



## WORLD COMPETITION DAY

**N**on-Governmental Organisations and consumer movements around the world have set aside December 5 as World Competition Day. There is a campaign around the world to observe December 5 as World Competition Day and increasingly many states observe the day. The latest state to recognise the day was the Republic of Philippines which has adopted December 5 as National Competition Day.

The aim of having such a recognition is to bring focus and attention of society on the vital importance of competition as means to address poverty, empowerment, job creation, technological transfer and creation of wealth amongst other benefits. World Competition Day would bring world-wide focus on competition law and policy.

December 5th was not just randomly chosen, but it coincides with the day on which the Set of Multilateral Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set) was approved by the United Nations General Assembly.

***This year's theme is: "Adverse Impact of Cartels on the Poor".***

There is no doubt the unscrupulous behaviour of cartels has a dire impact on the very vulnerable members of society. What makes the poor vulnerable is often the apparent lack of choices that confront them everyday. Cartel behaviour needs to be identified and be resolutely confronted for the benefit of society. This starts with you!

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# The Role of the Competition Authority of Botswana

Thula Kaira

**T**he Competition Act of Botswana was enacted in December 2009. The Competition Act was the first formal legal instrument enacted in Botswana to systematise competition rules in the economy. While the preamble does give a general purpose of the Act, the details of what the Act does is contained in several operative provisions of the Act, which include the functions of the Competition Authority as provided for under Section 5.

Section 4 of the Act establishes a body to be known as the Competition Authority, which is a body corporate capable of suing and being sued, subject to the provisions of the Act, of performing such acts as bodies corporate may by law perform. The Authority is responsible for the prevention of, and redress for, anti-competitive practices in the economy, and the removal of constraints on the free play of competition in the market. Section 5 proceeds to list seventeen (17) specific functions of the Authority. These seventeen functions can be summarised into two main parts: Enforcement and Advocacy.

For the first part of enforcement, the Authority is given powers to regulate the merging of enterprises and investigate and evaluate alleged contraventions of anti-competitive trade practices. Other enforcement roles include authorisation or refusal of applications for exemptions by enterprises to engage in certain anti-competitive practices that may have perceived or self-evident public interests. The Authority also has powers to refer or prosecute matters it has investigated under the Act to the Competition Commission. The Competition Commission has quasi-judicial powers, in other words it functions as a tribunal on competition related cases.

This process of separation of the investigation from the adjudication process is an important rule of law principle that is in-built in the Competition Act. The focus areas for enforcement under the Act are secret agreements between businesses not to compete against each other otherwise known as cartels. Technically this mischief would be classified as horizontal agreements and will include price-fixing, market allocation, bid-rigging/collusive tendering, etc); vertical agreements (involving players in the production/supply to consumption level, e.g., resale price maintenance, tied-selling or bundling of different products); abuse of dominance or monopolisation (evidenced through excessive pricing, predatory/below-cost pricing, exclusive dealing, etc) and mergers and acquisitions.

The other important aspect of the Authority's mandate is advocacy, which in essence is an educational role to businesses and the public. Further, the Authority fulfils the advisory function by advising government on all issues of competition. Competition Advocacy is aimed at influencing major stakeholders to understand and appreciate the basics of what the Competition Policy and Law is all about as well as understanding the functions of the Authority and the Commission. This role is important because a law that is not properly understood by society and its key constituents is

likely to be misunderstood and potentially be frustrated. It is in the interest of the staff of the Competition Authority to justify why the tax payers should maintain and sustain the institution. In this instance, under section 5 of the Act, the Authority is empowered to, among other things:

- Make rules for, and publicise decisions that increase fair and transparent business practices;
- Hold regular consultations with, and receive advice from, sector regulatory authorities in order to clarify who monitors and controls competition matters relating to those sectors;
- Inform and educate members of the public and persons engaged in trade or commerce, about the powers and functions of the Authority and undertake general studies on the effectiveness of competition in any sector of the economy
- Liaise with and exchange information, knowledge and expertise with authorities entrusted with functions similar to those of the Authority in other countries
- Advise Government on the actual or likely anti-competitive effects of current or proposed policies or legislation and where appropriate, how to avoid those effects; and
- Advise the Minister (of Trade and Industry) on international agreements relevant to competition matters and to this Act.

These functions are not easy task for any one institution - BUT with fortitude, healthy attitude and focus, nothing is impossible to those who believe. Performing functions in a general sense and achieving the objectives of the law on the ground may be two different things. To assist a competition authority to narrow the gap between its purpose as captured on paper and its output as may be expected on the ground by the reasonable by-stander, good leadership, proper staff training, code of conduct and a healthy result-oriented attitude towards our deliverables are essential and achievable pre-requisites.

As a public body funded by the tax payer, the Competition Authority would like to assure the public that we endeavour to perform our role as provided for in the law, but also take into account that our efforts are only a small part of the 'greater effort' of all other Batswana.

*\*Thula Kaira is the Chief Executive Officer of the Competition Authority.*

# What are Cartels and how do we Identify them?



Dr. Mokubung Mokubung

A cartel is essentially an illegal agreement or arrangement between two or more undertakings to limit output with the objective of increasing prices and profits and this has a damaging effect on overall competition. These arrangements include decisions by associations and concerted practices whose effect is to hinder competition. In practice, this is generally done by means of price fixing, bid-rigging and allocation of production quotas or sharing of geographic markets or product markets. A cartel may also be defined in its simplest terms as an agreement between or among undertakings not to compete with each other. Typically, cartel members may agree on various elements such as output levels, wholesale or retail prices, discounts, credit terms, and which customers they will supply, which areas they will supply, or who should win a contract (known as 'bid-rigging'). It should be noted that in some cartels several of the above elements may be present.

## How we Identify Cartels?

Detecting cartels and taking action against their members is one of the Competition Authority's top enforcement priorities under the competition law. However, as cartels often operate secretly, the Authority may have to rely on information provided by others, notably the buyers of the goods or services in its effort to stamp out cartels. This means that the purchasers in the public and the private sector have a particularly important role to play in the detection of cartels and bringing their suspicions to the attention of the Authority.

Methods of identifying cartels can be partitioned into those which are structural and those which are behavioural. A structural approach entails identifying markets with traits thought to be conducive to collusion. For example, it has been shown that cartel formation is more likely to occur in a market with fewer firms, more homogeneous products and more stable demand. In contrast, a behavioural approach involves either observing the means by which firms coordinate or observe the end result of that coordination. The means of coordination is some form of direct communication, for example, this could entail a person who is party to the cartel or an employee who stumbles across evidence or the discovery of documents associated with the cartel coming forward to the Authority in exchange for immunity or leniency. There are a number of signs that a purchaser may use to spot a cartel. Some examples are where suppliers raise prices by the same amount and at around the same time; offer the same discount or have identical discount structures; quote or charge identical or very similar prices or use certain terms or phrases such as: the industry has decided that margins should be increased; we have agreed not to supply in that area; or our competitors will not quote a different price.

## Where are Cartels Found?

Cartels can occur in almost any industry and can involve goods and services at the manufacturing, distribution or retail level. Some sectors are more prone to cartels than others because of their structure or the way in which they operate. Some of the factors that may facilitate cartels include markets where:

- There are fewer competitors- the larger the number of parties involved, the more difficult coordination becomes and therefore if there are fewer parties involved, coordination becomes easier;
- The products have similar characteristics, leaving little scope for competition on quality or service;
- Communication channels between competitors are already established; e.g., through an industry association and
- The industry is suffering from excess capacity or there is a general recession.

## Relevant Law

Cartel practices are an infringement to the Competition Act and the Competition Commission has the power to penalise undertakings that have committed an infringement, in addition to other remedies. Not only will members of the cartel be penalised, but a very strong deterrent message will be sent to other undertakings that may be contemplating cartel activity. The relevant law in the Competition Act is section 25 which states that;

Section 25 of the Competition Act states that an enterprise shall not enter into a horizontal agreement with another enterprise to the extent that such agreement involves any of the following practices:

- (a) directly or indirectly fixing a purchase or selling price or any other trading conditions;
- (b) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services;
- (c) bid rigging, except where the person requesting the bids or tenders is informed of the terms of the agreement before the time that the bids or tenders are made;
- (d) restraints on production or sale, including restraint by quota;
- (e) a concerted practice; or
- (f) a collective denial of access, of an enterprise, to which is an arrangement or association crucial to competition.

## Effects of Cartels

Cartels are a damaging form of anti-competitive activity. Their aim is to increase prices and as a result they directly affect the purchasers of the goods or services concerned, whether for businesses or private individuals. They also have a damaging effect on the wider economy as they remove the incentive for their members to operate efficiently. Therefore, cartels by their very nature eliminate or restrict competition. Companies participating in a cartel produce less and earn higher profits while society and consumers pay the bill thus impoverishing them further. This therefore means that cartels allow undertakings to achieve greater profits for less effort hence for the purchaser of the goods or services this means higher prices, poorer quality, and less or no choice at all. All these contribute to misallocation of resources and reduced consumer welfare. The ultimate consumer will in turn become the main sufferer from cartel agreements, and in the long term the economy suffers through higher inflation.

Of all restrictions of competition, cartels contradict the principle of market economy based on competition, which constitutes the very foundation of the community. For the afore-going reasons, cartels are universally condemned by all competition regimes. Going forward, the formation of cartels where enterprises collude or gang-up (gangsterism) with the aim to illegally rip

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the economic benefits at the expense of consumers and bleeding dry public coffers through conducts such as bid-rigging should be discouraged and penalised through the enforcement of the competition law. While the Competition Authority is always on the lookout for cartels, it relies heavily on credible tip-offs and cooperation with the public. Anonymity and confidentiality are always guaranteed; and this is done for the sake of prospering the economy and protecting consumers from falling into the poverty trap.

*\*Dr Mokubung Mokubung is the Director of Competition and Research Analysis at the Competition Authority.*



Duncan Morotsi

# Investigating and Prosecuting Cartels

Cartel conduct is prohibited under section 25 of the Competition Act and attracts an administrative penalty of 10% of the annual turnover of the offending enterprise. Investigating cartel behaviour requires a lot of resources and technical ability in order to be able to secure a conviction and let alone starting and completing an investigation. Cartels start when enterprises decide not to compete against each but instead conspire to work together against society for the sole purpose of making profit. Cartels can operate openly or secretly, they can be formal or informal, and they can operate nationally or internationally. Investigating cartels can therefore be a very challenging task for a competition agency. It is important for an agency to put in place a very robust investigative regime to have any chance of dismantling cartels in its jurisdiction. In combating international cartels, a good and effective cooperation agreement is a necessity.

Section 35 to section 37 of the Act empowers the Authority to investigate any enterprise after receiving a complaint from any person or to initiate an investigation on its own initiative. An investigation by the Authority is to ascertain the veracity of any complaint. An investigation in terms of the Act can only go on for a period of 12 months, after which there must be a prosecution or none at all. Failure to prosecute after 12 months entitles a person or enterprise under investigation to invoke the presumption of non-referral.

During the investigation of a cartel, many approaches can be adopted, and the most commonly used is conducting a dawn raid. A dawn raid is an unannounced entry and search of the premises of the cartel members under investigation. Cartel members are in constant contact with one another and a raid on one will alert others who will in turn destroy evidence. That is why there must be a simultaneous raid on all identified members.

A dawn raid is the most effective weapon for collecting evidence from and against cartels. A raid on the premises of cartel members can either be with or without a warrant in accordance with section 36 of the Act. Another approach to investigating a cartel is by not letting the members know that they are being investigated, as that may materially prejudice the investigations. An *ex-post* notice of investigation would be issued after the raid as per section

35 (3) of the Act. Any piece of evidence obtained during the investigation is admissible subject to evidential rules of relevance and admissibility.

Where a cartel has gone international, then an agency will have to rely on any cooperation agreement it has with another agency where the conduct is detected. It will be very difficult for any particular agency to conclude the investigation of a cartel operating across its borders without the help of another state competition agency. During the investigations, whether conducted nationally or internationally, any member of a cartel under investigation may avail itself of the leniency policy so as to avoid prosecution or receive a reduction of the financial penalty. A leniency policy comes as a result of a strategy adopted by most competition agencies around the world in order to aid the investigation of cartels. Some members of a cartel or anyone of them may come forward to the agency and confess their or its participation in the prohibited conduct and give all valuable information of the activities of the others. If the information given is valuable enough to lead to a conviction, then total immunity will be granted to the confessor or a partial reduction of the fine considered.

Prosecuting a cartel could be one of the most costly tasks an Authority can undertake because of the amount of evidence likely to be produced. The trial is usually not a short one given the number of cartels (respondents) that could be involved. In most jurisdictions, trials are delayed by lawyers raising technical objections to issues raised in the agency's founding documents. The easiest and quickest cartel prosecution is when one of the conspirators accesses the leniency policy and others enter into a consent agreement with the agency. In the first scenario, the agency enjoys the assistance of an insider and a conviction is guaranteed. In the second scenario, an acknowledgement of guilt is entered and there is no need for a protracted trial. Finally, it should be born in mind that cartels are a danger to competition and the economy generally and therefore their detection and prosecution should be a priority for any agency that wants to prove its effectiveness.

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# Safeguarding the Interests of the Poor in Mergers and Acquisitions



Magdeline Gabaraane

Competition legislation is designed to oversee and ensure that there is a healthy business rivalry amongst players in any given market. A key consideration within such legislation is the regulation of mergers and acquisitions, to prevent the development of market structures that may enhance the ability of firms to abuse their market power, to the detriment of consumers. Mergers and acquisitions take place when two or more independent companies combine their businesses. The process by which a merger and acquisition takes place can either be through purchasing/leasing of shares or assets or any other form of combination that might be deemed appropriate.

In an ideal market economy these types of transactions are encouraged as they are deemed to bring about efficiencies for the businesses, which should ideally translate into better service offerings for the consumers, across all income brackets. The enhancement in service offerings to consumers can come in the form of improved quality, choice and better prices of goods and services. It is important to note that in the event of a prevalence of anti-competitive mergers and acquisitions, it is the poor who would be the most affected.

The wealthy would often not mind paying more for buying a good or service, but for the poor, getting value for money for every thebe spent is more vital. Individuals and families with lower incomes have to spend a bigger proportion of their income on goods and services, and therefore, high prices arising from anti-competitive mergers and acquisitions will have a greater impact on them than other segments of the society.

Botswana, like many other developing countries, is actively pursuing ways and means of alleviating poverty through the development

of policies and legislative instruments, aimed at safeguarding the interests of the underprivileged. Competition policy and legislation is therefore no exception.

The desire to safeguard the interest of the underprivileged can be seen in the process for assessing mergers and acquisitions. In assessing mergers and acquisitions, the Competition Authority is empowered to take into consideration a series of public interest aspects that may have a direct bearing on the poor and their livelihood. The public interest issues touch on considering the ability of the transaction to, amongst others, maintain or promote employment in the sector in which the transaction is occurring. It is an undisputed fact that one of the important approaches to poverty reduction is to provide the underprivileged with productive employment opportunities and safeguard against possible loss of employment. A merger that results in removal of an existing business and the formation of one entity, may result in loss of employment, as the acquiring business rationalises job positions in an effort to weed out the duplication.

Similarly, the competition legislation empowers the Competition Authority to take into consideration the extent to which a proposed merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen-owned small and medium sized enterprises, which are ventures closest to the livelihood of the poor. A transaction may result in a foreign owned business acquiring a citizen owned business, thereby limiting the prospects of citizen empowerment. Similarly, a merger or acquisition may be such that it creates a barrier for citizen-owned small and medium sized enterprises to enter and expand in a particular market.

An equally important attribute of mergers and acquisitions, in positively affecting the lives of the poor, is in instances where the business being bought is failing (under financial distress) and therefore likely to be liquidated if not taken over by another business. In this instance, the acquisition of such a business would ensure continuity in the provision of services (or even an improvement in the service offering) and most importantly safeguard the loss of employment, which has a detrimental effect on worsening poverty.

In a nutshell, consumers and/or suppliers benefit from mergers, in many instances, and the type of efficiency benefits that may flow from mergers and acquisitions are no doubt plenty, most of which directly touch on the lives of the poor. These include but are not limited to the following:

- i. Efficiency benefits to consumers, if the gains to the business are passed on in the form of lower prices, higher quality or new products and services to consumers;
- ii. Ensuring continuity in the provision of a good or service, particularly in the case of a failing firm;
- iii. Safeguarding against the loss of employment; and
- iv. Promoting competition in the market, leading to the associated benefits to consumers.

Competition law is therefore vital for developing economies as it can have a positive impact on the alleviation of poverty.

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# Competition Day Say No to Cartels!

Gideon Nkala



A few weeks ago during a radio interview on DUMA FM I almost created a stir, when discussing the mandate of the Competition Authority I said the Authority is charged with the responsibility to identify and stop cartel behaviour in Botswana's business space.

"Is the word 'cartel' really appropriate? Surely in Botswana we have not descended to that level," protested the radio presenter who was obviously taken aback and unnerved by the use of a word he found a misnomer in Botswana's business environment. Today, December 5, Non- governmental Organisations across the globe are celebrating World Competition Day under the theme, "Adverse Impact of Cartels on the Poor".

To many of us, the mention of a cartel transports us to the Box Office realities where we see the Colombian, Mexican and other South American drug cartels that infiltrate, paralyse law enforcement through callous and corrupt means imaginable and visit violence upon anyone who stands on their way.

Cartels, whether in drugs or in any other industry, are motivated by greed and the desire to reduce competition. Without competition, cartels steal and rob from the public or consumers. Some studies say the median price index achieved by cartels over a long period could be as high as 25 percent. Differently put, in an area where the market is dominated by cartels there is a high likely-hood that the public could be losing up to 25 percent. Considering that this is only a median the burden of overly high prices could be much higher and this has grave consequences for the poor.

Adam Smith is credited with an observation that I find very apt on this occasion. Smith found it intriguing that businesses trading in the same market seldom have any merriment to share between themselves without the meeting ending up in a conspiracy against the public, often in contrivance to raise prices against the public. Competition literature is replete with instances where competing business firms collude to enter into an agreement to fix prices, rig tenders, allocate markets in order to maximise profits. This typifies the conduct of cartels.

Competition regulators are often girded with commensurate legal armour to weed out any cartel behaviour. In pursuit of this goal, identifying and breaking up of cartels is critical.

During the radio discussion alluded to above, the radio journalist wanted to know whether there is cartel activity in Botswana. Yes, there is. The Competition Authority has investigated a plethora of cases involving cartel conduct, many of these will now be coming before the Competition Commission. Even before the establishment of the Competition Commission and the Competition Authority the Botswana government had commissioned an economic mapping survey conducted by BIDPA which study informed the Competition Policy of 2005. This study identified market dominance in sectors such as meat, cement, sugar, beverages, mining and motor vehicle distribution. The survey opined that firms in these sectors enjoy substantial market power. Suffice to add that studies show that cartels predominately occur where there are a limited number of firms trading in the same or fairly homogenous products.

Every year around the world the public and consumers lose trillions of pula to business cartels and this cannot be allowed to go on. This year, we in Botswana should add our voice to the global clarion call against harmful effects of cartels.

On the occasion to mark Competition Day as founded by NGOs, we urge Botswana to help amplify the benefits of fair markets while at the same time highlighting the harmful effects of anti-competitive conduct. In the era of economic recession, budgets cuts and austerity measures, the cartel overcharges burden should stick out like a sore thumb.

We at the Competition Authority urge Botswana to be vigilant against cartels. Most importantly we implore civil society, media, prosecutors and legislators to take a tough stance that will lead to the deterrence of cartels.

The Competition Act which became operational in Botswana in October 2011 explicitly forbids price fixing (indirect or direct), dividing markets by allocating customers, suppliers or regions, bid rigging, production restraints, collective denial to market entry.

\*This article was first published in the Monitor Newspaper.

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