



Competition Authority Turns Two

The Competition Authority celebrated its second anniversary on April 18, 2013. It was on this day two years ago that the Chief Executive Officer of the Competition Authority, Mr Thula Kaira, reported for duty as the first and the only employee of the Authority. April 2011 is the birth of the Competition Authority in Botswana as it was then that the secretariat was set up.

The Authority was set up by Parliament through the Competition Act of 2009. The chief aim was to ensure fair competition in Botswana's economy by preventing anti-competitive conduct, removing constraints to free competition, as well as investigating and resolving all



The Chief Executive of the Competition Authority Mr. Thula Kaira

complaints of anti-competitive conduct in the market.

The Competition Act became operational in October 14, 2011 when the Competition Regulations were gazetted. The commissioning of the Regulations meant that the CA could carry out its key functions as mandated by the Act.

By its second anniversary, the Authority had handled a total of 112 cases. About 44% were mergers while 33% were cases of abuse of dominance which included predatory price-fixing, refusal to deal and exclusive agreements. At least 29% were cases of restrictive business practices which included bid-rigging, price-fixing and market allocation.

Seventeen cases were closed while investigations were still ongoing in the majority of cases. Over 80% of merg-

ers were approved while four mergers were rejected, out of which the Authority reached a settlement agreement with the parties in two cases.

As part of its investigations in some of these cases, the Competition Authority conducted four dawn raids in the medical aid and motor vehicle industries, as well as food supply for Government tenders, as provided for in Section 36 (1) of the Competition Act on entry and search of premises.

Furthermore, the Authority has embarked on three key research projects in the Retail, Poultry and Cement markets. Two of the studies are a joint project with other Southern African Development Community (SADC) nations, under the banner of the African Competition Forum.

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Trade and Industry Minister Honourable Dorcas Makgato-Malesu, the Chairman of the Competition Commission Dr. Zein Kebonang and the Chief Executive Officer Mr. Thula Kaira at the Second National Stakeholders Conference on Competition.

SECOND NATIONAL STAKEHOLDERS' CONFERENCE ON COMPETITION

The Competition Authority hosted the second annual National Stakeholders Conference on Competition on March 14, 2013 at the Gaborone International Convention Centre under the theme 'Towards a Culture of Fair Competition'. The objective of the annual conference was to update stakeholders on competition policy and law developments in Botswana, as well as to solicit and receive feedback.

The conference was attended by at least 150 participants from various sectors of the economy including mobile operators, consumer groups, research and academic institutions, civic leaders, Government, medical aid companies, political parties, legal practitioners, media, students and representatives of various sectors including construction, milling, poultry, retail and hotels.

Officially opening the conference, the Honourable Minister of Trade and Industry Dorcas Makgato-Malesu said the conference theme, 'Towards a Culture of Fair Competition', was fitting because there is need for a cultural or mindset change where fair competition is not regarded as a barrier to progress in businesses, but rather as a good reference point for progress.

The Minister said Government is committed to supporting local productions through procurement processes to enhance growth of businesses.

She however expressed concern that there is a perception that Government is obliged to procure local products and services which are not competitive by any international standards. She reiterated that while Government supports procurement from local producers, procurement has to be in accordance to the Government tender processes and standards have to be met.

The Trade and Industry Minister said creating a culture of competition is one of the precursors to competitiveness, and Government is committed to ensuring that there is fair competition in the economy.

She challenged the Competition Commission and the Competition Authority to take a developmental approach as they implement the Competition Act. "The performance of the two institutions will not be measured by how many cases they have handled from year to year, but rather what positive impact their interventions have had in the economy", she said.

The keynote address was made by Dr. Jochen Pöttgen, Head of Trade, Politics, Press and Information for the European Union Delegation to Botswana and the Southern African Development Community (SADC).

He said markets are created and managed by human beings who by nature have a tendency to manipulate things for personal benefit, hence the need for supervising authorities to ensure that the conditions of fair competition are met to defend players on the market, and most importantly and ultimately, to protect the consumers.

Dr. Pöttgen said competition policy is basically about making sure that companies compete with each other on an equal footing, on the basis of their products and prices, with no unfair advantages. He said it is a well-known fact that fair competition encourages innovation and technical developments, and thus the progression of markets.

"An adequate competition policy ensures that markets become and remain competitive, produces benefits for consumers, and acts against monopolistic revenues", Dr. Pöttgen said.

Investigation on Alleged Anti-Competitive Behaviour in Banks Concluded

The Competition Authority has completed its investigations concerning allegations that Botswana's commercial banks namely; Barclays Bank of Botswana Limited, Stanbic Bank, First National Bank of Botswana Limited and Standard Chartered Bank are engaged in anti-competitive practices in the way they select law firms to provide them with legal services.

The complaint lodged with the Authority was that the said banks favoured certain law firms which, without any competitive process, were selected and constituted into panels that exclusively provide the banks with legal services to the exclusion of all other law firms.

Following its investigations, the Authority found that a process does exist which banks use to constitute the said panels. This process and/or criteria used by the said banks in selecting law firms to provide them with legal services was found to be fair, justifiable and competitive. The law firms in the said panels, as the Authority found, were rigorously vetted and a competitive process applied so as to come up with the best suitable firms that would be constituted into the said panels.

More importantly, the said panels were not immutable and the other law firms that did not make it into the panels could be availed an opportunity to do so as the banks periodically reviewed the panels, and allowed interested law firms to submit their profiles.

The Authority discontinued with the investigation of this case but will continue to monitor and observe this market.

MERGER DECISIONS BY THE COMPETITION AUTHORITY MARCH – APRIL 2013

The Competition Authority made the following merger decisions in the months of March and April 2013:

❑ ACQUISITION OF THE ENTIRE ISSUED SHARE CAPITAL OF TOSAS BOTSWANA (PTY) LTD BY RAUBEX GROUP LIMITED

Pursuant to Section 60(4)(a)(ii) of the Competition Act, the Competition Authority on March 13th authorised the proposed acquisition of the entire issued share capital of Tosas Botswana (Pty) Ltd by Raubex Group Limited.

The Authority determined to authorise the proposed transaction on the grounds that analysis of the merger showed that there were no substantive competition concerns that would arise in the manufacturing and distribution of value-added bituminous products market in Botswana, on account of the acquisition of the entire issued share capital of Tosas Botswana (Pty) Ltd by Raubex Group Limited.

The Authority also took cognisance of the fact that:

- Although there was a vertical relationship between the activities of Tosas Botswana and Raubex Group Limited, the proposed transaction was not likely to result in substantial lessening of competition, nor endanger the continuity of supplies or services, due to the absence of geographical overlap between the activities of the merging parties;

- The market share of the merged entity in the manufacturing and distribution of value-added bituminous products market in Botswana was estimated above the 25% dominance threshold as set in the Competition Regulations, but that was not on account of the merger. In addition, there was no established track record of abuse of dominant market power in this market to warrant a threat of abuse of dominance post transaction implementation, as defined under Section 2 of the Competition Act (Cap 46:09); and

- No significant negative effect on public interest in Botswana has been identified, in relation to the provisions

of Section 59 (2).

The Authority approved the merger with optimism that in the future, the merged entity would consider to establish a roads construction and rehabilitation division in Botswana, which would also contribute to economic development in the country.

❑ ACQUISITION OF 100% ISSUED SHARE CAPITAL IN ECH MANAGEMENT SOLUTIONS BOTSWANA (PTY) LTD BY SERVEST (PTY) LTD

The Authority on March 20th authorised the proposed acquisition of 100% issued share capital of ECH Management Solutions Botswana by Servest (Pty) Ltd.

The transaction was authorised on grounds that the analysis of the facts of the merger showed that there were no substantive competition concerns that arise in the facilities management and consultancy services market in Botswana, on account of the acquisition of 100% issued share capital of ECH Management Solutions Botswana by Servest (Pty) Ltd.

Other factors considered by the Authority were:

- Although there is a vertical relationship between the activities of ECH Management Solutions Botswana and Servest (Pty) Ltd, the proposed transaction is not likely to result in substantial lessening of competition, nor endanger the continuity of service, due to the absence of product overlap between the activities of the merging parties in Botswana;

- The proposed merger is not expected to have any significant negative effect on public interest in Botswana in terms of employment, in that no retrenchments or redundancies are expected to occur at the target enterprise in Botswana, based on the parties' submission; and

- The merged entity demonstrates its commitment to engage citizen owned companies in its best efforts by subcontracting with them at all material times.

The Authority approved the acquisition

of 100% issued share capital of ECH Management Solutions Botswana by Servest (Pty) Ltd following the undertakings/commitments given by the merging parties that the merged entity shall:

- Use its best efforts to subcontract with citizen entities at all material times;

- Comply with all statutory prescriptions in respect of trade licenses and services reserved for citizens of Botswana or companies wholly owned by citizens of Botswana; and

- Subcontract to wholly citizen owned companies or citizens of Botswana the provision of reserved services.

❑ ACQUISITION OF 100% ISSUED SHARE CAPITAL IN COMZTEK HOLDINGS (PTY) LTD BY DATATEC LIMITED

The Competition Authority authorised the proposed acquisition of 100% issued share capital in Comztek Holdings (Pty) Ltd by Datatec Limited.

In its decision, it said the merger assessment showed that there were no substantive competition concerns that arise in the information and communications technology distribution market in Botswana, on account of the acquisition of 100% issued share capital in Comztek Holdings (Pty) Ltd by Datatec Limited.

The Authority was also of the view that:

- The proposed transaction is not likely to result in substantial lessening of competition, nor endanger the continuity of the service, due to the continued existence of competitive constraints such as countervailing power that will remain in the relevant market to ensure that rivalry continues to discipline the commercial behaviour of the merged firms;

- The merged entity does not possess any market dominance and consequently no threat of abuse of dominant market power is anticipated, post transaction implementation, as defined under Section 2 of the Competition Act; and

- No significant negative effect on public interest in Botswana has been identified, in relation to the provisions of Section 59 (2).

CHOPPIES PROPOSES TO MERGE WITH SUPASAVE AND MEGASAVE

The Competition Authority has received a merger notification between Choppies Enterprises Limited (Choppies), Supasave (Pty) Ltd and Megasave (Pty) Ltd. The proposed merger is in terms of Choppies acquiring all issued shares of Supasave and Megasave. Choppies is a service provider of fast moving consumer goods with 53 retail stores in Botswana and an estimated market share of 30% in the retail industry. Supasave is similarly a service provider of fast moving consumer goods, while Megasave was incorporated for the purposes of sourcing and supplying stock to Supasave. Supasave operates six retail stores in Botswana and accounts for less than 1% of the national market share in the retail industry. The Competition Authority seeks public and stakeholder views on the proposed merger. Any comments can be submitted to the Director of Mergers and Monopolies.



Bank of Botswana and Competition Authority Teams

Competition Authority And Bank Of Botswana Forge Cooperation

The Competition Authority and Bank of Botswana management met on March 7 to brief each other about their respective mandates as the two organisations prepare for the signing of a memorandum of understanding (MoU).

The Chief Executive Officer Mr. Thula Kaira led the Competition Authority delegation while the central bank team was led by the Director of Banking Supervision, Mr. Andrew Motsomi.

In his overview, Mr. Motsomi said the Bank of Botswana has put in place measures in the banking sector to promote innovation, but competition in the sector is inherently imperfect.

Mr. Motsomi said cooperation with the Competition Authority will help in guarding against some unfair business practises that banks may engage in, and this will help maintain the stability that they are trying to preserve in the banking system. He said it will also help the central bank in dealing with issues such as mergers and acquisitions in the banking sector.

In his presentation, Mr. Kaira said cooperation between the two regulators is necessary in order to foster mutual learning experi-

ences. He hailed the Bank of Botswana as a source of institutional memory for the country's financial sector, which would benefit the Authority in any future competition interventions in the sector. He said healthy and fair competition was the best way of adding value to the economy, and regulatory cooperation was important because the two institutions would tap into each other's distinctive competencies, and assist each other in dealing with industry crises.

The Competition Authority continues to forge cooperation with sector regulators and had at the time signed MoUs with the Directorate on Corruption and Economic Crime (DCEC), the Public Procurement and Asset Disposal Board (PPADB), and the Civil Aviation Authority of Botswana (CAAB).

The Authority was in full swing holding consultative talks with other institutions such as the Non-Bank Financial Institutions Regulatory Authority (NBFIRA) and the Botswana Telecommunications Regulatory Authority (BOCRA) to sign MoUs in the near future.

Competition Authority at the 12th International Competition Network Conference

The Competition Authority participated at the 12th annual conference of the International Competition Network (ICN), which was held in Warsaw, Poland from April 23rd to 26th.

The Chairman of the Competition Commission Dr. Zein Kebonang, led the Botswana delegation which joined more than 500 delegates from around the world representing more than 80 competition and anti-trust agencies and competition experts from the academic, legal, consumer and business communities.

The delegation included the Director of Legal and Enforcement Mr. Duncan Morotsi, Manager for Communications and Advocacy Ms. Gladys Ramadi, Human Resources Officer Ms. Sebilo Kebot-samang, and Analysts Ms. Pono Semane of the Mergers and Monopolies Department and Othusitse Oletile of the Department of Competition and Research Analysis.

The conference discussed a wide range of topics including cartels, competition advocacy, competition agency effectiveness, mergers and unilateral conduct. Mr. Morotsi participated in a panel discussion entitled *'What Unilateral Conduct Standards Should be Applied in Developing Countries'*. In his presentation, Mr. Morotsi said developing countries should adopt the same standards applied in developing countries.

He said in Botswana the dominance test was straightforward in that 25% of market share was the dominance threshold in the Competition Regulations. Mr. Morotsi however said the problem was that even though the structural test was available, there were exemptions for factors such as employment and exports.

During the question and answer session several panellists warned against what they termed *'abuse of government position'* in competition issues. They further cautioned against a one-size-fits-all competition enforcement mentality.

For her part, Ms. Semane participated in a session on *'Public Interest Objectives in Merger Review: How to Reconcile them with Competition Policy?'*



Ms. Semane told participants that like many other competition legislations in various jurisdictions, the Competition Act of Botswana sought to address whether a proposed merger was likely to prevent or substantially lessen competition, or result in an enterprise acquiring a dominant position in a market. It also considered whether a proposed merger would promote industrialisation or advance citizen economic empowerment as well as small and medium sized enterprises.

She said the Competition Authority may also consider public interest concerns in the absence of competition concerns. Such public interest benefits included whether a proposed merger may improve or prevent a decline in the production of or distribution of goods and services, or whether it would maintain or promote exports or employment.

The ICN was formed in October 2001 and now has 126 member agencies around the world including Botswana. The objective of the network is to increase understanding of competition policy and promote best practices around the world.

African Competition Forum Promotes Competition Cooperation

The African Competition Forum is using advocacy, integration, capacity building and research programmes to forge competition cooperation between countries and regions in the African continent. This was revealed at the 12th annual ICN conference in Warsaw, Poland by Mr. Francis Kariuki, the Chairman of the ACF, and Director General of the Competition Authority of Kenya.

The ACF is a network of 41 African countries which was launched in March 2011. The objectives of the forum are enhancement of the adoption of competition laws, building the capacity of new authorities, and advocating for implementation of competition laws in African countries and regional economic bodies.

Under the Advocacy Programme the ACF targets Parliaments, business organisations, the judiciary and regional institutions with the aim to promote the adoption and reform of competition laws, and

equipping national competition agencies in informing policy development. The expected outcome is enactment and reform of competition laws as well as broad-based acceptance of the positive role that competition can play in developing a sustainable economy.

Mr. Kariuki said under the Integration Programme the ACF is currently focusing on three member countries which are in the development phase of their competition laws, and to support them through input and technical assistance.

Regarding capacity building, the ACF hosts training workshops on bid rigging, case management and research methodologies so as to build capacity in investigations which will lead to greater detection and eradication of anti-competitive cases for the benefit of the poor. The Research Programme facilitates exchange of information and experience among staff of competition agencies, research

institutions and researchers on competition and trade policy. The expected outcome is increased regional competition, trade volume, investments and innovation, introduction of competition related courses in African universities to support the competition agencies, and increased employment of university graduates.

On challenges faced by the ACF, Mr. Kariuki said they include language as membership comprises Anglophone and Francophone countries; inadequate staff capacity, lack of reliable legal and communications infrastructure, sustainability of the programmes and staff turnover. To mitigate these challenges, the ACF is currently recruiting staff for the secretariat in Nairobi, and soliciting support from developed competition jurisdictions and development partners. A website and a newsletter are some of the tools being developed by the ACF to facilitate communication among member countries.

Australia: A Model For The Benefits Of Competition Law

The Chairman of the Australian Competition and Consumer Commission Mr. Rod Sims has outlined the benefits of competition policy reforms in Australia. In a speech to the pre-ICN meeting in Warsaw, Poland, Mr. Sims said in the 1960s, 1970s and early 1980s, Australia was an insular, highly regulated economy, with many public sector monopolies, contributing to low productivity and growth, and poor comparative economic performance.

The policy settings that led to this relative decline involved affording preferential treatment to certain industries via quotas; high tariffs and subsidies; prescriptive approaches to the regulation of product and factor markets; inflexible work practices; government-owned infrastructure monopolies that saw high cost utility services; and heavily regulated export sectors in agriculture and mining.

Mr. Sims said from the 1980s and 1990s Australia's economy was transformed by a broad reform agenda, particularly Australia's National Competition Policy, into an open, dynamic, flexible and high productivity economy.

Overall, there was a recognition that if Australia's economy was not competitive domestically, it could not compete internationally. An independent Committee of Inquiry rec-

ommended some changes to Australia's competition law, but more importantly recommended that competition laws apply universally to all business activity in Australia.

This largely involved extending the competition law to cover unincorporated enterprises and government business enterprises.

Other reforms included considerable deregulation of retail trading hours so that stores can open as they choose; reduced controls

on liquor licensing that previously provided protection to the hotel industry; reduced business licensing red tape and removing the legal profession's monopoly on conveyancing.

"These changes were forecast to lead to significant and wide economic gains for Australia, and they did", Mr. Sims said. In a number of areas targeted by the reforms there were significant price reductions in the electricity, rail, telecommunications and dairy sectors.

In conclusion, Mr. Sims said competition reform is the only way to ensure economic growth and to see that national living standards are sustained in the long term. "I also believe that this is true for both developed and developing economies" he said.

He observed that competition agencies in developing countries will usually need to have a larger advocacy role to take on vested interests and government restrictions. **(Access full speech on <https://www.accc.gov.au/speech/australia%E2%80%99s-experience-driving-economic-growth-through-competition-policy-reforms>)**



Mr. Rod Sims at the Pre-ICN meeting in Warsaw

TELKOM FINED R449 MILLION FOR ABUSE OF DOMINANCE

South African telecommunications operator Telkom will pay a R449 million penalty for abusing its dominance in the telecommunications sector, according to the country's Competition Commission.

Deputy commissioner Trudi Makhaya said this would be done in terms of an agreement between the company and the Commission.

"The Competition Commission and Telkom SA Limited have reached a settlement agreement on the basis that the commission withdraws its cross-appeal and Telkom withdraws its appeal from the Competition Appeal Court," she said.

Ms. Makhaya said the effect of the withdrawals was that the matter was now officially finalised. Telkom would pay an

administrative penalty of R449 million in accordance with the Competition Tribunal order handed down on August 7, 2012. The tribunal imposed the penalty on Telkom for abusing its dominance in the telecommunications market between 1999 and 2004.

This was a period in which Telkom was a monopoly provider of telecommunications facilities in South Africa. The tribunal concluded that Telkom used its monopoly in the facilities market to benefit its subsidiary in the competitive value-added network market. The commission referred the matter to the tribunal after receiving a complaint from the SA Vans Association and 20 other internet service providers. **(Source: Sowetan)**

COMPETITION AUTHORITY IN PICTURES

SECOND NATIONAL STAKEHOLDERS CONFERENCE ON COMPETITION



Captions

1. CA Intern Bianca Phele and staffer Neo Gopolang at the Conference 2. Dr. Jochen Pöttgen, Head of Trade, Politics, Press and Information for the European Union Delegation to Botswana and SADC Giving the Keynote Address 3. Some of the participants at the conference 4. Dr. Selinah Peters from the University of Botswana and Mr. Richard Harriman of Consumer Watchdog 5. Prime Time's Peo Sebotho Interviewing Competition Commissioner Tendekani Malebeswa

Competition Authority at the International Competition Network Conference in Warsaw, Poland



Captions

1. CA's Othusitse Oletile, Sebilo Kebotsamang, Gladys Ramadi, Pono Semane and Chairperson of the Competition Commission Dr. Zein Kebonang 2. ICN Advocacy Working Group Members Marianne Faessel Kahn and Sophie-Anne Descoumbes of France, Mariana Vital Morgado of Portugal and Rajeev Hashah of Mauritius briefing participants on advocacy projects 3. Gladys, Justine Nyenza of Tanzania FCC, Elizabeth Gaichuri of UNCTAD, Alex Mbaga of Tanzania FCC, Benjamin Chinhengo of Zimbabwe CTC and Luyamba Mpamba of Zambia CCPC at the conference 4. Mr. Duncan Morotsi with Professor Eleanor Fox of the New York University School of Law 5. President of the Polish Office of Competition and Consumer Protection Małgorzata Krasnodębska-Tomkiel

Competition Authority At The Steinmetz Gaborone Marathon



Goitseone, Thula and Setso taking a breather



Ntshaanana, Pono, Thabang, Sebilo, Modikwa, Tonny and Otlaathusa at the marathon!

HOW TO CONTACT US



Editorial Team

GIDEON NKALA: gideon.nkala@competitionauthority.co.bw
GLADYS RAMADI: gladys.ramadi@competitionauthority.co.bw
KELEBOGILE NGWENYA: kelebogile.ngwenya@competitionauthority.co.bw

Phone: +267 3934278
Fax: +267 3121013
Postal: Private Bag 00101, Gaborone
Facebook: Competition Authority Botswana
Twitter: @Competition Bots

Visit the Competition Authority website www.competitionauthority.co.bw where you can download the Competition Act 2009, Competition Regulations 2011, the National Competition Policy 2005 and other documents.