

Botswana Insights

Update by Webber Wentzel and Desai Law Group



Strengthened competition law regime

The Parliament of Botswana has approved the Competition Act, 17 of 2018 (the **New Act**). The President has assented to the New Act but it is yet to come into effect. There are no transitional provisions in place and once the New Act comes into effect it will wholly replace the Competition Act, 2009 (**the Current Act**). Until such time, the Current Act remains in effect.

The Minister of Investment, Trade & Industry (**Minister**) is actively developing regulations to accompany the New Act and we anticipate that the New Act will come into effect only after that exercise has been completed. There has

been no formal indication as to how long this process will take but we expect that it should be completed within the next 6 to 8 months.

Firms doing business in Botswana need to be aware that the New Act proposes significant amendments which may have implications for their operations. Overall, the New Act seeks to enhance the current competition legislation, particularly the sanctions for competition law contraventions. We would caution businesses to exercise vigilance and proactively prioritise compliance in a climate of increased risk.

A summary of some of the key proposed amendments are set out below:

MANDATE

The New Act proposes to widen the mandate of the Competition Authority of Botswana (the **Authority**). The Authority will change its name to the Competition and Consumer Authority and will also be responsible for

enforcing the Consumer Protection Act. In addition, a new tribunal known as the Competition and Consumer Tribunal will also be established to play an adjudicative role.

MERGER CONTROL

Thresholds

The New Act has not proposed changes to the asset and turnover threshold or the supply / acquisition threshold, as provided for in the Current Act.

It is worth noting though, that the provisions of the Current Act and the thresholds set out in the Competition Regulations of 2011 (**Regulations**) are not aligned. The Current Act provides that thresholds will be measured against the assets or turnover in Botswana of the enterprise being taken over, whereas the Regulations to the Current Act set the thresholds against combined assets/ turnover in Botswana of both the merging entities. We anticipate that the regulations to the New Act will seek to rectify this by ensuring that the thresholds are measured against the assets/ turnover in Botswana of the target enterprise only.

Sanctions

The amended merger control provisions introduces a fine not exceeding 10% of the consideration or the combined turnover of the parties involved in a merger (whichever is greater), if a merger is implemented without first notifying the Authority or before receiving approval from the Authority. It is not yet clear whether the sanctions provided for in the New Act will apply to an enterprise's global turnover or limited to turnover generated by an enterprise in Botswana. We would however expect, given inherent issues relating to extra-territorial enforcement, that the regulations will limit the sanctions to Botswana turnover.

It is also unclear at this stage whether the level of fine to be applied will be left to the discretion of the Authority or whether there will be guidelines developed which shall set out the level of fine to be applied under different circumstances. We understand that the Authority may

consider the possibility of putting in place a fixed fine at a stipulated percentage (for example - 6%, regardless of the facts surrounding the implementation of a merger in contravention of the New Act).

We expect these points to be clarified once the regulations to the New Act are completed.

Ministerial participation

Where a merger raises paramount issues of public interest, the Minister of Investment, Trade and Industry may, once notified of the merger by the Authority, provide comments in writing to the Authority. The Minister's comments shall be considered by the Authority when making its decision.

CARTEL CONDUCT

Criminal sanctions

The Current Act does not provide for criminal sanctions. The New Act includes a new provision which introduces criminal sanctions for officers or directors of enterprises who contravene the provisions of the New Act by engaging

in cartels and practices such as price-fixing, market division and bid-rigging. Under the proposed sanctions, any officer or director is liable for a fine not exceeding BWP100,000 or a term of imprisonment not exceeding five years, or both.

ABUSE OF DOMINANCE

The Current Act contains a general prohibition against abuse of a dominant position, whereas the New Act now specifies the type of conduct that may constitute an abuse of dominance, including: predatory conduct, tying and

bundling, loyalty rebates, margin squeeze, refusal to supply or deal with other enterprises, inducement, discriminating in price or other trading conditions and exclusive dealing.

CONTACT US

Please contact one of the people listed below for further information.

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