



# COMPETITION ALERT

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### THE LATEST LEGISLATIVE DEVELOPMENTS ON THE COMPETITION LAW AND CONSUMER PROTECTION FRONTS IN BOTSWANA

On 7 December 2017 the Parliament in Botswana approved the Competition Bill and it was subsequently passed on 27 March 2018. The Competition Act of 2018 (New Competition Act) whilst passed is yet to commence. It will commence upon notice being published in the Government Gazette. The Competition Act of 2009 (Old Competition Act) will continue to be applied pending commencement, after which the New Competition Act will replace the Old Competition Act. This article provides a brief overview of some of the distinguishing features of the New Competition Act.

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#### One regulator, two hats

Recently, the South African Competition Commission held a seminar on "The Impact of Competition Policy and the Competition Authorities' interventions on Consumer Welfare". At this discussion the panel discussed the benefit of having a single consumer watch and competition authority. As the structure of these two bodies are independent from each other in South Africa, the panel emphasised the need for co-operation and collaboration between the two watch dog agencies. It is consequently of relevance to note that our neighbouring country Botswana has opted to follow the international trend of widening the scope of the competition authority to include Consumer Protection matters under a single rubric. Botswana via its new legislation has actively catered for the implementation of an umbrella consumer and competition enforcement agency.

#### More institutions, more procedure

The current Act provides for an Authority, governed by a Commission. In addition to governing the affairs of the Authority, the Competition Commission is responsible for adjudicating enforcement cases brought before it by the Authority. Botswana's Competition Bill provides for the incorporation of a new body known as the Consumer and Protection Board in s6 (Board). The Board will function as the governing body of the Competition and Consumer Authority (Authority) (formerly known as the Competition Authority). In addition, s62 establishes the Competition and Consumer Tribunal (Tribunal).

Presently, the Competition Commission in Botswana serves a dual purpose. Not only is it the governing body of the Competition Authority but it also serves as the adjudication body dealing with cases presented before it by the Competition Authority. These functions will now be

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split between the Board and the Tribunal. The introduction of the Board to take over management of the Authority is a welcome development as it ensures the independence of the Authority from the body that adjudicates. The Tribunal then will essentially replace the Commission as a new institution, responsible for adjudicating complaints of misconduct. The current wording of the Bill suggests that complainants may be able to approach the Tribunal directly for relief, thus bypassing the Authority's investigative function. That appears to be a strange outcome and will need to be clarified.

The Authority remains responsible for deciding mergers. However, appeals can now be lodged with the Tribunal, whereas presently, all decisions of the Competition Authority that were appealed were brought before the High Court. Although the Tribunal will require some time to cut its teeth, the prospect of a specialised forum to hear merger cases is likely beneficial in the long run.

## **Enforcement against exclusionary conduct strengthened – dominant firms beware!**

The Bill introduces a number of additional noteworthy clauses to aid enforcement. Certain of these changes are similar to those contained in the South African competition legislation.

Botswana's New Competition Act in s31 introduces a specific list of conduct that could amount to the abuse of a dominant position. This list includes: predatory conduct; tying and bundling; loyalty rebates; margin squeeze; exclusive dealing; refusal to supply or deal with other enterprises, including refusal to supply access to an essential facility; and requiring or inducing a customer not to deal with a competitor. Unfortunately, some of the terms in the list require more express explanation, for instance, the scope of "predatory conduct" is left open, and may include not only predatory pricing but all manner of aggressive competition; and greater clarity will be required to be sure of what sorts of loyalty rebates might be abusive.

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*“The administration of laws under a single Competition and Consumer Authority will result in improved co-ordination of the policies, enhance consumer welfare and effectively address anti-competitive practices.”*



## Penalties now more pointed

Another notable clause is the introduction of criminal sanctions applicable to any officer or director of an enterprise who is in contravention of s25 (prohibition of horizontal agreements) or s27 (prohibition of resale price maintenance). The provision in the Bill states that “any officer or director of an enterprise who contravenes s25 commits an offence and is liable for a fine not exceeding P100 000 or to a term of imprisonment not exceeding five years, or to both. On the other hand a violation of s27 results in a fine not exceeding P50 000”. While criminal sanctions for cartel conduct is nothing new, the prospect of a criminal record for minimum resale price maintenance is novel and somewhat draconian. Going forward the Authority will be required to notify all investigations of any potential criminal conduct to local police. This may make evidence gathering challenging, as persons involved will be reluctant to disclose self-incriminating information.

Under the new competition regime, failure to notify a merger will attract financial penalties of a fine not exceeding 10% of the greater of either (a) the consideration or (b) the combined turnover of the merging parties to the transaction. At present, no such sanctions are provided for.

## Public Interest now a factor

Potentially the biggest shift in policy is that the New Competition Act also provides for the Minister of Investment, Trade and Industry to submit comments in writing in instances where the proposed merger gives rise to public interest concerns. However, unlike the position in South Africa, it does not provide a list of the categories of public interest that may be considered.

The consensus around the New Competition Act can be summed up by the following remarks. The Assistant Minister of Investment, Trade and Industry, Honourable Biggie Butale made the following remarks regarding the Bill: “The administration of laws under a single Competition and Consumer Authority will result in improved co-ordination of the policies, enhance consumer welfare and effectively address anti-competitive practices.” The Gaborone Central MP, Dr. Phenyio Butale commented that the Bill is: “A step in the right direction to ensure a competitive environment. However, he expressed concerns in respect of Botswana having sufficient resources to successfully implement the legislation”.

The practical implications are that those doing business in Botswana can surely expect a more robust level enforcement once the new legislation kicks in.

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