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**UNCTAD**



# VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY: **BOTSWANA**



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## **ACRONYMS/ABBREVIATIONS**

BITC	Botswana Investment and Trade Centre
CAB	Competition Authority of Botswana
CCA	Competition and Consumer Authority
CEO	Chief Executive Officer
CIPA	Companies and Intellectual Property Authority
EDD	Economic Diversification Drive
ESP	Economic Stimulus Programme
FCA	Fair Competition Act
FTC	Federal Trade Commission
GDP	gross domestic product
ICT	information and communications technology
IMF	International Monetary Fund
MITI	Ministry of Investment Trade and Industry
S and P	Standard and Poor
SACU	Southern African Customs Union
SMME	small, medium and micro enterprises
UNCTAD	United Nations Conference on Trade and Development
CCPA	Zambian Competition and Consumer Protection Act

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## 1. Foundations and history of competition policy in Botswana

### 1.1 Introduction

This report is based on information gathered during a fact-finding mission to Botswana carried out in October 2017 and current information available from various sources, including Government Ministry websites. Legislative developments since the time of information collection have been considered in finalizing the report.

### 1.2 Historical, social, political and economic context

#### 1.2.1 History and social context

Botswana, formerly known as Bechuanaland, is a landlocked country in Southern Africa, sharing borders with Zambia in the north, Zimbabwe in the north-east, Namibia in the west and South Africa in the south and south-east. Its main seaport access is through South Africa. Botswana covers an area of 582, 000 square kilometres with a relatively small population of about 2,230,905 persons<sup>1</sup> (2016). Though sparsely populated, the Government of Botswana has committed resources to protect and preserve some of the largest areas of Africa's wilderness.

Figure 1 shows the geographic position of Botswana and its main cities and towns.

#### 1.2.2 Political context

Botswana was a British protectorate until 1966 when Seretse Khama became the first president of independent Botswana.

Botswana stands out for its political stability and good governance, represents Africa's longest running multi-party democracy, and enjoys a good human rights record.<sup>2</sup> It has enjoyed stability since independence. Botswana is a multiparty republic, with elections held every five years. Its parliament consists of two houses – the National Assembly and the House of Chiefs. Appointed by parliament, the president is the Head of State and of Government, serving a maximum of two five-year terms in office. As of 1 April 2018, the current president is Mokgweetsi Eric Keabetswe Masisi.

#### 1.2.3 Economic context

Most of Botswana has a semi-arid climate, with seasonal rains from November to March, which vary from year to year presenting high levels of unreliability. To mitigate water scarcity, the Government has designed ways of managing water preservation and storage into drainage basins or catchments areas. There are six basins that feed into water dams for the population to use. Seasonal rivers are also drained into basins for example the Mkgadikgadi pans, where rivers such as the Moseitse, Nata and Boteti flow into.

The unreliability of rains and the landlocked state of Botswana leads to high reliability on imports of food and other goods from or through South Africa.<sup>3</sup>

**Figure 1. Map of Botswana**



Source: <http://www.vaganto.be/botswana/map2.php>.

<sup>a</sup> Reconsideration of a rejected merger by CCA pursuant to section 55 of the Competition Bill.

However, Botswana has recorded remarkable growth from the time it gained independence. It has emerged as one of the fastest-growing economies in the world, averaging 5 per cent per annum in the last decade.<sup>4</sup> This performance has been facilitated by sound macroeconomic management of mineral resources, mainly diamonds and good governance.

A running issue that has been pointed out in various reports<sup>5</sup> is the need to diversify the economy from dependence on a natural resource whose proceeds are dictated by the fluctuations in the international market, a fact that has been witnessed in Botswana in the years past. The Government has also recognized the need to diversify the economy to non-mining activities as a critical issue for consideration by policymakers.<sup>6</sup>

Botswanan diamond exports shrank in 2015 due to a fall in demand, coupled with supply-side factors such as persistent electricity and water shortages. As the world economy registers a sluggish recovery, especially in developed countries, Botswana's economic outlook continues to be negatively impacted.

In terms of GDP, 2016/2017 recorded a narrower contraction of 0.7 per cent of GDP in comparison with a 4.7 per cent fall in the 2015/2016 fiscal year. Revenues are pegged to two sources, mining 40 per cent and over 25 per cent from the Southern African Customs Union (SACU) revenue-sharing arrangement. Revenues registered an increase of 0.8 per cent of GDP 2016/2017, and reached 31.9 per cent of GDP, although they are still low compared with the historical average of around 37 per cent.<sup>7</sup> Expenditures declined by 2.7 per cent of GDP compared with the last fiscal year, driven by anticipated lower GDP growth, which, however, turned out higher than expected.

The former president, His Excellency Lieutenant General, Mr. Seretse Khama Ian Khama, in his State of the Nation Address to the eleventh Parliament on 6 November 2017, noted that the economy of Botswana suffered a recession, through which the economy has started to experience recovery in domestic growth, which according to current medium-term projections is expected to continue. The country's economic growth of 4.3 per cent in 2016 was driven by non-mining sectors; including trade, hotels and restaurants, with an increase of 13.5 per cent and transport and communications industries, registering an increase of 5.6 per cent in the same period.

Vision 2036 is a road map employed by the Government of Botswana to meet its twenty-first century objectives. At its core, the Vision recognizes that the outstanding economic, social, environmental and governance issues of Botswana are interconnected. Vision 2036 has not been conceived as solely a government agenda, it is rather a blueprint for national progress that requires participation and partnership from all individuals and sectors of society.

Botswana had a comparatively low inflation rate in 2017, averaging 3.5 per cent annually, which is expected to remain within the lower end of the Bank of Botswana's medium-term objective range of 3–6 per cent.<sup>8</sup>

The exchange rate policy of Botswana continues to support the competitiveness of local industries in both domestic and international markets by maintaining the stability of the pula against a basket of leading currencies. As at the end of August 2017, foreign exchange reserves were valued at 76.6 billion pula, which is equivalent to 17 months of import cover. With regard to the national budget, the overall fiscal balance for the 2016/2017 financial year was in surplus of 1.12 billion pula, instead of the 1.10 billion pula deficit that had been projected.<sup>9</sup>

Botswana implements the Economic Diversification Drive (EDD), which over the past six years (short-term component of EDD) has resulted in a substantial increase in Government procurement from local manufacturers and service providers, amounting to a cumulative total expenditure of 13.93 billion pula as of March 2017, which constitutes 52 per cent of total procurement for the period, focus being on the leather, dairy and textiles subsectors.

Further, Botswana is engaged in investment promotion strategy through the Botswana Investment and Trade Centre (BITC), established in 2012. Ten billion pula worth of foreign and domestic capital investment has been recorded, and 8,831 jobs have been created as a result.<sup>10</sup> The business expansion investment level was at 618 million pula in 2016/2017, compared with 377 million pula recorded in 2015/2016. In the area of export promotion, the Botswana Export Development programme is engaged in capacity-building programmes for companies in export businesses in the area of marketing, quality management and productivity. The Government recognizes the need to create an enabling environment for business through various interventions.

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While upholding its ranking as number 1 in the Africa Investment Index,<sup>11</sup> the Government has made efforts to raise the ease of doing business index ranking in order to accrue the associated benefits from such recognition. Such efforts include a doing business reforms road map, including the establishment of a regulatory impact assessment strategy and an uplift of the tender compliance certification process, setting up an ICT one-stop service centre to improve service delivery, review of both the companies Act and the registration of business names Act to include online services (registration) in order to hasten the process and make it faster for businesses.

During the 2017 State of the Nation Address, then President Ian Khama stated:

*“The Competition Authority has empowered citizens and enhanced the competitiveness of local companies by overseeing merger applications involving foreign investors. The Authority further imposed conditions for merging enterprises to commit to local sourcing and in some cases, build the capacity of the suppliers to be able to meet the required standards to supply.”*<sup>12</sup>

The statement demonstrates political will and support to the Competition Authority and also connotes appreciation of the work the Competition does in the economy of Botswana.

### **1.3 Evolution of competition law and policy in Botswana**

Botswana has had an open economy since independence in 1966 and has consistently sought to strengthen the functioning of markets. In pursuit of this goal, the Government has been developing and implementing policies and programmes for promoting the development of a dynamic private sector. Botswana is one of the African countries that were not put under the IMF and World Bank structural adjustment programmes of the 80s and 90s that were aimed at addressing price distortions and introducing liberalization of markets. However, according to a 1997 study by the Botswana Institute for Development Policy Analysis (BIDPA), Botswana was engaged in policies to liberalize its market.<sup>13</sup> The study addressed the liberalization of two important sectors to Botswana: maize, an import product, and beef, which captures the export market.

Beginning in 1999, Botswana started the process of looking at business conditions and thinking of

how regulatory measures can be put forward to ensure a level playing field for business to operate. An economic mapping report<sup>14</sup> was commissioned to look at the market structure and how businesses conduct themselves as they do business. A legislative inventory report was also initiated to look at laws that have a bearing on competition and determine whether there are provisions in such laws that can be considered anticompetitive and harmful to consumer welfare. These two reports were finalized in 2002 after a stakeholder consultative process spearheaded by UNCTAD and funded by UNDP through its country programme on private sector development.

These two reports aided the drafting of the competition policy adopted in 2005 and a Competition Act, which was enacted in 2009 and came into force in 2010. On institutional framework, the Competition Act of 2010 provided for the establishment of a Competition Commission and a Competition Authority, which opened its doors in 2011 to deal with competition cases in merger control, abuse of dominance and other anticompetitive practices. After several years of enforcing the competition law, certain loopholes were evident, which made its implementation a challenge. As a result, the Government embarked on a process to review the law and address the challenges therein.

In December 2017, the Botswana Parliament passed Competition Bill No. 22 of 2017, which established the Competition Authority with a new name: Competition and Consumer Authority. The Bill is awaiting presidential assent to become law. The Act establishes the Competition and Consumer Tribunal, separates the Competition Authority and Competition Commission, and creates the Competition and Consumer Board. A consumer protection act and its implementation will also be brought under the remit of the Competition and Consumer Authority.

The crucial changes in the amendment of the Competition Act include one major change: the establishment of an independent tribunal as a quasi-judicial body aimed at providing for separation of powers of the Competition Authority and the Competition Commission. The Competition Bill was passed by Parliament and will become law in the near future after presidential assent.

In addition, Consumer Protection Act No. 42-07 of 1998, which was implemented by the Consumer Protection Office in the Ministry of Investment, Trade and Industry (MITI), has also undergone scrutiny on

its effectiveness to protect consumers from unfair business practices. This law has also been revised and consequently, Consumer Protection Bill No. 23 of 2017 was presented to Parliament in December 2017, seeking to protect consumer welfare through the prohibition and the control of unfair business practices, among other issues of consumer interest. The Consumer Protection Bill was also passed by Parliament and is now waiting to become law after presidential assent. Therefore, in the near future, the new Competition and Consumer Authority will be implementing both competition and consumer protection laws.

### 1.4 Competition policy framework

The National Competition Policy for Botswana was adopted in 2005. The policy was aimed at harnessing the Government's desire to maximize the benefits of trade and investment liberalization, deregulation and privatization and to protect the benefits accrued through the liberalization and opening of markets by anticompetitive practices. The Policy also aims to address problems related to the globalization of cartels, abuse of market dominance and monopolization of key sectors following the opening up of markets and the increase in cross-border trade matters connected therewith.

The Policy provides a framework to prevent and redress anticompetitive practices and conduct by firms and to create a business-friendly environment that encourages competition and efficient use of resources. In turn, the policy framework promotes investment and innovation, broadens choices for consumers, reduces monopoly rents and consumer prices, and raises the quality of goods and services produced.

The Policy recognizes the concern on the emergence of private and other anticompetitive practices and their likelihood to undermine economic reform objectives. The Policy therefore establishes the parameters and the strategic policy considerations that would guide the drafting of a competition law. It also addresses the regulatory and institutional infrastructure that would ensure the effective implementation and enforcement of a competition law.

In order to ensure compliance with and adherence to locally and internationally acceptable standards for enforcement of anticompetitive business behaviour and conduct; the Government formulated a competition act, through which competition in the marketplace is regulated.

Institutional arrangements for the formulation, review, and monitoring of the implementation of the Competition Policy and its related legislation remain the responsibility of MITI, while the Competition Authority is responsible for the implementation of the Policy and enforcement of the Competition Act.

For the Competition Policy to succeed, Government committed to:

- (a) Establish an independent competition authority;
- (b) Ensure compliance and enforcement of the rules of fair play;
- (c) Maintain an effective and equitable balance between the interests of business and those of the public.

As part of its responsibility to implement the Competition Policy and its related legislation, the Competition Authority has the power to enforce the Competition Act, including:

- (a) Conducting investigations;
- (b) Prosecuting transgressions of the Competition Act;
- (c) Presiding over disputes.

Parties aggrieved by the decision of the Competition Authority have the right to appeal to the High Court.

The spirit of the Competition Policy is to provide the perspective on the formulation of the Competition Act that came into force in 2009. Both the formulation and implementation of the Competition Act form the central part of this peer review.

### 1.5 Legal framework for competition law

The law in force has been Competition Act No. 17 of 2009. It is an act that provides for the establishment of the Competition Authority, its mandate, the regulation of competition in the economy and matters incidental thereto. Subordinate legislation emanating from the Competition Act includes the Competition Regulations, 2011 and the Rules of the Competition Commission (the Tribunal), 2012. In December 2017, the Parliament of Botswana passed the Competition Bill. The Minister is awaiting presidential assent followed by promulgation. The focus of discussion in this report shall be on the provision of the Competition Bill with selected reference to the Competition Act.<sup>15</sup>

## **2. Institutional framework for competition policy and law implementation**

### **2.1 Competition Authority of Botswana**

Section 4 of the Competition Act establishes the Competition Authority as a body corporate, capable of suing and being sued, and subject to the provisions of the Competition Act, and capable of performing such acts as bodies corporate may, by law, perform.

#### **Functions**

The Competition Policy mentions only the establishment of the Competition Authority and proceeds to proclaim that as part of its responsibility in implementing the Competition Policy and its related legislation, the Competition Authority will have the power to enforce the Competition Act, including conducting investigations, prosecuting transgressions of the Competition Act and presiding over disputes. Parties aggrieved by a decision of the Competition Authority will have the right to appeal to the High Court.

From the provision of the Competition Policy as cited above, the Competition Authority was charged with the three key functions of conducting investigations (investigation role), prosecuting transgressions of the Competition Act (prosecution role) and presiding over disputes (adjudication role). The Competition Policy likewise provided for the right of appeal for parties aggrieved by a decision of the Competition Authority, which shall be to the High Court. The Competition Policy guarded the right to be heard (*audi alterum partum*) of the parties whom the Authority shall bring to book through the prescribed process, in the course of investigation, prosecution and adjudication.

Section 5 of the Competition Act provides for powers or functions of the Authority to the effect that it shall be responsible for the prevention of, and redress for, anticompetitive practices in the economy, and the removal of constraints on the free play of competition in the market.

### **2.2 Competition Commission of Botswana**

Section 9 of the Competition Act establishes the Competition Commission, which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority. The Commission

shall adjudicate on matters brought before it by the Authority under this Act and give general policy direction to the Authority.

### **2.3 Relationship between the Competition Authority, staff/employees of the Competition Authority and the Competition Commission**

Based on the provisions of sections 4 and 9 of the Competition Act, it is the Authority that was established as a body corporate to discharge all the functions vested in it under section 5 of the Competition Act. A body corporate established by a statute, as is the case for the Authority, is usually manned or constituted by individuals who are vested with the responsibility of ensuring that body corporate so established; the Commission for the case at hand runs smoothly as per the functions it is established to discharge.

Key stakeholder interviews conducted during the peer review fact-finding mission confirmed that behind the Competition Authority, there is the Competition Commission established under section 9 of the Competition Act. In other words, the functions provided under section 5 of the Competition Act are essentially those of the Commission that are statutorily the governing body of the Authority mandatorily responsible for the direction of the affairs of the Authority, which include the functions provided under section 5 of the Authority.

From a corporate governance perspective, the Competition Act defines and allocates powers and responsibilities between the Commission and the Executive Secretary. The Authority's chief executive officer or executive secretary is appointed by the Minister of Investment, Trade and Industry. Section 6(1) of the Competition Act requires that the appointment be made in consultation with the Commission. The chief executive officer is responsible for the day-to-day operations of the Authority, the management of the Authority's funds, property and business, and the organization and management of the Authority's employees.

Section 6(2) of the Competition Act subjects the executive secretary to the general supervision of the Commission in the discharge of the functions under section 5 of the Competition Act. Invariably, the executive secretary may recommend individuals for appointment as senior officers of the Authority; the final decision and matters relating to their terms and

conditions of employment lie with the Commission. In the same vein, the Minister, at the recommendation of the Commission, may terminate the executive secretary's contract of employment.

The situation is similar to that of Zambia and the United Republic of Tanzania,<sup>16</sup> where both laws provide for the Board to appoint the chief executive officer and other staff members according to the needs of the institution.

Likewise, the Botswana Competition Act provides for the appointment of a commission. The Commission is responsible for appointing the employees/members of staff and setting out the terms and conditions of their employment.

Based on the analogy and related common law jurisdiction set-up of a similar nature, and from a corporate governance point of view, it is logical for one to assert that the employees of the Competition Authority in Botswana hired under sections 6 and 8 of the Competition Act are engaged to enable the Commission to discharge the functions the Commission has been vested with, an oversight role under section 9 read together with section 5 of the Competition Act.

The employees of the Competition Authority hired under sections 6 and 8 of the Competition Act have not been legislated anywhere in the Competition Act to constitute the Competition Authority, as has been the practice as revealed during key stakeholder interviews and focus group discussions during the peer review interviews.

## **2.4 The Commission as a quasi-judicial tribunal**

Indeed, section 9(2) of the Botswana Competition Act also provided that the Commission shall adjudicate on matters brought before it by the Authority under the Competition Act. Secretariat functions for the Commission, whether in the discharge of its administrative or judicial functions, are executed by the Authority's executive secretary, who, although lacking a right to vote, is entitled to attend all the meetings of the Commission.

Key stakeholder interviews informed that at the set-up stage of the Authority *modus operandi*, a consultancy was commissioned that opined on the need for separation of investigation and adjudication powers thus the need for the distinction between the Authority and the Commission in a bid to satisfy the separation

of the referred powers requirement. This provision and the opinion so sought might have been the base for the set-up outlined in newly proposed legislation and the relationship between the Competition Authority and the Competition Commission as distinct bodies.

Besides administrative oversight, the Competition Commission in Botswana also has quasi-judicial functions. Thus, the Commission can sit as a tribunal to hear and determine competition cases. The Authority's employees, over whom the Commission has policy oversight functions, investigate complaints of anticompetitive behaviour before the Commission for adjudication.

In Botswana, issues have arisen as to whether the executive secretary, who would have presided over or authorized such investigations, being enjoined under the Competition Act to sit as the secretary of the Commission in any adjudicative process, would seem to be a conflicted party.

Furthermore, and seemingly perceived to compound the problem, is the fact that the seven commissioners making up the Commission are all engaged on a part-time basis and the Commission has neither funding of its own nor an independent secretariat other than those of the Authority.

Within the region and beyond, there has been an ongoing wrangle as to whether there is prejudice, bias or injustice occasioned by tribunals that assume the investigation, prosecution and adjudicative functions under one establishment, particularly with commonwealth jurisdiction. This exercise looked into the existing jurisprudence to clarify this point.

In Zambia, the ZCCPA<sup>17</sup> spells out the mandate of the Commission and its independence as a body cooperates, and also its responsibility under the law. The Zambian Act also stipulates for the administration of the Commission,<sup>18</sup> including the role of the Minister in the appointment of the Board of Commissioners and its composition. It also grants investigative powers to the Commission to deal with anticompetitive practices in the main areas of mergers, abuse of dominance and restrictive agreements.<sup>19</sup> The Act further grants the Commission powers to investigate and determine cases on restrictive agreements.<sup>20</sup> The Tribunal is established as an appellant body,<sup>21</sup> where decisions by the Commission can be appealed. High Court is the highest Court where cases can be appealed, and its decision is final.

Likewise, in the United Republic of Tanzania, the FCA establishes and constitutes the Commission,<sup>22</sup> spells out its functions, including its core functions to “promote and enforce compliance with the Act”.<sup>23</sup> The Tanzanian Act also provides the conditions of appeal for grieved parties.

The Commissions, as established under the laws in Zambia and the United Republic of Tanzania, have all the powers to investigate, prosecute and adjudicate on matters provided for under their respective enabling legislation.

The Botswana Competition Policy, 2005, paragraphs 10.2 and 10.3, is quoted below:

*“10.2 For the Competition Policy to succeed, Government will:*

*(a) Establish an Independent Competition Authority;*

*(b) Ensure compliance and enforcement of the rules of fair play;*

*(c) Maintain an effective and equitable balance between the interests of business and those of the public.”*

*10.3 As part of its responsibility to implement the Competition Policy and its related legislation, the Competition Authority will have power to enforce the Competition Act, including conducting investigations, prosecuting transgressions of the Competition Act, and presiding over disputes. Parties aggrieved by the decision of the Competition Authority will have the right to appeal to the High Court.”*

The Botswana Competition Policy, 2005, is operational to date. It preceded the enactment of the Competition Law and thus the establishment of the Competition Authority. Consistent with the policy, the establishment of the Competition Authority should have combined the three functions of conducting investigations (investigation role), prosecuting transgressions of the Competition Act (prosecutions role) and presiding over disputes (adjudication role).

## **2.5 Agency/model**

In the case of Botswana, CCA is an administrative agency established to administer the Competition Bill with a view to promoting its compliance. As per the definition, compliance means an act or process of complying with official requirements and

recommendations or is either a state of being in accordance with established guidelines, specifications, or legislation or the process of becoming so.<sup>24</sup>

Compliance is usually complemented by enforcement, which refers to the act or process of compelling compliance with a law, mandate, command, decree or agreement. It also refers to giving force or effect to a law or to compel its obedience.<sup>25</sup> In the process, CCA is statutorily empowered to investigate and determine a matter in the course of ensuring compliance is attained, see sections 5 (1), 5 (2) (b), (k), (l), (m) and (n) of the Competition Bill.

Based on the foregoing, it is therefore sound to say that law enforcement broadly refers to any system by which some members of society act in an organized manner to promote adherence to the law by discovering and punishing persons who violate the rules and norms governing that society.

The preamble and sections 4, 5, 6 and 62 of the Competition Bill can be construed in such a manner that CCA is a regulatory body established to administer the Competition Bill and to encourage and promote competition and consumer protection so as to enforce compliance with the Competition Bill.

It is a body corporate with powers to investigate complaints and in the cause of the investigation can hear interested parties and make decisions. The very purpose of establishment of CCA is to have a regulatory body to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and control of abuse of dominant position and the protection of consumers in the economy of Botswana. All the foregoing boils down to the promotion and maintenance of competition through enforcement of compliance with the Competition Bill in all sectors of the economy and that in the course of doing so, they may enquire on matters falling under the Competition Bill. It is apparent that the enforcement power of CCA extends only so far as contravention of Competition Bill is concerned and not beyond.

Considering the meaning of competition, establishment and functions of CCA, the appointment of members, as well as the power to initiate complaints and enforce compliance with the Competition Bill, CCA may investigate impediments to competition.

Whenever CCA conducts an investigation or a hearing of a complaint leading to a decision, it does so in its capacity as a regulator and in pursuance of its

functions of administering and enforcing compliance with the Competition Bill. The Tribunal and the High Court will then take up any appeals on competition cases decisions made by the Authority.

The fact that CCA has a department with powers to investigate competition complaints and that during hearing of a complaint, CCA accords the offender an opportunity to make his case heard as per section 36(4), and 41(2) of the Competition Bill, the practice at CCA is more inclined to an inquisitorial system. The hearing is part of the investigation procedure that follows after the preliminary investigation is complete; this means that unlike in a trial (in the Court); CCA continues its investigation right up to the hearing. The corollary is that the hearing itself is part of the investigation procedure.

## **2.6 Institutional set-up in Botswana under Competition Bill No. 22 of 2017**

After six years of operations and informed by practice, there was a need for review of the set-up through legislative amendments that have been passed by Parliament awaiting Presidential assent and eventually assignment of an effective date for the same.

The general spirit of the amendments with regard to competition issues is to build a more robust bifurcated agency model by separating the Authority from the Commission and establishing the two as separate entities with a view to strictly abiding by the principle of reparation of the investigation and adjudication in dispensation of competition justice in Botswana.

The Authority established under the Competition Act is continued under the same section 4 of the Competition Bill but renamed as the Competition and Consumer Authority (CCA). Functions of CCA in the Competition Bill are similar to those provided in the Competition Act under the same section 5, save for one addition: subsection (r), which provides for reporting the investigation of all criminal matters under this Act to the Botswana Police Service.

Section 6 of the Competition Bill establishes a body to be known as the Competition and Consumer Board, which shall be the governing body of the Authority and shall be responsible for the direction of the affairs of the Authority as well as general policy direction to the Authority.

Pursuant to section 7 of the Competition Bill, the Board shall consist of seven persons who have experience

and expertise in industry, commerce, economics, law, consumer affairs, public administration or any other area relevant to the objects and functions of the Board appointed by the Minister in writing.

Section 17 of the Competition Bill provides for the hiring of the chief executive officer of CCA, whereas section 19 (1) of the Competition Bill provides that the Board shall on the recommendation of the chief executive officer, and on terms and conditions determined by the Board, appoint such employees of the Authority as it considers necessary.

The wording in the Competition Act created the impression that the Authority and the Commission were distinct bodies, whereas there were many other factors and indicators that the Commission was the constitution of the Authority, implying they were one and the same thing. Much as the Competition Bill sought to partly cure this shortcoming, the language in the text as provided above still poses the same risk of the interpretation that the Authority and CCA are distinct bodies. There is need for such clarity to ensure that the logical understanding of the establishments of legal persons prevails.

The corollary of the foregoing is such that the Authority is constituted by the Board, which is made up of the seven persons of the calibre and qualifications so prescribed in the referred provisions hereinabove. The chief executive officer and other staff are only employed to enable the Authority as constituted in the Competition Act (the commissioners) to deliver the objects and functions of the Authority.

In establishing administrative agencies all over jurisdictions, the Parliament passes enabling legislation specifying the purpose, name, its constitution, functions and powers of the agency (sections 1, 4, 5 and 6 of the Competition Bill). It further describes the procedures of the agency for handling matters (parts VI and VIII of the Competition Bill) and provides for appeals and judicial review of CCA decisions, section 57 and further in section 83 of the Competition Bill.

## **2.7 Procedure for handling of notified mergers compared with other restricted practices**

### **2.7.1 Procedure for handling of notified mergers**

The procedure, as clearly provided for mergers, is such that CCA receives an application and investigates the same including hearing the parties concerned

(both notifying and third parties) as per section 51(2) 51(3) of the Competition Bill and eventually make full determination (deciding) as follows:

- (a) Either approving or declining to approve a merger pursuant to section 53 (1);
- (b) Imposing structural remedies for mergers pursuant to section 53 (2);
- (c) Reconsideration of own decision of matters for mergers pursuant to section 55;
- (d) Revocation of a merger pursuant to section 56;
- (e) Direction to the enterprise or enterprises that are implementing or have implemented a merger in contravention of the provisions the Competition Bill pursuant to section 58 (3).

An aggrieved party is given the opportunity to appeal to the Tribunal as per section 57 of the Competition Bill.

CCA may exercise in respect of the control of mergers (matter falling within part XI) the powers of investigation provided for in part VIII in respect of similar matters falling within part VI, where the Authority has reasonable grounds to believe that an enterprise has, without reasonable excuse, failed to comply with a direction issued by CCA pursuant to section 59 (1) of the Competition Bill.

In summary, CCA is empowered to receive an application, investigate and decide on the same in variant ways as described above.

### **2.7.2 Procedure for handling other restricted practices**

Pursuant to section 36 of the Competition Bill, CCA may, either on its own initiative or upon receipt of information or a complaint from any person, before commencing any investigation, conduct a preliminary inquiry into any practice where CCA has reasonable grounds to suspect that the practice in question may constitute an infringement of the following:

- (a) Per se prohibited agreement pursuant to section 25;
- (b) Resale price maintenance vertical agreements with similar effects to per se prohibited horizontal agreements pursuant to section 27 (1);
- (c) Horizontal agreements prohibited by the rule of reason pursuant to section 28;

- (d) Abuse of dominant position pursuant to section 31 (1);
- (e) Breach of exemption for agreement conditions/directions pursuant to section 33 (1) read together with section 41(1);
- (f) Unnotified merger pursuant to section 58(2) read together with section 59(1).

The procedure is such that CCA may appoint an inspector to produce a report with respect to infringement of the above pursuant to section 39 of the Competition Bill and within 12 months of completing the investigations refer the matter to the Tribunal if CCA determines that a prohibited practice has been established or issue a notice of non-referral.

## **2.8 Tribunal**

Section 62 of the Competition Bill provides for the establishment of the Tribunal, invariably, section 63 of the Competition Bill provides for jurisdiction of the Tribunal as follows: *“The Tribunal shall adjudicate over any matter brought before the Tribunal by the Authority or by a complainant regarding a breach of any of the provisions of this Act, or any appeal brought in accordance with the provisions of this Act”*.

Based on the above provision, the Tribunal was established with two types of adjudicative powers, to wit first instance and appellant.

### **2.8.1 First instance jurisdiction**

The Tribunal shall adjudicate over any matter brought before it by the Authority or by a complainant regarding a breach of any of the provisions of this Act.

### **2.8.2 Appellate jurisdiction**

The Tribunal shall adjudicate over any appeal brought in accordance with the provisions of this Act.

The construing of section 73 is to the effect that all that is investigated under section 39 should be referred to the Tribunal within 12 months of completion of investigation for adjudication, whereby CCA shall prosecute the same at the Tribunal consistent with section 5 (2) (o) and (p) of the Competition Bill.

Notwithstanding the provision of section 73 hereinabove, section 31 confers prohibition powers to CCA with regard to the abuse of dominant position. The provision is as partly quoted as follows: *“... Any conduct on the part of one or more enterprises is subject to prohibition by the Authority if, following an investigation by the Authority ...”*.

CCA, which has the power to prohibit an abuse of dominant position, can thus fully determine (decide) on an abuse of dominant position under section 31 of the Competition Bill.

It is observed that CCA is directly empowered to give direction (decide) with regard to unnotified mergers pursuant to section 58(2) of the Competition Bill.

The rest of prohibited practices, to wit breach of exemption for agreement conditions/directions, prohibition of agreements by rule of reason, resale price maintenance and per se prohibited agreements, CCA has not been given powers to make decisions on the same.

Pursuant to section 40(1) of the Competition Bill, CCA may only consider undertakings on matters of agreements prohibited by the rule of reason pursuant to section 28 and the abuse of dominant position pursuant to section 31 (1) of the Competition Bill.

Pursuant to section 40(2) of the Competition Bill, CCA may conclude any case it was investigating by entering into a settlement agreement with the parties. Such settlement agreement shall be taken to the Tribunal to be made an order of the Tribunal.

Sections 41 and 59 of the Competition Bill provide for enforcement of directions; the provisions are principally the same, i.e. the two are in pari materia.

Description of the two provisions is that subsection 1 of section 59, which provides for unnotified mergers, invites investigation powers under part VIII as applied to issues under part VI (control of restrictive agreements

and dominant position). It is important to note that the construing of this subsection amounts to the fact that unnotified merger issues are equated to issues under part VI, to wit control of restrictive agreements and dominant position.

Subsection 2 gives notice of CCA's intention to investigate the enterprise concerned and consistent with section 5(2) of the Competition Bill, consider any representations the enterprise wishes to make either orally or written.

Subsections 3 and 4 give CCA discretionary powers ("may") to apply to the Tribunal for an order and details thereto, requiring the enterprise to make good the default within the time specified in the order. This means that CCA may not apply for such orders at the Tribunal and deal with those matters within the scope of the Competition Bill.

The issue for the Botswana competition regime is to see how the mechanism of resolving competition issues favours the development of competition jurisprudence. Table 1 below shows the summary of procedure for handling of competition matters under the Competition Bill.

Section 67(3) of the Competition Act, 2009 provides to the effect that an appeal against the Court's (High Court) judgment may be made to the Court of Appeal, but only on a point of law arising from the judgment of the Court, or from any decision of the Court as to the amount of a penalty. The Competition Bill has departed from this position, whereby sections 83 and 84 of the same make reference to appeals and judicial

**Table 1. Stages for determination of competition matters in Botswana**

SN	Issue	First Instance		First Appeal	Secondary Appeal	Tertiary Appeal
1	Notified mergers	CCA		Tribunal/CCA <sup>a</sup>	High Court	
2	Unnotified mergers	CCA	Tribunal	High Court	None	
3	Prohibition of abuse of dominant position	CCA	Tribunal	High Court	None	
4	Breach of exemption for agreement conditions/directions		Tribunal	High Court	None	
5	Prohibition of agreements by rule of reason		Tribunal	High Court	None	
6	Resale price maintenance		Tribunal	High Court	None	
7	Per se prohibited agreements		Tribunal	High Court	None	

Source: Compilation from interviews with Staff of Competition Authority of Botswana.

review to the High Court and stops thereafter. There is no mention of further appeals to the Court of Appeal; the Court of Appeal provision was removed because it was redundant. All High Court matters are appealable to the Court of Appeal.

Much as Botswana has so far been inclined to develop its competition law enforcement framework with a bifurcated judicial model orientation, as evidenced by the 2017 amendments to be discussed below, it is important even at this seemingly late time, to look deeper into the broader spectrum of would-be happenings in the post amendments, considering some omissions that may have left some issues unattended by the recently passed amendments.

Interviews of key stakeholders have revealed that the Competition Authority has lost all cases at the Competition Commission, High Court and Court of Appeal on procedural technicalities. It was further revealed during interviews and focus group discussions that there has not been any case decided on merits of competition by either the High Court or the Court of Appeal during the six years of competition law enforcement in Botswana.

Currently the decisions of the Competition Commission are directly appealed to the High Court pursuant to sections 67, 68, 69 and 70 of the Competition Act. Findings from interviewed key stakeholders have revealed that competition expertise is not well developed in the High Court because competition culture and its enforcement remain generally uncommon and new in Botswana.

It was further revealed by most interviewed key stakeholders that they preferred the existence of a specialized appellant platform of equal or better competition footing in terms of competition economics and competition law that shall review the decisions of the Commission to the status quo of having the High Court as the immediate appellate body.

The reasons adduced for the choice is that the High Court mandatorily focuses on legal technicalities and holds the same with higher prominence compared with merits of competition. It was further revealed that a specialized competition appeals tribunal would be expected to act to the contrary by placing merits of competition on higher prominence and not legal and procedural technicalities, as done by the Courts.

According to those interviewed, the desire for a specialized competition appeals tribunal better

guarantees maintenance of the competition expertise developed and nurtured at the Authority (investigation and prosecution) and Commission (adjudication) levels.

The challenge that remains unresolved is to determine whether the Government of Botswana is willing and can afford to establish such a specialized competition appeals tribunal as a third layer (Authority, Tribunal and the Appellant Tribunal) in the dispensation of competition justice in Botswana. Preliminary findings from key stakeholders indicate that it may not be an easily accepted phenomenon, given the relatively small size of businesses found in the Botswana economy, which translates into expected low volumes of work for a specialized competition appeals tribunal.

Given the advantages of a specialized competition appellant body, and since the Tribunal has been established with both first instance and appellant jurisdiction, there should be a room for manoeuvre to attempt to fix the mechanism that shall ensure that all competition matters are first dealt with by CCA, then appealed at the Tribunal before they go out for further appeal at the High Court. Upon consensus, this can be dealt with either through the rules and regulations or a slight legislative amendment to create the Tribunal as an appellant body per se for all matters emanating from CCA.

The Competition Bill provides for both rule-and-regulation-making powers in relation to operations of CCA in sections 94 and 95 of the Competition Bill. Based on the foregoing, as a general rule, CCA lacks the power to act beyond the scope of its enabling legislation (doctrine of ultra vires). The Competition Bill is unlikely to bring about any issues that relate to a breach of natural justice in so far as separation of powers. As such, CCA is impliedly mindful of natural justice principle as described above.

To avert fears and speculation, the competition regulations to be made may provide that it shall adopt an inquisitorial approach in its case handling procedure, so as to sharpen its differentiation from the commonly known adversarial practice.

Should there be a need for an adversarial practice, which observes a strict separation of investigative and adjudicative functions, then the best institutional arrangement would be three distinct institutions: one for investigation, one for adjudication and another for appeals, as in South Africa. However, this would be costly to the Botswana economy and difficult to attain,

given the low level of competition practice currently observed, as explained earlier in this report.

## 2.9 Sanctions

Engagement in anti-competitive behaviour is a criminal offence for staff of an enterprise. The Competition Bill provides that “Any officer or director of an enterprise who contravenes section 25 commits an offence and is liable to a fine not exceeding 100,000 pula or to a term of imprisonment not exceeding five years, or to both”. The style for which the offences are created and sanctions are levied in the same provision is good, as it reduces the complication of going back and forth to match an offence with penalties, as provided in competition laws of other jurisdictions or even for other offences under the Competition Bill. The Competition Bill does not categorically provide for the procedure to be followed when a person is to be committed to prison. Responses from interviewed stakeholders show that no one has been imprisoned for infraction of the similar provision under the Competition Act, 2010, hence there is no experience in implementing these provisions.

Competition violations are hence criminal in their nature, the only difference with penal sanctions being that the accused in competition cases is often a legal person, i.e. the enterprise, not a natural person.

The Competition Bill in section 76(1), (2) and (3) sanctions, albeit discretionary, financial penalties to horizontal (section 25) and vertical agreements (section 25) to enterprises. The provisions provide that the Tribunal may, in addition to, or instead of, giving a direction, make an order imposing a financial penalty (not to exceed 10 per cent of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years) on the enterprise or enterprises concerned.

The Competition Bill in section 58 (3) (b) sanctions unnotified mergers with a fine not exceeding 10 per cent of the consideration or the combined turnover of the parties involved in the merger, whichever is greater.

The range of between 0 to 10 per cent of the turnover of the enterprise is considered to be too wide and can be subject of abuse, particularly when no guidance is provided in arriving at a commensurate level of financial penalty. Competition regulations should be able to provide for such guidance.

The Competition Bill does not directly sanction unnotified agreements prohibited by the rule of reason

under section 28 read together with section 33 of the Competition Bill and the abuse of dominant position under section 31 of the Competition Bill. Upon conclusion that such infractions have been occasioned by an enterprise, section 77 of the Competition Bill provides that the Tribunal shall give the enterprise or enterprises concerned such directions as the Tribunal considers necessary, reasonable or practicable including some structural remedies mentioned in subsection 3 (c) of section 77.

There is a possibility for a mismatch of gravity of offences and penalties for offences that bear similar magnitude of effects in the economy and markets caused by enterprises equally convicted but equivocally convicted by the same Tribunal.

The ideal situation would be to de-link only the persona part of criminology, as done under the Competition Bill and link all offences as against enterprise under sections 25, 27, 28, 31 and 59(2) of the Competition Bill so as to ensure that offences with similar gravity are accorded commensurate and similar penalties. This will not only ensure deterrence, but also bring about consistency because offences for agreements under sections 25, 27 and 58(2) in the same Competition Bill are penalized by fines not exceeding 10 per cent of either or both parties' annual turnover.

These anomalies should be looked at with a view to rectification for the betterment of competition enforcement in Botswana.

## 3. Competition law enforcement

### 3.1 Mergers

Section 45(1) of the Competition Bill states that 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 enterprise.

Section 45(2) of the Competition Bill provides that acquisition of control over the whole or part of another enterprise may be achieved in any manner, including:

- (a) The purchase or lease of shares, an interest, or assets of the other enterprise in question;
- (b) An amalgamation or other combination with an enterprise.

The term “merger” as defined in the Competition Bill definitively covers both horizontal and vertical mergers, as well as other possible business combinations.

However, it does not include joint ventures resulting in the establishment of greenfield enterprises, and the general provision under section 45 (2) (b) cannot justify the omission of a specific provision to cover such mergers. The underlying principle was that such joint ventures and strategic alliances have the same effect as pure mergers and should therefore be examined for possible anticompetitive effects. This shortcoming should also be rectified for the betterment of competition enforcement on mergers and acquisitions in Botswana.

Section 45(3) of the Competition Bill has covered the decisive influence test by referring to the ability to materially influence the policy of an enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in the Companies Act, in particular majority of shareholding, to wit 50 per cent or majority of voting rights in a company. This means, irrespective of the quantum of shareholding or voting rights that are at play in a merger transaction, should it result in a decisive influence change, the transaction amounts to a merger.

Section 46 of the Competition Bill is an import from section 53 of the Competition Act; it provides for exemption from mergers control by the Minister. The provision empowers the Minister to make regulations aimed at exempting enterprises from a merger review based on the commercial or industrial sector involved, the nature of the activities in which the enterprise is engaged or some aspect of the general public interest. Furthermore, the Minister may prescribe an alternative system of merger review as he or she considers appropriate.

To date, the provision has not been put to operation, but it potentially bears an inherent risk of misuse and or inconsistency to the spirit of the provision of section 3 of the Competition Bill which presses for its application to the economic activities within, or having effect within, Botswana, as a general rule.

Ordinarily, exemptions from application of the competition legislation is directed to sector-specific regulations, which has been covered under section 86 of the Competition Bill and would cover all aspects of competition, not only mergers. This shortcoming should also be looked at for possible rectification for the betterment of competition enforcement on mergers and acquisitions in Botswana, especially since it has not been put to use for all the six years of competition law and policy practice.

Section 49 of the Competition Bill provides for a pre-merger notification regime which requires mergers with values at or above a prescribed threshold (currently \$1,200,000 of the combined annual turnover or assets in Botswana of the merging parties).

The Competition Bill also provides for the payment of a merger notification fee (currently the practice is 0.01 per cent of the combined annual turnover or combined value of assets in Botswana of the merging parties). The interviewed merging parties did not express any dissatisfaction with the manner with which the fee is calculated.

Furthermore, section 49 of the Competition Bill requires each of the enterprises involved (acquiring or target enterprises) to notify CCA of the intention to merge. In one sense, this provision is good, as it imposes the notification duty to all enterprises, which makes it easy for CCA to hold at least the existing party in unnotified mergers where the target enterprise is extinguished. In the same vein, CCA should ensure attainment of holding merging parties to account comes without imposition of unnecessary physical notification burden in terms notification paperwork.

The interviewed merging parties did not express any dissatisfaction with the prescribed timelines under section 49 of the Competition Bill but were of the view that CCA should at least administratively be able to review mergers with genuine urgency within reasonably shorter periods than those statutorily provided.

According to the key stakeholder interviewed at the Competition Authority of Botswana, currently, under the Competition Act and its subordinate legislation, the practice developed is such that the case analyst prepares a report of the case analysis and a meeting is convened where the analyst presents the report *inter alia* indicating the possible theories of harm to all staff members of the Mergers Department with a view to receive guidance and comments to improve on the analysis.

In the course of carrying out the review, the Department and/or the Directorate had been holding meetings with legal representatives of merging parties on issues as the need arose. In terms of international cooperation, the Department has held conference calls with other authorities in the region, especially Namibia, South Africa, Zambia and the United Republic of Tanzania, to discuss possible theories of harm, relevant market, remedies and benchmarking, particularly where other

authorities may have dealt with similar cases. There is informal coordination and cooperation in merger cases in the sub region.

Merger fees are kept by Competition Authority of Botswana, and the Finance Department verifies the calculation of the merger, and ultimately, whether the merger fee has been paid.

All discussions and verification are carried out before the report is sent to the Merger Review Committee, which is comprised of directors and the chief executive officer. The director of mergers is the secretary of the Committee. The analyst presents recommendations on the merger to the Committee, which decides on the merger and communicates the decision to the parties. The merger decision is made public in a *Gazette* notice.

Under the Competition Bill, the decisions are to be made by the Board (comprised of Commissioners) as per the interpretation asserted hereinabove. Save for the final decision-making, the current procedure and practice remains valid in the Competition Bill, as it can strengthen the rigorousness, accuracy and quality of CCA submissions to the Board of Commissioners, which was reported to be requiring upgrading during focus-group discussions with the same. Nevertheless, pursuant to section 50 (2) of the Competition Bill, CCA should be alert and avoid the possibility of being bogged down in terms of beating the statutory timelines by its internal open-ended procedure(s), which are not time bound, to wit “as soon as practicable after a referral”.

Section 50 (2) of the Competition Bill provides for an opportunity to any person, including a third party not a party to the proposed merger, to voluntarily submit to the investigator or CCA any document, affidavit, statement or other relevant information in respect of a proposed merger. Furthermore, section 51 (1) of the Competition Bill empowers CCA, if it considers it appropriate, to determine that one or more hearings may be held in relation to a proposed merger.

The observation is that section 49(2) of Competition Bill makes it a mandatory procedure for CCA to publish all merger notifications. However, the provision does not clearly provide for how and by which means the members of the public shall be informed of a proposed merger so as to ensure wide reach of the general public. Key stakeholder interviews revealed that the current practice is that CCA issues a merger notice through its website and social media accounts, announcing a merger review, the names of the

acquiring and acquired entities, and names of relevant directors of both entities. In other jurisdictions, mergers are published in widely circulating newspapers.

Invariably, the criteria for determining whether to proceed with a hearing or not is not provided for in the Competition Bill. Ordinarily, it should be that whenever a public notice is issued, it should also request for members of the Public to express their desire to be heard in their response to the public notice. This will ensure that the hearings are demand driven at first instance, unless CCA is of the opinion that the responses from the public are not commensurate to the gravity of the potential effects, then CCA can purposefully target the key stakeholders and invite them directly to a hearing session. It is reported that the Authority currently does exactly as referred to above in under the Competition Act; however, moving forward under the Competition Bill after it becomes law, the content of a notice on merger notification should be provided for in legally binding rules or regulations under sections 94 or 95 of CCA as schedules.

CCA should improve this practice under the Competition Bill based on the aforementioned statutory and administrative shortcomings for the betterment of competition enforcement on mergers and acquisitions.

Section 52 of the Competition Bill is consistent with the norm of merger-control regimes by prohibiting those mergers that would be likely to prevent or substantially lessen competition or either create or strengthen a position of dominance (including an enterprise which is not involved as a party in the proposed merger) in a relevant market.

The second step of the merger prohibition test is provided in section 52(2) of the Competition Bill which, though non-mandatory, but lists public interest issues that CCA may take into account in the course of its merger assessment. Should CCA opt not to take into account the public interest issues in its assessment, this subsection becomes inapplicable and harmless.

The issue arises when CCA invokes section 52 (2) of the Competition Bill. Can CCA decline to give approval to the implementation of the merger to the extent that it relates to a market in Botswana pursuant to section 53 (1) (b) of the Competition Bill?

The Competition Bill is silent on the effects of operation of section 52(2) on CCA's determination of a merger pursuant to 53 (1) (b). In law, if a phenomenon is not

expressly proscribed, it cannot impliedly be purported so; to this end, CCA should use section 52(2) of the Competition Bill as a shield rather than a sword in considering the factors.

It is also noted that CCA is only mandatorily required to issue written reasons for its decisions on mergers when it has either rejected or approved with conditions. In the event of unconditional approval, CCA will only issue written reasons if it is requested to do so by any person pursuant to section 53 (4) (b) (ii) of the Competition Bill.

Reasons for decisions are key to the development of jurisprudence, even for non-contentious matters, as they can distort the consistency and predictability of CCA decisions. For this reason alone, they should be given, even without a request, to at least the merging parties. These shortcomings should also be looked at for possible rectification for the betterment of competition enforcement on mergers and acquisitions in Botswana.

Pursuant to section 55 of the Competition Bill, CCA is obligated to reconsider a rejected merger if an aggrieved merging party files an application through written or oral presentation of fact, issue or evidence that was not submitted with the original notification of the merger that the parties consider material to their case, which would have made the Authority arrive at a different decision.

In law, once a body has made a decision, it is usually termed to be *functus officio*, meaning to have fulfilled the function or accomplished the purpose, and therefore is of no further force or authority. For avoidance of breach of strict application of natural justice principle of *nemo iudex in causa sua*, which means that no one should be a judge in his or her own cause, such a procedure should have been found in the appellate stage mostly handled by a different body. Nevertheless, the provision underscores the fact that CCA is a regulatory body not bound by strict rules found in courts in its principle cause of dispensing competition justice in Botswana.

Section 56 provides for the revocation of approval of a merger if the decision to approve was based on materially incorrect or misleading information for which a party to the merger is responsible or any condition attached to the approval of the merger that is material to the implementation is not complied with. The procedure for revocation has been provided in general terms, which one may argue is fine, as long as

regulations can provide for details of such a process.

Serious omission arises from the fact that the Competition Bill has not provided for the effect of the revocation, given the practical constraints of its implementation. The phenomenon is known in the competition fraternity that, embarking on a revocation route compares to “unscrambling the egg”.

Section 58(2) (d) of the Competition Bill has attempted to cover such effects as follows:

*“Where the Authority determines, on investigation, that a merger is being or has been implemented in contravention of the provisions of this Part, it may give direction to the enterprise or enterprises involved ... to take such further measures as may be necessary to restore the conditions of competition existing prior to the merger.”*

The provision is not clear enough to give users of the law a good understanding of the post-revocation situation and effects thereof under the Competition Bill. The provision should have gone further to provide that the effect of the decision to revoke a merger is that:

- (a) The Certificate of approval or conditional approval in respect of the relevant merger is deemed to have been rejected as of the date of that Certificate;
- (b) All parties to the merger are, for all purposes of the Competition Bill, in the same position as if they had never notified the Authority of that merger;
- (c) The Authority may further consider that merger only if the acquirer subsequently files a new merger notification with respect to it;
- (d) Where a new merger notification is subsequently filed in respect of that merger, CCA shall consider that merger on the basis of that new notification without reference to any previous notification filed in respect of it.

Realistically, it may be practically impossible to get to a position whereby all parties to the merger are, for all purposes of the Competition Bill, in the same position as if they had never notified the Authority of that merger; but CCA should be able to accept a position asymptotically close to the ideal. This shortcoming should be rectified for the betterment of competition enforcement on mergers and acquisitions in Botswana.

Pursuant to section 63 of the Competition Act, which is currently in use as a good law in Botswana, unnotified mergers were not sanctioned by any penalty other than directives to make good of the infraction. Invariably, pursuant to section 58 (3) of the Competition Bill, failure to notify a notifiable merger is an infraction that upon conviction attracts a penalty of a fine not exceeding 10 per cent of the consideration or the combined turnover of the parties involved in the merger, whichever is greater. This is a good development of competition law practice in Botswana in line with international best practice.

Under the Competition Bill, unnotified mergers are procedurally dealt with pursuant to section 58(2) read together with section 59(1).

With regard to unnotified mergers, the two provisions may be interpreted to mean that CCA can decide upon extinction by way of giving direction pursuant to section 58(2), unless the parties do not comply with the directions given then the investigation process is initiated under section 59(1) of the Competition Bill.

The procedure for handling unnotified mergers is contentious and litigious, just as is the process for revocation of an approved merger and rejection of a notified merger. Ordinarily, because of the resemblance described, one would be inclined to expect the means involved in handling the similarities to also be alike. Nevertheless, the procedure for revocation of an approved merger and rejection of a notified merger is different from that of handling unnotified mergers.

Revocation of an approved merger and rejection of a notified merger are dealt with at CCA at first instance, whereas unnotified mergers are de jure prosecuted at the Tribunal at first instance. Invariably, this has a bearing on the appeals, as stated earlier in this report and as such shall be discussed later in this report. This shortcoming should also be looked at for possible rectification for the betterment of competition enforcement on mergers and acquisition in Botswana.

## 3.2 Restrictive trade practices

### 3.2.1 *Per se* prohibited agreements

The horizontal types of *per se* agreements are covered under section 25 of the competition Bill. The prohibition has covered conducts related to price fixing, division of markets and bid rigging alone. Despite the mention of conduct, the Competition Bill has not provided for what would constitute elements for each type of conduct prohibited. Given the criminal nature and

sanctions of infractions under section 25 as provided by section 26 of the Competition Bill, it would be prudent for the provision to expressly provide for elements that CCA would have to establish for the criminal infraction under section 25 to stand.

Such clarity would make the law consistent with the legal principle of *nulla poena sine lege certa* – that there is to be no penalty without a definite law. The principle requires that a penal statute must define the punishable conduct and the penalty with sufficient definiteness to allow citizens to foresee when a specific action would be punishable, and to conduct themselves accordingly. The rule expresses the general principle of legal certainty in matters of criminal law. It is recognized or codified in many national jurisdictions.<sup>26</sup>

Section 25 of the Competition Bill has not provided for commonly found horizontal agreement practices of output restriction between competitors and collective boycott by competitors, which many jurisdictions prohibit irrespective of their effects (*per se*).

The Competition Bill has not provided a clearly articulated procedure for giving effect to the criminalization of infractions provided under section 26. The only provision is that under section 5(2) (r), CCA is required to report the investigation of all criminal matters under the Competition Bill to the Botswana Police Service. The Bill is not clear as to the role of the police, since CCA is also an investigatory body mandated to investigate matters prohibited under the Competition Bill. The reporting of CCA to the police, which may not necessarily be well vested with competition criminology, may represent a serious obstacle to enforcement of the provision.

Ordinarily, once CCA has completed its investigation, perhaps incidence into the criminal justice machinery could be at the level of the director of public prosecution seeking consent to prosecute the criminality with reference to seeking a custodial sentence before the appropriate court of law. In addition, the Competition Act has not specified which Court shall be used to enforce section 26.

Further, matters related to section 25 are decided by the Tribunal at first instance following CCA's referral of the Tribunal pursuant to section 73 of the Competition Bill. It not clear how the two processes of referring the investigated matter are going to be handled without clashing if the matter is referred to the Tribunal and reported to the Botswana Police Service.

These shortcomings should also be looked at for possible rectification for the betterment of competition enforcement in per se prohibited agreements in Botswana.

Section 27(1) of the Competition Bill provides for vertical resale price maintenance agreements, commonly referred to as hub and spoke, with similar effects to per se prohibited horizontal agreements. The inclusion of these agreements under per se prohibition provisions is consistent with the modern architecture of drafting competition laws in line with modern international best practice.

Nevertheless, despite the similarity of effects between infractions of section 25 and 27, thus the referred inclusion; the Competition Bill has prescribed different sanctions for infractions under section 25, to wit a fine not exceeding 100 000 pula or to a term of imprisonment not exceeding five years, or both, whereas an infraction under section 27 is sanctioned by a fine not exceeding 50 000 pula. This shortcoming should also be looked at for possible rectification for the betterment of competition enforcement in per se prohibited agreements in Botswana.

### **3.2.2 Agreements prohibited by the rule of reason**

Section 28 of the Competition Bill relates to horizontal agreements prohibited by the rule of reason. Notification for rule-of-reason agreements is covered under section 28(1) and (2) of the Competition Bill. Despite the fact that the exemptions for agreement assessment criteria are provided for under section 33 of the Competition Bill, the process for notification by the parties to the agreement has not been provided for under the Competition Bill. The provision should have expressly provided that parties to the agreement should apply to the Authority for the exemption.

The specific time frame for which the agreement will be reviewed is not stipulated, leaving the default time for investigation provided under section 73(1) of the Competition Bill, to wit CCA shall refer the matter to the Tribunal within one year after it has completed its investigation. As is, the provision serves the unnotified agreements well, just as the unnotified mergers are subjected to an investigation procedure under section 39 of the Competition Bill. For those notified agreements, specific reasonable time frames should have been assigned for the review process, perhaps by emulating those provided for notified mergers under section 49 of the competition Bill.

Section 29 of the Competition Bill provides for the threshold whereby the agreeing parties are prohibited from entering into such agreements. Thus, if construed loosely, it has the potential of leaving too much room for agreements to be notified. It is not clear enough to give users of the law a clear situation for which they are entering into an agreement or understanding that is subject to the rule of reason as provided in the Competition Bill.

Specifically provided numerical thresholds are helpful, and thus easier to be complied with, as compared with other more flexible approaches, which require an in-depth understanding of competition that is lacking in the developing world, including Botswana.

The Tanzanian law, for example, provides as follows:

*“unless proved otherwise, it shall be presumed that an agreement does not have the object, effect or likely effect of appreciably preventing, restricting or distorting competition if none of the parties to the agreement has a dominant position in a market affected by the agreement and either (a) or (b) applies:*

*(a) The combined shares of the parties to the agreement of each market affected by the agreement are 35 per cent or less;*

*(b) None of the parties to the agreement are competitors.”*

Such a threshold and condition precedent give an elaborate definition of agreements that are considered under the rule-of-reason approach. The threshold does not appear to scrutinize small companies that seek to grow and enhance their efficiencies through various forms of such agreements.

Further, the provision does not provide for its restriction in so far as it does not cover mergers, since mergers, too, are a form of agreement that may be construed as being the scrutiny of this provision.

With regard to the prohibitions mentioned in section 28(1) (b) (c) and (d), to wit agreement which (b) restrains production or sale, including restraint by quota; (c) involves a concerted practice; or (d) involves a collective denial of access of an enterprise to which is an arrangement or association crucial to competition. The provisions in (b) and (d) portray a mix up of prohibitions, as they seem to refer to output restriction and collective boycott by competitors which are issue per se prohibited agreements. On the other hand, (c) refers to a concerted practice that has not been

defined, but it generally refers to an agreement in the competition arena, as opposed to unilateral practice, leaving its existing gaps in the legislation.

With regard to the prohibitions mentioned in section 28(2) (a) (b) (c) as stated below:

*“(a) limits or controls production, market outlets or access, development or investment; (b) applies similar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or (c) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which, by their nature or according to commercial usage, have no connection with the subject of such contracts”.*

The provision under 28(2) (a) can be construed as referring to output restriction, which is also an issue dealt with under the per se approach. Section 28(2) (b) and 28(2) (c) can be construed as referring to price discrimination and tying and bundling, which are issues covered under abuse of dominance as prohibited exploitative conduct.

Based on the above, it is clear that the concept of the rule of reason has been lost as a result of mixing up issues, as explained previously. The cited shortcomings should also be looked at for possible rectification for the betterment of competition enforcement in Botswana.

### 3.3 Abuse of dominant position

Abuse of dominance prohibition provisions are usually drafted to target conduct by a dominant enterprise either unilaterally or in combination with other enterprises’ “combined dominance”. Usually the targeted conduct is the one that “has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market”.<sup>27</sup> In other words, having determined that the dominant firm or firms have engaged in anticompetitive acts, it remains necessary to determine whether this practice has resulted or is likely to result in substantial harm to competition.

The Competition Bill does contain an express and general prohibition of abuse of dominance under section 31(1).

The provision provides for both situations of dominance, to wit unilateral conduct and combined dominance in line with best practice of modern

competition law provisions. However, a close look at the two provisions read together shows that section 32 (a) and (b) provides for the threshold (market share) for which the enterprise(s) shall be determined as dominant in the defined relevant market without expressly mentioning a definite figure; thus if construed loosely, it has a potential of protracted arguments concerning the same.

It is not sharp enough to give users of the law a clear understanding that enterprise is or is about to be considered as having a dominant position in the relevant market as defined under Competition Bill.

Invariably, it is observed that section 32 (a) and (b) lacks the condition precedent “potent element” of prohibiting only those conducts by dominant enterprise which “has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.”

Specifically provided numerical thresholds and a condition precedent are helpful and thus easier to be complied with as compared with other more flexible approaches that require an in-depth understanding of competition which is lacking in the developing world, including Botswana.

Further, section 31(2) allows for consideration of public interest issues listed in items (a) to (e) on a discretionary basis in the course of investigation of abuse of dominance cases. Should CCA opt not to take into account the public interest issues in its assessment, this subsection becomes inapplicable and harmless.

The issue arises when CCA invokes the section 31(2) of the Competition Bill. Can CCA decline to prohibit abuse-of-dominance conduct under section 31 (1) (a) to (e) to the extent that it relates to a market in Botswana pursuant to section 31(1) of the Competition Bill? The Competition Bill is silent on the effects of implementation of section 31(2) on CCA’s prohibition of abuse-of-dominance conduct pursuant to section 31(1) of the Competition Bill.

Although the Competition Bill does not expressly provide for the level of market share that enterprise(s) must attain to be considered dominant, as is the case for several competition laws which contain a market share threshold for the presumption of dominance, the National Competition Policy defines monopolization as the conduct and practice of a firm with a dominant position of at least 40 per cent or more market share

and significantly larger than that of its largest rival to maintain, enhance or exploit its dominant power in the marketplace. CCA could borrow from such a definition, should it opt for a number trigger for dominance consistent with the Policy.

The threshold to trigger dominance is not compulsory and has also attracted some criticism, despite the inherent ability of creating legal certainty. The threshold setting is criticized for being rigid and not allowing for the required economic assessment of the question whether or not a company enjoys substantial market power.<sup>28</sup>

In the absence of a market share threshold that triggers a rebuttable presumption, CCA may consider the possibility of adopting guidelines on how it assesses market power, i.e. what type of factors it takes into consideration (not what constitutes public interest, as the current Competition Bill wording provides under section 31(2)) instead of market shares, but as stated earlier. Given the low level of competition expertise in the developing world, this should be considered for future development of the Competition Law or used as an alternative with market shares provided in guidelines, rules or regulations to be made under sections 94 or 95 of the Competition Bill, respectively, to avoid confusing users of the law.

Section 31(2) refers to agreement of enterprise while assessing the application of public interest issues in determining abuse of dominance. This is taxonomically incorrect since agreements being them vertical or horizontal constitute a different category of prohibited practice dealt with under sections 25, 27 and 28 and are distinct from abuse of dominance issues. Invariably, it was earlier pointed out that there are issues of abuse of dominance that have been provided for under agreements prohibited by rule of reason provided under section 28 of the Competition Bill. Both these anomalies have to be looked at for possible rectification so as to avoid confusion to users of the law.

The list of abusive conducts under section 31(1) (a) to (e) has been drafted exhaustively thus legally, leaving no room for inclusion of those conducts not mentioned by the list. Ordinarily, such list would have been left open-ended (non-exhaustive) to accommodate all other theories harm under the abuse of dominance prohibitions that may in due course arise in the course of development of competition law or those inadvertently left out, such as, loyalty discounts and

rebates among others such as those provided in section 16(2) of the Zambian law.

Operationally, under the Competition Act that applied between from 2009 to 2018 before coming to effect of the Competition Bill, the investigations Department dealt with all the prohibited agreements and abuse of dominance issues. The workflow is as shown on figure 2.

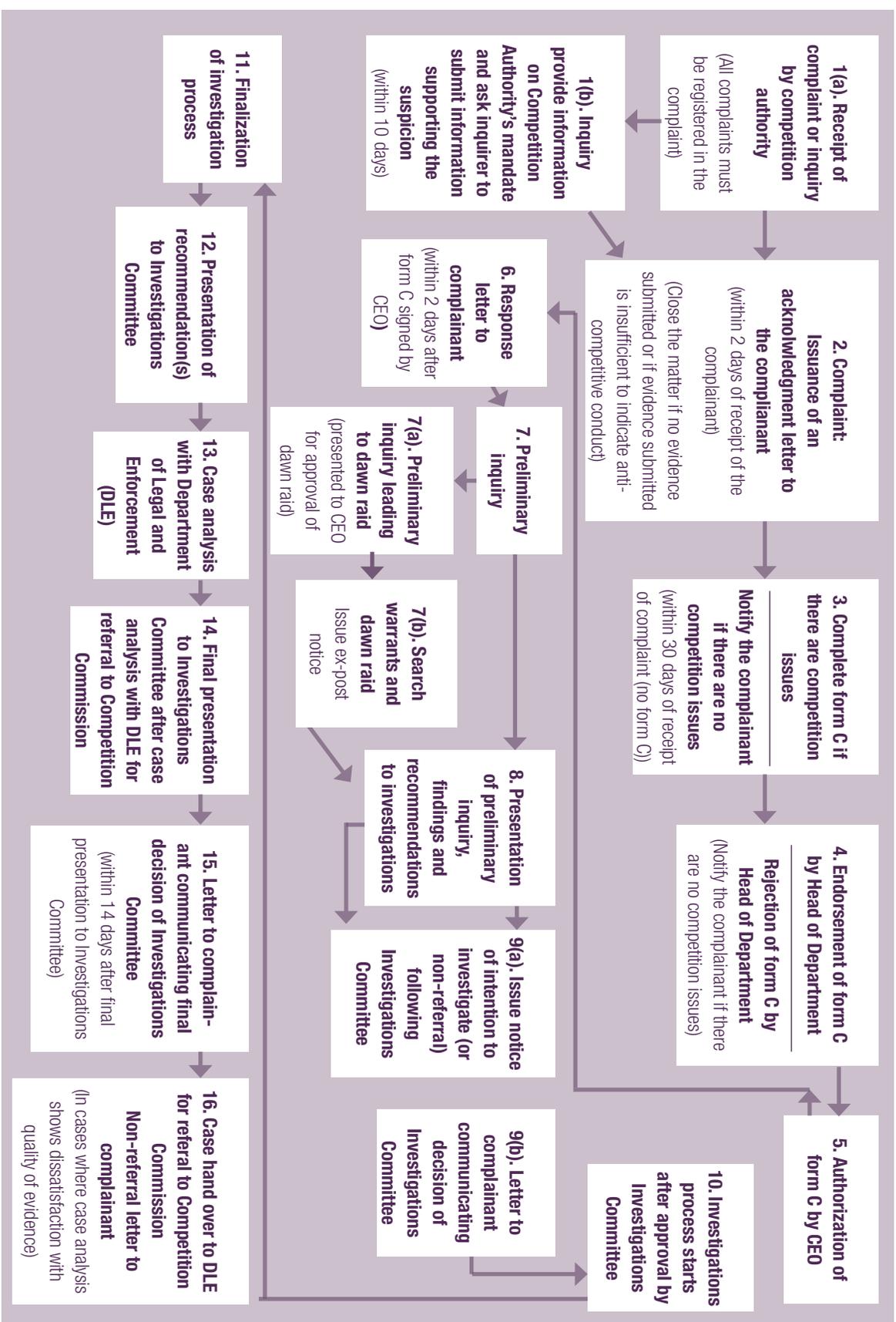
The existing workflow is applicable to a great extent under the provisions of the Competition Bill since these matters are determined at the Commission after the Authority has referred them to it. The same setting with different names exists under the Competition Bill, where by CCA shall refer the matters it has investigated to the Tribunal pursuant to section 73 of the Competition Bill.

According to the staff who were interviewed, the issuance of an ex-post notice of investigation has raised a controversy about its legal standing that led to a court case which has been determined (Judgment on this case is available on request). This process defies the logic of notice, which provides the parties with prior information. Since it is a matter that is statutorily provided under section 36 (3) of the Competition Bill, it should be examined, and CCA should provide clear guidance on the issue to avoid a repetition of the referred controversy.

Another operational difficulty has been observed under the existing workflow with regard to case analysis with the legal team, which is done to prepare the case for referral to the Commission. The case analysis is aimed at identifying gaps in the information collected and evidence adduced therefrom in the course of investigation. Investigators who are not lawyers have been drafting affidavits and subpoenas showing facts, course of action and proposed remedies, which they submit to the Legal Department for review and send to the respondent as well.

Upon receiving the respondent's reply to the allegation, the Legal Department forwards the reply to the investigators, who draft responses to the respondent. The drafting is mostly legal, and unfortunately, there is no legal officer in the Investigations Department, making the whole exercise difficult because of the mismatch of skills with reference to the required output. Invariably, this task is not part of the job description of the case officers, who are non-lawyers.

**Figure 2. Workflow concerning prohibited agreements and abuse of dominance cases**



Based on the practical experience of the staff interviewed, it was proposed that the drafting of legal documents (affidavits and subpoenas) and case analysis functions should best be done by a legal officer to be recruited within the Investigations Department. The proposal is included in this report. Having legal officers in the core departments is a good practice that will ensure the workflow is dealt with end to end under the leadership and oversight of one department. This will improve operational efficiencies of the investigations in terms of prioritization and turnaround time for matters dealt under part VIII, in particular prohibited agreements and abuse of dominance.

The interviewed case handlers averred that they required legal advice and backing in the course of investigation in the field, thus further underscoring the need for legal officers to be recruited in the key investigation departments. In the same vein, and without prejudice to the foregoing, the non-legal minded case investigators should be trained on how to draft legal documents and handling of evidence as well as training on skills to testify at the Tribunal and the High Court when and where they will be needed to give testimonies. Currently, the Investigation Department has three analysts, all non-lawyers, whereas there are two legal officers in the entire Competition Authority. Thus, as discussed earlier, there is a need for more legal officers.

Section 37 of the Competition Bill gives CCA the power to enter and search premises in search for information with regard to agreements (both vertical and horizontal) and abuse of dominance only. Invariably, this is the provision that shall be invoked when CCA carries out dawn raids. Exclusion of unnotified mergers is provided for under section 58; its enforcement is sanctioned by section 59 (1) of the Competition Bill invoking investigation powers of under part VIII as applied to matters under part VI, to wit the control of restrictive agreements and dominant position. Unless there is a contrary motive to the exclusion of the unnotified mergers from the provision, this is an anomaly that should be looked at with a view to improving competition enforcement in Botswana.

Under the Competition Act, the Competition Authority has carried out a number of successful dawn raids. The experience has been that at least two members of staff, including an information technology officer, conduct dawn raids. The challenge experienced with dawn raids is the collection of electronic evidence/

documents due to limited experience in collecting electronic evidence, as well as a few IT staff (there is only one IT officer at the Authority). An incidence was reported whereby the employees of the raided company resisted entry in the absence of their lawyers. This led to a delayed operation. This operational anomaly should be looked at with a view to improving competition enforcement in Botswana.

Figure 2, in particular box 12, shows that the practice has been that investigated matters are taken to the Investigations Committee for review and advice. The composition is that CEO is the Chairperson, whereas the Director of Investigations is the Secretary. Ordinarily, the Investigations Committee meets once a month, during which the Director of Investigations reports on general stages, the investigation plan and the timeline for every matter under investigation. According to staff interviewed, the submission of the matter to the Investigations Committee, as depicted in box 12 of figure 2, amounts to duplication because the Department would have informed CEO separately, as shown in box 5 of figure 2, for which CEO is knowledgeable, and the Department gives directions and reports to CEO as chair of the Investigations Committee during the monthly briefings.

Despite a tendency towards duplication, one needs to consider the fact that all the referred submissions made prior to the case submissions post investigations are piecemeal and thus do not present the full picture of the case, as is the case for the submission in box 12 of figure 2. As averred earlier, the current procedure and practice save for the cited difficulties remains valid and with the necessary modifications, may be applied under the Competition Bill, as it can strengthen the rigorousness, accuracy and quality of CCA submissions to the Board of Commissioners, which was reported to be requiring upgrading during focus group discussion.

A summary of all competition cases dealt with by the Competition Authority under the Competition Act from 2011 to 2017 is as presented in table 2.

Out of 121 cases handled by the Competition Authority between 2011 and 2017, there are 79 cases equivalent to 65.3 per cent that were closed due to lack competition issues observed. Nineteen cases equivalent to 15.7 per cent were closed for other undisclosed reasons. This makes a total of 98 cases equivalent to 81 per cent of all cases that were initiated during the period closed for either having no

**Table 2. Distribution of cases by sector**

S/N	Sector	Frequency	Percentage
1	Agriculture	7	5.8
2	Broadcasting	1	0.8
3	Education	2	1.7
4	Energy	5	4.1
5	Food and beverages	3	2.5
6	Health	15	12.4
7	Horticulture	1	0.8
8	Manufacturing	5	4.1
9	Mining and quarrying	4	3.3
10	Panel beating	1	0.8
11	Poultry	3	2.5
12	Printing and publishing	2	1.7
13	Retailing	12	9.9
14	Road construction	1	0.8
15	Services	49	40.5
16	Telecommunication	3	2.5
17	Tourism	1	0.8
18	Transport	5	4.1
19	Missing file	1	0.8
	<b>Total</b>	<b>121</b>	<b>100.0</b>

Source: Peer review interviews, 2017.

**Table 3. Distribution of status of cases initiated by CAB, 2011–2017**

S/N	Status	Abuse of dominance	Horizontal/vertical Agreements	Resale price maintenance	Non-competition (commercial disputes)	Total	Percentage of total cases
1	Cases closed for lack of competition issues	54	21	1	3	79	65.3
2	Cases closed for other reasons	9	9		1	19	15.7
3	Referred to competition commission (Tribunal)	0	4	4	0	8	6.6
4	Ongoing cases	9	4	1		14	11.0
5	Missing file	1				1	0.8
<b>7</b>	<b>Total number of cases</b>	<b>73</b>	<b>38</b>	<b>6</b>	<b>4</b>	<b>121</b>	<b>100.0</b>

Source: Peer Review Interviews, 2017.

competition issues or other reasons.

Only 8 cases equivalent to 6.6 per cent were referred to the Competition Commission for determination and 14 cases equivalent to 11.6 per cent were still ongoing before the Tribunal at the time of the peer review.

With regard to the specifics, during the period under review, there were 73 cases related to abuse of dominance practices, of which 54 cases equivalent to 74 per cent were closed due to lack of competition issues, and 9 cases (equivalent to 12.3 per cent) were closed for unstated reasons. This makes a total of 63 cases equivalent of 86.3 per cent of all abuse of dominance cases that were initiated during the period closed for either having no competition issues or other reasons. No case has been referred the Competition Commission, and 9 cases (equivalent to 12.3 per cent) were still ongoing before the Competition Commission at the time of the peer review.

During the period under review, there were 38 cases related to horizontal and vertical agreements initiated. 21 of these, equivalent to 55.3 per cent, were closed due to lack of competition issues, whereas 9 cases equivalent to 23.6 per cent were closed due to other unstated reasons. This makes a total of 30 cases equivalent to 79 per cent of all horizontal and vertical agreements cases that were initiated during the period closed for either having no competition issues or other reasons. Four cases equivalent to 10.5 per cent were referred to the Competition Commission and 4 cases equivalent to 10.5 per cent were still ongoing before the Competition Commission at the time of the peer review.

With regard to resale price maintenance, six cases were initiated, one of which was closed due to lack of competition issues, four were referred to the Competition Commission, while one was ongoing before the Competition Commission at the time of the peer review.

Operationally, the same case officers handle resale price maintenance, horizontal and vertical agreements, as well as abuse of dominance. There is no separation of duties as to per se prohibited agreements (cartel) and abuse of dominance.

Given the architecture of the Competition Bill with regard to the nature of prohibitions associated to the anticompetitive restrictive practices issues discussed earlier, and without prejudice to the sovereignty of Competition Authority and Competition Commission's

decisions, it is logical to conclude that there is a need for restructuring as provided in by the Competition Bill to properly provide for restrictive practices, identify and sharpen offences associated with such practices and prohibit the same commensurately as commented above.

Invariably, there arises an issue of concern as to what makes so many cases be dropped after they have been initiated. Interview findings have shown that the inadequacies in the provision of the law, to wit the Competition Act and lack of proper balance between procedural compliance requirements and competition knowledge at both the Competition Authority and Commission levels, have contributed to such a scenario, hence the need for remedial action to such an undesired state of affairs at CCA and the Tribunal under the Competition Bill.

## **4. Non-enforcement issues**

### **4.1 Market studies**

Section 5(2) (g) of the Competition Bill provides for the mandate of CCA to undertake general studies, whether by way of a market inquiry in terms of this Act or otherwise, on the effectiveness of competition in individual sectors of the economy. This function has been perpetuated by the Competition Act verbatim following the passing of the Competition Bill to law, to CCA. Operationally, within the Authority, this has been carried out by the Investigations Department. Market studies are conducted with a view to providing leads to the enforcement leg of the Authority, as well as feeding into the advocacy wing of the Competition Authority with informed positions policies, programmes and other interventions that distort markets while being unenforceable.

According to the stakeholder interview findings, a similar pattern of going to the Investigation Committee is also observed for market studies. The Investigations Department needs the authorization of the Investigation Committee to conduct a market study. Recently, two more studies on liquefied petroleum gas and the pharmaceutical sectors were conducted. The opinion of the stakeholders about duplication in investigations is reiterated in the market studies.

In its seven years of existence, the Competition Authority has conducted five market studies, most recently in aviation, shopping malls and the retail sector (in-house brands). There is no evidence that findings of the studies have provided input to either

enforcement or advocacy functions of the Authority. Findings from table 2 show that it is only the retail sector that was both studied and had cases brought up for investigation and possible enforcement. Furthermore, the retail sector cases show that there were two such cases in 2012, four in 2013, two in 2015 and four in 2016. It is noted that the retail sector study was completed in 2017, thus having no relation to the reported cases.

The link between the studies and cases should be developed and grown for the good of competition practice in Botswana. Invariably, the small number of studies is proof that carrying out the two tasks by the Investigation Department is daunting, given the limited number staff. As such, this amplifies the need to recruit more officers for the Investigation and Legal Departments.

## 5. Competition advocacy

The advocacy work of the Competition Authority has been carried out based on the mandate given to the Competition Authority under section 5(2)(d) and (e) of the Competition Act, which is in *pari materia* with the provision of section 5(2)(d) and (e) of the Competition Bill.

### 5.1 Cabinet Minister

The growing trend in developing countries is to position Competition Authorities in central ministries so as to avoid a position where competing policies are manned by one Minister. In Botswana, the Competition Authority and CCA, as the case shall be under the Competition Bill, shall also be under the Ministry of Industry, Trade and Investment. In line with the increasing best practice and developing the competition and economic regulation legal framework, both competition and sectoral economic regulators should be placed under one central ministry.

The Minister has also been given powers to determine technical competition matters that should otherwise be left for the Members of the Commission and the Competition Act or the Board: for instance, regarding the powers conferred on the Minister to decide on mergers, which should be avoided. The Minister should be left with the general oversight and administrative parts of functioning of CCA and the members that the Minister appoints based on their expertise and competencies deal with technical matters. For efficiency purposes, good drafting practice should place functions of the Minister in the Competition Law under

one provision and register them all so as to avoid the possibility of statutorily provided government capture.

### 5.2 Academia

The Department of Economics of the University of Botswana is working on a curriculum for a post-graduate degree in economics of competition policy and regulation, which may take at least one year to complete. It is expected that the course will contain eight modules. Currently, about 150 students learn competition economics as part of the industrial economics course, where staff of the Competition Authority of Botswana have been invited to come and lecture in the course.

The legal department runs a summer course on the law of sales and credit agreements on consumer protection.

The University of Botswana law faculty requested that a memorandum of understanding (MOU) be signed between the Competition Authority and the University of Botswana to cooperate on competition and consumer protection issues.

The University has asked whether lecturers and students with an interest in competition and consumer issues could be invited to future competition advocacy and training events organized by the Competition Authority.

The Competition Authority has partnered with the University of Botswana for three years, which has led to collaborative arrangements. For example, the Competition Authority hosted students for 8 weeks (industrial attachment), and the University of Botswana invited staff of the Authority to speak about competition issues and the Competition Authority to the students and the university community.

In future, the University of Botswana Economics Department would like to collaborate with the Competition Authority in market studies/research, including outsourcing. They would also like to be informed of competition seminars and workshops to share their experiences and would like to receive Competition Authority newsletters.

### 5.3 Public opinion

The Competition Authority has been engaging its stakeholders with a view to creating awareness of competition law and policy, specifically by promoting its compliance through non-enforcement

mechanisms. The Authority has used forums such as social media, conventional print and digital media, and presentations to conferences.

The Authority has also advocated the repeal of anticompetitive laws and policies through competition assessment of targeted laws and policies through implementation of its advocacy plans.

An interview of legal practitioners showed that there was very little interaction between the Competition Authority and the Courts; as such, no relationship has been established. With regard to competition law practice, it was reported that there was no firm that specialized in competition, but business law practitioners were seen to be possible candidates for such specialization due to resemblance of the issues. Further, most legal firms had not placed competition as a priority on their agenda, partly because there was no direct demand for such services from the market because most corporates prefer South African legal firms over local ones and also because the Authority had not been active in using the Botswana Bar as a forum for promoting competition law practice. This could be attributed to a level of case load requiring legal action in the Competition Authority or insufficient knowledge and experience in the case of lawyers from Botswana.

It was also found that most of the members of the public who have interacted with Authority respondents and complainants alike considered the Authority to be doing a commendable job, given the social and geo-economic circumstances of Botswana. Most of the stakeholders interviewed reported that the Authority was mostly well known in the area of merger control, adding much work has been done.

#### 5.4 Business community

The same sentiment of insufficient interactions with the Authority was shared with Business Botswana, an organization with a membership base of 25 businesses, mostly manufacturers and service providers. The Business Botswana annual general meetings, where at least 15 members or more are usually in attendance and the newsletter is distributed to all stakeholders and different entities in Botswana and beyond.

According to officials interviewed at Business Botswana, there was no established relationship between Business Botswana and the Authority; there was also no evidence that the Authority has taken

advantage of the available platforms under Business Botswana to advocate for fair play in the market and compliance to competition law. This is an area CCA should focus on, as the members are mostly companies in different businesses, which are the primary targets of the competition law.

It was also observed that the link between research and advocacy functions remains weak or non-existent, as there is no evidence of research work that has been used as input to advocacy work of the Authority for the past six years. This is another area where possible rectification could lead to the betterment of competition practice in advocacy in Botswana.

## 6. Other laws of importance to competition law enforcement

### 6.1 Sector regulators

The National Competition Policy of Botswana in its exclusions and exemptions part refers to public utilities as follows:

*“The provision of infrastructural facilities for public utilities such as land-line telecommunications, water, and electricity require huge capital outlays, which take long to recoup given the paucity of Botswana’s population and the resultant small market base. Since this situation may constrain private sector investment in this subsector, Government may exclude and exempt the provision of some of the infrastructural facilities from this Policy.*

*The aforementioned exclusions and exemptions notwithstanding, Government may include the provision of services such as public utility connections and distribution services within the ambit of this Policy.”*

The National Competition Policy discusses the relationship between the Competition Authority and sector-specific regulators in part 8.1 (d) (i), (ii) and (iii):

*“Government recognizes the important role and advantages of having sector- or industry-specific regulators such as the Bank of Botswana and the Botswana Telecommunications Authority. However, Government will ensure that all sector-specific regulatory bodies fall under the ambit of the Competition Law.*

*Legislation related to this Policy and other existing pieces of legislation, which have a direct or indirect bearing on the Competition Policy, will*

*be harmonized and interfaced in order to ensure consistency and fairness in their application.*

*In sectors characterized by economic/commercial activities, complex science, engineering and technology or having natural monopoly or other special elements, the Competition Authority and sector-specific regulators collaborate and complement each other."*

Based on these provisions, one can deduce three key issues related to sector regulators, namely the selective need for economic regulation, the Competition Authority's jurisdiction over all competition matters in the sector specific regulatory bodies, and the need for the Competition Authority and sector-specific regulators to collaborate with and complement each other. This is the spirit of the Competition Policy of Botswana.

The provision on economic regulation in the Competition Bill is based on the provision of section 3 (1) and the exemptions provided in section 3(3) (c) of the Competition Bill, which states that "[t]his Act shall not apply to any practice or agreement expressly required or authorized by any law or scheme, including matters falling within the terms of a licence issued pursuant to a regulatory regime established by statute for the purpose of economic or prudential regulation."

CCA is deemed to have no jurisdiction over any of the regulated sectors (network-based utilities): electricity, petroleum, water and gas, collectively known as energy; communications; surface and marine transport, and civil aviation. This is consistent with the National Competition Policy and also within the international best practice on selection of sectors to be subject to economic regulation. Invariably, since both the National Competition Policy, as quoted above, and the Competition Bill, under its section 86 (5), have provided for a consultative mechanism for CCA and the sector-specific regulators; the understanding is clear that there should be concurrent jurisdiction between CCA and the sector-specific regulators in Botswana.

The Competition Authority has signed memorandums of understanding with regulators in the telecommunications and the civil aviation sectors. Without prejudice to the content of the referred MoUs, the best practice is for both the competition and sectoral regulators statutes to categorically provide for a mechanism of ensuring that the competition issues are

adequately covered. The sector regulators in their respective economic regulation to either formulate separate legal instruments or have instruments that refer the same to CCA. Reading of the enabling provisions of the two economic regulators visited together with the relevant provision of the Competition Act as well as the Competition Bill, do not provide for such a desired architecture. Section 20 of the Telecommunications Act discusses monitoring of competition in the telecommunications sector as follows: "The Authority shall be responsible for monitoring competition in the telecommunications sector ...The Authority shall report any contravention of the rules of competition as specified under section 48 of this Act to the Attorney General who shall deal with any such contravention as he considers appropriate".

Civil aviation legislation is silent on such matters and the stakeholders interviewed stated that they were not familiar with competition issues or the link with the competition enforcement framework, despite the existence of the MoU.

The energy regulator has just been established, whereas the surface and marine transport regulator(s) have not.

Increased cooperation between competition and regulatory authorities which serve the same consumer in the Botswana economy is desirable and could be achieved, since there is a need to share information, financial and other resources for the benefit of the economy.

The two sets of legislation do not provide for such a cross-referencing. Statutorily, CCA is barred from exercising its jurisdiction in the regulated sectors, despite the fact that the sectoral regulators are also not directly mandated by their laws to deal with competition issues. As earlier stated, MoUs cannot be the instruments to take care of such an important part of competition and economic regulation.

A more serious anomaly with regard to the provision is that it also exempts sectors under prudential regulation its definition is the assurance of adherence to standards of the industry. This is with the exception of issues related to market access (entry and exit to markets) and price discovery which are solely granted to economic regulators (not prudential regulators). It is therefore logical to say all economic regulators are prudential regulators, but the contrary is not true. Although other jurisdictions have included in the list other economic (sectoral regulators) for sensitivities of

such sectors; the open-endedness of the provision of section 3(3)(c) of the Competition Bill poses a potential challenge to the users of the law.

In the same vein, it is unequivocally inconsistent with the Competition Policy that avers to the effect that the Government will ensure that all sector-specific regulatory bodies (prudential regulation bodies) fall under the ambit of the Competition Law, a position in line with best practice as a general rule but provides an exemption for natural monopolies (economic regulation bodies).

## 6.2 Intellectual property

Intellectual property in Botswana is administered by the Companies and Intellectual Property Authority (CIPA), which is responsible for administering four pieces of legislation. CIPA doubles as a business registrar as well as a patent registrar and administrator. As such, CIPA is more of a registrar of companies than a regulator.

Within the legal and policy framework for competition, intellectual property rights are discussed in the National Competition Policy and the Competition Bill as shown below.

The National Competition Policy, under Exclusions and Exemptions: Intellectual Property Rights:

*“The Policy recognizes the important role intellectual property (patents, trademarks and copyrights) plays in Botswana’s human and economic development endeavours and the need to protect and safeguard the interests of intellectual property rights-holders. Therefore, as a way of protecting intellectual property rights from infringement and in order to promote the development of creations and innovations, intellectual property rights will be exempted and excluded from the ambit of this Policy.”*

Competition Bill, section 3(3) (c): *“This Act shall not apply to any agreement to the extent that the agreement relates to the protection, exercise, licensing or assignment of rights under any law governing intellectual property rights”.*

From the provisions cited above, it is clear that both the policy and the law governing competition in Botswana have exempted intellectual property. The growing trend in drafting of competition laws which includes intellectual property aspects especially those on abuse of rights as part exploitative and/or exclusionary conducts under abuse of dominance in

their restricted trade practices provisions. Section 16 (2) (b) of the Consumer and Consumer Protection Act in Zambia provides an example for such prohibition that recognizes any conduct capable of limiting or restricting market outlets or market access, investment in a manner that affects competition.

Despite the exemption discussed above, CIPA and the Authority have a three-year-old MoU, which among other things, has achieved coordination between the two, to wit CIPA has included in its check list for amalgamations (mergers and acquisitions), a requirement for a letter of approval from the Authority to be filed by the merging parties.

Findings of the interview with CIPA show that there is little understanding of the Authority’s work beyond a few issues under MoU, including definitions and the threshold for mergers notification. This is an area that CCA should with immediate effect take up with CIPA to ensure there is a good understanding of the definition of merger and merger thresholds so as to collaborate in the area of non-notification of mergers. At a later stage of development of the two legislations, CIPA and CCA should consider having cross-referencing of the enabling legislation so as to provide for evaluation of registered intellectual property rights as against foreseeable anticompetitive effects beyond registration so as to be able to limit them at entry point, given the economic dependency of Botswana on key imported goods and services.

## 6.3 Consumer protection

In Botswana, consumer protection issues have been dealt with pursuant to the provisions of Consumer Protection Act No. 42-07 of 1998. The Consumer Protection Office in the Ministry of Investment, Trade and Industry (MITI) has all along been implementing the Act. In December 2017, Parliament passed Consumer Protection Bill No. 23 of 2017 into law, which and now awaiting presidential assent to become law. Effective from the assent, the new Competition and Consumer Authority will be implementing both competition and consumer protection laws in Botswana.

Since consumer protection issues were not dealt with by the Authority, as was the case for competition, the peer review did not have mandate to deal with the matters. Nevertheless, there have been issues particularly touching on jurisdiction, institutional set-up and the organization structure that shall be applied to the consumer protection mandate with necessary modifications.

Despite the fact that there have been no consumer protection issues dealt with so far, review of the Consumer Protection Bill can produce a few things that CCA can watch for effective take-off. It is important to deal with matters related to consumer protection at less cost to the consumer. Expecting consumers to channel their complaints through CCA, which is centrally placed in Gaborone, is detrimental to securing their interests, due to cost and time constraints. Given the paucity of its population, rolling out CCA branches throughout Botswana may also not be cost effective in the immediate term, despite the provision of the regional office in the existing organizational structure of the Authority. In the current set-up of the Consumer Protection Department in the Ministry of Investment, Trade and Industry, CCA could explore how best the regional offices could fit into the future new organization structure once the two bills become law.

## **7. Organizational structure of the Competition Authority**

### **7.1 Commission/Competition and Consumer Board**

Section 6 of the Competition Bill establishes the Competition and Consumer Board, which will replace the Commission (figure 3) and is its equivalent under the Competition Act. Section 7 of the Competition Bill provides for the Minister to appoint seven members and select among them a chairperson as per subsection 4. The provision does not provide for any procedure to be followed by the Minister in exercising these powers. Section 8 provides for tenure of the members as not exceeding five years with a possibility of one further term of the same tenure. A maximum of 10 years can be considered long enough for members to make a meaningful contribution to CCA.

Nevertheless, the Minister can within the law appoint members for less than the stipulated five years and if misapplied, can lead to problems faced by other jurisdictions of shortness of tenure of members and even absence of the Board or Commission, such as in the case of the United Republic of Tanzania in 2015/2016. However, this is probably provided so as to enable the application of subsection 2, which requires the Minister to assign periods of appointment such that not more than one-third of the members will expire in any one year. This ensures continuity of CCA business at all times, especially when applied

prudently to ensure longevity of tenure of all members occasioned by staggered appointments of five years to all members in compliance with the provision, as discussed earlier.

Section 9 of the Competition Bill provides for removal of members by the Minister, and grounds for removal are listed in subsection 1. The provision does not provide for any procedure to be followed by the Minister in the exercise of these powers. Irrespective of the list of grounds the Minister should rely upon, the provision should have raised the bar for the Minister to show cause as to the reasons so adduced. Addition of a right of appeal would provide robust independence of the members as individuals and jointly as the Board.

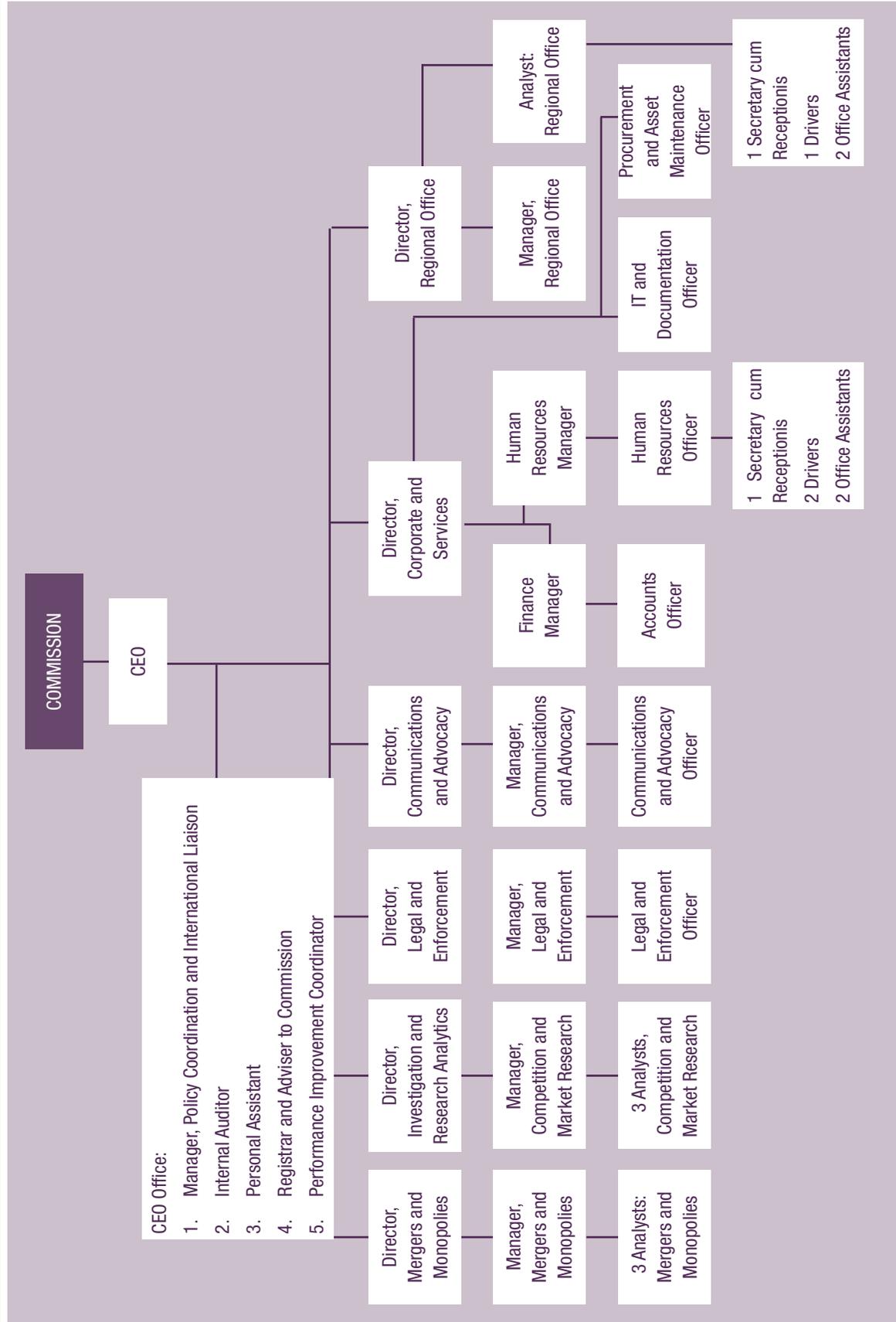
Without prejudice to the status quo, the ideal situation would be for the Minister to appoint members, following an independent competitive process, which would produce a list of qualified candidates for the Minister to choose from. The President could have been the appointing authority for the Chairperson; on the other hand, the powers to remove any of the members could have been vested upon the President alone.

This would not negate the ministerial appointment powers but would ensure more transparency and recruitment of suitable people to serve on the Board, as compared to the current system. The five-year terms staggered among the members with a possibility of another five years would ensure that the institutional memory is statutorily sustained among the same Board and carried over to successive Boards. The powers to remove members should be statutorily provided to allow for more versatility in decision-making at CCA.

With regard to validity of decisions and acts of the Board under section 14 of the Competition Bill, that “decision or proceeding of the Board shall not be invalid on account of the appointment of any member being defective; or the Board having consisted of less than the number of members provided for under section 7(1), if the act was done, or the decision was made, or the proceedings took place, in accordance with a majority vote of the persons who were at the time entitled to act as members”.

This provision can be construed as defeating the purpose of appointment of members as provided under section 7 and validity of meetings where decisions are made (regarding quorum), as provided under section 13(7), thus being contrary to principles

Figure 3. Competition Authority of Botswana: Organizational chart



of good regulation that ensure due process in delivery of competition justice.

These anomalies should be looked at with a view to improving competition enforcement in Botswana. The same criteria should be employed with necessary modification for the Tribunal under the competition Bill.

## 7.2 Secretariat

This consists of the CEO and the rest of the staff. Accordingly, there is a very strong link between the Investigations Department and the Legal and Enforcement Department, as well as the Mergers and Monopolies Department. Stakeholders from at least two departments – the Investigations Department and the Legal and Enforcement Department – have

expressed operational difficulties arising from the organizational structure. The distribution of the workload is shown in table 4.

The Ministry is responsible for the Commission that approves the organizational structure for which even before the passing of the Competition Bill which shall necessitate adjustment to the existing structure because of the inclusion of consumer protection issues under the mandate of CCA. This is an avoidable constraint; CCA should be allowed to vary the organizational structure without involving the Ministry so as to hasten processes for purposes of operational efficiency. This further reiterates the need for increased independence of CCA in managing resources, including human resources, to be able to deliver its mandate as expected.

**Table 4. Distribution of competition workload among departments**

No.	Competition issue	Directorate		
		Mergers and Monopolies	Investigations and Research Analysis	Legal and Enforcement
1	Notified mergers under section 49 of the Competition Bill	√		
2	Unnotified mergers under section 58 of the Competition Bill	√		
3	Notified agreements under section 28 of the Competition Bill			√
4	Unnotified agreements under section 28 of the Competition Bill		√	
5	Agreements under sections 25, 26 and 27 of the Competition Bill		√	
6	Abuse of dominant position under section 31 of the Competition Bill		√	
7	Prosecution of all competition cases before the Tribunal			√
8	Appeals from competition cases <sup>a</sup>			√
9	None Competition Cases and other Legal Duties under section 4(2) of the Competition Bill			√

Source: Peer Review Interviews 2017.

<sup>a</sup> All appeals from decisions on notified mergers, unnotified mergers, horizontal and vertical agreements and abuse of dominant position cases.

With regard to the competition functions, it is important to design an organization structure that will allow for end-to-end completion of the tasks performed by one department. This is to say the directorate that handles whichever of the restrictive trade practice should be able to handle the whole case to finality of the same as per the stages described in table 1. This will entail attaching legal practitioners in all the three departments and also in the Consumer Protection side as the case may be upon the Competition Bill being passed to law.

Furthermore, CCA should consider establishing some level of specialization by introducing at mid-level departments (managers) to handle specialized issues that require similar sets of skills. An example of this would be the analysis of agreements prohibited by the rule of reason and notified mergers under one department (Mergers and Monopolies) but separate units (Mergers and Exemptions and Anti-monopolies) within the same department. Whereby notified agreements prohibited by the rule of reason and notified mergers are handled by the former and unnotified agreements prohibited by the rule of reason and unnotified mergers are handled by the later. The same principle should be observed by the consumer protection department(s) to be established as previously mentioned and other directorates, with necessary adjustments.

## 8. Resources of the Competition Authority

The Competition Authority of Botswana (CAB) has a human resources base of 34 staff, of which 16 are from Mergers and Monopolies, Investigations and Research Analysis, and Legal and Enforcement

Departments technical staff), whereas 18 from the Office of the Chief Executive Officer and Corporate Services are mostly support staff (table 5).

The CEO doubles in both technical and support functions as the general overseer of the Authority. This is the complement under the Competition Act that will be migrated to CCA when the Competition Bill is enacted.

Records at the Authority show that most of the current employees of the Competition Authority are relatively experienced and familiar with the functions they perform at the Authority, having worked for the Authority for at least four years. Only a few were new to the Authority.

Among the technical operational staff, most have undergone postgraduate competition training at university, to wit a post-graduate degree in competition economics/law. Comprehensive-in-house training has been provided for staff. Since its inception in 2011, much time and resources have been spent on training and retraining Authority staff in investigations, prosecution and economic analysis, as well as relevant specialized professional areas in support services.<sup>29</sup> Most staff members have attended short (two to three days) training courses abroad. The situation is the opposite of that of the Commissioners. The Authority should consider mobilizing resources and organize a tailor-made training programme aimed at addressing knowledge and skills gaps for both the Commissioners and staff.

According to key stakeholders, the low turnover of staff at the Authority can be mainly attributed to the relatively good working conditions and opportunities. There are no severe complaints on the part of Authority

**Table 5. Distribution of human resources among directorates**

Department	Establishment	Vacant	Head count
Office of the Chief Executive Officer	6	2	4
Mergers and Monopolies	5	1	4
Investigations and Research Analysis	5	0	5
Corporate Services	12	1	11
Communications and Advocacy	3	0	3
Legal and Enforcement	3	1	2
<b>Total</b>	<b>34</b>	<b>5</b>	<b>29</b>

Source: Competition Authority of Botswana (CAB), 2017.

staff in relation to remuneration, a problem that exists in most competition authorities within the region. The Authority monitors the attrition rate, and in 2016, only two employees left the Authority bringing the turnover rate for the year to 6.06 per cent.<sup>30</sup>

The remuneration situation is unlike that of the Commissioners, who receive a small allowance when they engage in Authority work.

The findings with regard to staff remuneration is consistent with findings of the Employee Engagement Survey to gauge the level at which employees are engaged; that is, whether they are committed to the organization's goals and values, which indicated that employee engagement in the Authority is currently at 71.8 per cent against the Authority's strategic target of 85 per cent. This was a slight increase from 69.2 per cent of the past year's survey.<sup>31</sup>

It was observed that there is a good appreciation of ICT and electronic documentation of proceedings and archives at the Authority, even though this may not translate to effectiveness in handling cases, due to other staff constraints mentioned earlier. There is a well-kept and interactive website together with social media platform such as Facebook and Twitter, as well as, the Authority's own domain of emails. Nevertheless, it was reported that financial resources are a limiting factor to having additional facilities that

could allow quicker implementation of activities at the Authority.

According to the staff interviewed, in 2016, CAB experienced two major system breakdowns and it took two months to restore. This mean there is a need to improve the existing ICT infrastructure with a possibility for migration to online systems and avoid paperwork for increased efficiencies at CAB. The Authority does not have a sufficient number of staff who can deal specifically with ICT, despite a justifiable demand for additional full-time employees, preferably to manage ICT affairs of the Authority.

Regarding financial resources, the Authority has insufficient funds to carry out the broad mandate it has been statutorily given. Table 6 shows that government subventions were the main source of income for the Authority, followed by merger notification fees.

For the two consecutive years 2015 and 2016, there were deficits attributed to declining exemption and merger fees, declining administrative and lease expenses, as well increased government budget input. 2017 recorded a surplus attributed mostly to the windfall gains from exemption and merger fees, as well as other income consisting of the disposal of plant and equipment, recovery form MITI games and sundries. The only reliable source is government funding, which should ideally be the case, since the

**Table 6. Distribution of CAB income by source**

Source	2017		2016		2015	
	Amount (pula)	Contribution (%)	Amount (pula)	Contribution (%)	Amount (pula)	Contribution (%)
Government subvention	28 210 395	88.19	22 301 574	94.69	21 555 271	90.47
Exemption fees	-	-	-	-	130 096	0.55
Merger fees	3 220 707	10.07	1 199 693	5.09	1 991 229	8.36
Sale-of-tender documents	2 380	0.01	13 500	0.06	11 000	0.05
Interest revenue	75 912	0.24	38 207	0.16	139 109	0.58
Other income	479 904	1.50				
Total income	31 989 298	100.0	23 552 974	100.0	23 826 705	100.0
Total expenses	28 667 530		24 709 938		28 758 183	
Income gap	3 321 768		(1 156 964)		(4 931 478)	

Source: CAB Annual Reports, 2016 and 2017.

mergers and exemption fees have not been proven to yield significant revenues for the Authority. According to staff interviewed, the Treasury has the discretion to take the merger fees from CAB, although so far that has not happened.

Pursuant to section 21 of the Competition Bill, CCA shall be funded by the following:

- (a) Moneys appropriated by the National Assembly for the purposes of the Authority;
- (b) Fees that the Authority may charge for practices being examined or investigated in terms of this Competition Bill;
- (c) Fees to be paid in respect of mergers notified for approval by the Authority.

The sources of CCA under the Competition Bill have been prudently linked to activities related to its functions. The provided sources have been restricted to avoid the possibility of including sources that are inconsistent with the spirit and objectives of the Competition Bill. Nevertheless, there are other legitimate sources consistent with the Competition Bill, such as non-conflicted grants, for example, those for research and other project works issued by development partners that have not been provided for in the law as it reads today. Also omitted is the funding from sectoral regulators practising economic regulation.

Based on the practice of coexistence of competition and economic regulation, there is evidence that economic regulatory authorities have often had excess funds emanating from their regulatory functions. Other jurisdictions – Turkey and the United Republic of Tanzania – have provided in their competition laws that they will receive funds from the regulated sector authorities based on the principle that the two serve the same consumer, hence the need for sharing to avoid multiple levies by the authorities. These would be examples worth emulating so as to increase CCA coffers in a bid to have the competition frontier pushed forward in tandem with the regulated sectors. This reemphasizes the need to have a well-defined relationship with the regulated sectors and provided for statutorily by the laws of competition and sector regulators.

## 9. Judiciary

Section 67(3) of the Competition Act, 2010 states that an appeal brought against the judgment of the High

Court may be made to the Court of Appeal, but only on a point of law arising from the judgment of the Court, or from any decision of the Court as to the amount of a penalty. The Competition Bill has departed from this position, whereby sections 83 and 84 of the Bill make reference to appeals and judicial review to the High Court and stops thereafter. Consultation with the Attorney General Chambers confirmed that the Court of Appeal provision had been removed because it was redundant. All High Court matters are appealable to the Court of Appeal.

This confirmation by the Attorney General Chambers should be examined and adopted by the judiciary with a view to ensuring that competition cases are not excluded from the benefit of the scrutiny of the Court of Appeal, thus offering either a secondary or tertiary chance of appeal to the aggrieved parties in the course of dispensing competition justice in Botswana.

Arising from an earlier point on insufficient interaction between the courts and the Competition Authority, it would be advisable to establish communication mechanisms and design advocacy and training programmes for the judiciary. This would create awareness and understanding of how the courts operate and give the judiciary an opportunity to better understand and adjudicate competition cases.

## 10. General considerations for policy recommendations

There is need for the political system to assure all investors, domestic and foreign, of their protection and access to fair, equitable, transparent and accountable investment opportunities, processes and incentives thereto. While most contacts hailed the professionalism exhibited by the Authority and the Commission/Tribunal, concerns were raised about their ability to deal with unwarranted government interventions.

The Competition Bill has sufficient safeguards on declaration of interest for Commissioners and the staff of the Authority have strict codes of conduct to safeguard against unethical conducts. Employee engagement at the Authority has been at 71.8 per cent, compared with the Authority's strategic target of 85 per cent as of 2016. There is a need to ensure that it does not drop, but rather raise it to the strategic target and higher.

Now that CCA and the Tribunal are poised to be separate legal entities under the Competition Bill,

experience elsewhere shows that the duo coexists in a high-paced and time-limited working environment whereby personal working relationships may not be prioritized. It is thus important that CCA and the Tribunal engage in more team-building activities to create a greater team-spirit. As in most institutions in the region, senior management and the lower-ranking staff need to work at creating more direct communication lines with each other and a system of feedback through, for example a suggestion box where staff would be free to express their concerns.

### **10.1 Recommendations addressed to the Government**

The Government may wish to consider the following recommendations:

- (a) There should be sufficient allocation of financial and human resources to cover the observed gaps so as to ensure sufficiency at the Authority;
- (b) The Authority should be enabled to exercise independence to vary working tools such as organizational structure without having the approval of the Ministry to allow more flexibility and increased efficiency of delivery;
- (c) There is a need to promote the coexistence between sector economic regulation authorities and the Competition Authority, their independency and efficiencies.

### **10.2 Recommendations addressed to the Competition Authority**

- (a) The Competition Authority may wish to consider the following recommendations:
- (b) The institutional set-up and practice for the enforcement of competition should be revisited with a view to creating a practical and dynamic set-up that guarantees basic procedural rights to the parties concerned without hindering operational efficiency in the dispensation of substantive competition justice and not vice versa;
- (c) There should be placement of required skills and competences in departments so as to meet the delivery expectation on an end-to-end basis that reduces interdepartmental dependency, in particular, legal professionals in all enforcement-related departments;

- (d) Capacity-building and training of staff should be given priority, including staff needs assessments to guide the training programmes to be developed;
- (e) With the new mandate on consumer protection, there is need to produce a road map report on the merging of the two functions and assign competencies in the two areas;
- (f) Commensurate capacity-building and training in consumer protection, including needs assessments to guide the training programmes, should be developed;
- (g) Work with local universities to develop a curriculum on competition and consumer protection to develop human resource capacities in this area so as to address the evident need for a systematic inclusion of competition and consumer protection law either at undergraduate or professional qualification examinations for the legal profession and thus assist Botswana in having a transparent and accountable implementation of competition policy;
- (h) Consider establishing an annual conference on competition law with the Law Society in Botswana and its related stakeholders, along the lines of the annual Anti-trust Spring meetings of the American Bar Association;
- (i) Develop tailor-made advocacy programmes for specific target groups in the economy, including the business community, consumer organizations, government ministries and departments, the judiciary and business lawyers.

### **10.3 Recommendations addressed to the Judiciary**

The judiciary may wish to consider the following recommendations:

- (a) There is need for more interaction between CCA and the judiciary. Botswana now has a highly trained, experienced and responsible judicial system; however, there have been concerns about its efficiency and specialization, especially in commercial matters such as competition law;
- (b) The judiciary should consider attending certain forums related to competition law enforcement to interact with other judges handling competition issues so as to enhance and sustain such knowledge and skills, as the Judiciary forms a critical part of competition law enforcement in Botswana through the appellant jurisdiction of the same.

#### **10.4 Recommended areas for development of the law**

It is noteworthy that the Competition Authority has just completed the exercise of major legal reforms/amendments that have reached a highly advanced legislative stage, to wit presidential assent. The Competition and Consumer Protection Bills are out, and the former has been the focus of this peer review

report, the latter less so, as it has not been practised by the Authority.

This report has identified issues for consideration, in the next round of development of the law in various subsections of the report. The Authority is therefore invited to reflect on these issues when implementing the revised competition and consumer protection legal framework.

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## ENDNOTES

- <sup>1</sup> [www.statsbots.org.bw](http://www.statsbots.org.bw) (accessed 17 March 2018).
  - <sup>2</sup> <http://www.bbc.com/news/world-africa-13040376>.
  - <sup>3</sup> <http://www.worldbank.org/en/country/botswana/overview>.
  - <sup>4</sup> <https://tradingeconomics.com/botswana/gdp-growth-annual>.
  - <sup>5</sup> <https://www.tralac.org/news/article/11502-botswana-s-eleventh-national-development-plan-ndp-11.html>.
  - <sup>6</sup> African Economic outlook, AFDB OECD, UNDP 2017. at:[www.africaneconomicoutlook.org/sites/default/files/2017-05/Botswana\\_EN\\_2017.pdf](http://www.africaneconomicoutlook.org/sites/default/files/2017-05/Botswana_EN_2017.pdf).
  - <sup>7</sup> <http://www.worldbank.org/en/country/botswana/overview>.
  - <sup>8</sup> <http://www.bankofbotswana.bw/assets/uploaded/midterm-review-of-2017-mps--final.pdf>.
  - <sup>9</sup> <http://www.bankofbotswana.bw/assets/uploaded/State%20of%20Nation%202017%20Final.pdf>.
  - <sup>10</sup> Ibid.
  - <sup>11</sup> See Quantum Global Holdings, <http://quantumglobalgroup.com/knowledge-hub/africa-investment-index/>.
  - <sup>12</sup> See paragraph 48 of the State of Nation Address by His Excellency Lieutenants General, Mr. Seretse Khama Ian Khama, President of the Republic of Botswana, in Gaborone on 6 November 2017; <http://www.bankofbotswana.bw/assets/uploaded/State%20of%20Nation%202017%20Final.pdf>.
  - <sup>13</sup> <https://www.africaportal.org/publications/the-impact-of-trade-liberalization-on-botswanas-beef-and-maize-sectors/>.
  - <sup>14</sup> BIDPA (2002), Economic Mapping for Botswana, Gaborone, Ministry of Trade, Industry and Tourism. See also Legislative Inventory, Ministry of Trade, Industry and Tourism.
  - <sup>15</sup> Ibid.
  - <sup>16</sup> See section 6 of the Zambia competition and Consumer Protection Act and rules 2 and 3 of the Tanzanian Fair Competition Act.
  - <sup>17</sup> See section 4 (2) of the Zambia Competition and Consumer Protection Act of 2010.
  - <sup>18</sup> Ibid. Section 4(3).
  - <sup>19</sup> Ibid. Section 5.
  - <sup>20</sup> Ibid. Section 58(1–4).
  - <sup>21</sup> Ibid. Sections 60, 67 and 68.
  - <sup>22</sup> Fair Commission Act (FCA) of Tanzania, section 62 (1–3).
  - <sup>23</sup> Ibid. Section 65.
  - <sup>24</sup> <http://searchdatamanagement.techtarget.com/definition/compliance>.
  - <sup>25</sup> Ibid.
  - <sup>26</sup> Klip André, 2011, Substantive Criminal Law of the European Union (Maklu Publishers, Apeldoorn, Netherlands).
  - <sup>26</sup> [http://unctad.org/en/Docs/tdrbpconf7d8\\_en.pdf](http://unctad.org/en/Docs/tdrbpconf7d8_en.pdf), UNCTAD Model Law on Competition.
  - <sup>28</sup> For further details, please see the UNCTAD Model Law on Competition 2010 – Chapter IV (TD/RBP/CONF.7/L.4), available at [http://www.unctad.org/en/docs/tdrbpconf7L4\\_en.pdf](http://www.unctad.org/en/docs/tdrbpconf7L4_en.pdf).
  - <sup>29</sup> CAB Annual Report, 2016. <http://www.competitionauthority.co.bw/sites/default/files/Annual%20Report%202015-16.pdf>.
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