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**Thula Kaira, CEO Competition Authority, Speaking Notes at the Workshop for the Business Community on the Implementation of the Cartel Leniency Policy, Lansmore Hotel, Gaborone on Friday, 29th November 2013.**

Distinguished Captains of Industry, Ladies and Gentlemen,

Ke a dumedisa ka Pula!

We thank the Lord for His grace as He has showered us graciously with His rains and we pray that this shall continue in order for you and I to continue exploiting the vast opportunities that come with this free gift from above.

We are indebted to your presence here as we know just how busy you are and we wish to assure that we do not take your presence here for granted - neither shall we abuse your generous gesture to listen to us. We thought it prudent to engage with yourselves today to enlighten each other on a new development that is coming out of our competition implementation system. Most of you may already be aware that competition authorities the world-over have been focusing their energies at combating the economic white-collar crime of cartel conduct that has resulted in some corporate executives facing jail sentences in the United States, Canada and the United Kingdom. The Organisation for Economic Co-operation and Development (OECD) has labelled cartel behaviour as among ‘the most egregious violations of competition law’[[1]](#footnote-1). There is however increasing international voices in the competition and pressure-group worlds that are pushing to criminalise cartel conduct. More than 20 countries have now adopted a form of criminalisation.[[2]](#footnote-2)

What is the status in Botswana?

In Botswana, cartel conduct is not a criminal offence under the current Competition Act of 2009, just as it is not in any of the countries in the SACU and SADC region. Cartel offences in Botswana are punishable only by a fine to the enterprises concerned, but the fine can be as high as 10% based on the turnover of the enterprise for a period of three (3) years during the currency of the conduct [section 43(4) of the Act]. It is a well-documented fact from other jurisdictions that cartel members may reap huge profits from the conduct and a 10% fine is something that a culprit enterprise would readily pay, there is nowadays the reputational capital (otherwise also referred to as ‘Goodwill’) that an enterprise may lose. The personal reputation of the corporate executives involved in white collar crime is also at stake.

Why should we be concerned about cartels, you may ask?

Dealing with cartel conduct such as price fixing, bid-rigging and market allocation is good business. It is good business because once a cartel is broken, the market will, hopefully, retain to its competitive nature and retain benefits to customers and consumers in the form of greater choice, availability of products at competitive quality, quantities and price. This market scenario is worth protecting through both policy and law. Extra profits made by cartel members are not ploughed back into society as once a customer and a consumer have been overcharged and/or provided with a less favourable economic good, they have been robbed of the welfare gain they should have had at a particular time. While class action or civil damage suits exist in some countries, it is not that easy in our part of the world.

While businesses participating in a cartel may have some short-term benefits, it is not a sustainable competitive advantage because:

1. A cartel is not a sustainable business practice as it would reach a point when an enterprise’s competitive advantage in the market is lost and its market exit is then imminent;
2. There is always a cheater in a cartel who double-deals and eventually the cartel collapses, leading to cut-throat competition and price-wars, which again are not sustainable and affect business liquidity in the medium to long-term;
3. Competition authorities the world over are increasingly unearthing cartels which result in huge fines and of course, leads to an enterprise facing angry customers and consumers who are hard to retain for repeat-sales/purchases.

You surely share our concern at the possible existence of cartels in your respective economic sectors that may be leading to you paying higher prices for your inputs and thus raising your operational costs. You must be worried when there is a possible supplier nearby who refuses to supply you with a key input and directs you to buy from someone who is far away, thus raising your logistical costs. This is our concern as well.

What is the way forward?

We cannot think of any way forward other than appealing to the business community to resist falling for the heresy that there is heaven in the cartel ring. Colluding on what prices or tariffs to charge, dividing markets to keep away from the dynamics of competition or engaging in bid-rigging and win tenders at inflated prices is bad business strategy. Our second appeal is that detecting cartel conduct is a difficult task and requires the cooperation of business. Your cooperation is indispensable to keep Botswana cartel-free.

How can you cooperate in the fight against cartels?

Being a whistle-blower is a very good starting point. We will give you the whistle and teach you how to blow it! The Competition Authority in Botswana as well as the Competition Commission have developed a cartel leniency policy that is aimed at facilitating a process of whistle-blowers disclosing the existence of a cartel in exchange of partial or full immunity. This is why we are here, to share with you about the nomenclature of cartel conduct under the Competition Act in Botswana, and the leniency policy that may benefit you as a business fed-up with the clandestine operations in the abyss of cartel.

We are hopeful that as we interact during the course of the day, we shall enrich each other and leave this place capacitated to add greater value to the well-being of Batswana.

I thank you for your attention.

PULA!

1. OECD, *Recommendation of the OECD Council Concerning Effective Action Against Hard Core*

*Cartels* (1988). [↑](#footnote-ref-1)
2. Caron Beaton-Wells, Melbourne Law School, University of Melbourne, *Cartel Criminalisation as Cultural Change* - A report from findings of a survey of the Australian public, Presentation at ICN Cartels Workshop

5 October 2010, <http://www.law.unimelb.edu.au/files/dmfile/ICNCartelWorkshopPlenary10510101SLIDES2.pdf> [↑](#footnote-ref-2)