

New competition regime launched in Botswana

By Elisa Mugabo

Two years ago, Botswana, for the first time, became subject to a dedicated competition law regime when the Competition Act, No 17 of 2009 was enacted to regulate competition in the country's economy.

As at the time of writing, only certain sections of the Act are in effect, namely those that effectively establish the authorities to enforce the legislation.

The Act creates a Competition 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 as the Authority's governing body. 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, which are to be prescribed by the Minister. At present, these have not yet been promulgated. Notifiable mergers may not be implemented until the Authority approves the merger.

In assessing a proposed merger the Authority must determine whether it would likely:

- prevent or substantially lessen competition or restrict the provision of any service or endanger the continuity of supplies or services; or
- result in any enterprise acquiring a dominant position in a market, including an enterprise not involved in the proposed merger.

When assessing a merger, the Authority may also take into account factors it considers relevant to the public interest. It may grant approval subject to conditions it considers appropriate; conditions it regards as necessary, reasonable and practicable to remedy, mitigate or prevent any adverse effects of a merger.

The Authority may 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 to determine whether any feature of a relevant sector or an agreement prevents, restricts or distorts competition for the supply or acquisition of any goods or services in Botswana.

If the Authority determines that adverse effects for competition exist in a sector or any agreement investigated in a market inquiry, it may seek to address the effects through its powers contained in the Act.

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 to provide an effective remedy.

Conduct which is prohibited or may be prohibited

The Act provides 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); and
- 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, conduct which, after investigation, is determined to amount to an abuse of dominance, 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 consider 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.

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 prohibited horizontal 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. Provision is made for “dawn raids” by enabling the Authority to authorise 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 professional privilege.

Where the Authority identifies a prohibited practice, it must within one year of the investigation having been opened refer the matter to the Commission. 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 must provide written notice of its proposed decisions (stipulating reasons, penalties and remedial action) and inviting the enterprise/s to submit written or oral representations.

The Commission is required to give directions necessary to bring the prohibited conduct to an end. In addition, it may impose a penalty, not exceeding 10% of the annual turnover during the breach of the prohibition up to a maximum of three years, on the enterprise/s concerned.

Other Penalties

A person who commits an offence under the Act may be liable to a fine not exceeding 30 000 Pula or to imprisonment for no longer than two years, or both. Failure to comply with an order of the Commission renders the offender liable to a maximum fine of 500 000 Pula or to imprisonment for a term not exceeding 10 years, or both.

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