

Intergovernmental Group of Experts on Competition Law and Policy

16th Session

5-7 July 2017

Room XVII, Palais des Nations, Geneva

Thursday, 6 July 2017

Afternoon Session

Agenda Item 3b. Challenges faced by young and small competition agencies in the design of merger control

Presentation by

Ms. Magdeline Gabaraane

Botswana Competition Authority

This material has been reproduced in the language and form as it was provided. The views expressed are those of the author and do not necessarily reflect the views of UNCTAD.



IGE Conference

Challenges in the design of merger control regime

Magdeline Gabaraane

Director, Mergers and Monopolies

Geneva 5 – 7 July, 2017



Outline

- Introduction
- Merger Control Provisions
- Public Interest Considerations
- Assessment of mergers and acquisitions
- Experience and Observations
- Challenges
- Conclusion

Introduction

- The Botswana Competition Authority was formally established in April 2011
- Early years were formative, involving establishment of the institution, developing processes and procedures and public awareness
- To date, it is a fully-fledged institution with approx. 32 employees
- The Authority's operations and execution is guided by the 5 year strategic plan (2017 -2022)

Merger Control Provisions



Notifiable transactions

- Emphasis is on acquisition of control
- Transactions that meet the notification thresholds

Assessment of mergers

- Prevention or substantial lessening of competition test
- Acquisition of dominant position
- Public interest considerations (using “may”)



Public Interest Considerations



PUBLIC INTEREST

Consideration of the effect of the transaction on:-

- ◆ Maintaining and promoting exports and employment
- ◆ Advancing citizen empowerment initiatives
- ◆ Enhancing competitiveness of SMME
- ◆ Affecting national industries to compete internationally
- ◆ Affecting industrialization
- ◆ Promoting technical and economic progress

Assessment of Mergers and Acquisitions

| SECTOR | 2012/13 | 2013/14 | 2014/15 | 2015/16 | 2016/17 | TOTAL |
|------------------------------|-----------|-----------|-----------|-----------|-----------|------------|
| Agriculture | 2 | 4 | 0 | 0 | 4 | 10 |
| Construction | 2 | 1 | 1 | 1 | 3 | 8 |
| Advertising | 0 | 0 | 1 | 0 | 1 | 2 |
| Education | 0 | 0 | 2 | 0 | 1 | 3 |
| Finance & Banking | 0 | 1 | 2 | 0 | 2 | 5 |
| Health | 3 | 0 | 0 | 0 | 0 | 3 |
| Hospitality | 2 | 3 | 2 | 1 | 3 | 11 |
| ICT | 2 | 1 | 1 | 2 | 0 | 6 |
| Insurance | 4 | 0 | 1 | 2 | 4 | 11 |
| Manufacturing | 0 | 2 | 2 | 5 | 6 | 15 |
| Mining | 5 | 5 | 6 | 2 | 2 | 20 |
| Motor Industry | 0 | 0 | 1 | 0 | 0 | 1 |
| Pharmaceuticals | 0 | 0 | 1 | 0 | 1 | 2 |
| Property/Real Estate | 0 | 1 | 1 | 3 | 3 | 8 |
| Wholesale & Retail | 4 | 5 | 6 | 12 | 13 | 37 |
| Security services | 0 | 0 | 2 | 1 | 0 | 3 |
| Telecommunications | 0 | 0 | 1 | 0 | 1 | 2 |
| Transportation and Logistics | 1 | 7 | 2 | 0 | 7 | 17 |
| Other | 5 | 2 | 0 | 4 | 1 | 12 |
| TOTAL | 30 | 32 | 32 | 33 | 52 | 176 |

Experience and Observations



Experience in merger design and enforcement:

- Application of merger enforcement on real life cases
- Assessment process and procedures developed and refined during enforcement
- Challenges and legal limitations discovered during application

Observations:

- Lack of awareness and understanding by business community and legal fraternity
- Management of stakeholder expectations key
- Benchmarking and consultation with other agencies added a lot of value
- Extra time spent offering opinions to merging parties on notification eligibility

Observation



- Unavailability of credible data and market research required to understand the structure of the market and inform the decision;
- Limited appreciation of roles of key stakeholders in merger enforcement;
- Resource constraints – human and financial;
- Legislative ambiguity and inadequacy;
- New field, thus limited expertise and experience.



CHALLENGES

- Diverse stakeholder expectations on the objective of merger control;
- Implementation of mergers without notification; and
- Alignment of national priorities with emerging trends in merger control.

Conclusion

- The CA has addressed the challenges through:
 - Signing MoUs with custodians of credible data sources - sector regulators;
 - Structured training – ICN participation and use of toolkits, post-graduate diploma in Economics for Competition Law;
 - Extensive benchmarking during merger assessments;
 - Extensive public awareness and stakeholder engagement;
 - Streamlined processes and procedures for fast tracking simple mergers;
 - Amendment of Act to address legislative inadequacies; and
 - Peer review of old cases by competition experts.




Thank you!


Competition Authority

Plot 28, Matsitama Road, Main mall

Private Bag 00101

Gaborone, Botswana

 (+267) 3934278

 (+267) 3121013

 Competition Authority - Botswana

 @CompetitionBots

 www.competitionauthority.co.bw

 CA@competitionauthority.co.bw

