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# COMPETITION ALERT

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### Competition Law in Africa – Update 2019

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## Competition Law in Africa – Update 2019

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### Amendments to the Botswana Competition Law, effective 2 December 2019

The new Botswana Competition Act 17 of 2018 (Competition Act), which was passed in March 2018 is now officially in force, as of 2 December 2019.

The Competition Act for the first time specifically identifies types of abusive conduct (namely, predatory conduct, tying and bundling, loyalty rebates, margin squeeze, refusal to supply or deal with other enterprises including refusal of access to an essential facility, requiring or inducing any customer to not deal with other competitors, discriminating in price or other trading conditions; and exclusive dealing) bringing a level of certainty on the types of contravention the Botswana Competition and Consumer Authority as it is now referred to will seek to prosecute.

The Competition Act also introduces criminal sanctions, personally penalising the directors of competitor firms who engage in anticompetitive practices. These directors could face financial penalties of up to BWP 100,000 or to a term of imprisonment not exceeding five years, or both. Firms in a vertical relationship engaged in resale price maintenance can face an administrative penalty of up to BWP 50,000.

Also new to the Competition Act is the imposition of a penalty of up to 10% of the purchase consideration or the combined turnover of merger parties (whichever is

higher) in circumstances where a merger was not notified and/or implemented without competition authority approval. Whilst this was recognised as a contravention of the old Act, no provision had previously been made for a penalty.

To further address the public interest aspects of mergers, the Competition Act now affords the Minister of Investment, Trade and Industry an opportunity to submit comments in writing in instances where a merger gives rise to public interest concerns.

### Catch up on competition law enforcement in Namibia

December 2019 will mark a decade of competition law enforcement in Namibia. No doubt that the Namibia Competition Commission (NACC) will pause to reflect on the experiences of the past 10 years in terms of what went right and what didn't; as well as what challenges lay ahead and how these should be addressed.

Now would also be a good time for local and international firms doing business in Namibia to pause and reflect on their own conduct, and whether any of these falls short of compliance with the Namibia Competition Act.

Contraventions of the Namibia Competition Act attract an administrative penalty of up to 10% of a firm's global annual turnover. Depending on the type of contravention, other relief, such as interdicts and divestiture orders, may also be made. This, in addition to the reputational damage a competition law contravention (even if only alleged) can attract - the stakes are therefore high.

## Competition Law in Africa – Update 2019...continued

Companies doing business in Namibia must take stock of their activities, lest they find themselves on the other side of the law.

To bring you up to speed, below is a summary of some of the NACC's more recent enforcement activities:

- In July 2019, the NACC concluded settlement agreements with two large insurers in Namibia for their role in: (i) setting mark-ups that panel beaters may charge for the repair of motor vehicles and (ii) setting maximum rates, which panel beaters may recover for their labour. The NACC viewed the conduct as price fixing. The insurers made a public admission that their conduct constituted an unintended contravention of the Competition Act and agreed to pay an administrative penalty, which collectively amounted to N\$20,5 million.
- In June 2019, the NACC levied an administrative penalty of just over N\$1,4 million against a glass fitment centre for implementing a merger without prior approval. The NACC only learnt of the transaction some two years after implementation. The NACC did not seek to unravel the merger, possibly on the basis that the merger did not result in a substantial prevention or lessening of competition, and sought only to enforce an administrative penalty.
- In January 2019, the NACC issued a media statement confirming its conclusion of a market study in the Namibian automotive industry. The NACC's study revealed a number of distortions in the competitive process across the various value chains, including for example, the

commonplace use of exclusivity agreements and the prevalence of territorial restrictions. The NACC identified franchising agreements, whereby one company is given an exclusive right to sell a particular brand, as being its biggest concern. The NACC has initiated a formal screening exercise into the industry to determine whether there are any grounds upon which it could initiate formal investigations.

- In October 2018, the NACC confirmed an investigation against four short-term insurers for their alleged involvement in a practice of requiring customers (insured motor vehicle owners) to deal only with certain retailers of motor vehicle windscreens. It is alleged that insurers induced their customers to deal only with the insurer's "preferred suppliers" and in some instances also waived excess payments if the customer selected the insurer's supplier of choice.
- In September 2018, the NACC launched an investigation against the Pharmaceutical Society of Namibia and over 200 of its members pursuant to a society rule imposing a uniform 50% mark-up on the cost of dispensing medicines. The NACC views the conduct as price fixing.

The NACC is certainly on an upwards trajectory of detecting and prosecuting competition law contraventions. Companies doing business in Namibia must take stock of their activities, lest they find themselves on the wrong side of the law.

## Competition Law in Africa – Update 2019...continued

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### Zambia Competition Commission still open for competition law amnesty

In a clever attempt to raise awareness and encourage compliance with Zambian competition laws, the Zambia Competition Commission (Commission) has called upon persons/enterprises engaged in or having knowledge of, anti-competitive behaviour, to come forward and disclose such behaviour, in exchange for immunity from possible civil and criminal prosecution.

The Commission's amnesty programme will run until the end of February 2020.

In essence, the programme is a means of assisting the Commission to determine the existence of anti-competitive trade practices and eradicate these, whilst at the same time offering offending firms the opportunity to come forward and disclose their own conduct, thereby avoiding exposure to a penalty of up to 10% of annual turnover or the risk of a five-year term in prison.

In order to secure amnesty, the offending firm is required to provide quality information, of such degree and detail that would enable the Commission to prove the existence of an anti-competitive practice. In this light of disclosures made by the amnesty applicant, the Commission is bound to come into information regarding co-conspirators to the same conduct. In these circumstances, firms party to anticompetitive practices, can face prisoner's dilemma - uncertain on whether

to itself approach the Commission and make full disclosure of its own conduct, or to remain silent and risk its co-conspirator 'blowing the whistle'. If an offending firm chooses silence above full disclosure and the Commission comes into information implicating that firm, at the close of the February 2020 window, the Commission can prosecute the offending firm to the full extent of the law.

Cognisance should also be had to the fact that Zambia is a Member State of the Common Market for Eastern and Southern Africa (COMESA). If in addition to Zambia, an amnesty applicant is also present (either by way of physical presence and/or trade into) any other Member State, and the anti-competitive trade practice extends to that Member State, the practice will also be capable of being reviewed by COMESA. Securing amnesty from prosecution in Zambia will not necessarily absolve the amnesty applicant from prosecution in COMESA (or any other implicated countries for that matter).

In light of the Commission's amnesty programme, firms doing business in Zambia are encouraged to review their business dealings and if any inkling of anti-competitive behaviour is detected, legal advice on the next steps, should promptly be sought.

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