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**COMPETITION
LAW AND POLICY**



VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY IN BOTSWANA

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CONTENTS

- 1.1 Historical, social, political and economic context
- 1.2 Evolution of competition law and policy in Botswana
- 2.0 Institutional Framework for Competition Policy and law Implementation
- 3.0 Competition law enforcement
- 4.0 General considerations for policy and recommendations



1.1 Historical, social, political and economic context

- ▶ Geography: Botswana is a landlocked country in Southern Africa, surface area (582, 000 square kilometres);
- ▶ Population: 2,230,905 persons (2016);
- ▶ Politics: Multiparty republic, parliamentary system - the National Assembly and the House of Chiefs;
- ▶ In terms of GDP, has been one the best in Africa;
- ▶ Economic base: mining 40%: 25% SACU revenue-sharing arrangement.



1.2 Evolution of competition law and policy in Botswana

- ▶ Botswana: open economy; strengthening functioning of markets;
- ▶ Escaped Structural Adjustment Programmes of the 80s and 90s;
- ▶ Competition Act of 2010: Commission and Authority (2011);
- ▶ Area: merger control, abuse of dominance, other practices;
- ▶ Passed Competition Bill No. 22 of 2017 (Dec.);
- ▶ Competition and Consumer Authority (new Name);
- ▶ Signed into law in March 2018;
- ▶ New areas: tribunal, consumer protection bill, institutional merger.



2.0 Institutional Framework for Competition Policy and law Implementation

2.1 Competition Authority of Botswana

- ▶ Established under Section 4 of the Competition Act;
- ▶ Powers or Functions: Sec 5 of the Competition Act.

2.2 Competition Commission of Botswana

- ▶ Established under Section 9 of the Competition Act;
- ▶ Function: case adjudication; policy direction to the Authority (sec 5);

2.3 Institutional arrangements:

- Commission: Statutorily; governing body of the Authority.



2.4 The Commission as a quasi judicial tribunal

- ✓ Commission: quasi-judicial functions: sits as a tribunal: to hear and determine cases;
- ✓ Plus policy oversight functions, adjudicator;
- ✓ Authority investigates complaints : brings cases before the Commission;
- ✓ CEO presides, does investigations: as Secretary of commission: conflicted party?
- ✓ Independence of the Commission: part time basis, funding?

2.5 Agency Model

- ▶ Under new law, CCA as a regulator;
- ▶ Tribunal & High Court: appeals; on cases decisions: by Authority;
- ▶ CCA has powers to investigate complaints: offender heard (36(4), and 41(2));
- ▶ Portrays inquisitorial system. Hearing is part of investigation procedure.



3.0 Competition Law Enforcement

3.1 Mergers

- ❖ Sec. 45(2): New law: acquisition of control (whole or part);
- ❖ Horizontal and vertical mergers, plus other business combinations;
- ❖ NOT covered: Joint ventures - to establish greenfield enterprises;
- ❖ Sec 45 (2) (b): sufficient justify for such mergers;
- ❖ Pre-notification of mergers (Sec 49);
- ❖ Sec. 49(2): mandatory for CCA to publish all merger notifications;
- ❖ Publication of notice ways and means: not provided.



3.2 Restrictive trade practices

3.2.1 Per se prohibited agreements

- Per se horizontal agreements: Sec. 25;
- Conduct: price fixing, division of markets and bid rigging;
- But elements that would constitute the conduct prohibited: Not provided;
- Without the elements; CCA has a job to establish them to fulfil Sec. 25 and 26;
- Missing common prohibitions (Sec. 25): output restriction: collective boycott;
- Missing: Clear procedure giving effect to criminalization of infractions (Sec. 26);
- Sec. 5(2) (r), CCA to report the investigation of all criminal matters the Police;
- However: Police role is not clear: CCA is also has investigatory mandate (clarification needed here to avoid obstacles to enforcement);
- Also not specified: which Court to enforce section 26.



3.2.1 Per se prohibited agreements cont....

- Tribunal: Adjudicates matters provided under Sec. 25;
- As a court of first instance for CCA's referral pursuant to section 73;
- Issue of Police versus Tribunal : not clearly defined;
- Noted, sec. 25 and 27; similar in effects between infractions;
- But, the law prescribes different sanctions for infractions under section 25;
- Fines and sanctions: > or =100 000 pula or to a term of imprisonment not exceeding five years, or both (Sec.25);
- While Sec 27 is > or = 50 000 pula;
- Need to address this anomaly for ease of enforcement.



3.2.2 Agreements prohibited by the rule of reason

- ▶ Notification: for rule-of-reason agreements; section 28 (1) and (2);
- ▶ Criteria for agreements exemptions assessment; Sec. 33;
- ▶ However, notification process by the parties; **NOT** provided for;
- ▶ Normally ; expressly stated; parties should apply to the Authority for the exemption;
- ▶ Specific timeframe for review; Not stipulated; but Sec. 73 (1) can guide;
- ▶ CCA to refer the matter to the Tribunal; one year allowance after investigation;
- ▶ Threshold for agreeing parties to enter into such agreements; sec.29; too much room?
- ▶ Sec. 28(1) (b) (c) and (d), agreement on restrains production or sale, a concerted practice; a collective denial of access.



3.2.2 Agreements prohibited by the rule of reason

- ▶ Sec. 28 (b) and (d) portray a mix up of prohibitions: output restriction and collective boycott: usually per se prohibited agreements;
- ▶ Plus, Sec. 28(c); a concerted practice, not defined;
- ▶ Refers to an agreement in the competition arena;
- ▶ As opposed to unilateral practice, leaving gaps in the legislation.

3.3 Abuse of dominant position

- ❖ Market Share threshold; Sec. 32 (a) and (b) But no definite figures;
- ❖ Lack precedent “potent element” under these provisions;
- ❖ Exclusive list of abusive conducts; sec. 31(1) (a) to (e);
- ❖ No room for others that may emerge.



3.3 Abuse of dominant position cont.....

- ▶ Public interest consideration; sec. 31(2) issues listed in items (a) to (e);
- ▶ On a discretionary basis: abuse of dominance cases;
- ▶ But a need to relook se.31(1)(a) to (e) and ask ; can CCA decline to prohibit abuse-of-dominance conduct under this section? Implications?
- ▶ Read together sec.31(2) and 31 (1).

4.0 General considerations for policy recommendations

- ▶ Promote working environment between CCA and the Tribunal;
- ▶ CCA and the Tribunal to engage team-building activities .



4.1 Recommendations addressed to the Government

- ❑ Allocation of sufficient allocation of financial and human resources;
- ❑ Promote coexistence between sector economic regulation authorities and CCA;
- ❑ Uphold CCA functional independence, maintaining the Ministerial link is also key.

4.2 Recommendations to the Competition and Consumer Authority

- ▶ Review of institutional set-up and enforcement; Required skills, competences;
- ▶ Capacity-building and training; needs assessments (both in competition and consumer protection);
- ▶ Annual Conference for stakeholders;
- ▶ Develop a curriculum on both areas to enhance human resource; University input;
- ▶ Advocacy programmes for specific target groups;
- ▶ Consumer protection; a road map on institution merger; assign competencies.



4.3 Recommendations to the Judiciary

- ▶ More interaction between CCA and the judiciary;
- ▶ The judiciary to consider attending certain CCA forums;
- ▶ To promote networking and sharing of ideas.

4.4 Recommended areas for development of the law

- ▶ The Authority is invited to reflect on issues identified in this report when implementing the revised competition and consumer protection legal framework.





THANK YOU FOR YOUR ATTENTION

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