The African and Middle Eastern Antitrust Review

2014

Published by Global Competition Review
in association with

Bookbinder Business Law (Bowman Gilfillan Africa Group)
Bowman Gilfillan
Compass Lexecon
Coulson Harney Advocates
ENSafrica
Helmy, Hamza and Partners (Baker & McKenzie International)
Nortons Incorporated
RBB Economics
Robinson Bertram

BBL | BOOKBINDER BUSINESS LAW

GCR GLOBAL COMPETITION REVIEW

Botswana

Jeffrey Bookbinder and Chabo Peo
Bookbinder Business Law, member of Bowman Gilfillan Africa Group

Competition law in Botswana is based on the National Competition Policy for Botswana (the Policy),[1] which espouses the prevention and redress of anti-competitive conduct. The Policy is anchored on the values central to extant government policy, which are privatisation, economic diversification, development and competitiveness on both a domestic and international platform.[2]

The Competition Act

Competition law is governed by the Competition Act and the regulations promulgated therein (the Act). The Act establishes the Competition Authority (the Authority) as the primary enforcement agency responsible for the prevention and redress of anti-competitive practices in the economy and the removal of constraints on the free play of competition in the market.[3] The Commission is the independent governing body responsible for the affairs of the Authority.[4] The Act is enforced by the Authority, the Commission and the High Court of Botswana.

The Act regulates mergers, restrictive practices and abuse of dominance. A merger occurs when one or more enterprises directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another.[5] There is no prescribed definition of how 'control' may be achieved.

At present, a merger is notifiable if it meets the following prescribed thresholds:[6]

- the turnover in Botswana of the enterprise or enterprises being taken over exceeds 10 million pula;
- the assets in Botswana of the enterprise or the enterprises being taken over have a value exceeding 10 million pula; or
- the enterprises concerned would, following implementation of the merger, supply or acquire 20 per cent of a particular description of goods or services in Botswana.

In relation to this requirement, even where an acquiring firm has no presence in Botswana but acquires control of a target firm with a market share of 20 per cent or more in a relevant market, the merger thresholds will be triggered because, on a strict reading of the Act, post-merger the acquiring firm will have a market share of 20 per cent or more. Put differently, there is no need for an accretion in market share in order for the notification obligation to be triggered.

The Act applies to 'all economic activity within or having an effect within, Botswana.' Accordingly, foreign-to-foreign mergers are notifiable if the merger involves economic activity within or having an effect within Botswana and where the prescribed thresholds are met.

Any agreement entered into in order to give effect to a merger as defined by the Act, will not fall within the scope of the provisions relating to restrictive practices.[7]

Abuse of dominance

Section 4 of the Act provides that an enterprise may be considered to be dominant if the enterprise supplies or acquires at least 25 per cent of the goods or services in the market; or three or fewer enterprises supply or acquire at least 50 per cent of the goods or services in the market.

Dominance per se is not unlawful, what is deemed unlawful in terms of the Act is an abuse of such dominance. An abuse may occur where the dominant enterprise engages in certain restrictive and anti-competitive practices, inter alia:[8]

- charges an excessive price to the detriment of consumers;
- refuses to give a competitor access to an essential facility when it is economically feasible to do so;
- engages in an exclusionary act; or
- engages in a concerted practice.

However, the abuse of dominance is subject to a rule of reason analysis.

Restraints

The Act prohibits both vertical and horizontal restrictive practices. The Authority may prohibit any horizontal agreement that limits or controls production, market outlets or access, technical development or investment; applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive advantage; and makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject of such contracts.[9] Resale price maintenance is per se unlawful, however, a supplier may recommend a resale price provided that the supplier makes it clear that the price is not binding and that the product labelling makes it clear that the price is 'recommended'.[10] Restrictive practices may be prohibited if such conduct is found to have the object or effect of reducing competition in any market within the jurisdiction of the Authority.

The provisions relating to restrictive practices will not apply to inter-connected parties or parties that share some degree of common ownership and control.[11] In addition, to the extent that an agreement constitutes a designated professional rule, imposes obligations arising from a designated professional rule or constitutes an agreement to act in accordance with such rules, the provisions of the Act relating to restrictive agreements and dominance shall not apply. [12]

Where the Commission establishes that a party is engaging in a restrictive practice, the Commission may issue a directive to bring the breach to an end, including a direction to terminate or modify the agreement in question if the same is still in force.[13] In addition to a cease-and-desist order, the Commission may impose a financial penalty on the breaching enterprise or enterprises, which penalty shall not exceed 10 per cent of the turnover of the breaching enterprise, calculated for the duration of the period that the breach existed.[14] In calculating the financial penalty, the Commission may have regard to the gravity of the infringement and the recurrence

or duration thereof.[15] While there are no criminal sanctions expressly provided in the Act where the provisions in respect of cartel conduct have been contravened, the Act does provide for criminal sanctions, primarily for those individuals who are found to have interfered in an investigation.

When assessing a penalty, the Commission will take into account the following as aggravating factors (the list is not exhaustive):[16]

- the involvement of senior managers and directors in the infringement;
- repeated infringements by the same enterprise;
- whether an infringement is intentional, rather than merely negligent;
- engagement in coercive or retaliatory measures against a leniency applicant;
- continuation of the infringement after the Authority commenced the investigations;
- acting as a leader, or instigator, of the infringement(in other words whether the enterprise was a ringleader); and
- coercing other enterprises to continue with the infringement.

The following may constitute mitigating factors in the assessment of a financial penalty (the list is not exhaustive);[17] whether the enterprise under investigation:

- under acted severe duress or pressure;
- was genuinely not sure or uncertain as to whether the agreement or conduct at issue constituted an infringement of the Competition Act;
- took adequate steps to ensure compliance with sections 25 and 26(1) of the Competition Act;
- terminated the infringement as soon as the Authority intervened; and
- cooperated with the Authority to enable the enforcement process to be concluded speedily and effectively.

The Act in practice

Prior to 2005 and the enactment of the Act, the Policy was preceded by the government's promulgation of an economic mapping policy which identified dominant parties in the meat, cement, sugar, beverages, mining and motor vehicle distribution industries.[18]

The economic mapping policy noted that 'firms in these industries enjoy substantial market power where tendering for public procurement [and] may be open to collusion amongst other bidders in their respective markets.'[19] As of March 2013, the Authority had investigated 11 abuse of dominance cases in the following sectors: health care, emergency medical services; service industry, mining explosives, hydraulics and poultry; of which four were closed and seven carried forward to the next year.[20] The challenge facing the Authority is establishing the existence of abuse.

While the mandate of the Authority is the regulation of competition in the economy and matters incidental thereto, currently there appears to be a fixation on the incidental rather than the regulation of competition per se. Pursuant to section 59(2) of the Act, public policy has established a firm footing as a key factor when considering a proposed merger. Presently, much of the Authority's attention is directed at merger control and at industries that are of particular concern to the public due to their perceived anti-competitiveness and their effect on small to medium-sized businesses. These industries include medical aid, motor vehicle distribution, fast-moving retail goods and the construction industry. In the process of balancing economic, competition and consumer interests, what has emerged is an incorporation of non-competition factors in the assessment of mergers. Section 59(2) provides an unlimited discretion to the Authority, to consider, in addition to and notwithstanding any competition factors raised 'any factor which bears upon the broader public interest' including the extent to which:[21]

- the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition or to the acquisition or strengthening of a dominant position in a market;
- the merger may improve, or prevent a decline in the production or distribution of goods or the provision of services;
- the merger may promote technical or economic progress, having regard to Botswana's development needs;
- the proposed merger would be likely to affect a particular industrial sector or region;
- the proposed merger would maintain or promote exports or employment;
- the merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen-owned small and medium-sized enterprises; or
- the merger may affect the ability of national industries to compete in international markets.

This is not an exhaustive list and in line with the broader government policy the Authority readily places a 'citizen empowerment' condition on the merged entity.[22] In addition, the Authority has taken into consideration other non-competition factors, such as employment, in the assessment of mergers. However, it is important to note that a consideration of public policy factors will not diminish the importance of the competition factors nor is such a decision made in a vacuum removed from the greater commercial reality of the transaction.

The Authority is currently undertaking three key research projects in the retail, poultry and cement markets.[23] This is indicative of a bias toward public interest issues that is becoming characteristic of the Authority. This approach has, nonetheless, recently been sanctioned by the Commission, which in a landmark ruling (its first adjudicative hearing) approved the Authority's decision to reject the merger of MRI Botswana and Botswana Medical Aid Society on public interest grounds and directed that in each of the transactions, if any party wanted to sell shares held by CEDA Venture Capital, they should sell to citizens that are not part of the current shareholding, in order to broaden citizen empowerment. This notwithstanding that the Authority found that the transaction would not lead to the substantial lessening of competition in health-care administration, emergency medical services, call-centre services and on-site medical clinics in Botswana. Pending a High Court challenge, this approach will continue to guide local enforcement.

Although there is no existing leniency policy in Botswana, the Act provides that where the Authority is investigating any restrictive practices or abuse of dominance, the investigated enterprise may offer an undertaking to the Authority to address any concern that has arisen, or may be expected to arise, prior to or during the investigation. The Authority may determine the case on the basis of such undertaking where the Authority is satisfied that all concerns are addressed by that undertaking. By offering such an undertaking, the enterprise concerned admits to its contravention of the relevant provisions.

Conclusion

In a short period, the Authority has established itself as a transparent, efficient and active regulator. By its second anniversary on 18 April 2013, the Authority had handled a total of 112 cases; 44 per cent of which were mergers and 33 per cent were cases of abuse of dominance, which included predatory pricing, refusal to deal and exclusive agreements. Eighty per cent of the proposed mergers were approved, while four mergers were rejected. Of those four, the Authority reached a settlement with the parties in two cases.

There are currently no proposed amendments to the Competition Act, however, it is evident that there is a need for amendments to the provisions regarding thresholds as they catch economic activity not having any bearing on competition.

Notes

1 National Competition Policy for Botswana, Ministry of Trade and Industry, July 2005.
2 Mid-term review of National Development Plan 10, Ministry of Finance and Development Planning, June 2013 at pages 32–26.
3 Competition Act [Cap 46:09] at section 5 subsection 1.
4 Ibid at section 9.
5 Ibid at section 52, subsection 1.
6 Ibid note 3 at section 54.
7 Ibid at section 65, subsection 1.
8 Ibid note 3 at part V.
9 Ibid at section 25.
10 Ibid at section 26.
11 Ibid at section 29.
12 Ibid note 3 at section 27, subsection 2.
13 Ibid.
14 Guidelines of the Competition Commission on the principles to be used in determining any penalty or remedy imposed in terms of section 25 and section 26 of the Competition Act [Cap 46: 09] at section 8.
15 Ibid at section 9.
16 Ibid at section 10.
17 Ibid at section 11.
18 Ibid note 1 at page 2.
19 Ibid.
20 Competition Authority annual report 2011/12 at page 11.
21 Ibid note 3 at section 59, subsection 2.
22 In Botswana 'citizen empowerment' equates with ownership by citizens of an interest in the entities concerned.
23 Botswana Competition Bulletin, Issue 2 volume 1 at page 1.

Jeffrey Bookbinder
Bookbinder Business Law

Jeffrey was admitted as a barrister and solicitor of the Ontario Bar in 1989 and as an attorney of the High Court of Botswana in 1993 (and as a conveyancer and notary public in 2012). Jeffrey has an LLM in international business law from the University of London. During his practice Jeffrey has acted for all major financial institutions including First National Bank of Botswana Limited, Barclays Bank of Botswana Limited, Standard Chartered Bank Limited, Stanbic Bank Limited, Bank Gaborone and Bank of Botswana. Parastatal clients have included Botswana Power Corporation, Botswana Development Corporation, Botswana Telecommunication Corporation, Venture Capital Partners, CEDA and CEMAEF.

In addition, Jeffrey has acted for Botswana Insurance Fund Management and Debswana Mining Company in providing various corporate advice.

Chabo Peo
Bookbinder Business Law

Chabo Peo graduated dean's merit list in 2010 with an LLB from the University of Cape Town. Chabo joined the firm in March 2011 and was admitted as an attorney of the High Court of Botswana in October 2011. In 2012, Chabo completed a three-month competition law internship with Bowman Gilfillan in Cape Town. Ms Peo's areas of interest include competition law, corporate and commercial law. Chabo works closely with Jeffrey and has acted as assisting counsel in an array of corporate transactions.

BBL | BOOKBINDER
BUSINESS LAW

9th Floor, iTowers North
Lot 54368, CBD
Gaborone
Botswana
Tel: +267 391 2397
Fax: +267 391 2395

Jeffrey Bookbinder
jeffrey@bookbinderlaw.co.bw

Chabo Peo
chabo@bookbinderlaw.co.bw

www.bookbinderlaw.co.bw

Bookbinder Business Law is a niche, corporate commercial law firm in Botswana and the latest addition to the Bowman Gilfillan Africa Group. Established in 2010 by Jeffrey Bookbinder, the firm has become one of the leading corporate and commercial law firms in Botswana, participating in numerous major transactions. Jeffrey Bookbinder has been recommended as a preferred lawyer for mergers and acquisitions by Which Lawyer and is listed in Chambers as a 'Notable Practitioner in Band One'.

Bookbinder Business Law has established itself as a pioneer in corporate and commercial transactions offering clients a pragmatic and individualised service. Our attorneys have comprehensive and varied industry-relevant expertise, which has meant that our excellence is recognised and appreciated by clients. Our experience in the competition arena spans industries as wide as pharmaceutical, information technology, agricultural and facilities management services.

The firm has a thriving competition law practice and has recently taken part in the following noteworthy transactions:

- local counsel to Datatec Limited in its acquisition of all of the shares in Comztek Holdings (Pty) Ltd;
- local counsel to Sasol Oil in the sale of its shareholding in Tosas Holdings to Raubex Group;
- counsel to Servest (Pty) Ltd in its acquisition of all of the shares in ECH Management Services (Pty) Ltd and Camp Management Services Botswana (Pty) Ltd; and
- local counsel in the acquisition by Aspen Pharmacare Holdings Limited of intellectual property rights of certain over-the-counter products of GlaxoSmithKline Plc.

Strategic research partners of
the ABA International section

THE QUEEN'S AWARDS
FOR ENTERPRISE:
2012

The Official Research Partner of
the International Bar Association

Law
Business
Research

THE AFRICAN AND MIDDLE EASTERN ANTITRUST REVIEW 2014 ISSN 2054-2682