

BOTSWANA - THE LAUNCH OF A NEW COMPETITION REGIME

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For some time, Botswana has not had a dedicated competition law regime and competition in certain sectors has been governed only by industry-specific legislation such as the Industrial Development Act, the Trade & Liquor Act, the Consumer Protection Act and the Companies Act.

In 2009 the Competition Act, No 17 of 2009 (“the Act”) was enacted to regulate competition in the country’s economy. The Act applies to all economic activity within, or having effect within, Botswana. As at the time of writing, only certain sections of the Act are in effect, namely Parts I to IV, which became operative on 9 July 2010. These parts of the Act effectively establish the authorities that will enforce the legislation.

The Act establishes a body known as the Competition Authority (“the Authority”) to be responsible for the prevention of, and redress for, anti-competitive practices in the economy, and the removal of constraints on the free play of competition in the market. The Act further establishes the Competition Commission (“the Commission”) as the governing body of the Authority. Any decision of the Commission may be taken on appeal by an aggrieved party to the High Court, which may confirm or set aside a Commission decision.

Mergers and Acquisitions

The Act provides for mandatory notification of mergers meeting asset and/or turnover thresholds prescribed by the Minister. These thresholds have not yet been promulgated. Notifiable mergers may not be implemented until the merger is approved by the Authority.

In assessing a proposed merger the Authority must determine whether the merger would be likely to prevent or substantially lessen competition or restrict trade or the provision of any service or endanger the continuity of supplies or services; or would be likely to result in any enterprise acquiring a dominant position in a market (including an enterprise which is not involved in the proposed merger). When assessing a merger, the Authority may also take into account any factors which it considers relevant to the public interest.

The Authority may grant approval subject to conditions it considers appropriate. Such conditions may be imposed where the Authority considers it necessary, reasonable and practicable to remedy, mitigate or prevent any adverse effects of a merger.

The Authority may at any time revoke its decision to approve a merger if its decision was based on materially incorrect or misleading information or if the conditions attached to the approval granted are not complied with.

Market Inquiries

Notably, and in a similar vein to the amendments introduced to South Africa’s Competition Act, the Act introduces the concept of “market inquiries”. The Authority may initiate a market inquiry with the objective of determining whether any features of each relevant sector or

each type of agreement has the effect of preventing, restricting or distorting competition in connection with the supply or acquisition of any goods or services in Botswana.

If the Authority determines that adverse effects for competition exist in relation to a sector or any agreement investigated in a market inquiry, it may seek to address the effects through its powers set out in the Act in respect of prohibited practices. If the effects cannot be remedied under the Act, or are the result of other legislation or regulatory measures, the Authority may make recommendations to the Minister for further action required to provide an effective remedy.

Conduct which is prohibited or may be prohibited

Provision is made in the Act for the outright prohibition of certain agreements, while other agreements may be prohibited after investigation by the Authority.

The Act prohibits certain agreements between competing enterprises in particular, those involving practices such as price fixing, market allocation, bid rigging, restraints on production or sale and concerted practices (“horizontal agreements”). The Act further prohibits agreements between enterprises operating at a different level of the supply chain (“vertical agreements”), to the extent that such agreements involve resale price maintenance.

The Authority may prohibit other horizontal or vertical agreements if, following an investigation, they are found to substantially lessen competition in a market for any goods or services. In addition, any conduct which, after investigation, is determined to amount to an abuse of dominant position, may be prohibited. The Act provides that a “[d]ominant position means a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors”. In determining whether an abuse of dominance has occurred, the Authority may have regard to certain factors, including whether the agreement or conduct in question maintains or promotes exports from Botswana or employment in Botswana, or advances the strategic or national interest of the country in relation to a particular economic activity.

The Authority may grant an exemption from the prohibition of an agreement if it can be reasonably expected that there will be offsetting benefits.

Investigation by Authority

Where the Authority reasonably suspects that a practice constitutes an infringement of the outright prohibited horizontal agreements or vertical agreements or amounts to the abuse of a dominant position in the market, it may initiate an investigation, either of its own accord, or on receipt of information or a complaint. Written notice of an investigation must be served on all the affected parties as soon as practicable, unless the Authority considers that it would materially prejudice the initial stages of the investigation. In this regard, provision is made for “dawn raids”, by allowing for the Authority to authorize the entry and search of the premises of an enterprise in certain circumstances.

No enterprise or person is required to disclose any information or document which they would be entitled in court to refuse to disclose or produce on the grounds of legal profession privilege.

Where the Authority determines that a prohibited practice has been established, it must within one year of the investigation being opened refer the matter to the Commission or alternatively it may issue a certificate of non-referral. A complainant who receives such a certificate may refer the complaint to the Commission subject to its rules of procedure.

The Commission is required to provide written notice of its proposed decisions (stipulating reasons, penalties and remedial action) and inviting the enterprise or enterprises concerned to submit written submissions or make oral representations. The Commission is required to give directions necessary to bring the prohibited conduct to an end. In addition it may make an order imposing a financial penalty, not exceeding 10% of the annual turnover of the enterprise during the breach of the prohibition up to a maximum of three years, on the enterprise or enterprises concerned. While the Act does not state it expressly, it appears that the percentage penalty would apply to turnover in Botswana.

Other Penalties

A person who commits an offence as prescribed by the relevant provisions of the Act may be liable to a fine exceeding 30 000 Pula or to imprisonment for a term not exceeding 2 years, or both. Where a person fails to comply with an order of the Commission, the person is liable to a fine not exceeding 500 000 Pula or to imprisonment for a term not exceeding 10 years or both.

Corporate leniency

Currently the Act does not provide for corporate leniency. However, as the new regime develops, a leniency policy may be introduced.