



**GUIDELINES ON THE APPLICATION OF PUBLIC
INTEREST UNDER THE COMPETITION ACT**

1. INTRODUCTION

1.1 The Botswana Competition Act¹ was enacted in 2009 with the specific aim of promoting and maintaining fair competition in the economy of Botswana. However, as a developing country, Botswana is faced with economic and social challenges common to many other developing countries, which challenges include unemployment, small markets and low levels of domestic and foreign investment. Not only does its Competition Act aim to achieve maximum efficiency in the maintenance of competitive markets but in addition there are public interest considerations incorporated in the Act. Public interest implies general social welfare.² According to Justice Felix Frankfurter of the US Supreme Court, “the idea of public interest is a vague, impalpable but all controlling consideration.”³ It is thus distinguishable from self-interest or individual, sectional, class or group interest. Public interest in competition law involves the balancing of competitiveness and the development of a country.

1.2 These Guidelines seek to discuss the public interest objectives of the Competition Act and to give more guidance to the Authority on how to apply the public interest provisions in the Act by reference to how such provisions have been interpreted and dealt with in other jurisdictions. Firstly, the purpose and objectives of the Competition Act will be discussed including the public interest objectives, followed by a comparative analysis of the manner in which Australia, Mauritius and South Africa have interpreted and dealt with public interest provisions within their respective legislations. The Guidelines conclude by discussing how the provisions relating to public interest in the Botswana Competition Act should be interpreted and applied.

2. WHAT IS PUBLIC INTEREST?

2.1 When determining a question of public interest under the Act, be it in granting of exemptions, assessing the abuse of dominance or mergers, the Authority or Commission should look at the approach already tried and tested by other jurisdictions more especially the Australian Competition Tribunal (ACompT). The test is;

¹ Act no. 17 of 2009

² See http://www.cuts-ccier.org/pdf/Dimensions_of_Competition_Policy_and_Law.pdf

³ Quoted in Ramaiya, A. – ‘Guide to the Companies Act’ – Wadhwa and Company, Agra, India, 1992.

“Whether, the proposed conduct/ arrangement is likely to result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.”⁴

- 2.2 According to the ACompT, the public detriment of the lessening of competition should not be the only detriment considered, but there are other detriments that are to be weighed in the balance when a judgement is made. Certain things may be relied upon as being beneficial but may, on the contrary be detrimental to the society. Such detrimental effects must be considered in order to determine the extent of its beneficial effects.⁵
- 2.3 When applying the test, the Authority or Commission should take into account all public detriments likely to result from the relevant conduct in to account either by looking at the detriment side of the equation or when assessing the extent of the benefits.

3. WHAT IS PUBLIC BENEFIT?

- 3.1 In the case of **Queensland Cooperative-Milling Association(Ltd)** (1976), ATPR 40-012, at page 17 and 242, ACompT defined public benefit to be:

“anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements the achievement of the economic goals of efficiency and progress. Plainly the assessment of efficiency and progress must be from the perspective of the society as a whole: the best use of society’s resources. We bear in mind that efficiency as a concept that is usually taken to encompass “progress”; and that commonly efficiency is said to encompass allocative efficiency, productive efficiency and dynamic efficiency”.

- 3.2 In **VFF Chicken Meat Growers**, ACompT took a broader view of what is a benefit, by stating that: “public benefits have been taken to include anything which increases the well-being of members of society... Particular emphasis is placed on positive consequences for the achievement for the goal of maximising economic efficiency.”

⁴ See: ACCC Guide on Authorisations (2010)

⁵ See: Media Council Case

4. WHAT IS “the public”?

4.1 In **VFF Chicken Meat Growers**, the ACompT stated that:

“The tribunal previously has adopted a definition of “the public” which would include all members of the society in all their roles- for example as investors, shareholders or workers as well as consumers and also people incidentally affected by market outcomes. Moreover, it also has taken the view that by and large, there should be no difference in the weight attached to the benefits irrespective of who are the beneficiaries.”

4.2 In **Qantas Airways Ltd** (2004), ACompT, 9 at page 51, the tribunal stated that the question of whether a benefit is a public benefit should be directed towards:

- a) the extent to which the benefit has an impact on the members of the community, that is society;
- b) the extent to which it falls into the category of anything of value to the community generally;
- c) the weight given to that benefit, having regard to its nature, characterisation and the identity of the beneficiaries; and
- d) the number and identity of the proposed beneficiaries.

5. WHAT IS PUBLIC DETRIMENT?

5.1 Public detriment is not defined in our Act, but the definition given by the ACompT in the case of **Re VFF Chicken Meat Growers**⁶ case is apposite for the purpose of our assessment. The ACompT defined it as:

“any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.”

5.2 It is, therefore, understood that public detriment is essentially the opposite of public benefit.

⁶ Supra.

6. PUBLIC INTEREST OBJECTIVES IN THE COMPETITION ACT

6.1 There are certain instances under the Competition Act where even though an enterprise is engaged in practices that are anticompetitive, the Competition and Consumer Authority may allow the enterprise to carry on with such practices or allow the provision in the arrangement to be made as an exception. In these particular instances, the practice is allowed to continue on grounds of public interest that are outlined in the Act. The provisions promoting public interest which are expressly incorporated in the Competition Act are under sections 30(2), 32(1) and section 59(2) respectively and they relate to abuse of dominance, exemptions and mergers.

6.2 Abuse of Dominance

6.2.1 The first provision in the Competition Act where public interest considerations have been outlined is with regard to abuse of dominance. The Act does not define what an abuse of dominant position is. Nonetheless, Regulation 4 of the Competition Regulations prescribes the threshold for determining a dominant position as where the enterprise supplies or acquires 25% of the goods or services in that market or where three or fewer enterprises supply or acquire at least 50% of the goods or services in the market. What exactly amounts to an abuse of such dominance will be gathered from case law.

6.2.2 Section 30 of the Act states that the Authority, in determining whether an abuse of dominant position has occurred, 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 interests 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 other 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.

6.2.3 These public interest objectives are the same as some of those under the exemption provision.

6.3 Exemptions

6.3.1 The exemption provision under section 32 of the Competition Act permits an enterprise to apply to the Authority to have agreements it has entered into, falling under the prohibitions in section 27, exempted. On receipt of such application the Authority would carry out an investigation to determine whether the enterprise is involved in a practice that prevents or substantially lessens competition as stipulated in section 27(1). If indeed the enterprise is engaged in such prohibited practices, the Authority will determine if on the facts, it can reasonably be expected that there will be offsetting benefits for the public directly attributable to the agreement, and if so, the Authority will grant a time bound exemption after consulting interested parties.⁷

6.3.2 The effect of this is that the conduct of an enterprise that would ordinarily be prohibited by the Competition Act in that it amounts to a horizontal agreement or vertical agreement other than those specifically described in sections 25 and 26(1) of the Act, would not be prohibited. The offsetting benefits for the public must be such that they amount to at least one of the specific objectives listed under section 32(1). These objectives are that the agreement must:

- a) maintain lower prices, higher quality or greater choice for consumers;

⁷ Section 34 of the Competition Act

- b) promote or maintain the efficient production, distribution or provision of goods and services;
- c) promote technical or economic progress in the production, distribution or provision of goods or services;
- d) maintain or promote exports from Botswana or employment in Botswana;
- e) advance the strategic or national interest of Botswana in relation to a particular economic activity;
- f) provide social benefits which outweigh the effect of competition;
- g) occur within the context of a citizen empowerment initiative of Government; or
- h) enhance the effectiveness of the Government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation.

6.3.3 However, the Authority will only grant the exemption if the prevention or lessening of competition is proportionate to the benefits for the public and does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the products or services in question.

6.4 Mergers

6.4.1 The last part of the Act in which public interest considerations feature is with respect to mergers. For purposes of the Act, 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.⁸ The public interest considerations are stated under section 59(2) of the Act. This provision requires the Authority, in the assessment of a proposed merger, to determine whether the merger would be likely to prevent or substantially lessen competition or to restrict trade or to endanger the continuity of supplies or services or whether the merger would be likely to result in any

⁸ Section 52 of the Competition Act

enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in any market. The provision ⁹ further states that the Authority may, in addition, consider any factor which the Authority considers bears upon the broader public interest in the proposed merger including the extent to which:

- a) 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 the market;
- b) the merger may improve, or prevent a decline in the production or distribution of goods or the provision of services;
- c) the merger may promote technical or economic progress, having regard to Botswana's development needs;
- d) the proposed merger would be likely to affect a particular industrial sector or region;
- e) the proposed merger would maintain or promote exports or employment;
- f) the merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen-owned small and medium sized enterprises; or
- g) the merger may affect the ability of national industries to compete in international markets.

6.4.2 These public interest objectives are more or less the same as those relating to exemptions and abuse of dominance. There is an echoing of the promotion of efficient production, distribution or provision of goods or services, promotion of technical or economic progress in the production distribution or provision of goods and services, the maintenance or promotion of exports and employment and the like.

⁹ Section 52(2) of the Act.

6.5 The pivotal question in these Guidelines however is how these public interest objectives in the Competition Act should be interpreted and applied in practice. Is the Competition and Consumer Authority compelled to apply these objectives in every case relating to abuse of dominance, exemptions, and mergers? Or does the Authority have the discretion on whether to consider these objectives? As there are no decided cases that have dealt with any public interest issue under abuse of dominance, mergers or exemptions in our jurisdiction, it is necessary to look into how other jurisdictions have dealt with this issue.

7. INTERPRETATION AND APPLICATION OF THE PUBLIC INTEREST EXCEPTIONS IN THE COMPETITION ACT

7.1 When Public Interest will be Considered

7.1.1 Section 30(2) relating to public interest considerations in the determination of abuse of dominance cases does not mandatorily require the Authority at all times to consider issues of public interest. The provision states that “...*the Authority may have regard to whether the agreement or conduct in question...*” furthers any of the listed public interest objectives. Had the Legislature intended to make it compulsory, the word “**shall**”, as in the case of Mauritius or the word “**must**”, as in the case of South Africa, would have been used. The same applies to section 59(2) relating to mergers. It states that the Authority **may** consider any factor which the Authority considers bears upon the broader public interest in the proposed merger, giving the Authority the discretion as to whether to consider the public interest objectives or not. This is quite the opposite of South African Competition Legislation in which consideration of the public interest impact of a proposed merger transaction is required in all cases. Section 59(2) of the Act goes on to give a list of these public interest issues that may be considered in assessing a merger but the list is not exhaustive. The Authority may consider any other issue it considers to be of the broader public interest.

7.1.2 According to section 32 of the Act, the Authority will only grant an exemption if it could reasonably be expected that there will be offsetting benefits for the public directly attributable to the agreement, if one or more of the public interest objectives listed in that section exists. After looking into and investigating these public interest issues, the Authority would then exercise its discretion to refuse or grant the exemption. The wording of this provision is similar to that of the South African Competition Act which states that the Competition Commission **may** grant an exemption only if... the agreement or practice concerned, or category of agreements or practices concerned, contributes to any of the public interest objectives.

7.2 Practical Application of Public Interest

7.2.1 Public interest objectives of developing countries are very similar since they share similar social and economic problems. Therefore the way other developing countries have interpreted and applied their provisions relating to public interest can be used as a guide on how Botswana can apply its own provisions. The Botswana Competition Act and the South African Competition Act share similar public interest objectives. In both Acts, the following public interest issues are considered:

- a) the promotion of exports;
- b) the promotion of the ability of small business enterprises to become competitive;
- c) the effects of a proposed merger on a particular industrial sector or region;
- d) the effects of a proposed merger on employment; and
- e) the ability of national industries to compete in international markets.

7.2.2 The effect of a proposed merger on employment has received a lot of attention and prominence in South Africa. The *Metropolitan Holdings Limited and Momentum Group Limited*¹⁰ case, gave rise to this public interest consideration. In this case the Tribunal conditionally approved the acquisition of 100% of the issued ordinary share capital of Momentum by Metropolitan. The Tribunal first assessed the competitive effects and concluded that the merger was unlikely to substantially prevent or lessen competition in any relevant potential market. However, the merging parties submitted that the merger may lead to up to approximately 1000 job losses as a result of redundancies and the need to improve efficiencies in the post-merger entity. The Tribunal stated that *it must be proven that employment loss is of a considerable magnitude and that short term prospects of re-employment for a substantial portion of the affected class are limited*. This would be a useful guide in considering employment concerns as a public interest issue for the Authority. If this is raised on the facts of a particular case then *prima facie* this would be presumed to have a substantial adverse effect on the public interest and an evidential burden would then shift to the merging parties to justify it before a final conclusion can be made. In this case the merging parties failed to discharge such burden. However, the Tribunal approved the merger but subject to a limited moratorium on retrenchments for two years.¹¹

7.2.3 The *Iscor Limited and Saldhana Steel (Pty) Limited*¹² merger sheds light on the South African Tribunal's views on how to assess mergers that may impact on a "particular sector or region". The merger involved the acquisition by Iscor of the remaining 50% shares owned by the Industrial Development Corporation in Saldhana Steel. Iscor was a key player in steel production in South Africa. Saldhana was a high-tech mill that was to supply the export market from the port of Saldhana. The acquisition entailed a change from joint to sole control by the acquiring firm. The Tribunal evaluated the impact of the acquisition on public interest. They found that if the merger was not approved, it would have adverse effects on public interest. The impact of a prohibition of the acquisition would have had calamitous consequences for the Saldhana Bay region given that most

¹⁰Case 41/LM/Jul10.

¹¹Also see the cases of Walmart Stores Inc and Massmart Holdings Ltd, Stanbic-Nedcor Merger case and the Tongaat Hulett and Transvaal Sugar case.

¹²Case no: 67/LM/Dec01.

economic activity originated in the steel mill. The evidence revealed that the Saldhana Steel plant was a vital part of the town's economic life and its closure would not only affect its employees but also all the firms and individuals whose livelihood depended on its functioning. Looking at the small size of the region and its dependence on a small number of industries, the effect of the plant closure, according to the Tribunal would be devastating. In addition, the Tribunal noted the firm's contribution to community development through its social programmes that contributed to the upliftment of the region. This case can be used as a guide on how the Competition and Consumer Authority can interpret the public interest provision relating to the effects of a proposed merger on a particular industrial sector or region.

7.2.4 With regard to the provision relating to the promotion of the ability of small business enterprises to become competitive, the *Ring Pharmacies Case* is a good reference. In this case a group of 33 individually owned pharmacies, which formed an association called Ring Pharmacies, were small and medium sized enterprises (SMEs). Ring Pharmacies had been engaging in joint market initiatives to assist them to compete with pharmacy chains. The said pharmacies applied for an exemption so that they could continue to conduct joint marketing initiatives to enable them to compete with established chains of pharmacies. The exemption was granted for 5 years to enable these SMEs to compete with large chains. The decision lends support to SMEs to become competitive.¹³

7.2.5 It can be seen from the above that foreign jurisdictions that are closely linked to Botswana have applied public interest exceptions in different areas of competition law to even allow what would otherwise be anti-competitive conduct to continue because of the benefits to society. These cases offer useful guidance to Botswana on how public interest can be applied in a controllable and justifiable manner.

¹³See also Bernina-Saskor Case and Pioneer Foods-SAD Holdings

8. CONCLUSION

8.1 It has been demonstrated that the only way in which public interest exceptions can be applied in Botswana is with reference to decided cases in comparable jurisdictions with similar legislation and similar legal systems to Botswana. These Guidelines do not discuss every public interest exception that is provided in the Competition Act, but provides useful guidance on the possible interpretation and application of the most prominent exceptions of this nature.

8.2 As a general guide, the Authority will adopt, the test from the Australian experience which mainly focuses on whether there is a likelihood that the proposed conduct or arrangement will result in a public benefit that outweighs the likely public detriment constituted by any lessening of competition.