued by the Commission pursuant to the Act to clarify the Commission’s approach on cartel matters falling within its jurisdiction in terms of the Act. This CLP serves as guidance to the execution of the Commission’s investigative and prosecutorial discretion in respect of cartels as set out in the Act.
- 2.3 In particular, this CLP aims to provide guidance in respect of how the Commission will exercise its investigative and prosecutorial discretion in respect of cartel participants, who by their cooperation contribute to uncovering cartel conduct. This CLP sets the conditions under which non-prosecution or a reduction of the applicable sanction/penalty (including the pecuniary penalty) can be granted. This CLP applies to participants (natural persons, undertakings and associations of undertakings) in cartels.
- 2.4 The CLP further sets out the benefits, procedure and requirements for co-operation with the Commission in exchange for non-prosecution or a reduction in penalty.

3. The CLP Defined

- 3.1 The CLP outlines a process through which the Commission will grant a self-confessing cartel member, who is first to approach the Commission, leniency for its participation in a cartel activity² upon a cartel member fulfilling specific conditions and requirements set out under the CLP.
- 3.2 The CLP is a compliance mechanism devised to encourage cartel participants to disclose to the Commission a cartel activity, to discourage or prevent the formation of cartels and to eradicate this harmful conduct.

² The Commission is empowered to investigate Chapter 3 contraventions in accordance with section 16 (1) (f), 23 and 33 of the Act as well as to institute proceedings in the High Court of Namibia in terms of Section 38 and section 40 of the Act.

- 3.3 Section 38 of the Act grants the Commission discretion in determining whether or not to institute proceedings in the High Court against an undertaking. Leniency in the context of the CLP therefore means that the Commission would in exercise of its discretion³ not subject the successful applicant⁴ to adjudication⁵ before the High Court for its involvement in the cartel activity.
- 3.4 The CLP is a lenient process in that a cartel member that approaches the Commission on its own accord, and provides information that would result in the institution of proceedings against other cartel participants, will not be subjected to prosecution in relation to the alleged cartel which forms part of the application under the CLP.
- 3.5 Thus, an undertaking involved, implicated or suspecting that it is involved in a cartel activity would be able to come forward on its own accord and confess to the Commission in return for leniency. In other words, if a cartel member realises that such conduct may be a contravention of the Act, it could on its own free will without waiting for the Commission to investigate them, report the cartel activity to the Commission under the CLP.
- 3.6 The CLP therefore serves as an aid for the efficient detection and investigation of cartels, as well as effective institution of proceedings in the High Court against undertakings involved in cartel activities. It envisages not only a situation that the applicant alerts the Commission of the existence of a cartel activity, but also one that would culminate in a referral of, and ultimately in a final determination made by the High Court or Supreme Court, as the case may be, of such reported cartel activity, with the applicant co-operating against other members of the cartel.
- 3.7 The CLP is also adopted in recognition of the fact that not all undertakings engaging in anticompetitive conduct are aware that such conduct is illegal. In some sectors some conduct may be so prevalent that market players assume it is legal. Even those undertakings that become aware of the illegal nature of their conduct may fear disclosing the conduct for fear of severe consequences flowing from the Act or from other cartel members.
- 3.8 The CLP is thus designed to uncover cartels that would otherwise go undetected and to also make the ensuing investigations more efficient. It is for this reason that the benefits of leniency are spelt out from the outset to serve as an incentive for the applicant to come forward.
- 3.9 The Commission's decision not to refer an undertaking to the High Court in terms of section 38 as a result of the fact that an undertaking approached the Commission in terms of this CLP does not imply that the applicant is viewed as less of a cartel member than the other cartel members, but on the fact that the applicant is the first to approach the Commission with information and evidence regarding the cartel.
- 3.10 Subject to relevant provisions of the CLP, the existence of the CLP shall, however, not preclude the Commission from deciding to exercise its powers to investigate a cartel in terms of the Act.

³ Discretion in terms of section 38 of the Act

⁴ Successful applicant means an undertaking that meets all the conditions and requirements under the CLP.

⁵ Adjudication means the institution of legal proceedings in the High Court against an undertaking in terms of Section 38 of the Act and the imposition of pecuniary penalty in terms of Section 53 of the Act. The word prosecution has a similar import to adjudication herein.

4. Interpreting the CLP

- 4.1 Unless otherwise indicated in the CLP, the definitions and interpretation of words or phrases used in this entire document will be those given in section 1 of the Act and Rule 1 to the Rules made under the Act.
- 4.2 The term leniency as used in the CLP refers to leniency from prosecution before the High Court as envisaged in terms of section 38 of the Act in relation to the alleged cartel which forms part of the application under the CLP.
- 4.3 Any reference to a number of days in the CLP refers to business days as envisaged in terms of Rule 3 of the Rules made under the Act.

5. Application of the CLP

- 5.1 The CLP is applicable only in respect of alleged *cartels*. A cartel refers to agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia and includes agreements between parties in a horizontal relationship which directly or indirectly fixes purchase or selling prices or any other trading conditions; divides markets by allocating customers, suppliers, areas or specific types of goods or services; involves collusive tendering; limits or controls production, market outlets or access, technical development or investment (Section 23(1) read with section 23(2)(a) and 23(3)(a)(b)(c) and (e) of the Act).
- 5.2 The cartel activities in respect of which the CLP is applicable need not have been entered into in Namibia. For as long as a cartel activity has an effect in Namibia, the CLP would apply irrespective of the fact that the activity takes place outside Namibia⁶.
- 5.3 Leniency granted by another competition authority would not automatically qualify the applicant for similar treatment by the Commission under the CLP. The applicant must submit to the Commission a separate application which meets the conditions and requirements set out under the CLP.
- 5.4 Leniency will be granted in respect of separate and various cartel activities provided the applicant meets the requirements for each contravention reported. Thus, there will be no blanket leniency. For instance, if an application for leniency is successful in respect of one contravention out of the three that were committed at a certain given time, the applicant is not excluded from liability in respect of the other two contraventions. The only exception would be in respect of contraventions that cannot be severed, and therefore may be considered as one contravention.
- 5.5 The CLP is aimed at cartel activities:
- 5.5.1 which the Commission is not aware of; or
- 5.5.2 which the Commission is aware of but in relation to which it has insufficient information, and no investigation has been initiated yet; or

⁶ See Section 3(1) of the Act.

- 5.5.3 in respect of pending investigations and investigations already initiated by the Commission but, having assessed the matter, the Commission is of the view that it has insufficient evidence to prosecute the undertakings involved in the cartel activity.
- 5.6 Only an undertaking that is *'first to the door'* to confess and provide information in accordance with the CLP to the Commission in respect of cartel activity would qualify for leniency under the CLP. If other members of the cartel wish to come clean on their involvement in a cartel to which the applicant has already confessed, the Commission may explore other processes outside the CLP, which may result in the reduction of the pecuniary penalty and or a consent agreement in terms of section 40 of the Act. In the event that the matter is referred for adjudication to the High Court, the Commission may consider at its discretion asking the High Court for favourable treatment⁷ of the applicants who were not the first to apply for leniency pursuant to the CLP.
- 5.7 The CLP applies to an undertaking, which includes a business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust. A person refers to both a natural and a juristic person. The CLP will apply to a natural person to an extent that such person is involved in an economic activity, for instance, a sole trader or a partner in a business partnership. Furthermore, it is important that a person making the application be the person authorised to act for an undertaking in question.
- 5.8 Reporting of cartel activity by individual employees of an undertaking or by a person not authorised to act for such an undertaking will only amount to whistle blowing and not to an application for leniency under the CLP.
- 5.9 The leniency granted pursuant to the CLP does not protect the applicant from criminal or civil liability resulting from its participation in a cartel infringing the Act.

6. Nature of the CLP process

- 6.1 The CLP is a compliance tool that serves as an aid in the investigation of cartels.
- 6.2 The CLP process is undertaken on a confidential basis. Disclosure of any information submitted by the applicant prior to leniency would be made with the consent of the applicant, provided such consent will not be unreasonably withheld by the applicant.
- 6.3 Within the scope of the statutory limits and regulations on the disclosure information the Commission shall treat in confidence the identity of the applicant and protect all trade and business secrets during the course of the proceedings and disclosure would only be made with the written consent of the discloser of the information.
- 6.4 Where an application for leniency or reduction of the applicable penalty including the pecuniary penalty has been filed, the Commission shall use the statutory limits of its discretionary powers to refuse applications by private third parties for file inspection or the supply of information, insofar as the leniency application and the evidence provided by the applicant are concerned.

⁷ Favourable treatment implies substantial or minimum reduced pecuniary penalty from the one prescribed, which will be dictated by the nature and circumstances of each case, as well as the level of cooperation given.

- 6.5 Fair and proper administration of the Act underlines the CLP. It is for this reason that honesty and cooperation are paramount for the effective implementation of the CLP.
- 6.6 Nothing in the CLP shall limit the rights of any person who has been injured by cartel activity in respect of which the Commission has leniency under the CLP to seek civil⁸ or criminal remedies.

7. Disqualification criteria

- 7.1 There are various instances in which the CLP would not be applicable, namely:
- 7.1.1 where the cartel conduct in respect of which leniency is sought falls outside the ambit of the Act;
 - 7.1.2 where another undertaking has already made a successful application for leniency under the CLP in respect of the same conduct; or
 - 7.1.3 where the applicant fails to meet any other requirement and condition set out in the CLP.
- 7.2 It is the approach of the Commission that unsuccessful applicants, if they so wish, be encouraged to cooperate with the Commission and attempt negotiations to settle the matter with the Commission through a settlement or consent agreement, which may result in a more lenient penalty or a reduced pecuniary penalty.
- 7.3 The Commission may, on its own initiative in deserving cases, explore other lenient approaches outside the CLP in respect of unsuccessful applicants.

8. How to ascertain if the CLP will be applicable?

- 8.1 Where an undertaking is unsure whether or not the CLP would apply to a particular conduct, it may approach the Commission through an advisory opinion on a hypothetical or anonymous basis to get clarity. This should be done in writing. An undertaking concerned may choose to remain anonymous if it wishes to.
- 8.2 An undertaking that chooses to disclose its identity or any relevant information at this stage does so at its own risk. The Commission will however, protect information submitted by applicants and treat it with utmost confidentiality.
- 8.3 Any clarification provided pursuant to section 8 of the CLP will not have a binding effect on the Commission, or the High Court or Supreme Court, as the case may be. It is merely issued to guide the would-be applicant as to whether a conduct would be considered for leniency under the CLP.

⁸ A right to bring a civil claim for damages arising from a prohibited practice comes into existence on the date that the High Court makes a determination in respect of a matter that affects that person, or in case of an appeal, on the date that the appeal process in respect of that matter is concluded (see s. 54) of the Act).

9. Forms of lenient treatment applicable in terms of the CLP

9.1 CLP applicants may expect the following outcome to their applications:

9.1.1 Conditional Leniency

9.1.1.1 Conditional leniency is given to an applicant at the initial stage of the application and the aim is to create a good environment of trust between the applicant and the Commission pending the finalisation of the infringement proceedings. Conditional leniency will be done in writing between the applicant and the Commission and its purpose is to signal that leniency has been provisionally granted.

9.1.1.2 Conditional leniency will precede total leniency/non-prosecution. The Commission will give the applicant total leniency after it has completed its investigation and has effectively instituted proceedings in the High Court against the undertakings involved in cartel activities and once a final determination has been made by the High Court or the Supreme Court, as the case may be, provided that the applicant has met the conditions and requirements set out in the CLP on a continuous basis throughout the proceedings.

9.1.1.3 The Commission reserves the right to revoke the conditional leniency at any point in time until total leniency is granted if, at any stage, the applicant does not co-operate or fails to fulfil any other condition or requirement set out in the CLP.

9.1.2 Total leniency

9.1.2.1 Once the High Court or Supreme Court, as the case may be has reached a final decision in respect of the alleged cartel, total leniency is granted to a successful applicant who has fully met all the conditions and requirements under the CLP.

9.1.3 No leniency

9.1.3.1 An applicant who fails to meet the conditions and the requirements under the CLP will not qualify for leniency.

9.1.3.2 In the event that leniency is not granted to an applicant, the Commission is at liberty to deal with the applicant as provided for in the Act. Similarly, the Commission may consider a consent agreement, or where the matter is referred to the High Court, the Commission may ask for a reduction of the pecuniary penalty in respect of the unsuccessful applicant.

9.1.3.3 An applicant who does not meet all the requirements for total leniency, but wishes to be considered for some form of favourable treatment may also approach the Commission for a possible settlement of the matter as contemplated in terms of section 40 of the Act.

10. The requirements and conditions for leniency under the CLP

- 10.1 The applicant for leniency under the CLP must meet the following conditions and requirements to qualify for the leniency;
- (a) the applicant must honestly provide the Commission with complete and truthful disclosure of all evidence, information and documents in its possession or under its control relating to any cartel activity;
 - (b) the applicant must be the first applicant to provide the Commission with information, evidence and documents sufficient to allow the Commission in its view, to institute proceedings in relation to a cartel activity;
 - (c) the applicant must offer full and expeditious co-operation to the Commission concerning the reported cartel activity. Such co-operation should be continuously offered until the Commission's investigations are finalised and any subsequent proceedings in the High Court or Supreme Court are completed;
 - (d) the applicant must immediately stop the cartel activity or act as directed by the Commission;
 - (e) the applicant must not alert other cartel members or any other third party that it has applied for leniency;
 - (f) the applicant must not destroy, falsify or conceal information, evidence and documents relevant to any cartel activity; and
 - (g) the applicant must not make a misrepresentation concerning the material facts of any cartel activity or act dishonestly.

11. The procedure to be followed in the CLP

- 11.1 The procedure outlined in this CLP is the procedure to be followed and the outline is aimed at ensuring efficient facilitation of the CLP. The Commission may exercise some flexibility where necessary to achieve the desired outcome. For instance, where the process refers to a meeting, the Commission may in certain circumstances choose to use other forms of communicating with the applicant without having a meeting. The procedure is as follows:

11.1.1 First Contact with the Commission

11.1.1.1 The applicant must make an application for leniency in writing (marked 'LENIENCY APPLICATION' to appear clearly on the top left-hand corner of the envelope/email.) to the Director of the Enforcement, Exemptions & Cartels Division of the Commission by one of the following means:

- (i) Electronic Mail: clp@nacc.com.na
- (ii) Hand Delivery: The Namibian Competition Commission, Shop no. 14, BPI House, 77 Independence Avenue, Windhoek, Republic of Namibia.

11.1.1.2 The application must contain information substantial enough to enable the Commission to identify the cartel conduct and its participants in order to determine whether or not an application for leniency has been made in respect of the same conduct. It is not necessary for the applicant to disclose its identity at this stage.

11.1.1.3 If another undertaking has already made an application in respect of the same conduct, the Commission must advise the applicant accordingly in *writing* within ten (10) days, or within a reasonable period, after receipt of the application.

11.1.1.4 If no undertaking has made an application already, the Commission must advise the applicant accordingly and in *writing*. The applicant must thereafter within ten (10) days, or within a reasonable period, after receipt of such advice from the Commission make an arrangement for the first meeting with the Commission.

11.1.2 Oral statements in CLP applications

11.1.2.1 When submitting in writing its application for leniency or its marker application, the applicant may apply to the Commission to request that information regarding the alleged cartel be provided orally. The Commission may, at its discretion and on a case-by-case basis, accept such request from an applicant. The applicant will nevertheless be required to provide the Commission with all existing written information, evidence and documents in its possession regarding the alleged cartel.

11.1.2.2 Oral statements will be recorded and transcribed at the Commission's premises. The applicant may review the technical accuracy of the recording and transcript and correct the content of its oral statements within a reasonable time period to be determined at the discretion of the Commission. Upon expiry of the time period, the oral statements, corrected as the case may be, will be deemed to be approved and will amount to restricted information forming part of the Commission's records pursuant to section 33 of the Act and the internal framework for enforcement and case management adopted by the Commission.

11.1.3 Meetings to be held for CLP applications

The Commission envisages the following meetings to be held with a CLP applicant, but may call for additional meeting(s) should the circumstances so require:

11.1.3.1 First Meeting with the Commission

- i. At this first meeting the Applicant for leniency must bring all the relevant information, evidence and documents at its disposal, whether written or oral, that is related to the cartel activity for consideration by the Commission. The applicant must reveal its full identity and answer all the questions that the Commission may ask in relation to conduct being reported or matters relating thereto.

- ii. The purpose of this meeting is to find out whether the applicant's case would qualify for leniency under the CLP. The Commission must within ten (10) days, or within a reasonable time, after the date of the first meeting make a decision on whether or not the applicant's case qualifies for leniency and inform the applicant accordingly in *writing*.
- iii. If the Commission decides that the applicant meets the conditions and requirements set out in the CLP, arrangements for a second meeting will be made.
- iv. If the Commission decides that the applicant does not qualify for leniency, the applicant will be so advised in writing. This would be regarded as "No Leniency".

11.1.3.2 Second meeting with the Commission

- i. The aim of this meeting is to discuss and grant conditional leniency to the applicant pending finalisation of any further investigations by the Commission in the matter. The meeting will also serve as an opportunity for the Applicant (represented by its CEO or appointed representative) to discuss its application with the Secretariat of the Commission.
- ii. At this stage the applicant will be required to bring forward any other relevant information, evidence and documents that it may still have in its possession or under its control, whether written or oral. The Commission would be able to make copies of all documents provided.
- iii. A written agreement between the applicant and the Commission, otherwise known as the conditional leniency agreement, which will be granted subject to the conditions and requirements of the CLP, will be agreed upon between the applicant and the Commission.
- iv. The Commission shall maintain confidentiality on all information, evidence and documents given to it throughout the process. The provisions of Section 55, 63, and 64 of the Act will apply *mutatis mutandis* to the information received from Applicant. Use of documents and information obtained from the applicant at the Court in terms of the Act shall not amount to the breach of confidentiality.

11.1.3.3 Investigations, Analysis and Verification

- i. After the granting of conditional leniency, the Commission will move forward with its investigations relating to the cartel activity. The Commission will analyse and verify information or documents given by applicant against any existing or discovered information and/or documents. At this stage the Commission may use all methods and tools provided for in the Act, including interview, subpoena, search or summon any undertaking(s) whom it believes could assist in connection with the matter.

- ii. Once the Commission is through with this exercise and is satisfied that it has sufficient information to issue a Notice of its proposed decision or institute proceedings in the High Court, it will inform the applicant in a final meeting. Similarly, should the Commission not be satisfied it can call a meeting with the applicant either to revoke the conditional leniency or to solicit further documents or information so as to enable the Commission to complete the exercise.

11.1.3.4 Final meeting

- i. The purpose of this meeting between the Commission and the applicant is to inform the applicant that the Commission intends to institute proceedings in relation to the alleged cartel and to request the applicant to continue to cooperate fully and expeditiously in the proceedings. Conditional leniency will continue to apply until the High or Supreme Court, as the case may be, has reached a final decision regarding the matter.
- ii. Should the applicant wish to withdraw its application, it runs the risk of being dealt with in terms of the Act.

12. Placing of a marker

- 12.1 Prior to making an application for leniency, a prospective applicant may choose to apply to the Commission for a marker (the “marker application”). The marker application is made in writing to the Director of the Enforcement, Exemptions & Cartels Division of the Commission by one of the following means:
 - (i) Electronic Mail: clp@nacc.com.na
 - (ii) Hand Delivery: The Namibian Competition Commission, Shop no. 14, BPI House, 77 Independence Avenue, Windhoek, Republic of Namibia.
- 12.2 The marker application must identify that it is being made to request a marker, the applicant’s name and address, the alleged cartel conduct and its participants and justify the need for a marker.
- 12.3 For purposes of this CLP, a marker refers to the practice of reserving a place for an applicant for leniency for a specified period of time whilst it conducts an internal investigation in order to perfect its application for leniency.
- 12.4 The marker system caters for the needs of those applicants who for legitimate reasons are not in the position to submit all necessary evidence from the onset but require more time to make their applications complaint.
- 12.5 The Commission may grant, at its discretion and on a case-by-case basis, a marker to protect the applicant’s place in the queue of applications for leniency. In granting the marker, the Commission will determine on a case-by-case basis the period of time within which the applicant must provide the necessary information, evidence and documents needed to meet the conditions and requirements set out in section 10 of the CLP. If the applicant submits at a later stage an application for leniency along with the necessary information, evidence and documents within the time limit determined by the Commission, such application for leniency and information, evidence and documents will be deemed to have been provided on the date when the marker application was granted by the Commission.

13. Grounds for revocation

- 13.1 Revocation may occur at any time in respect of conditional leniency.
- 13.2 The Commission will revoke a conditional leniency in writing.
- 13.3 Revocation will occur if the applicant fails to meet the conditions and requirements of the CLP, including in the event of lack of cooperation by the applicant, provision of false or insufficient information, misrepresentation of facts and dishonesty.
- 13.4 It must be noted that, in terms of section 63(d) of the Act, a person commits an offence when s/he knowingly provides false information to the Commission. Thus, an applicant whose leniency has been revoked by the Commission based on the provision of false information, will be liable to penalties stipulated in section 64(c) of the Act, if convicted of such an offence.
- 13.5 Where conditional leniency is revoked, the Commission may decide to pursue the matter in terms of the relevant provisions of the Act.

14. Effect(s) of failure to meet the conditions and requirements set out in the CLP (unsuccessful application under the CLP)

- 14.1 Failure to meet the conditions and requirements set out in the CLP, including lack of cooperation, dishonesty, providing insufficient evidence or false information, will result in an unsuccessful application, the effect of which would include the following:
- 14.1.1 The Commission would be at liberty to investigate the matter and approach the High Court for adjudication in terms of the provisions of the Act.
- 14.1.2 The Commission may, depending on the matter, ask for a lenient sanction when approaching the High Court to adjudicate on a matter in respect of an undertaking whose application has been unsuccessful.
- 14.1.3 The Commission and/or the unsuccessful applicant may initiate negotiations for a settlement agreement or a consent order, which may also result in reduction of a fine that may be imposed in terms of the Act.⁹

15. Whom to contact at the Commission regarding the CLP?

- 15.1 Undertakings seeking to make general enquiries on the CLP or seeking clarification on whether or not leniency would be considered may contact the Enforcement, Exemptions & Cartels Division at:

Telephone number: +264 61 224622
E-mail address: clp@nacc.com.na

⁹ The High Court of Namibia has the power to impose a pecuniary fine of up to 10% of the undertakings' global turnover in terms of Section 53(2) of the Act.