



## **REFUSAL TO DEAL GUIDELINES**

**December 2014**

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# REFUSAL TO DEAL GUIDELINES

## 1.0 INTRODUCTION AND THE PURPOSE OF THESE GUIDELINES

- 1.1 These Guidelines are intended to be used by staff of the Competition & Consumer Authority (the Authority) when reviewing a case of refusal to deal.
- 1.2 The objective of competition law in Botswana is to maintain and encourage competition amongst business enterprises as a vehicle to promote economic efficiency and maximise consumer welfare.
- 1.3 These Guidelines provide a conceptual framework within which evidence on refusal to deal can be built. It also discusses practical issues that may arise in refusal to deal conduct that is relevant to the nature of the complaint.
- 1.4 These Guidelines are not a substitute for the Competition Act (CAP 46:09, herein referred to as “the Act”). They must, therefore, be read in conjunction with the Act, Regulations and other guidelines. Their purpose is to complement what is in the law.

## 2.0 BACKGROUND ON REFUSAL TO DEAL

- 2.1 Small and large businesses often complain to the Authority that manufacturers or distributors refuse to deal with them in relation to the supply of goods or provision of services.
- 2.2 The complainants contend that they have an absolute right to be supplied or to have access to supply, as this is presumed to be part of their right to participate in economic activity in the country. There may be other Government policies and laws that may provide for such rights. Within the field of competition policy and law, however, refusal to deal is not absolute and an inquiry has to be undertaken to understand the nature and reason behind such refusal by any enterprise.
- 2.3 Refusing to supply scarce or essential goods to a competitor when supplying those goods is economically feasible is commonly referred to as refusal to supply/deal. This conduct is associated with dominant enterprises.<sup>1</sup>

## 3.0 WHAT THE ACT SAYS ABOUT REFUSAL TO DEAL

- 3.1 Refusal to deal is subsumed under section 30(1) of the Act covering ‘Abuse of Dominant Position<sup>2</sup>, which states that:

*Any conduct on the part of one or more enterprises is subject to prohibition by the Authority if, following an investigation by the Authority, such conduct is determined to amount to an abuse of a dominant position in any market.*

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<sup>1</sup>Refer to Competition and Consumer Authority (Botswana), “Monopolisation and Abuse of Dominance Guidelines” (2013).

<sup>2</sup>ibid.

3.2 For further details on abuse, the Competition and Consumer Authority has published a detailed guide on Monopolisation and Abuse of Dominance.

3.3 The Act is fundamentally concerned with preventing anti-competitive conduct and providing appropriate safeguards for consumers. Whether or not a refusal to deal is a breach of the Act often depends on the effect the refusal has or would have on competition.

#### **4.0 WHEN IS REFUSING TO DEAL LEGAL? <sup>3</sup>**

4.1 The following are incidents (not exhaustive) that may be considered as legal reasons for the conduct of refusal to deal:

4.1.1 there may be sound commercial reasons (legal ones) why a customer is refused supply of goods or services. For example, a wholesaler or manufacturer may find it too costly or inconvenient to sell to people who walk-in off the street, or may dislike supplying the outlets which are located too close to each other<sup>4</sup>;

4.1.2 when perhaps the supplier believes that a reseller is a bad credit risk, does not promote the goods or services properly or lacks particular skills or expertise relevant to the business<sup>5</sup>;

4.1.3 when it may purely be a personality clash between the two parties that is causing the problem<sup>6</sup>; and

4.1.4 when there are legitimate commercial reasons for refusal to supply.

4.2 However, suppliers should not attempt to use one of these (above) as a front for illegal conduct.

#### **5.0 CONDUCT THAT MAY AMOUNT TO ANTI-COMPETITIVE (ILLEGAL) REFUSAL TO DEAL**

5.1 The following are instances that may amount to anti-competitive behaviour, and thus illegal refusal to deal:

5.1.1 Where competitors are involved in restricting the supply of goods to one another, especially if they have the purpose or effect of substantially lessening competition in the market in which the business operates<sup>7</sup>.

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<sup>3</sup> This section is extracted from the Australian Competition and Consumer Commission (ACCC) booklet produced as a guide on "Refusal to Deal" (ISBN 1 921227 28 1), January 2007. also available online at: <http://transition.accc.gov.au/content/item.phtml?itemId=304569&nodeId=8f54207dcb5456dfbc81efa2d27db6f1&fn=Refusal%20to%20deal%20January%202007.pdf>.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Australian Competition and Consumer Commission (ACCC), guide on "Refusal to Deal" (ISBN 1 921227 28 1), January 2007. Also available online

- 5.1.2 For example, in December 1995 the Federal Court of Australia imposed penalties totalling more than A\$20 million on three pre-mixed concrete suppliers and some executives after finding they had engaged in conduct involving refusal to deal with one another.<sup>8</sup>
- 5.1.3 Where in a vertical distributorship agreement, the manufacturer dictates to the distributor that the distributor should only sell to a certain market (market not supplied by the manufacturer). In that instance, the manufacturer would be ensuring that the distributor (in the downstream supply-chain) does not encroach in its market territory (i.e., manufacturer's market).
- 5.1.4 Where competitors are engaged in collective or concerted refusal to engage with any direct or indirect customers or suppliers.

## **6.0 REFUSAL TO DEAL AS AN INSTANCE OF ABUSE OF MARKET POWER (SECTION 30 OF THE ACT)**

- 6.1 Section 2 of the Act defines a dominant position as:

*a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors.*

- 6.2 The assessment test applied under abuse of dominance cases includes establishing the following:
- 6.2.1 whether the parties involved are enterprises;
- 6.2.2 whether the enterprises involved are in a dominant position (individually and jointly);
- 6.2.3 whether the alleged conduct amounts to abuse of dominance; and
- 6.2.4 whether the abuse has an effect on competition.
- 6.3 Similar to other legislation globally, the Act prohibits 'the abuse of a dominant position'. Even though the abuse of market power is prohibited, it should be well understood that companies are usually not restrained to grow and possibly become dominant in a market place using their distinctive competencies. However, the problem exists if a dominant enterprise abuses its dominant market position (such as 'refusal to deal'). The latter distorts the market environment since there would be no fair playing ground.
- 6.4 That means, any form of excessive exercise of such market power restricting competition is subject to prohibition.

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<http://transition.accc.gov.au/content/item.phtml?itemId=304569&nodeId=8f54207dcb5456dfbc81efa2d27db6f1&fn=Refusal%20to%20deal%20January%202007.pdf>

<sup>8</sup> ACCC v Pioneer Concrete (Qld) Pty Ltd, Boral Resources (Qld) Pty Ltd, and CSR Limited. Also available on line at <http://www.accc.gov.au/media-release/record-penalties-in-concrete-price-fix-case>.

- 6.5 The dominant enterprise may freely increase its market share on various markets provided that the instruments used to achieve this goal are not anti-competitive.<sup>9</sup>
- 6.6 Refusal to deal resulting from Resale Price Maintenance (RPM).<sup>10</sup> There are several instances where Refusal to Deal may be connected to RPM, which are as follows:
- 6.5.1 where suppliers (including manufacturers and wholesalers) cannot specify to resellers a minimum price below which goods or services cannot be resold or advertised for sale. A supplier may recommend an appropriate price, but cannot force resellers to adhere to it by refusing or threatening to refuse to supply, to stop charging or advertising below that price or from advertising discounts. In the famous *Colgate Doctrine*<sup>11</sup> case, where Colgate (seller of soap products) had a Retail Price Maintenance policy to its customers. Customers who retailed at a price below the one suggested by Colgate were punished by the manufacturer refusing to deal with them. Colgate spent a good deal of resources in determining who maintained their suggested prices and who did not. Colgate simply refused to continue to deal with a vendor that it determined was not abiding by the rules as its policy was to cease re-supply to the vendor.
- 6.5.2 the United States Supreme Court ruled that a company has power to decide with whom to do business. A company may unilaterally terminate business with any other company without triggering a violation of anti-competition law;
- 6.5.3 this Colgate case created an exception to ‘vertical price restraints’. According to the ruling, resale price maintenance is generally illegal *per se*, but if a supplier merely says it will not deal with resellers that charge less than the supplier’s stipulated price, the supplier need not deal with such a retailer. This is a narrow exception, as companies are still prohibited from threatening or warning price-cutters; and
- 6.7 the Authority would equally be concerned where dominant buyers pressured suppliers not to supply competitors with a discount - this can induce others to breach the law, e.g., a retailer who possesses market power and threatening a manufacturer that other retailers competing with it should not be given discounts. If the manufacturer offers discounts to competitors, the dominant retailer will not do business with the manufacturer.

## **7.0 WHEN A DOMINANT ENTERPRISE MAY NOT REFUSE TO DEAL WITH A COMPETITOR?<sup>12</sup>**

- 7.1 A dominant enterprise that controls a large part of the supply of a product may not refuse to supply a downstream customer unless the dominant enterprise has sound reasons for doing this.<sup>13</sup>

<sup>9</sup> Competition and Consumer Authority (Botswana), Monopolisation and Abuse of Dominance Guidelines (2013).

<sup>10</sup> Section 26 of the Competition Act (49:06): An enterprise shall not enter into a vertical agreement with another business enterprise to the extent that the agreement involves Resale Price Maintenance.

<sup>11</sup> *United States v Colgate & Company* (1919) 250 U.S. 300 (39 S.Ct. 465, 63 L.Ed. 992). This is an old case on refusal to deal, refer to <http://www.law.cornell.edu/supremecourt/text/250/300>.

<sup>12</sup> Firm A is a dominant firm in an upstream market that refuses to supply a key input to Firm B, a competitor in the downstream market. As a result, Firm B may potentially be prevented from competing in the downstream market if it does not have access to supply from another upstream supplier and, consequently, competition in the downstream market may be diminished. A dominant firm that sells its product to both wholesalers and retailers may have an incentive to curtail supply to its wholesale customers (which it competes with in the retail market) in order to bolster its direct sales within the retail market.

7.2 Refusal to supply the good may be regarded as an abuse of a dominant position if it is of discriminatory nature.<sup>14</sup>

7.3 Generally, competition legislation does not interfere with a supplier's choice of customer or route to the market. However, in certain limited cases, a dominant enterprise may be in a position to abuse its market power by refusing to supply another enterprise (where there is no alternative source of supply) and in this way impede effective competition in a market. For example, in the judgment of the Polish Court of Competition and Consumer Protection,<sup>15</sup> it was said that:

*The refusal to deal is not listed as a prohibited practice constituting the abuse of a dominant position. Nevertheless, the list of practices is open and hence refusal to deal may be treated as a specific form of abuse of a dominant position. Refusal to deal may constitute an abuse of a dominant position if the contractor does not have alternative sources of supply.*

7.4 The following decision was further taken in the United States of America's Judgment of the Supreme Court of 9 October 2003,<sup>16</sup> that,

*Every undertaking has a right not to sell goods to unreliable contractors or to debtors. However, the criteria for the refusal to sell should be objectively justified and be applicable to all contractors on equal terms. Furthermore, such refusal should not be permanent, but it should depend on the meeting of the set criteria by the contractor.*

7.5 An enterprise with a substantial degree of power in a particular market (by market share or otherwise) cannot take advantage of that power for the purpose of damaging other businesses by refusing to deal or by offering to do business on such unrealistic terms that it is tantamount to refusal to deal. However, this does not mean that the supplier/distributor has to deal with everyone. The onus is on the customer or distributor to show that the supplier's action was taken with the purpose of deterring or preventing the business or class of business from entering or competing in that market.

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<sup>13</sup> Refer to case York Timbers Ltd/SA Forestry Company Ltd (SAFCOL) 15/CR/Feb01, In 2001, York Timbers brought an application for interim relief before the Competition Tribunal in which it alleged that SAFCOL had abused its dominant position by, amongst others, refusing to supply. The Competition Tribunal highlighted the key elements and evidence required to prove whether an alleged refusal to supply amounts to an abuse of dominance. On evaluation of the submissions, the Competition Tribunal assessed whether the dominant firm, SAFCOL, has attempted to use or abuse its dominance to extend or preserve its position through the reduction of supply. It was found that SAFCOL's dominance in the upstream market remained unaffected by the alleged conduct. In addition, the Competition Tribunal found that SAFCOL had not leveraged its upstream market power downstream and, as a result of failure by the applicant to show that SAFCOL's position downstream had in anyway improved as a result of the alleged conduct, the interim relief application was dismissed.

<sup>14</sup> Australian Competition and Consumer Commission (ACCC) booklet produced as a guide on "Refusal to Deal" (ISBN 1 921227 28 1), January 2007. Also available online at: <http://transition.accc.gov.au/content/item.phtml?itemId=304569&nodeId=8f54207dcb5456dfbc81efa2d27db6f1&fn=Refusal%20to%20deal%20January%202007.pdf>.

<sup>15</sup> 2 June 2004, XVII, in Poland, Ama 94/03 Wokanda 2005, No. 7-8, item 49.

<sup>16</sup> Mateusz Btachucki, (2013) Polish Competition Law, Case No: 1CK 134/02, nyr, Commentary Case Law and Texts, ICN 12<sup>th</sup> Annual Conference. Page 7 of 12

## 7.6 Exclusive Dealing

- 7.6.1 Exclusive dealing may amount to refusal to deal when it involves one enterprise trading with another, imposing restrictions on with whom, or in what, that enterprise can deal with. There are two types of exclusive dealing: full line forcing and third line forcing.<sup>17</sup>

### Box 1

#### TWO COMMON TYPES OF EXCLUSIVE DEALING

##### A. Full Line Forcing

Full line forcing refers to a situation in which a producer or supplier insists that the retailer must carry the full range of products in the line. If the retailer is not agreeable to that instruction, the producer refuses to supply. This reduces the retailer's freedom of choice of supplier. The competition rule, therefore, posits that a supplier shall not refuse to supply goods or services because the intending purchaser will not agree to:

- i. refuse to buy, or limit the amount of goods or services it buys, from a competitor of the supplier; and
- ii. refuse to re-supply, or re-supply to a limited extent, goods to particular enterprises or a particular class of enterprise or in a particular place or places.

##### B. Third Line Forcing

- i. Third line forcing is a form of exclusive dealing which involves the supply of goods or services on the condition that the purchaser buys goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition.<sup>18</sup> For example, it would be illegal for a financing company to make a loan conditional on the borrower buying cover from a specific insurance company.
- ii. Property lease agreements that have a similar effect are also prohibited. Example: in June 1995 the Australian Competition and Consumer Commission succeeded in an action against a Sydney car dealer<sup>19</sup> and its finance manager when the court found that the company had been offering special deals on the condition that buyers obtained finance through its preferred credit provider.

## 7.7 Bundling

- 7.7.1 A thin line exists between 'bundling' and 'third line forcing'. In the latter, the supplier provides the products or services as separate entities; whereas in the former the product or service package is designed as one inseparable unit. Bundling, therefore, refers to offering several products for sale as one combined product; and a bundle of products may be called a package deal or a compilation or an anthology. Bundling is a common feature in many imperfectly competitive product markets.

<sup>17</sup>Office of Fair Trading (July 2001). "The role of market definition in monopoly and dominance inquiries", Economic Discussion Paper 2.

<sup>18</sup>Refer to Australian Competition and Consumer Act (ACCC) 2010, "Anti-competitive conduct and restrictive trade practices".

<sup>19</sup>In the Case of AV Jennings v First Provincial Building Society Limited, No. QG 42 of 1996. FED No. 306/96, the issues were that a car dealer offered a higher trade-in price, on the condition that the buyer finances their purchase through the car dealer's preferred credit provider; and this was identified as anti-competitive. The bank and the car dealer were therefore charged for the offense.



7.7.2 It can be used by firms to discriminate among consumers or to extend market power into a related product market and its effects may reduce a rival's profits and overall welfare. It may eventually drive rivals from the market. It is, perhaps, best illustrated by an Australian High Court example, whereby a manufacturer supplied its customers on the condition that the customers use the transporter identified by the manufacturer, even though there were other alternative transporters. That was not acceptable to the Court.

## 7.8 Constructive Refusal to Deal

7.8.1 A constructive refusal to deal is when a supplier offers to do business on such unrealistic terms that it is tantamount to a refusal to deal.<sup>20</sup> Apart from simply declaring its refusal to deal, the supplier may, for example, use delaying tactics, request excessive prices for the input or impose other unreasonable trading conditions. Additionally, margin squeeze<sup>21</sup> is conceived as a "constructive" refusal to deal.

## 7.9 What Complaining Enterprises Can Do (Self-help)

7.9.1 Where staff meets any of the discussed situations in relation to a particular enterprise, the first step should be to advise the enterprise to approach the supplier to discuss the reason for the refusal. Perhaps changes can be made which would satisfy the supplier's requirements.

7.9.2 Trade associations or industry bodies may be able to help by suggesting improvements to marketing strategies or acting as an arbitrator to settle disputes. It may even be more practical for the reseller to shop around for another source of supply. An alternative supplier may be able to offer a better deal.

7.9.3 However, if these approaches are unsuccessful, and the refusal to deal falls into one of the illegal categories, then the business affected can take its own court action or complain to the Authority.

## 8.0 WHAT CAN THE COMPETITION AND CONSUMER AUTHORITY DO?

8.1 When the complaint on the conduct of refusal to deal is lodged with the Authority, the staff should require as much information and any documentary evidence to support an allegation that a dominant supplier has contravened the Act.

8.2 When considering whether to take action, the Authority should give prime importance to promoting competition in the particular market as a whole. It will look at all relevant information, including matters which may not be directly related to the complaint, in order to have a broad understanding of the market.

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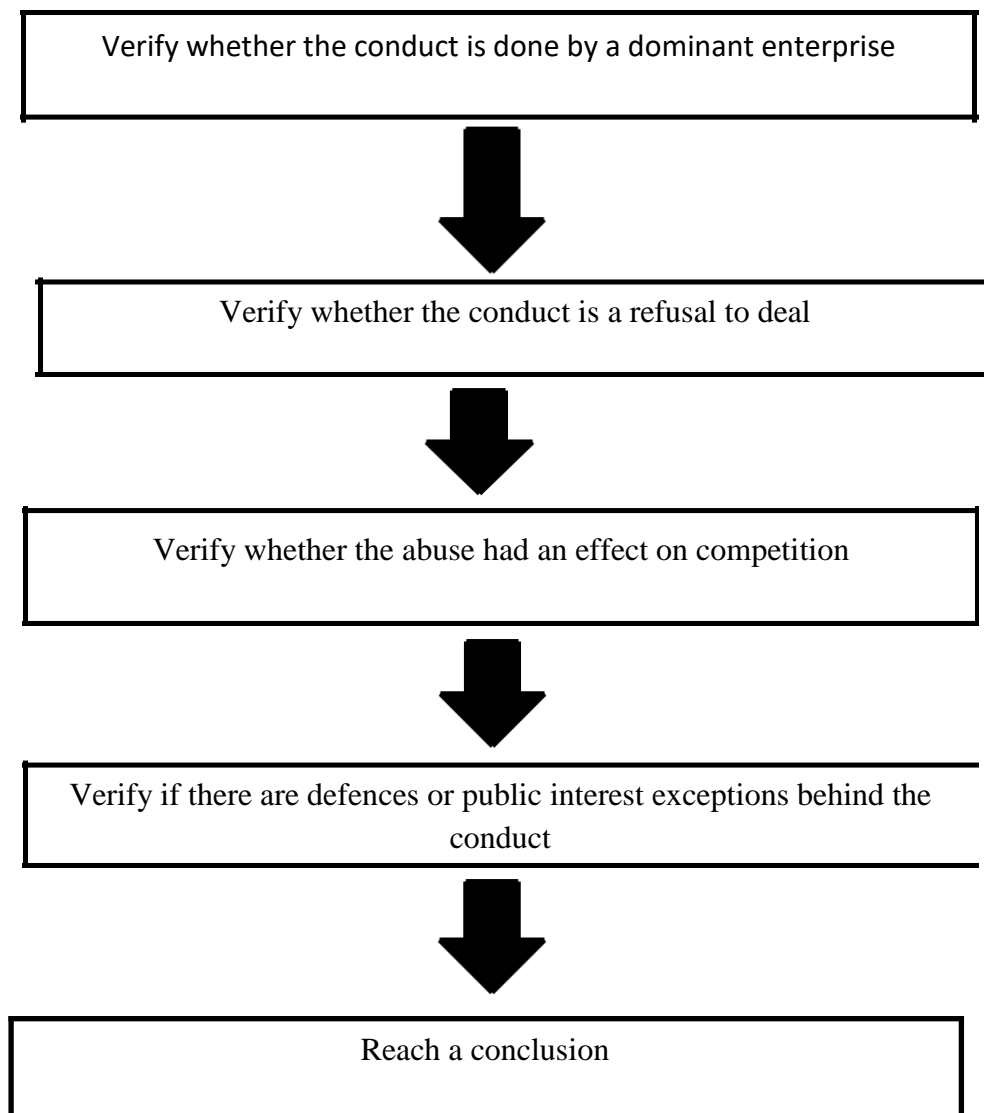
<sup>20</sup>Office of Fair Trading (July 2001), "*The role of market definition in monopoly and dominance inquiries*", Economic Discussion Paper 2.

<sup>21</sup>This is either excessive pricing upstream or predation downstream. It occurs when the margin between the price the vertically-integrated firm charges upstream and the price it charges downstream is less than the costs that an efficient downstream competitor would incur.

- 8.3 The Authority should then decide whether to try to resolve the matter by talking to the supplier to provide enforceable undertakings or by instituting proceedings through the Competition Commission.
- 8.4 The Authority can get orders restoring supply or stopping the illegal conduct.
- 8.5 If the Authority escalates the case to the Commission, the complainant is likely to be required to give evidence.

## 9.0 COMPETITION TEST FOR REFUSAL TO DEAL

- 9.1 It is impossible to give more than an indication of what factors are considered when the Authority looks at the competition effect in the market resulting from the conduct of refusal to deal.
- 9.2 The following gives an indication of how the Authority assesses allegations of refusal to deal.



- 9.3 When considering the effect on competition, these are some of the factors that the Authority Commission or courts may consider:<sup>22</sup>
- 9.3.1 the number, size and distribution of buyers and sellers, and especially the degree of market concentration;
  - 9.3.2 the height of the barriers to entry; that is, the ease of importing products and the ease with which new enterprises can enter and secure a place in the viable market;
  - 9.3.3 the extent to which the products in the market can be characterised by extreme product differentiation and sales promotion;
  - 9.3.4 the character and the extent of the vertical relationships between the customers and suppliers; and
  - 9.3.5 the nature of the arrangement between the enterprises which may restrict their ability to function as independent entities.

## **10.0 ASSESSING WHETHER COMPETITION HAS BEEN SUBSTANTIALLY LESSENE BY REFUSAL TO DEAL**

- 10.1 It is not enough merely to show that an individual business has been severely affected. The wider market for a particular product must be considered. For example, the Authority will have to look at whether there are other alternative suppliers or economically reasonable substitutes to the products which the complainant can access.
- 10.2 When territorial restrictions<sup>23</sup> have been imposed as a condition of supply, there is need to assess whether consumers are severely restricted in their ability to buy a product or its substitutes within the territory.
- 10.3 As a general guide, where there is substantial monopoly or monopsony<sup>24</sup> power, it is more likely that competition will be adversely affected.

## **11.0 DEFENCES FOR REFUSAL TO DEAL**

- 11.1 The Act recognises that a respondent may claim defences behind engaging in a conduct of abuse of dominance.

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<sup>22</sup> Report on the Analysis of Refusal to Deal with a Rival under Unilateral Conduct Laws. Prepared by the Unilateral Conduct Working Group. Presented at the 9th Annual Conference of the ICN, Istanbul, Turkey, April 2010; also available online at <http://www.internationalcompetitionnetwork.org/uploads/library/doc616.pdf>.

<sup>23</sup> The term "territorial restriction" refers to "arrangements under which a wholesaler or retailer agrees not to sell outside of a specified geographical area, or not to sell to customers who reside or have their places of business outside of that area". (**exclusive** territorial arrangements and the antitrust laws, law library, Indiana University.

<sup>24</sup> Monopsony refers to a market situation in which the product or service of several sellers is sought by only one buyer. If there is only one customer for a certain good, that customer has a monopsony in the market for that good.

11.2 Therefore, in terms of section 30(2) of the Act,<sup>25</sup>

*“In determining whether an abuse of dominant position has occurred, the Authority may have regard to whether the agreement or conduct in question -*

- (a) maintains or promotes exports from Botswana or employment in Botswana;*
- (b) advances the strategic or national interest of Botswana in relation to a particular economic activity;*
- (c) provides social benefits which outweigh the effects on competition;*
- (d) occurs within the context of a citizen empowerment initiative of Government, or otherwise enhances the competitiveness of small and medium sized enterprises; or*
- (e) in any way enhances the effectiveness of the Government’s programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation.”*

11.3 It is not enough for an enterprise to cite a defence. The defence must be self-evident in relation to the abusive conduct and must be of such value to society that it outweighs the detriment to competition (see the Authority’s relevant guidelines on Public Interest).

## **12.0 CONCLUSION**

12.1 These Guidelines address a number of key issues that are expected to arise when staff is dealing with the case of refusal to deal. The contents herein are not exhaustive, but provide the minimum indicators of what the Authority should be looking for when dealing with refusal to deal.

12.2 Staff of the Authority or any party using or referring to these Guidelines needs to ensure that they compare the process or conclusions herein with the latest decisions or judgments of the Commission, competition tribunal/s, or superior courts in Botswana or other relevant comparable jurisdictions.

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<sup>25</sup> Competition and Consumer Authority (Botswana), Monopolisation and Abuse of Dominance Guidelines (2013).