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From Service to Self-Interest: Civil Servants, Government Contracts and Corrupted Market Competition in Namibia

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ABSTRACT

In Namibia, a rule – or rather a non-rule – allows civil servants to bid for government tenders. Indeed, though the Anti-Corruption Act 8 of 2003 criminalize corruption and the Public Procurement Act 15 of 2015 bars civil servants from vying for government contracts within their own public entity, none of these statutes expressly forbid civil servants from tendering for contracts offered by other public bodies. This *lacuna* or non-rule leads profit-seeking, self-interested civil servants (hereinafter ‘commercial servants’) to compete with private firms, the very constituencies the state already pays them to serve. The question arises whether the conflict of interests caused by this non-rule amounts to corruption and, if so, whether it violates Namibia’s competition law. This paper measures the extent to which this non-rule, by allocating taxpayers’ money to conflicted persons, hurts citizens-consumers. To answer this question, the article divides the analysis into three integral parts. The article begins by exploring the ‘Fishrot Files’, which has been labeled as Namibia’s ugliest corruption scandal. This episode serves as a vivid illustration of the pitfalls of allowing civil servants to bid for government contracts, emphasizing the loopholes that these government employees can exploit for personal gain in Namibia’s multi-billion-dollar tender industry. Also, in that section, the article lays bare the Chicago school of antitrust thought that informs this research, emphasizing as it does consumer choice. Then, shifting to the conceptual understanding of corruption, the article dissects the notion of corruption in general and in terms of the Anti-Corruption Act 8 of 2003. Here, the author insists that conflicts of interest lie at the heart of

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virtually all definitions of ‘corruption’. As such, the article contends that the rule permitting civil servants to engage in commercial activities with their employers can reasonably be interpreted as institutionalized corruption. Moreover, the author maintains that, because the loophole enables civil servants to ‘compete’ with private bidders, the rules of competition law should apply to those civil servants as well.

Third, by leveraging the consumer choice theory from the Chicago school, the article argues that civil servants often possess informational advantages over private bidders when tendering for government contracts. These information asymmetries lessen competition and render the relevant markets inefficient, creating an uneven playing field that defeats the objectives of the Competition Act 2 of 2003.

Lastly, the article draws out the broader implications of these findings. Not only has the rule in question been implicated in significant corruption scandals, but it also threatens the integrity of Namibia’s public procurement processes. By diminishing fair competition and potentially wasting taxpayer funds, it poses significant economic and governance challenges. This study offers invaluable insights for policymakers in Namibia and other jurisdictions where such non-rule exists. It calls for a reconsideration of the prevailing policy to ensure that public procurement processes are transparent, competitive, and free from conflicts of interest. Most importantly, it enriches competition theories by probing these scenarios where the state engages in business rivalry with its subjects.

Keywords: *Commercial Servants, Fishrot Scandal, Information Asymmetry, Institutionalised Corruption, Competition Law, Conflict of Interest*

1 Introduction: Namibian civil servants and the murky waters of government tenders

In Namibia, the boundary between civil service and commercial endeavors is made ambiguous by a notable omission in the nation's legislative framework. This article endeavors to explore the consequences of allowing civil servants, whom we will refer to as 'commercial servants', to bid for government contracts, while delving into the repercussions this has on competition and corruption.

This study traces its roots back to 2003 when the Namibian Parliament introduced the Anti-Corruption Act, an earnest initiative in upholding transparency and opposing corrupt activities. Nevertheless, an intrinsic gap was left unbridged: the Act did not explicitly prevent civil servants from participating in tenders proposed by government bodies and parastatals. This oversight paved the way for profit-driven civil servants to directly lock horns with private firms in the commercial arena. And, although the Public Procurement Act 15 of 2015 forbids civil servants from participating in government tenders offered by their own public entity,¹ it does not prevent them from bidding on similar contracts from other public entities. Such a paradigm not only invokes ethical concerns but also propels one to reconsider the foundational tenets of civil service.

Using the consumer choice theory² derived from the Chicago school of antitrust thought as my primary theoretical lens, I explore the informational advantages that civil servants might possess. The question that emerges, and which this research seeks to answer, is: Does the absence of a definitive rule barring civil servants from government tenders tilt the competitive landscape and, if it does, does this blurring of roles equate to corruption as

1 Sec 66(2B) of the Public Procurement Act 15 of 2015.

2 For recent studies on consumer choice theory, see Averitt NW (2024) "The Many Benefits of Thinking in Terms of 'Consumer Choice'" 53(1) *University of Baltimore Law Review* 139-160; Lin T-C (2024) "Can Instruction in Consumer Choice Theory in Introduction to Microeconomics Benefit Student Learning in Upper-Level Economics Courses? The Example of Public Finance" 46 *International Review of Economics Education* 1-13; Mach P (2022) "The Application of Lagrange Multipliers in Consumer Choice Theory" 16(1) *Economic Studies & Analyses / Acta VSFS* 63-75; Graef I (2021) "Consumer Sovereignty and Competition Law: From Personalization to Diversity" 58 *Common Market Law Review* 471-504 at 475-476 (tracing the origins of consumer choice theory or consumer sovereignty to the writings of Adam Smith, and explaining how neoliberals such as Joseph A Schumpeter, Ludwig von Mises and Friedrich Hayek elaborated on this theory); and Scheele R (2021) "Facebook: From Data Privacy to a Concept of Abuse by Restriction of Choice" 12(1) *Journal of European Competition Law & Practice* 34-37.

defined under Namibia's legislative constructs? A perusal of existing literature, particularly the infamy of the 'Fishrot Files' scandal, offers a tangible testament to the risks inherent in unchecked governmental processes. Through this discourse, I postulate that the existing ambiguity in the rules likely fosters an environment susceptible to corruption and undermines fair competition, possibly contradicting the spirit of the Competition Act 2 of 2003.

I divided the remainder of this article into three sections. The article begins with an exploration of the Fishrot Files, which has been labeled as Namibia's ugliest corruption scandal. This episode serves as a vivid illustration of the pitfalls of allowing civil servants to bid for government contracts, emphasizing the loopholes that these government employees can exploit for personal gain in Namibia's multi-billion-dollar tender industry. Also, in that section, the article lays bare the Chicago school of antitrust thought that informs this research, emphasizing as it does consumer choice.

Then, shifting to the conceptual understanding of corruption, the article dissects the notion of corruption in general and in terms of the Anti-Corruption Act 8 of 2003. Here, I insist that conflicts of interest lie at the heart of virtually all definitions of 'corruption'. As such, the article contends that the rule permitting civil servants to engage in commercial activities with their employers can reasonably be interpreted as institutionalized corruption. Moreover, I maintain that, because the loophole enables civil servants to 'compete' with private bidders, the rules of competition law should apply to those civil servants as well.

Third, by leveraging the consumer choice theory from the Chicago school, I submit that civil servants often possess informational advantages over private bidders when tendering for government contracts. These information asymmetries lessen competition and render the relevant markets inefficient, creating an uneven playing field that defeats the objectives of the Competition Act 2 of 2003.

In its concluding section, this article draws out the broader implications of these findings. Not only has the rule in question been implicated in significant corruption scandals, but it also threatens the integrity of Namibia's public procurement processes. By diminishing fair competition and potentially wasting taxpayer funds, it poses significant economic and

governance challenges. At any rate, the scandal has exposed the necessity of comprehensive reforms, increased accountability, and a collective effort to combat corruption at all levels.

Understanding this complex dynamic is not merely an academic exercise. The insights gleaned hold substantial implications for policymakers in Namibia, serving as a beacon for crafting robust legislation. Furthermore, the Namibian public can gain a clearer picture of their institutional mechanics, and other global jurisdictions observing similar ambiguities might find valuable lessons herein. As this exploration unfolds, it becomes evident that in the realm of governance, nuances matter profoundly.

2 The ‘Fishrot Files’ and the Chicago School of antitrust thought

In Namibia’s office corridors, the whisper of the ‘Fishrot’ evokes unease and reminds interlocutors of the darkness lurking behind closed doors. Considered Namibia’s most egregious corruption scandal,³ ‘Fishrot’ has thrust into the limelight the blurred boundaries between civil service and commercial interests. A few experts portray it as ‘deep-rooted’ in Namibia’s political system⁴ despite the country’s stellar records in terms of governance, but I trace this particular scandal back to a legislative oversight: an absence of explicit rules prohibiting civil servants from bidding on government tenders.

This ‘non-rule’ has fostered an environment where civil servants, vested with public responsibility, can don the hat of a commercial bidder, leveraging their unique positions for personal profit. This section of the article seeks to understand the depths of the Fishrot and its implications, drawing parallels with the influential Chicago school of antitrust thought.

3 *S v Shanghala and Others* (SA 62 of 2022) [2023] NASC 2 (6 March 2023) at para 3 (Frank AJA remarking that the allegations in the Fishrot Trial represent “the largest corruption scandal since independence in this country, if not its history”).

4 See eg Coetzee J (2021) “An Analysis of the Depth of Corruption in Namibia’s Political System, With Reference to the Fishing Industry Scandal Known as ‘Fishrot’” 30 *Journal of Namibian Studies* 131 – 152 at 139 – 140 and 143 (stating that corruption is deep-rooted in the party-political and executive systems of Namibia).

2.1 The depths of the Fishrot

The ‘Fishrot Files’ is not just a tale of unchecked ambition but rather a multi-faceted narrative encompassing political influence, bureaucratic complicity, and commercial malfeasance. It revolves around the allocation of fishing quotas and involves abuse of power, money laundering, and corruption. To be precise, the accused persons in the ongoing Fishrot Trial (i.e., 9 individuals and a number of corporations) face several charges:⁵

1. Racketeering and money laundering in terms of the Prevention of Organised Crime Act 29 of 2004 (POCA),
2. Corruption in terms of the Anti-Corruption Act,
3. Fraud in the form of tax evasion,
4. Conspiracy to commit crimes,
5. Theft, and
6. Obstructing or attempting to defeat or obstruct the course of justice.

The scandal came to light in November 2019 when Jóhannes Stefánsson, an Icelandic whistleblower, exposed the corrupt practices of Samherji, an Icelandic fishing company operating in Namibia.⁶ The Icelandic company had allegedly bribed Namibian officials, including the previous Minister of Fisheries, to secure a massive fishing quota.⁷

Coetzee identified three groups of “fishy” players in the Fishrot saga:⁸

5 See *S v Shanghala and Others* (2023) para 1. These criminal charges also appear in the 9 court cases that have dealt with ‘Fishrot’ so far: *S v Van Wyk* (17) (Appeal against refusal of bail) (HC-MD-CRI-APP-CAL 76 of 2020) [2020] NAHCMD 399 (7 September 2020); *Shanghala and Others v S* (CC 6 of 2021) [2022] NAHCMD 164 (1 April 2022); *Nghipunya v Minister of Justice* (HC-MD-CIV-MOT-GEN 343 of 2021) [2022] NAHCMD 510 (14 October 2022); *National Fishing Corporation (Pty) Ltd v African Selection Fishing (Namibia) (Pty) Ltd & Others* (HC-MD-CIV-ACT-OTH- 1143 of 2021) [2022] NAHCMD 580 (21 October 2022); *Hatuikulipi v S* (CC 6 of 2021) [2022] NAHCMD 693 (27 December 2022) [High Court judgment]; *Hatuikulipi v S* (CC 6 of 2021) [2022] NALCMD 693 (27 December 2022) [Labour Court judgment]; *De Klerk v Penderis and Others* (SA 76 of 2020) [2023] NASC 1 (1 March 2023); *S v Kokule* (HC-MD-CRI-APP-CAL-2023/00036) [2023] NAHCMD 476 (7 August 2023); *De Klerk v Prosecutor-General and Others* (HC-MD-CIV-MOT-POCA-2022/00487) [2024] NAHCMD 247 (24 May 2024).

6 See Winters R (2021) “Fishrot, the Global Stench of Scandal” 50(2) *Index on Censorship* 66 – 68 at 66 – 68, and Coetzee (2021) at 143.

7 Coetzee (2021) at 146.

8 Coetzee (2021) at 138 – 139.

- (1) *the mega operators*, who operate in multiple industries and have political and business connections;
- (2) *the daisy chain operators* or “runners”,⁹ who carry out smaller tasks under the instructions of the mega operators; and
- (3) *the professional elite*, including lawyers and auditors, who facilitate money laundering and other illegal activities.

The scandal has shaken Namibia’s politics severely. The former Namibian fisheries and justice ministers (Bernhard Esau and Sacky Shanghala, respectively) were arrested and remanded in custody on charges of corruption, fraud, and money laundering.¹⁰ The United States has also imposed an entrance ban on those former ministers.¹¹

The media has played a crucial role in reporting on the scandal, with social media platforms being particularly influential.¹² However, there have been misgivings about how the government responded to the crisis, including attempts to withhold information and protect politically well-connected individuals implicated in the scandal.¹³ At its core, the scandal unravels the vulnerabilities of Namibia’s public service. Though it primarily featured the fisheries minister’s allocation of fishing quotas, as opposed to public procurement, the scandal nonetheless reveals the dangers of allowing civil servants or senior government officers to directly transact business with the government. The fact that former justice minister Shanghala’s own company, Olea Investments, received N\$4,5 million that originated from the powerful Icelandic firm, Samherji, dramatically exemplifies this.¹⁴

9 Coetzee borrowed the term ‘runner’ from the field of drug dealings, and he includes in this group public officials in offices, ministries, or agencies; and private people who carry out the tasks.

10 (29 November 2019) “Fishrot 6’ to apply for bail” *The Namibian*, available at <https://namibian.com.na/fishrot-6-to-apply-for-bail/> (7 October 2023).

11 Oirere S (16 June 2021) “US Acts on Fishrot Scandal by Banning Two Namibian Ministers”, available at <https://www.seafoodsource.com/news/business-finance/us-acts-on-fishrot-scandal-by-banning-two-Namibianministers#:~:text=The%20U.S.%20said%20both%20Esau,and%20public%20processes%2C%20including%20by> (11 October 2023).

12 See Coetzee (2021) at 140.

13 See Coetzee (2021) at 140.

14 See Immanuel S (2019) “Shanghala Dodges N\$4m Fishrot Payment Questions” *The Namibian*, available at

With civil servants eligible to bid for government contracts, the system has become rife with information asymmetries. These ‘commercial servants’ have insider knowledge, access to critical data, and, in some instances, the ability to influence the tendering process, making it significantly challenging for private firms to compete on an equal footing. The tendrils of the Fishrot scandal reached the highest echelons of Namibia’s administrative hierarchy. It did not just ensnare a few rogue officials exploiting a loophole; it emblemized a systemic rot, where the guardians of public interest morphed into its exploiters. The vast sums of money involved, estimated at more than N\$ 317 million Namibian dollars [or South African Rand],¹⁵ siphoned away from public projects, underscore the magnitude of this breach of trust.

However, beyond the nitty-gritty of the Fishrot Files, lies a larger question about the nature of public service, ethics, and governance. If the very individuals entrusted with public welfare can be swayed by personal profit, how robust is the institutional framework? Moreover, what lessons can other nations draw from Namibia’s experience to safeguard their public procurement processes?

2.2 Corruption and competition: a long story

Corruption and competition share a long history. These phenomena also connect at the level of concepts. Kaufmann and Vicente envision corruption as ‘the allocation of public-sector goods to a private agent (or public official) “who competes with the population”’.¹⁶

2.3 The Chicago School of antitrust thought and its relevance

To contextualize the Fishrot Files within broader theoretical frameworks, I deploy the Chicago school of antitrust thought, which heavily emphasizes consumer choice. I enlist insights from that theory skeptically, considering its neoliberal genesis. Rooted in the belief that markets, when left to their devices, tend towards efficiency, the Chicago school views antitrust laws as

<https://namibian.com.na/shanghala-dodges-n4m-fishrot-payment-questions/> (11 October 2023).

15 *S v Shanghala and Others* (2023) para 2.

16 Kaufmann & Vicente (2011) at 198 – 199.

mechanisms to foster competition, thereby benefiting the consumer. At its heart, this school of thought prioritizes consumer welfare over market structure, presuming that, if consumers are better off, the market structure is optimal.

When juxtaposed against the backdrop of the Fishrot Files,¹⁷ the Chicago school offers a unique lens. The very act of civil servants bidding on government tenders disrupts the equilibrium of the market. With their informational advantages, these ‘commercial servants’ can outbid private firms, not based on efficiency or value but on their insider knowledge. This situation distorts competition but, more critically, it diminishes consumer welfare. The taxpayers, in this case, are the ultimate consumers, and their interests are compromised as funds get channeled to potentially sub-optimal projects, purely due to the informational asymmetry at play.

Furthermore, the Chicago school emphasizes the dangers of regulatory overreach, warning against excessive intervention that might stifle innovation and competition. However, the Namibian context presents a paradox. The absence of a clear rule prohibiting civil servants from bidding has inadvertently stifled genuine competition. It underlines the necessity of a balanced regulatory approach, one that ensures a level playing field while avoiding undue stifling of market forces.

3 Dissecting corruption: the Namibian context and beyond

Corruption, often depicted as a shadowy figure exchanging money in dimly lit alleys, is far more pervasive and nuanced than this image suggests. It seeps into the very fabric of societies, influencing policies, skewing economies, and, most insidiously, eroding the legitimacy of institutions.¹⁸ While many nations, including Namibia, have introduced

17 On the incentives created by competition to engage in corruption, see Flammer C (2018) “Competing for Government Procurement Contract: The Role of Corporate Social Responsibility” 39(5) *Strategic Management Journal* 1299 – 1324 at 1304; and Wolinsky A (1995) “Competition in Markets for Credence Goods” 151(1) *Journal of Institutional and Theoretical Economics* 117 – 131 at 117.

18 See Karianga H (2024) “State Financial Corruption and Its Impact on Development” 18 *Revista De Gestão Social E Ambiental*, 1-17 at 10 (stating that corruption negatively impacts society, especially its values and income disparities); Moschovis G (2010) “Public Spending Allocation, Fiscal Performance and

legislation like the Anti-Corruption Act 8 of 2003 to combat this scourge, eradicating corruption effectively hinges on how policymakers, graft busters, and lawyers understand its essence.

3.1 The uncertain nature of corruption in Namibia

The Namibian state relied on the Anti-Corruption Act to litigate corruption cases in court,¹⁹ but in 2009 the High Court in *Lameck* declared unconstitutional the terms ‘corruptly’ and ‘gratification’ in several sections²⁰ of the Anti-Corruption Act. Smuts J held that the term ‘corruptly’ is “unduly vague” and does not “meet the test of indicating with reasonable certainty what is hit by it to those who are bound by it, as is required by the principle of legality.”²¹ *Lameck* shows that, despite the breakthroughs achieved by the Anti-Corruption Act, Namibia and its courts have not yet elucidated the old-age problem of defining corruption.

Corruption existed even in the colonial days, but legislation protected corrupt officials.²² Only their bosses knew about the instances of corruption, and they preferred to remain quiet about it.²³ Because Namibia lacked any comprehensive perspective on the criminality of corruption, dishonest officials could always successfully plead that they did not commit any offence.²⁴

Lawyers in Namibia and South Africa have for a long time struggled to define ‘corruption’. For decades, the state prosecuted corruption cases by relying on common-law provisions. At common law, prosecutors did not call corruption as such. Instead, the state prosecuted those

Corruption” 29 *Economic Papers* 64-79 (arguing that corruption lowers social expenditure and leads to fiscal slippages).

19 For example, *S v Nakale and Others (No 1)* 2007 (2) NR 405 (HC) (conviction); *S v Nakale and Others (No 2)* 2007 (2) NR 427 (HC) (sentencing); *Prosecutor-General v Lameck & Others* 2009 (2) NR 738 (HC); *Prosecutor-General v Lameck and Others* 2010 (1) NR 156 (HC) (discussion of search warrant procedure); *S v Lameck and Others* (3) (15 of 2015) [2017] NASC 20 (19 June 2017); *Simataa v Magistrate of Windhoek and Others* 2012 (2) NR 658 (HC); and *S v Goabab and Another* (SA 45/2010) [2012] NASC 25 (15 November 2012).

20 Anti-Corruption Act ss 32, 33, 36, 42, and 43.

21 *Lameck* (2009) para 91.

22 Horn N & Skeffers I (2010) “The Fight Against Corruption in Namibia” in Hannam M & Wolff J (eds) *Southern Africa: 2020 Vision: Public Policy Priorities for the Next Decade*, London: e9 publishing at 104.

23 Horn & Skeffers (2010) at 104.

24 Horn & Skeffers (2010) at 104-105.

cases as bribery²⁵ and, to a lesser extent, fraud. At common law, ‘fraud’ consists in intentionally and unlawfully making a representation that causes actual or potential prejudice to another person.²⁶ Bribery, on the other hand, consists in tendering (and accepting) a private advantage as a reward for performing a duty.²⁷ The crime is committed by both the person who gives the bribe and by the person who knowingly receives it. In 1928, the Legislative Assembly for the Territory of South West Africa enacted the Prevention of Corruption Ordinance,²⁸ which introduced a definition of corruption that largely reproduces the common-law crime of bribery.²⁹

In *R v Ingham*,³⁰ the court stated that the crime of bribery essentially differs from the crime of fraud, where the false representation constitutes an essential ingredient of the offence of fraud. Although the accused is charged with agreeing to give, or offering to give, as well as with giving certain gifts or considerations, in each case the said gift is then the essence of the offence.

However, common-law crimes such bribery and fraud encompass a very narrow range of corrupt behavior. Common-law bribery, for example, only applies to public servants;³¹ it does not cover acts by agents on behalf of their principals.³² Despite the changes brought about by the Anti-Corruption Ordinance and the Anti-Corruption Amendment Act, Namibia still did not criminalize corruption comprehensively.

The Anti-Corruption Act has changed the common law in that it defines the crime of corruption more holistically. In *Goabab*, Chief Justice Peter Shivute remarked that the definition of corruption had to sweep far more widely because “corruption may manifest itself in different shapes and forms.”³³ Today any person can commit the crime of corruption in the

25 Snyman CR (2014) *Criminal Law* LexisNexis at 401.

26 Snyman (2014) at 523; Burchell J (2006) *Principles of Criminal Law* Cape Town: Juta at 833.

27 Burchell (2006) at 889.

28 Prevention of Corruption Ordinance 2 of 1928.

29 See Prevention of Corruption Ordinance, ss 2(a)-(b).

30 *R v Ingham* 1958 (2) SA 37 CPD 43.

31 Snyman (2014) at 401-402.

32 Moller M (2000) “Public Service Ethics in Africa Country Report: Namibia” in *Ethics and Good Governance in Namibia* Windhoek: Konrad Adenauer Stiftung and Namibia Institute for Democracy at 15.

33 *Goabab* (2012) para 14.

form of bribery; the law does no longer confine the crime to civil servants. Still, even with this broader acceptance of the term 'corruption', the Namibian Anti-Corruption Act has not fixed the definition issue entirely. Actually, unlike South Africa, it does not create a general definition of crime, then unbundles the general crime into more specific offences.³⁴

Counsel in *Goabab*³⁵ urged the Supreme Court of Namibia to interpret the term 'corruptly' after the High Court declared it vague and overbroad in *Lameck*.³⁶ Responding to counsel's plea, the Supreme Court ruled that

for the purposes of this judgment... that the word 'corruption', at its lowest threshold when used in the context of the public service, includes the abuse of a public office or position (including the powers and resources associated with it) for personal gain.³⁷

The Court added that the synonyms of 'corruptly' include 'immorally, wickedly, dissolutely and dishonestly'.³⁸ While waiting for future disputes to further test and refine the definition of corruption in Namibia, the courts appear to have settled on the following position: The adverb 'corruptly' in the Anti-Corruption Act bears its ordinary meaning³⁹ of 'immoral, wicked, dissolute, and dishonest'.⁴⁰

Namibian lawmakers must therefore calibrate the scope of its notion of 'corruption'. No international treaties – not even the treaties on corruption adopted by the African Union or the United Nations – can really define 'corruption' in a way that applies to each and every country. This is because corruption depends on the values of each society, and each society retains the power to make laws that regulate its members, including norms qualifying certain behavior as corrupt.

34 Burchell (2006) at 892-895.

35 *Goabab* (2012) para 12.

36 *Lameck* (2009) para 91.

37 *Goabab* (2012) para 16.

38 *Goabab* (2012) para 16.

39 *Lameck* (2009) para 94.

40 *Goabab* (2012) para 16.

3.2 The essence of corruption

The essence of corruption eludes definition and comprehension,⁴¹ if only because countries differ in their cultures, politics and laws,⁴² and in the way the legal systems define corrupt action. In fact, for the past 50 years, much of the empirical research on corruption has focused on perceptions of this phenomenon.⁴³ Despite the absence of a universally agreed definition, Jain nonetheless argues that a “consensus” exists that corruption denotes “acts in which the power of public office is used for personal gain in a manner that contravenes the rules of the game”.⁴⁴ After he reviewed the scholarly literature, Phil identified the three most commonly cited definitions of corruption: the public office-centered, the public interest-centered, and the market definitions.⁴⁵ He observed that the view of corruption as “the subversion of the public interest or the common good by private interests” boasts an “impeccable historical pedigree”.⁴⁶

Crucially, the concept of corruption can connote both legal and illegal activities. Because it involves the country’s political elites (i.e., the mega operators), Fishrot is best described as both ‘grand corruption’ and ‘bureaucratic corruption’.⁴⁷ From a legal standpoint, it would also

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- 41 See Hugo E et al (2022) “Two Sides of the Coin: Exploring the Duality of Corruption in Latin America” 19(5) *Journal of Institutional Economics* 673-687 at 673-675 (discussing how defining corruption has proved difficult and contentious, in major part because no consensus exists on the scope of the phenomenon and on certain definitional distinctions, such as the distinction between appropriation of public goods for personal gain and privatization, and governmental distortion of the market and regulation); Jain (2001) at 73.
- 42 See Hauser C and Hogenacker J (2014) “Do Firms Proactively Take Measures to Prevent Corruption in Their International Operations?” 11(3-4) *European Management Review* 223-237 at 234 (affirming that, in some countries, people and firms deem corrupt practices as customary or even necessary, particularly in environments where bureaucratic inefficiencies prevail); Kaufmann & Vicente (2011) at 199 (positing that legality is defined at the political level, implying that different political elites will define ‘corruption’ differently).
- 43 Megías A et al (2023) “Deontological and Consequentialist Ethics and Attitudes Towards Corruption: A Survey Data Analysis” 170 *Social Indicators Research* 507-541 at 507 (observing that much of the empirical research for the past 45 years concentrated on perceptions of corruption as researchers sought to define and measure corruption).
- 44 Jain (2001) at 73.
- 45 Phil M (1997) “Defining Political Corruption” 45(3) *Political Studies* 436 – 462 at 440 – 446.
- 46 Phil (1997) at 440; see also at 458 (stating that “corrupt action directly subverts the distinction between the interests of the individual or group and the responsibilities of the office, and thereby erodes the very distinction upon which the domain of politics relies for its capacity to resolve conflict.”).
- 47 See Jain AK (2001) “Corruption: A Review” 15(1) *Journal of Economic Surveys* 71 – 121 at 73 – 75 (defining ‘grand corruption’ as acts whereby a country’s political elite exploits their power to make policies shaping the economy, as opposed to ‘bureaucratic corruption’, where corrupt acts by

fall under the purview of organized crimes. One major aspect of the Fishrot amounts to ‘legal corruption’, as defined by Kaufman and Vicente, who rightly said that ‘legal corruption’ occurs where the elite, including public officials and private agents, engage in corruption within a legal framework that they have created to protect their own corrupt practices.⁴⁸ Indeed, in 2015, Fisheries Minister Esau and Justice Minister Shanghala amended the Marine Resources Act⁴⁹ to give the Fisheries Minister a wide discretion to allocate fishing rights as he wished.⁵⁰ This amendment set the scene for the Fishrot scheme to scale. This sort of legal framework aims to legalize corruption, to make it acceptable to the population.⁵¹

At its core, corruption oozes a multifaceted malaise, but if one searched for a singular thread that binds its many manifestations, it would be the ‘conflict of interest.’ This represents a scenario where a person’s interests, often cloaked under the guise of professional duties, clash with the broader objectives of institutions and society. As I have just mentioned, this conflict manifests itself in multiple ways, from a bureaucrat favoring a particular vendor in exchange for kickbacks to a legislator framing policy that benefit personal business ventures. Both scenarios featured the Fishrot scandal.

Crucially, however, note that not every conflict of interest translates to corruption. It is the act of exploiting this conflict for personal gain, at the expense of the larger good, that transforms a mere ethical dilemma into full-blown corruption. In terms of moral philosophy, I view this idea of corruption as consequentialist.

appointed bureaucrats when dealing with their superiors (i.e., the political elites) or with the public).

48 Kaufmann D & Vicente PC (2011) 23(2) *Economics & Politics* 195 – 219 at 199.

49 Marine Resources Act 27 of 2000.

50 The Justice Minister and Fisheries Minister amended section 33 of the Marine Resources Act, which empowers the Fisheries Minister to allocate rights to harvest marine resources. See also Shelleygan P (2023) “Venaani to Table Bill to Deal With Fishrot Amendments” *The Namibian*, available at <https://www.namibian.com.na/venaani-to-table-bill-to-deal-with-fishrot-amendments/#:~:text=Esau%2C%20along%20with%20former%20minister,the%20guise%20of%20governmental%20objectives.> (27 August 2024).

51 See Kaufmann & Vicente (2011) at 199.

3.3 The Namibian quandary: civil servants and commercial interests

Namibia's legislature envisioned the Anti-Corruption Act 8 of 2003 as an instrument to deter corrupt activities⁵² and promote transparency. But like all legislative tools, its efficacy is only as good as its comprehensiveness and implementation. The Act, while robust in many aspects, overlooked a pitfall – it did not expressly prohibit civil servants from bidding for government contracts. This legislative oversight led to the emergence of 'commercial servants' who, armed with insider knowledge and enticed by potential profit, began competing with private firms. Such a scenario presents an inherent conflict of interest. A civil servant, whose primary duty is to uphold public welfare, is now pitted against private entities, driven by the allure of personal profit.

Namibian law does not utilize the term 'civil servant'; instead, it employs the term 'staff member'.⁵³ So, for the purposes of this article, I use the phrase 'staff member' to refer to civil servants. Note, however, that a 'staff member' or 'civil servant' does not comprise elected officials, such as government ministers and members of Parliament, nor does it encompass members of the police, the army, and the correctional services.⁵⁴

Even if one were to argue that a civil servant can objectively separate these dual roles, the very perception of bias corrodes public trust. And, once trust is compromised, the foundation of democratic institutions begins to waver.⁵⁵

Given that conflicts of interest are central to virtually all definitions of corruption, the Namibian non-rule allowing civil servants to bid for government tenders can be perceived as not just an ethical oversight but institutionalized corruption. This perspective does not merely conflate terms: it underscores a systemic flaw that might incentivize malpractices.

52 The long title of the Anti-Corruption Act 2003 proclaims that the statute aims "[t]o establish the Anti-Corruption Commission and provide for its functions; to provide for the prevention and punishment of corruption; and to make provision for matters connected therewith."

53 Sec 1 of the Public Service Act, sv 'staff member' (defining a 'staff member' as "any person employed in a post on or additional to the establishment as contemplated in section 4 and includes the Secretary to the Cabinet and the Secretary to the President").

54 Sec 1 of the Public Service Act, 1995, sv 'member of the services'.

55 See Kumagai S & Iorio F (2020) *Building Trust in Government Through Citizen Engagement* Washington DC: World Bank at 1 (affirming that trust in government – or political trust – constitutes a necessary precondition for representative democracies).

3.4 A distorted playing field

One of the more tangible outcomes of this non-rule is its impact on competition. Civil servants, by virtue of their positions, possess informational advantages over private entities. This knowledge does not only relate to the nuances of the tendering process; it extends to understanding the preferences of the decision-making bodies, the weightage given to different criteria, and, in some cases, even the bids of competitors.

Such asymmetry of information threatens the very tenets of competition. It is akin to a race where one participant has prior knowledge of the hurdles while the others are left guessing. Thus, the commercial-servants phenomenon goes beyond corruption in the traditional sense; it distorts market dynamics and, in doing so, compromises on the quality, efficiency, and cost-effectiveness of public projects.

From these market distortions, one could reasonably and should logically infer that the rules of competition law, designed to ensure a level playing field in commerce, should apply to civil servants. Their dual roles, as public servants and commercial bidders, should be subjected to the same scrutiny as any other entity to preserve the sanctity of the competitive process.

The Competition Act 2 of 2003 was designed to ensure fair competition in Namibia, promoting efficiency, adaptability, and development in the economy. The Act aims to restrict practices that diminish economic welfare and to promote the interests of consumers. The informational advantages civil servants possess clearly undermine these objectives, creating an uneven playing field that offends the spirit of the Act.

3.5 The Procurement Act and its Fishrot Amendments

The Public Procurement Act, the Anti-Corruption Act, and the Public Service Act collectively strive to maintain transparency and fairness in government procurement, mitigating the informational advantages of commercial servants. Specifically, in the wake of the Fishrot

revelations, the Namibian Parliament substantially amended⁵⁶ the Public Procurement Act in 2022 to, among others, restrict civil servants' participation in procurement proceedings:⁵⁷

The following persons may not participate, either personally or through an entity corporate or incorporate in which he or she has a financial, economic or personal interest, as a bidder or supplier in a procurement process conducted by the Board or public entity:

- (a) staff members of the public entity;
- (b) members of the Board or its staff members; or
- (c) members of a board, local authority council, regional council or similar governing body.

In addition, the Anti-Corruption Act criminalizes⁵⁸ public officers acquiring private interests in contracts or opportunities from their employing public body, or using their position for gratification. The Public Service Act further reinforces these restrictions,⁵⁹ prohibiting unauthorized private work by civil servants and requiring Prime Minister's approval for any private agency or work related to their official functions, with mandatory declaration of such activities by household members. These provisions, combined with internal checks, audits, and oversight mechanisms, aim to ensure that commercial servants do not unduly impair the competitiveness of the government procurement market.

In short, the Public Procurement Act, the Anti-Corruption Act, and the Public Service Act curb the freedom of civil servants to vie for contracts emanating from their own public entities, and they generally regulate those servants' conduct and conflicts of interests. Nonetheless, *none of these Acts explicitly stop civil servants from tendering for contracts with other public entities*. Still, the spirit of these laws extols transparency, fairness, and the avoidance of conflicts of interests, which some lawyers could interpret as discouraging civil servants from tendering even if not explicitly forbidden.

56 Public Procurement Amendment Act 3 of 2022.

57 Sec 66(2B) of the Public Procurement Act, 2015.

58 Secs 36 & 43 of the Anti-Corruption Act, 2003.

59 Secs 17(1)(b) & 25(1)(e) of the Public Service Act 1995.

4 Information asymmetry in public procurement

The intricate dance of supply and demand forms the essence of market economies.⁶⁰ At its core lies a system that thrives on transparency, efficiency, and, most importantly, the free flow of information.⁶¹ But what happens when one firm in the market has an undue advantage over the others and thus skews this flow? Leveraging the consumer choice theory from the Chicago School of thought, I dive into the informational advantages Namibian civil servants habitually possess over private bidders in government contracts and the resulting market inefficiencies.

4.1 The Chicago School and consumer choice theory

To explain what the Namibian situation implies, I must first unpack the Chicago school's consumer choice theory. I must also underline, at this juncture, that the 'consumer' in the government procurement market (in Namibia) is the (Namibian) government itself and, by extension, all (Namibian) taxpayers. The uniqueness of this quandary consists in commercial servants standing on both sides of that market at the same time as consumers (government) and as service providers.

At its heart, consumer choice theory argues that consumers benefit the most in a competitive environment where they can freely choose among multiple options. This competition drives innovation,⁶² efficiency,⁶³ and, crucially, offers the consumer the best value for their money.

60 Historically, economists such as Adam Smith and Alfred Marshall laid the groundwork for the concepts of supply and demand. See Smith A (1776) *An Inquiry Into the Nature and Causes of the Wealth of Nations* London: W Strahan and T Cadell; Marshall A (1920) *Principles of Economics* London: Macmillan and Co. See also Nelson RR (2013) "Demand, Supply, and Their Interaction on Markets, as Seen From the Perspective of Evolutionary Economic Theory" 23 *Journal of Evolutionary Economics* 17-38 at 17-18 (recalling that, since the time of Marshall, both (1) the concepts of supply and demand, and (2) the proposition that the market balances supply and demand underpin modern economics).

61 See Simintiras AC et al (2015) "Should Consumers Request Cost Transparency?" 49(11/12) *European Journal of Marketing* 1961-1979.

62 See Yan Z et al (2022) "Competition and Heterogeneous Innovation Qualities: Evidence From a Natural Experiment" 14(13) *Sustainability* 1-21 (showing, through a Chinese case study, that product market competition improves the overall quality of innovation).

63 Hatfield JW et al (2016) "Price Controls, Non-Price Quality Competition and the Nonexistence of Competitive Equilibrium" 99 *Games and Economic Behaviour* 134-163 ().

Also known as consumer sovereignty⁶⁴ or the choice model,⁶⁵ this theory approaches competition law and policy by stressing the value of consumer preferences and the ability to choose among different options in the marketplace. It suggests that competition policy should focus not only on price competition but also on other forms of nonprice competition, such as variety, innovation, quality, and safety.⁶⁶ The theory posits that consumers value more than just competitive prices; they also want options and the ability to make choices that align with their preferences.⁶⁷

I prefer the choice model because it reflects both competition policy and case law in jurisdictions with longer experience with antitrust matters, such as the United States.⁶⁸ According to the consumer choice theory, antitrust enforcement should aim to protect and promote consumer choice by ensuring that markets remain competitive and that consumers have a range of options to choose from.⁶⁹ This requires preventing artificial restrictions on competition, such as price fixing or anticompetitive mergers, and guarding against market failures that impede consumers' ability to make rational choices.⁷⁰

The theory recognizes that there are diminishing returns to variety, meaning that there is an optimal level of consumer choice that balances the benefits of choice with the costs of information processing and decision-making.⁷¹ It suggests that the optimal amount of choice should be determined on an industry-by-industry basis, taking into account factors such as long-term innovation and the importance of variety to consumers.⁷²

64 Graef (2021) at 475-476. See also Averitt (2024) at 140 (crediting Robert H Lande with pioneering the interpretation of competition law as something centred on non-price competition or 'consumer choice').

65 See Averitt NW & Lande RH (2007) "Using the 'Consumer Choice' Approach to Antitrust Law" 74(1) *Antitrust Law Journal* 175 – 264 at 175 – 264 (contrasting 'the choice model' with 'the price model').

66 Averitt (2024) at 140; Averitt & Lande (2007) at 175, 184 – 185, and 198.

67 See Graef (2021) at 475 (recalling that Adam Smith insisted that it is in a free market economy that consumer sovereignty reigns supreme and that consumers enjoy the freedom and the capacity to choose the products that best match their demand); Averitt & Lande (2007) at 178.

68 See Lande RH (2001) "Consumer Choice as the Ultimate Goal of Antitrust" 62(3) *University of Pittsburgh Law Review* 503 – 525 at 503 – 525; and Averitt & Lande (2007) at 180.

69 Graef (2021) at 476-477; Averitt & Lande (2007) at 181.

70 Graef (2021) at 476-477; Averitt & Lande (2007) at 181 – 182.

71 Averitt & Lande (2007) at 192 – 193.

72 Averitt & Lande (2007) at 192 – 195.

The consumer choice theory does not intend to replace existing competition law paradigms completely, such as the price and efficiency models. Instead, it seeks to complement and expand upon these models by incorporating a broader range of factors that matter to consumers.⁷³ Scholars, policymakers, and anti-corruption experts can implement it in a disciplined and predictable manner by analyzing situations on a case-by-case basis and by developing its empirical foundations.⁷⁴

Crucially, the choice model intimately connects to consumer protection law. My own research⁷⁵ and that carried out by Averitt & Lande⁷⁶ highlight the relationship between antitrust and consumer protection law in facilitating consumer choice.

Central to the consumer choice theory is the idea that all players in the market possess the same set of information.⁷⁷ When this information symmetry prevails, the market operates at peak efficiency. However, a breakdown in this symmetry can distort market dynamics, leading to inefficiencies⁷⁸ and, in many instances, undermining the core tenets of competition.

4.2 Informational advantages of civil servants

Information asymmetry occurs when one party in a transaction holds more or better information than the other. In the Namibian context, the ability of civil servants to bid for government tenders presents a clear case of information asymmetry on two distinct fronts. First, by virtue of their position, these commercial servants access intricate details of the tendering process, the nuances of what the government body might be looking for, the budgets allocated, and in some cases, even the bids of competing entities. This inside

73 Averitt & Lande (2007) at 175 – 176.

74 See Averitt & Lande (2007) at 177 – 178.

75 Zongwe DP et al (2023) “The Economics of Repair – Fixing Planned Obsolescence by Activating the Right to Repair in India” 11 *International Journal on Consumer Law and Practice* 97 – 122 at 97 – 122.

76 Averitt NW & Lande RH (1997) “Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law” 65(3) *Antitrust Law Journal* 713 – 756 at 713 – 756.

77 The efficient market hypothesis (EMH) captures this idea. See Degutis A & Novickyte L (2014) “The Efficient Market Hypothesis: A Critical Review of Literature and Methodology” 93(2) *Ekonomika* 7-23 at 8 (defining the EMH as a stock market where stock prices reflect fundamental information about firms).

78 Vollstaedt U et al (2020). *Increasing Consumer Surplus Through a Novel Product Testing Mechanism*. Ruhr Economic Papers, No. 887. Essen: RWI – Leibniz-Institut für Wirtschaftsforschung at 1; Akerlof GA (1970) “The Market for ‘Lemons’. Quality Uncertainty and the Market Mechanism” 84(3) *The Quarterly Journal of Economics* 488-500.

information provides them with a distinct advantage over private entities, who must operate based solely on the details provided in the tender document.

Imagine a game of poker where one player knows the cards of the others. The dynamics of the game shift, and the player with the information has a distinct advantage, much like the civil servants in Namibia's procurement cycle.

The other way in which commercial servants enjoy more or better information than their rivals emanates from the truism that sellers typically have better information about the quality of their products than buyers.⁷⁹ This informational advantage disrupts the efficient functioning of the market.

4.3 Impact on market efficiency

With their insider knowledge, civil servants can tailor their bids to outmatch their competitors, not necessarily based on superior value or efficiency but purely based on the information they wield. This distortion can lead to contracts being awarded not to the most competent or value-driven bidder but to the one with the most information.

Information asymmetries can lead to market inefficiencies, because resources may be misallocated or mispriced as a result. These asymmetries can lessen competition and hinder markets from functioning efficiently.⁸⁰

More specifically, the informational advantages of profit-seeking civil servants' lower competition in at least six respects: adverse selection, market power, trust or reputation, and barriers to entry.

a) Adverse selection

Information asymmetry causes adverse selection.⁸¹ This outcome occurs when buyers cannot tell good products from bad ones, so they assume that everything is low quality and offer

79 See Vollstaedt U et al (2020) at 1.

80 Wolinsky (1995) at 117 – 118.

81 Hedengren D & Stratmann T (2015) "Is There Adverse Selection in Life Insurance Markets?" 54(1) *Economic Inquiry* 450-463 at 451 (stating that information asymmetry gives rise to adverse selection).

lower prices.⁸² This can lead to a market for “lemons”,⁸³ where low-quality goods or services drive out higher-quality ones. Adverse selection reduces competition by limiting the choices available to consumers and discouraging firms from offering high-quality products or services. In government procurement involving commercial servants, adverse selection could arise when private firms, unable to compete with the informational advantages maintained by those servants, either withdraw from the market or pare down the quality of their bids, leaving the government with sub-optimal choices and reduced value for taxpayer money.

b) Market power

Information asymmetries can give certain firms market power,⁸⁴ allowing them to exploit their superior knowledge to gain a competitive advantage. For example, firms with better information about market conditions or customer preferences can set prices or negotiate contracts more effectively, leading to higher profits and reduced competition.⁸⁵ Commercial servants could leverage their insider knowledge of government workflows, budgets, and decision-making criteria to outbid private firms, culminating in inflated costs for public projects and reduced competition from private entities. Nonetheless, it seems unlikely that this information superiority could make a commercial servant dominant and, hence, subject to section 25 of the Competition Act, read with Rule 36 of the rules passed under that Act.⁸⁶

c) Trust and reputation

In markets with information asymmetries, trust and reputation play a crucial role. Firms with a poor reputation may struggle to compete, as customers hesitate to trust them.⁸⁷ By

82 See also the definition of ‘adverse selection’ by Weibull JW (10 December 2001), available at <https://www.nobelprize.org/prizes/economic-sciences/2001/ceremony-speech/> (29 August 2024).

83 Van den Bergh R & Montangie Y (2006) “Competition in Professional Services Markets: Are Latin Notaries Different?” 2(2) *Journal of Competition Law and Economics* 189-214 at 193. See also Akerlof GA (1970) “The Market for ‘Lemons’: Quality Uncertainty and the Market Mechanism” 84(3) *The Quarterly Journal of Economics* 488 – 500 at 488 – 500.

84 See Shi P & Zhang W (2014) “A Test of Asymmetric Learning in Competitive Insurance With Partial Information Sharing” 83(3) *Journal of Risk & Insurance* 557-578 at 557 (asserting that asymmetric learning, a particular form of information asymmetry, could result in market power and earn higher profits from repeat customers).

85 See Wolinsky (1995) at 130 (concluding that, despite intense competition, markets for professional services display some aspects of fraud, that prices embody markups, and that competition does not maximize consumers’ expected surplus).

86 Rules made under Competition Act, 2003, General Notice 41/2008 (GG 4004), 2008.

87 See Nicolau JL & Sellers R (2010) “The Quality of Quality Awards: Diminishing Information Asymmetries

contrast, commercial servants boast an insider status and a perceived governmental authority that endow them with an unearned reputational advantage over private firms. This advantage may warp the market's natural mechanisms for building trust and reputation based on actual performance and reliability.

d) Barriers to entry

Information asymmetries can create barriers for new firms wishing to enter the government procurement market. Commercial servants' access to better information or resources makes it difficult for new entrants to compete on an equal footing.⁸⁸

4.4 Counterarguments

However, while the last few paragraphs above present a compelling case against the participation of civil servants in government tenders, several factors advocate for such participation. These include the diversity of the procurement landscape, built-in safeguards, and the lack of capacity or expertise.

a) Diverse procurement landscape

One could argue that the Namibian government's procurement landscape is vast and diverse. A civil servant in the ministry responsible for health, for instance, might not necessarily command an informational advantage when bidding for a tender in the ministry responsible for infrastructure. The specificity of knowledge required might negate the perceived advantage.

This counterargument appears to justify the Namibian Parliament's decision to only prohibit staff members from tendering for contracts issued by the public entity they work for.⁸⁹

in a Hotel Chain" 63(8) *Journal of Business Research* 832 – 839 at 834 – 835.

88 See also Potoski M & Prakash A (2009) "Information Asymmetries as Trade Barriers: ISO 9000 Increases International Commerce" 28(2) *Journal of Policy Analysis and Management* 221 – 238 at 221 – 238; Alibeiki H (2017) "Two Essays on Power and Information Asymmetries in Competitive Supply Chains", (doctoral thesis, McGill University) available at <https://escholarship.mcgill.ca/downloads/pv63g2610> (visited 11 October 2023) at ii and 5 (affirming that power and information asymmetries dramatically change the motivations and actions of players. These asymmetries shape competition within supply chains and, among others, impact bidding behaviour in procurement auctions).

89 Sec 66(2B)-(2C) of the Public Procurement Act, 2015, (on the recusal and non-participation, respectively, of staff members of the Board or a public entity), read with sec 66(3), which criminalizes any failure to comply with sec 66(2B).

Indeed, the Public Procurement Act does not expressly bar staff members from bidding for contracts from public entities other than their own.⁹⁰

b) Checks and balances

The presence of internal checks and balances, audit mechanisms, and oversight bodies might ensure that, even if civil servants exercise informational advantages, the tendering process remains transparent and above board. The Public Procurement Act,⁹¹ the Anti-Corruption Act,⁹² and the Public Service Act,⁹³ restrict civil servants from taking part in procurement proceedings. Viewed from this vantage point, commercial servants do not impair the competitiveness of the government procurement market.

c) Capacity and expertise

In some instances, civil servants or entities they control might genuinely be the best suited for a particular contract due to their expertise, experience, and understanding of the governmental machinery. Excluding them might deprive the government of the best possible service provider. Such exclusion would contravene the axioms of perfect competition, which envisions the market as connecting as many buyers and sellers as possible.⁹⁴

5 The road ahead: protecting the integrity of Namibia's public procurement

The non-rule that permits civil servants to bid for government tenders, though apparently innocuous, has rippling effects on Namibian society. These effects touch the very fabric of governance and trust that binds a government to its people. The fact that the Public Procurement Act precludes civil servants from bidding for government contracts issued by

90 See sec 25(2) of the Public Procurement Act, 2015, (on the disqualifications of persons eligible for appointment as staff members of a public entity), secs 66(2B)-(2C), and 66A (on the duty to disclose conflicts of interests).

91 Sec 66(2B) of the Public Procurement Act, 2015.

92 Secs 36 & 43 of the Anti-Corruption Act, 2003, (criminalizing any public officer (1) who acquires a private interest in any contract or opportunity emanating from the public body that he serves as a member or that employs him; or (2) who uses his office or position for gratification).

93 Sec 17(1)(b) of the Public Service Act, 1995,) (prohibiting civil servants from engaging in unauthorized private work) and sec 25(1)(e) (making it an offence for a staff member to operate or undertake any private agency or work related to their official functions without the Prime Minister's approval, and requiring staff members to declare if any member of their household engages in such agency or work).

94 See Mankiw NG (2021) *Principles of Economics* Boston: Cengage at 62-63.

the public entity they work does not keep them from tendering from similar opportunities from other public entities.

Labelled as Namibia's ugliest brush with corruption, Fishrot exposes the vulnerabilities of a system that allows public servants, those entrusted to serve the people, to exploit the very system they are part of. The corruption scandals, however significant they might seem, are but the tip of the iceberg. Beneath these overt manifestations of impropriety lies a more insidious threat to the integrity of Namibia's public procurement. When civil servants, with their informational advantage, enter the fray as bidders, they tilt the level playing field. Over time, this can result in inflated bids, stalling of projects, and waste of taxpayer funds, casting shadows on the very efficacy of public procurement.

The main thesis is that *the rules of competition law should extend to commercial servants*. What does this thesis imply for Namibian law? First, it means that the provisions of the Competition Act and rules passed under it apply to commercial servants. Section 3 stipulates that the Act applies to "all economic activit[ies] within Namibia", including commercial servants bidding for contracts in the government procurement market. Second, commercial servants should be treated as an 'undertaking' in terms of the Competition Act,⁹⁵ bringing them firmly within the Act's purview.

Moreover, my primary argument implies that the Namibian Competition Commission (NaCC) must have the power to investigate the conduct of commercial servants, especially when it suspects those servants of having engaged in restrictive trade practices. This would significantly enhance oversight and accountability in public procurement. In line with the Chicago School of thought, which has informed much of this analysis, the NaCC, agencies, and courts should not presume the illegality of commercial servants' bids simply because they work for the public service or wield asymmetrical information.⁹⁶ Instead, regulators and

95 Sec 1 of the Competition Act, 2003, sv 'undertaking' (defining an 'undertaking' as "any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service.")

96 See Piraino Jr, TA (2007) "Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century" 82(2) 345-409 at 346, and 349.

courts must expressly call for evidence of the effect of such status or superior information on the level of competition in the government procurement market.⁹⁷

To coordinate and harmonize efforts effectively, the NaCC should enter into a formal agreement with the Central Procurement Board in terms of section 67 of the Competition Act, just as it did with the Bank of Namibia (i.e., the central bank),⁹⁸ the communications regulator,⁹⁹ and the electricity regulator.¹⁰⁰ This would allow for coordinated actions in the field of procurement, closing loopholes and enhancing overall market efficiency.

The findings from this study do not speak to Namibia alone. They hold invaluable lessons for policymakers in other jurisdictions where a similar non-rule might exist. The complexities of public procurement, the difficulties in upholding transparency, and the imperative of maintaining a level playing field are universal. As such, the learnings from Namibia's experience can serve as a guide, a reference point, and at times, a cautionary tale for policymakers worldwide.

Moreover, this discourse enriches competition theories. It adds a new dimension, probing into scenarios where the state, in a paradoxical twist, finds itself in a business rivalry with its subjects. Such scenarios challenge conventional wisdom, urging theorists and practitioners alike to revisit, rethink, and refine the existing paradigms.

97 See Piraino Jr (2007) at 350-351, 355, and 358-359.

98 General Notice 41/2012 (GG 4888).

99 General Notice 17/2012 (GG 4868).

100 General Notice 675/2021 (GG 7688).