

COMPETITION ACT, 2009

No. 17



of 2009

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SCHEDULE II

An Act to provide for the establishment of the Competition Authority, its mandate, the regulation of competition in the economy, and matters incidental thereto.

Date of Assent: 24.12.2009

Date of Commencement: On Notice

ENACTED by the Parliament of Botswana.

PART I – *Preliminary*

Short title and commencement

1. (1) This Act may be cited as the Competition Act, 2009 and shall come into effect on a date appointed by the Minister, by Order published in the Gazette.

(2) Different commencement dates may be determined under subsection (1) in respect of different provisions of the Act.

Interpretation

2. In this Act, unless the context otherwise requires —

“agreement” means —

(a) any form of agreement, whether or not legally enforceable, entered into between enterprises and is implemented or intended to be implemented in Botswana;

(b) a decision by an association of enterprises; or

(c) a concerted practice;

“Authority” means the Competition Authority established under section 4;

“bid rigging” means a horizontal agreement between enterprises whereby, in response to a request for bids —

(a) one of the parties to the agreement agrees not to submit a bid; or

(b) the parties to the agreement agree upon the price, terms and conditions of a bid to be submitted

but an agreement does not amount to bid rigging where the person requesting the bids is informed of the terms of the agreement before the time when the bid is made;

“concerted practice” means cooperative or coordinated conduct between enterprises achieved through direct or indirect contact, that replaces their independent action but does not amount to an agreement;

“Court” means the High Court of Botswana;

“dominant position” means a situation in which one or more enterprises possess such economic strength in a market as to allow the enterprise or enterprises to adjust prices or output without effective constraint from competitors or potential competitors;

“enterprise” means a person or group of persons whether or not incorporated, that carries on a business for gain or reward in the production, supply or distribution of goods or the provision of any service;

“horizontal agreement” means an agreement between enterprises each of which operates, for the purpose of the agreement, in the same market and would therefore normally be actual or potential competitors in that market;

“member” means a member of the Competition Commission;

“premises” includes any vehicle, vessel, aircraft or container;

“relevant market” means the geographical or product market to be used for the purpose of assessing the effects of a practice, conduct or agreement on competition;

“resale price maintenance” means an agreement between a supplier and a dealer with the object or effect of directly or indirectly establishing a fixed or minimum price or price level to be observed by the dealer when reselling a product or service to the dealer’s customers;

“services” includes the carrying out and performance of any engagement, whether professional or not, for gain or reward, other than the supply of goods;

“small enterprise” has the meaning assigned to it under the Small Business Act; and

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“vertical agreement” means an agreement between enterprises each of which operates, for the purposes of the agreement, at a different level of the production chain and relates to the conditions under which the parties may purchase, sell or resell certain goods or services.

3. (1) Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having effect within, Botswana.

Application

(2) This Act binds the State to the extent that the State engages in trade or business for the production, supply or distribution of goods or the provision of any service within any market in Botswana that is open to participation by other enterprises.

(3) This Act does not apply to —

- (a) 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;
- (b) enterprises operating on the basis of statutory monopoly in Botswana;
- (c) any practice or agreement expressly required or authorised 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;
- (d) any collective bargaining activity or agreement negotiated or concluded in terms of any labour legislation;
- (e) conduct designed to achieve a non-commercial socio-economic objective;
- (f) any practice, conduct or agreement, to the extent that the practice, conduct or agreement relates to the export of goods from Botswana or supply of services outside Botswana;
- (g) any practice, conduct or agreement approved or required under an international agreement to which Botswana is a party; and
- (h) service carried out under a contract of employment.

PART II — *Establishment of Competition Authority and Commission*Competition
Authority

4. There is hereby established a body to be known as the Competition Authority, which shall be a body corporate capable of suing and being sued and, subject to the provisions of this Act, of performing such acts as bodies corporate may, by law, perform.

Functions of
Authority

5. (1) The Authority shall be responsible for the prevention of, and redress for, anti competitive practices in the economy, and the removal of constraints on the free play of competition in the market.

(2) Notwithstanding the generality of subsection (1), the Authority shall –

- (a) make rules for, and publicise decisions that increase, fair and transparent business practices;
- (b) regulate the merging of enterprises;
- (c) hold regular consultations with, and receive advice from, sector regulatory authorities in order to clarify who monitors and controls competition matters relating to those sectors;
- (d) inform and educate members of the public and persons engaged in trade or commerce, about the powers and functions of the Authority;
- (e) advise Government on the actual or likely anti-competitive effects of current or proposed policies or legislation and where appropriate, how to avoid those effects;
- (f) offer ongoing advice to the Government on whether exclusions provided for under section 3 should be maintained;
- (g) 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;
- (h) collect information for the performance of its functions;
- (i) liaise with and exchange information, knowledge and expertise with authorities entrusted with functions similar to those of the Authority, in other countries; and
- (j) advise the Minister on international agreements relevant to competition matters and to this Act;
- (k) investigate and evaluate alleged contraventions of Part V;
- (l) grant or refuse applications for exemption in terms of Part VI;
- (m) authorise with or without conditions, mergers of which it receives notification under Part X;
- (n) prohibit or refer mergers of which it receives notification under Part X;
- (o) refer matters it has investigated under this Act to the Commission for adjudication;
- (p) prosecute before the Commission, matters referred to the Commission under paragraph (o); and
- (q) deal with any matter referred to it by the Commission under this Act.

6. (1) The Authority shall have a Chief Executive Officer to be called the Executive Secretary, who shall be appointed by the Minister after consultation with the Commission, and upon such terms and conditions as the Minister may determine.

Executive
Secretary of
Authority

(2) The Executive Secretary shall, subject to the general supervision of the Commission, be responsible for —

- (a) the day to day operations of the Authority;
- (b) the management of the funds, property and business of the Authority; and
- (c) the organisation and management of the employees of the Authority.

(3) The Executive Secretary may, subject to the provisions of this Act, delegate the exercise of any of the Executive Secretary's functions under this Act, to any officer of the Authority.

7. (1) Subject to subsection (2), the Executive Secretary shall hold office for 5 years and shall be eligible for re-appointment.

Tenure of
office of
Executive
Secretary

(2) The Minister may, on the recommendation of the Commission, terminate the appointment of the Executive Secretary for —

- (a) conduct which undermines the intergrity of the Authority;
- (b) prolonged or permanent incapacity; or
- (c) incompetence.

8. (1) The Commission shall on the recommendation of the Executive Secretary, and on terms and conditions determined by the Commission, appoint such employees of the Authority as it considers necessary.

Appointment
of employees

(2) The Executive Secretary may appoint full-time or part time inspectors for the purposes of this Act, from amongst the employees of the Authority or any person the Executive Secretary considers suitable.

(3) The Executive Secretary shall determine the conditions of service and remuneration of an inspector who is not in the full-time service of the Authority.

9. (1) There is established a body to be known as 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.

Competition
Commission

(2) Notwithstanding the generality of subsection (1), the Commission shall —

- (a) adjudicate on matters brought before it by the Authority under this Act; and
- (b) give general policy direction to the Authority.

10. (1) The Commission shall consists of 7 persons appointed by the Minister, in writing.

Membership

(2) In appointing members to the Commission, the Minister shall select persons who have expertise in industry, commerce, economics, law, consumer affairs or public administration.

(3) The Minister shall appoint the Chairperson of the Commission from amongst the members.

(4) The Minister shall cause appointments to the Commission to be published by notice in the Gazette within 30 days of the appointments being made.

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- Tenure of office
- 11.** (1) A member shall hold office for a period not exceeding 5 years as may be specified in the notice appointing the member, and on the expiration of that period shall be eligible for re-appointment.
(2) In appointing members, the Minister shall so specify such periods of appointment such that the periods of appointment of not more than one third of the members shall expire in any one year.
- Disqualification
- 12.** A person shall not be appointed as a member or shall not continue to hold office, who —
- (a) has in terms of a law in force in any country —
 - (i) been adjudged or otherwise declared bankrupt and has not been discharged, or
 - (ii) made an assignment, arrangement or composition with his creditors, which has not been rescinded or set aside; or
 - (b) has within a period of ten years immediately preceding the date of his or her appointment, been convicted —
 - (i) of a criminal offence in any country,
 - (ii) of a criminal offence for which he has not received a free pardon and notwithstanding that the sentence has been suspended, which, if committed in Botswana, would have resulted in a criminal offence having been committed, the penalty for which would be at least six months imprisonment without the option of a fine;
 - (c) is a member of the National Assembly or *Ntlo ya Dikgosi*; or
 - (d) is a Councillor.
- Removal of member
- 13.** (1) The Minister may remove a member from office where the member —
- (a) is absent, without reasonable cause, from three consecutive meetings of the Commission of which that member has had notice;
 - (b) is inefficient;
 - (c) has been found to be physically or mentally incapable of performing his or her duties efficiently, and the member's medical doctor has issued a certificate to that effect;
 - (d) contravenes the provisions of this Act or otherwise misconducts himself or herself to the detriment of the objectives of the Commission; or
 - (e) has failed to comply with the provisions of section 15 (1).
- (2) A member may resign from the Commission by giving 30 days notice, in writing, to the Minister.
- (3) The office of a member shall become vacant —
- (a) where the member appeals, a period of 30 days from the date a ruling against the member is made on an appeal made in respect of a conviction against the member under section 12 (b);
 - (b) where the member does not appeal, 30 days from the date the member was convicted of an offence referred to under section 12 (b);
 - (c) where the member communicates his or her resignation, in writing, to the Minister, in accordance with subsection (2);
 - (d) where a period of 30 days has elapsed from the date the member is given notice in writing by the Minister to vacate office; or

(e) where a member is removed by the Minister on the grounds of misconduct in terms of subsection (1) (d).

14. Where the office of a member becomes vacant before the expiry of the member's term of office by virtue of the member's resignation or removal from office, the Minister may, in accordance with section 10 appoint another person to be a member in place of the member who has vacated office.

Filling of
vacancy

15. (1) A member of the Commission shall not —

- (a) engage in any activity that may undermine or undermines the integrity of the Commission;
- (b) unless the Commission otherwise directs, participate in making any decision of the Authority in respect of which the member has a direct or indirect financial or other personal interest in a private capacity; or
- (c) use any confidential information obtained in the performance of the member's functions as a member to obtain, directly or indirectly, a financial or other benefit for that member or any other person.

Conduct and
disclosure of
interest

(2) Every member shall —

- (a) forthwith after the member's appointment, disclose in writing to the Minister, any direct or indirect financial interest which the member has in any business carried on in Botswana or elsewhere;
- (b) disclose in writing to the Minister, any direct or indirect financial interest which the member acquires in any business carried on in Botswana or elsewhere, as soon as is practicable after the member acquires such financial interest;
- (c) at any meeting of the Commission at which any matter which is the subject of consideration and in which matter the member is directly or indirectly interested in a private capacity, the member shall forthwith upon the commencement of the meeting, disclose such interest and shall not, take part in any consideration or discussion of, or vote on, any question concerning that matter.

(3) A disclosure of interest made under subsection (2) (c) shall be recorded in the minutes of the meeting at which it is made.

(4) Where a member fails to disclose his or her interest in accordance with subsection (2) and the Commission makes a decision which benefits that member, that decision shall be void to the extent to which it benefits the member.

(5) A person who contravenes the provisions of this section commits an offence and is liable to a fine not exceeding P30 000 or to a term of imprisonment not exceeding two years, or to both.

PART III — *Meetings and Proceedings of Commission*

Proceedings
of
Commission

16. (1) Subject to the provisions of this Act, the Commission shall regulate its own proceedings.

(2) The Vice Chairperson of the Commission shall be elected by the members from amongst themselves.

(3) The Commission shall meet as often as is necessary or expedient for the discharge of its functions, which shall not be less than twice a year.

(4) Meetings of the Commission shall be held at such places and times as the Commission may determine and shall be convened by the Chairperson or the Executive Secretary of the Authority.

(5) The Chairperson may convene a special meeting of the Commission within seven days of receipt of a special request in writing from at least four members for such special meeting to be held.

(6) There shall preside at any meeting of the Commission —

(a) the Chairperson;

(b) in the absence of the Chairperson, the Vice Chairperson; or

(c) in the absence of the Chairperson and the Vice Chairperson, a member elected for the purpose of that meeting by the members present from amongst themselves.

(7) A decision of the Commission on any matter shall be by a majority of the members present and voting at the meeting and, in the event of an equality of votes, the Chairperson shall have a casting vote in addition to the Chairperson's deliberative vote.

(8) At any meeting of the Commission, a quorum shall be constituted by not less than one half of the members.

(9) The Chairperson of the Commission shall cause proper minutes of the meetings of the Commission to be taken and recorded.

(10) Minutes of each meeting of the Commission shall be kept and confirmed by a subsequent meeting of the Commission.

Validity of
decisions

17. (1) An act or decision or proceeding of the Commission shall not be invalid on account of —

(a) the appointment of any member being defective;

(b) the Commission having consisted of less than the number of people provided for under section 10 (1),

if the act was done, or the decision, or the proceedings took place, in accordance with a majority vote of the persons who were at the time entitled to act as members.

Remuneration

18. A member shall be paid out of the funds of the Commission such allowances as the Minister may determine.

Appointment
of employees

19. (1) The Executive Secretary of the Authority shall be the Secretary of the Commission.

(2) The Executive Secretary shall attend the meetings of the Commission, but shall not vote.

20. The Authority may engage persons to give advice to, and perform services for, the Authority, on such terms and conditions as the Authority may determine.

Consultants

PART IV — *Financial provisions*

21. The funds of the Authority shall consist of —

Funds of Authority

- (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 Act; and
- (c) fees to be paid in respect of mergers notified for approval by the Authority.

22. The financial year of the Authority shall be a period of twelve months starting on 1st April and ending on 31st March each year.

Financial year

23. (1) The Authority shall keep and maintain proper accounts and records of accounts in respect of every financial year relating to the assets, liabilities, income and expenditure of the Authority, and shall prepare, in each financial year, a statement of such accounts.

Accounts and audit

(2) The accounts of the Authority in respect of each financial year shall, within three months of the end of each financial year, be audited by an auditor appointed by the Authority.

(3) The auditor shall report in respect of the accounts for each financial year, in addition to any other matter on which the auditor considers it pertinent to comment on, whether or not —

- (a) the auditor has received all the information and explanation which, to the best of the auditor's knowledge and belief, were necessary for the performance of the auditor's duties;
- (b) the accounts and related records of the Authority have been properly kept;
- (c) the Authority has complied with all the financial provisions of this Act with which it is the duty of the Authority to comply; and
- (d) the statement of accounts prepared by the Authority was prepared on a basis consistent with that of the preceding year and represents a true and fair view of the transactions and financial affairs of the Authority.

(4) The report of the auditor and a copy of the audited accounts shall, within fourteen days of the completion thereof, be forwarded to the Authority by the auditor.

24. (1) The Authority shall, within a period of six months after the end of the financial year or within such longer period as the Minister may approve, submit to the Minister, a comprehensive report on the operations of the Authority during such year, together with the auditor's report and the audited accounts as provided for in section 23.

Annual reports

(2) The Minister shall, within 30 days of his/her receiving the Authority's report, lay such report before the National Assembly.

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PART V — *Control of restrictive agreements and dominant position*

Prohibition of horizontal agreements

25. An enterprise shall not enter into a horizontal agreement with another enterprise to the extent that such agreement involves any of the following practices —

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

Prohibition of vertical agreements

26. (1) An enterprise shall not enter into a vertical agreement with another business enterprise to the extent that the agreement involves resale price maintenance.

(2) Notwithstanding subsection (1), a supplier or producer may recommend a minimum resale price to the reseller of a good or service if —

- (a) the supplier or producer makes it clear to the reseller that the recommendation is not binding; and
- (b) the product has the recommended price stated on it, and the words “recommended price” appearing next to the stated recommended price.

Other horizontal and vertical agreements

27. (1) A horizontal agreement or vertical agreement other than one referred to under section 25 or section 26 (1) respectively, may be prohibited by the Authority if, following an investigation by the Authority, such agreement is found to have the object or effect of preventing or substantially lessening competition in a market for any goods or services in Botswana.

(2) Without prejudice to the generality of subsection (1), the Authority may prohibit any horizontal agreement or vertical agreement which —

- (a) limits or controls production, market outlets or access, technical development or investment;
- (b) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (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.

(3) This section does not apply to an agreement which, on its own or taken with another agreement —

- (a) constitutes a professional rule prescribed under Schedule I;
- (b) imposes obligations arising from a professional rule prescribed under Schedule I; or

- (c) constitutes an agreement to act in accordance with a professional rule prescribed under Schedule I, unless the professional rule constitutes an infringement of sections 25 or 26, or is considered to constitute an abuse of dominant position.

28. The Authority may carry out an investigation to determine whether the provisions of section 27 (1) should be applied if the Authority is satisfied that the parties to the agreement —

Threshold for determining prohibition

- (a) in the case of a horizontal agreement, together supply a prescribed percentage, or acquire a prescribed percentage, of goods or services in a market in Botswana;
- (b) in the case of a vertical agreement, individually supply or acquire, at either one of the two levels of the market that are linked by the agreement, a prescribed percentage of goods or services of any description in a relevant market in Botswana.

29. (1) The provisions of sections 25, 26 (1) and 27 (1) do not apply to an agreement to which the only parties are interconnected parties.

Interconnected enterprises

(2) Where the parties to an agreement are not inter-connected parties but nonetheless share some degree of common ownership and control, the Authority shall adopt the presumption that the agreement is subject to sections 25, 26 (1) and 27 (1), unless either one of the enterprises concerned can show good cause why such presumption cannot be sustained.

(3) For the purposes of this section, bodies corporate are inter-connected if one of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

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

Abuse of dominant position

(2) In determining whether an abuse of dominant position has occurred, the Authority may have regard to whether the agreement or conduct in question —

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

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Threshold for determining dominant position

31. For the purpose of investigating the potential application of the prohibition on abuse of dominant position, the Authority will consider a dominant position capable of existing in relation to the supply of goods or services of any description if it is satisfied that —

- (a) a prescribed percentage of those goods or services are supplied by one enterprise, or are acquired by one enterprise; or
- (b) a prescribed percentage of those goods or services are supplied by three or fewer enterprises, or are acquired by three or fewer enterprises.

PART VI — *Exemptions and assessment criteria*

Exemptions

32. (1) Where the Authority finds, on investigation that an agreement other than a horizontal agreement or a vertical agreement prohibited by section 25 and section 26 (1) respectively prevents or substantially lessens competition, the Authority may, subject to section 34, grant an exemption from the prohibition if it can be reasonably expected that there will be offsetting benefits for the public directly attributable to the agreement in the form of —

- (a) the maintenance of lower prices, higher quality or greater choice for consumers;
- (b) the promotion or maintenance of the efficient production, distribution or provision of goods and services;
- (c) the promotion of technical or economic progress in the production, distribution or provision of goods and services;
- (d) the maintenance or promotion of exports from Botswana or employment in Botswana;
- (e) the strategic or national interest of Botswana in relation to a particular economic activity being advanced;
- (f) the provision of social benefits which outweigh the effects on competition;
- (g) the agreement occurring within the context of a citizen empowerment initiative of Government; or
- (h) the agreement in any other way enhancing the effectiveness of the Government's programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation:

Provided that the prevention or lessening of competition is proportionate to the benefits for the public and does not allow the enterprises concerned to eliminate competition completely in respect of a substantial part of the products or services in question.

(2) Subject to section 34, the Authority may also grant an exemption to a category of agreements where it is satisfied that the agreements are unlikely to lead to a substantial lessening of competition, or that one or more of the circumstances specified in subsection (1) (d) to (h) exist or are reasonably expected to exist in relation to those agreements.

(3) An exemption granted in terms of this section shall be valid for such period as the Authority may consider appropriate and shall be subject to such conditions as the Authority may determine.

(4) The Authority shall publish, in the Gazette, all its decisions to grant an exemption and shall state its reasons for not applying the relevant prohibition to the agreement or category of agreements concerned.

33. (1) Where —

- (a) the Authority has determined that information on which an exemption was based is materially incorrect;
- (b) there is a material change in the circumstances regarding the exemption;
- (c) or if a condition on which the exemption was granted is not complied with,

the Authority may, subject to the provisions of section 34, revoke the exemption.

34. The Authority shall consult interested parties and shall consider any representation such parties may make before it grants an exemption or revokes an exemption.

Revocation of
exemption

Consultation
on
exemptions

PART VII — *Investigation of horizontal and vertical agreements*

35. (1) The Authority may, either on its own initiative or upon receipt of information or a complaint from any person, start an investigation into any practice where the Authority has reasonable grounds to suspect that —

- (a) the practice in question —
 - (i) may constitute an infringement of sections 25 and 26 (1), and
 - (ii) is prohibited after investigation in terms of sections 27 (1) and 30 (1); and
- (b) the thresholds referred to under the provisions of sections 28 or 31 are, or may be, satisfied.

(2) Where the Authority decides to conduct an investigation, the Authority shall as soon as practicable, give written notice of the proposed investigation to every enterprise which is suspected to be a party to the practice to be investigated and shall in the notice —

- (a) indicate the subject matter and the purpose of the investigation; and
- (b) invite the enterprise concerned to submit to the Authority, any representation which the enterprise may wish to make to the Authority in connection with the matter to be investigated, within such period as the Authority shall specify in the notice.

(3) Where the Authority considers that to give notice under subsection (2) would materially prejudice the exercise of its powers to enter and search any premises in terms of section 36, it may defer the giving of notice until after those powers have been exercised.

(4) For purposes of an investigation under this section, the Authority may, by notice in writing served on any person considered by the Authority to be relevant to the investigation, require that person —

Investigation
by Authority

- (a) to provide the Authority with any information pertaining to any matter specified in the notice which the Authority considers relevant to the investigation, in a statement signed by —
 - (i) that person,
 - (ii) in the case of a body corporate, a director or member or other competent officer, employee, or agent of the body corporate, within the time and in the manner specified in the notice;
- (b) to produce to the Authority, or to a person specified in the notice to act on the Authority's behalf, any document or article as specified in the notice, which relates to any matter which the Authority considers relevant to the investigation;
- (c) to appear before the Authority or before a person specified in the notice to act on the Authority's behalf, at a time and place specified in the notice, to give evidence or to produce any document or article specified in the notice.

(5) If the Authority decides not to conduct an investigation, having received a complaint or a request to investigate a practice in terms of subsection (1), the Authority shall, in writing, inform that person of the reasons for its decision.

36. (1) Where the Authority has reasonable grounds for suspecting that an enterprise has engaged in, is engaging in, or is about to engage in, a horizontal or vertical agreement prohibited in terms of section 25 (1) and section 26 (1) respectively or in the abuse of dominant position, the Authority may authorise the entry and search of that enterprise's premises, by an inspector appointed in writing by the Authority.

(2) Subject to subsection (3), an inspector appointed and authorised in writing by the Authority, may at any time during normal business hours —

- (a) enter enterprise or any other premises where information or documents are kept by the said enterprise;
- (b) search any person on the premises if there are reasonable grounds for believing that the person has possession of any documents or article that has a bearing on the investigation;
- (c) examine any document or article found on the premises that has a bearing on the investigation;
- (d) require information to be given about any document or article by —
 - (i) the owner of the premises;
 - (ii) the person in control of the premises;
 - (iii) any person who has control of the document or article; or
 - (iv) any other person who may have the information;
- (e) if documents or information are not provided, require any of the persons specified in paragraph (d) (iv) to state, to the best of their knowledge, where the documents are to be found or how the relevant information may be retrieved;
- (f) take extracts from, or make copies of, any book or document found on the premises that has a bearing on the investigation;
- (g) use any computer system on the premises, or require the assistance of any person on the premises to use that computer system, to —
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data;

- (iii) seize any output from that computer for examination and copying; and
 - (h) attach and, if necessary, remove from the premises for examination and safeguarding, any document or article that has a bearing on the investigation.
- (3) An inspector appointed and authorised under subsection (1) may not enter upon and search any premises unless the inspector obtains a warrant authorising such entry and search in accordance with subsection (4).
- (4) If a magistrate's court is satisfied, upon application made on oath or affirmation, that there are reasonable grounds for suspecting that it is necessary, in order to ascertain or establish whether any person has engaged in or is engaging or is about to engage in a practice falling within the scope of sections 25, 26 (1), 27 (1) or 30 (1), for an inspector to exercise the powers conferred by subsection (1), the magistrate may grant a warrant authorising a named inspector to exercise those powers in relation to any premises specified in the warrant.
- (5) Upon first entering any premises under a warrant, the inspector shall —
- (a) provide to the owner or person in control of the premises proof of —
 - (i) the inspector's authority to enter the premises by handing a copy of the warrant to that person; and
 - (ii) the inspector's identity; or
 - (b) where none of the persons mentioned in paragraph (a) is present, affix a copy of the warrant to the premises in a prominent and visible position;
 - (c) provide on request, a document from the Authority indicating the subject matter and purpose of the investigation and the nature of the practice under investigation; and
 - (d) allow the enterprise under investigation a reasonable period within which to obtain legal advice.
- (6) Notwithstanding subsection (3), an inspector may without a warrant enter any premises, other than a private dwelling, to exercise the powers conferred by subsection (1) if the owner, or any other person in control of the premises, consents to the entry and search of the premises.
- (7) An inspector exercising the powers conferred by subsection (1) by virtue of a warrant or in terms of subsection (6) may be accompanied and be assisted by other persons specified in the warrant.
- (8) An inspector who removes anything from any premises under subsection (2) (h) shall —
- (a) issue a receipt for that thing to the owner of, or person in control of, the premises; and
 - (b) return that thing as soon as practicable after achieving the purpose for which it was removed.
- (9) On leaving any premises which an inspector has entered by virtue of a warrant under this section, the named inspector shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as that inspector found them.
- 37.** (1) Nothing in this Part requires a person or an enterprise to disclose or produce information or a document if the person or enterprise would in an action in court be entitled to refuse to disclose or produce it on the grounds of legal professional privilege.

(2) The person or enterprise shall, however, where required to do so by the Authority in the exercise of its powers under this Act, disclose the name and address of a client to the Authority.

PART VIII — *Determination of cases, penalties and remedies*

Consideration
of evidence

38. (1) Upon commencing an investigation, the Authority may appoint an inspector to prepare a report to the Authority, on whether there is evidence in a particular case that an anti-competitive practice falling within the scope of sections 25, 26 (1), 27 (1) or 30 (1) may be occurring or may have occurred.

(2) The inspector shall produce his or her report on the basis of the documents and information gathered pursuant to the provisions of Part VII.

(3) The Authority may in addition receive in evidence, any further statement, document, information or matter, not limited to material received pursuant to Part VII that may, in its opinion, assist with its investigation.

Initial hearing
and referral to
Commission

39. (1) The Authority may at any time following the opening of an investigation, and shall, if any party under investigation so requests, convene a hearing at which the Commission shall hear the views of any person they consider to have a relevant interest in the case.

(2) Within one year after an investigation is opened by the Authority, the Executive Secretary shall —

(a) subject to subsection (3), refer the matter to the Commission if the Authority determines that a prohibited practice has been established; or

(b) in any other case, issue a notice of non-referral to the complainant, in the prescribed form.

(3) When the Authority refers a matter to the Commission, the Authority —

(a) may refer all the particulars of the complaint as submitted by the complainant; or

(b) may refer only some of the particulars of the complaint as submitted by the complainant; or

(c) add particulars to the complaint as submitted by the complainant; and

(d) in respect of any particulars of the complainant not referred to the Commission, shall issue a notice of non-referral referred to under subsection (2) (b).

(4) In a particular case —

(a) the Authority and the complainant may agree to extend the period under subsection (2); or

(b) on application by the Authority made before the end of the period referred to under subsection (2), the Commission may extend that period.

(5) Where the Authority has not referred a complaint to the Commission, or issued a notice of non-referral within the stipulated time, or the extended period referred to under subsection (4), the Authority shall be considered to have issued a notice of non-referral.

(6) Where the Authority issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Commission, subject to its rules of procedure.

(7) A referral to the Commission, whether by the Authority or by a complainant, shall be in the prescribed form.

(8) The Chairperson of the Commission shall, by notice in the *Gazette*, publish each referral made to the Commission.

(9) The notice published under subsection (8) shall include —

- (a) the name of the respondent; and
- (b) the nature of the conduct that is the subject of the referral.

(10) The Commission may decline to hold a hearing requested under subsection (1) until the Commission is satisfied that it has obtained sufficient information for the purposes of the hearing from the inspector investigating the matter or other officers of the Authority assembling evidence in exercise of the powers specified in Part VII.

40. (1) Where the Commission determines that a hearing is to be held, the Commission shall give reasonable notice of the hearing, in writing, to the enterprises concerned and to any other interested third party —

Conduct of
hearing

- (a) specifying the date, time and place for the holding of the hearing; and
- (b) stipulating the matters to be considered at the hearing.

(2) The Commission shall decide whether to —

- (a) hold individual hearings with each of the enterprises, and other interested third parties, separately, or to hold a single hearing attended by all the enterprises involved and interested third parties; and
- (b) hold such hearings —
 - (i) in public, or
 - (ii) where the Commission considers that there is a need to protect commercially confidential information, in restricted session.

(3) A minimum of four members shall be present at a hearing.

(4) The hearing shall be governed by and conducted in accordance with the procedural rules published by the Commission under section 79 (1).

(5) For the purpose of conducting any hearing, the Commission may order any person to —

- (a) attend before the Commission;
- (b) give evidence on oath or otherwise;
- (c) furnish, in writing or otherwise, such particulars in relation to the matter as the Commission may require; or
- (d) produce any document which the Commission considers relevant for purposes of the hearing.

(6) An order given under subsection (5) may include a requirement as to the date on which or the time within which the order is to be complied with.

(7) Any person who without reasonable cause, fails to comply with an order given under subsection (5), commits an offence and is liable to a fine of P30 000 or to imprisonment for a term not exceeding two years, or to both.

(8) The Commission shall keep such record of the hearing as is sufficient to set out the matters raised by the persons participating in the hearing.

A.198

Proposed
decision by
Commission

41. (1) If, upon concluding an investigation, the Commission proposes to make a decision to the effect that —

- (a) section 25 or section 26 (1) has been infringed;
 - (b) an agreement is subject to prohibition in terms of section 27 (1) and none of the circumstances specified in section 29 or section 32 (1) apply to that agreement; or
 - (c) an abuse of dominant position has occurred or is occurring and none of the circumstances specified in section 30 (2) apply to the case, the Commission shall give written notice of its proposed decision to each enterprise that may be affected by that decision.
- (2) The Commission shall, in the notice issued under subsection (1) —
- (a) state the reasons for the Commission's proposed decision;
 - (b) state the penalties or remedial action that the Commission proposes to apply; and
 - (c) inform each enterprise subject to the proposed decision that each of the enterprises may —
 - (i) submit written representations to the Commission; and
 - (ii) indicate whether either enterprise requires an opportunity to make oral representations at a pre-decision hearing before the members.

Pre-decision
hearing

42. (1) Where an enterprise signifies that it wishes to make oral representations at a pre-decision hearing, the Commission shall —

- (a) convene a hearing to be held at a date, time and place determined by the Commission; and
- (b) give written notice of the date, time and place to —
 - (i) the enterprise or enterprises concerned,
 - (ii) any person who had lodged a complaint with the Commission concerning the practice that was the subject of the Authority's investigation, and
 - (iii) any other person whose presence at the hearing is considered by the Commission to be necessary.

(2) The provisions of section 40 (2), 40 (3), 40 (4) and 40 (5) shall apply to a pre-decision hearing.

Directions on
horizontal and
vertical
agreements

43. (1) Where the Commission determines that a breach of the prohibitions under sections 25 (1) and 26 (1) has occurred, the Commission shall give an enterprise or enterprises involved in any of the activities prohibited by sections 25 and 26 such directions as are necessary to bring the breach of the prohibition to an end, including a direction to terminate or modify the agreement in question if it is still in force.

(2) The Commission may, in addition to, or instead of, giving a direction, make an order imposing a financial penalty on the enterprise or enterprises concerned.

(3) The Commission shall not impose a financial penalty unless the Commission is satisfied that the breach of the prohibition was committed intentionally or negligently.

(4) The amount of a penalty imposed in terms of subsection (2) shall not exceed 10% of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years.

(5) An order imposing a penalty under subsection (2) shall specify the date before which the penalty is required to be paid, which date shall not be earlier than the period within which an appeal against the order may be brought.

(6) Where the penalty has not been paid by the specified date and —

(a) no appeal was brought against the order; or

(b) such an appeal was made but dismissed or withdrawn, the Commission may apply to the High Court for an order enforcing payment, which order if granted, may be enforced as if it were a civil judgment granted by the Court in favour of the Government.

(7) A financial penalty payable in terms of this Act shall be paid into the Consolidated Fund.

44. (1) If, upon the conclusion of an investigation and a hearing, the Commission determines that —

(a) an agreement constitutes an agreement referred to under section 27 (1), and that the circumstances provided for under section 32 (1) do not apply sufficiently to offset the adverse effects on, or absence of, competition; or

(b) an abuse of dominant position has occurred or is occurring and the provisions of section 30 do not apply to the matter or do not apply sufficiently to offset the adverse effects on, or absence of, competition, the Commission shall give the enterprise or enterprises concerned such directions as the Commission considers necessary, reasonable or practicable.

(2) The Commission may, acting under subsection (1) direct the enterprise concerned to remedy, mitigate or prevent —

(a) the adverse effects on competition that the Commission has identified; or

(b) any detrimental effects on users and consumers to the extent that they have resulted from, or may be expected to result from, the adverse effects on, or absence of, competition.

(3) A direction issued in terms of subsection (1) may include a requirement for the enterprise to which it is given to —

(a) terminate or amend an agreement;

(b) cease or amend a practice or course of conduct including conduct in relation to prices;

(c) observe specified conditions in relation to the continuation of an agreement or conduct;

(d) supply goods or services, or grant access to facilities, either generally or to named parties;

(e) separate or divest itself of any enterprise or assets; or

(f) provide the Commission with specified information on a continuing basis.

Directions on
abuse of
dominant
position

A.200

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|---------------------------|---|
| Application of remedies | <p>45. Except where a concerned enterprise has —</p> <ul style="list-style-type: none">(a) elected not to attend a hearing which it had itself requested; or(b) failed to attend a hearing when required to do so by the Commission, <p>the Commission may not apply a remedy or impose a financial penalty unless the enterprise against whom it is proposed to take relevant action has had the opportunity to state its views at an initial hearing or at a pre-decision hearing.</p> |
| Interim relief | <p>46. (1) Where the Authority has reasonable grounds to suspect that an enterprise is —</p> <ul style="list-style-type: none">(a) party to an agreement falling within the scope of sections 25 or 26 (1),(b) party to an agreement which may prove, on investigation, to fall within the scope of section 27 (1), or(c) engaged in conduct which may prove, on investigation, to constitute abuse of dominant position, <p>but the Authority has not completed its investigation into the matter, the Commission may where it considers it necessary for the purpose of preventing irreparable damage to a particular person or category of persons, or protecting the public interest, give such directions as it considers appropriate for that purpose.</p> <p>(2) Before giving a direction under this section, the Commission shall —</p> <ul style="list-style-type: none">(a) give written notice to the enterprise or enterprises to whom it proposes to give the direction; and(b) give the enterprise or each of the enterprises an opportunity to make written or oral representations. <p>(3) A notice under subsection (2) must indicate the nature of the direction which the Commission is proposing to give and its reasons for wishing to give it.</p> <p>(4) A direction given under this section has effect while subsection (1) applies, but may be replaced if the circumstances permit by a direction under section 43 (1).</p> |
| Acceptance of undertaking | <p>47. (1) An enterprise may offer an undertaking to the Authority to address any concern that has arisen, or may be expected to arise, prior to or during an investigation in respect of an agreement falling within the scope of sections 25, 26 (1) or 27 (1) or of conduct falling within the scope of section 30 (1).</p> <p>(2) The Authority may determine a case on the basis of an undertaking if the Authority considers that the undertaking satisfactorily covers all concerns it has over the adverse effects for competition of the agreement or conduct.</p> |
| Enforcement of directions | <p>48. (1) Where the Authority has reasonable grounds to believe that an enterprise has, without reasonable excuse, failed to comply with a direction issued pursuant to the Commission's powers under this Act or with the terms of an exemption granted under section 32, the Authority may exercise the powers of investigation provided for in Part VII.</p> <p>(2) Where the Authority proposes to determine that such failure has occurred, it must give notice of its intention to the enterprise concerned and consider any representations the enterprise wishes to make.</p> |

(3) The Commission may then apply to the Court for an order requiring the enterprise to make good the default within a time specified in the order.

(4) The order may provide for all the costs of, or incidental to, the application for the order, to be borne by the enterprise in default.

PART IX — *Market inquiries*

49. (1) Where the Authority has reasonable grounds to suspect that, in the light of observed price rigidities or other circumstances, a restriction or distortion of competition may be occurring —

Conditions for
initiating
market
inquiries

(a) within a particular sector of the economy; or

(b) within a particular type of agreement occurring across various sectors, the Authority may initiate a market inquiry.

(2) The objective of an inquiry shall be to determine —

(a) whether any feature, or combination of features, of each relevant sector and each type of agreement has the effect of preventing, restricting or distorting competition in connection with the supply or acquisition of any goods or services in Botswana or part of Botswana; and

(b) whether any of the mitigating circumstances specified in sections 30 (2) or 32 (1) apply to the sector or type of agreement on the same basis they would have applied to an individual matter arising under sections 25, 26 (1), 27 (1) or 30 (1).

50. For the purposes of an inquiry under section 49, the Authority may invite all interested parties to submit information and may in addition exercise, in relation to enterprises considered to be involved in the matters covered by the inquiry, all the powers of investigation conferred on the Authority by Part VII.

Powers of
investigation

51. (1) The Authority shall publish its findings at the conclusion of an inquiry.

Action
following
inquiry

(2) In the event that the Authority determines that adverse effects for competition exist in relation to a sector or type of agreement referred to in section 49 (2) (a) and that either section 49 (2) (b) does not apply or applies only to a limited extent, the Authority shall —

(a) to the extent that a practice identified by the inquiry is capable of being addressed as a matter falling within sections 25, 26 (1), 27 (1) or 30 (1), deal with it in accordance with those provisions; or

(b) to the extent that the adverse effects for such competition cannot be remedied under this Act or are the result of other legislative provisions or regulatory measures, make recommendations to the Minister for such further action, including amendments to legislation, as is required to provide an effective remedy.

PART X — *Control of mergers*

Acquisition of control of enterprise

52. (1) For the purposes of this Part, 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.

(2) 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; or
 - (b) amalgamation or other combination with that enterprise.
- (3) A person controls an enterprise if that person —
- (a) beneficially owns more than one half of the issued share capital of the enterprise;
 - (b) is entitled to exercise a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;
 - (c) is able to appoint or to veto the appointment of a majority of the directors of the enterprise;
 - (d) is a holding company, and the enterprise is a subsidiary of that company as contemplated in the Companies Act;
 - (e) in the case of an enterprise being a trust, has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;
 - (f) in the case of the enterprise being a close corporation, owns the majority of the members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or
 - (g) has the ability materially to influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f).

Exemptions from merger control

53. (1) The Minister may, by regulation, specify categories of merger to which merger control in the terms of section 55 will not apply, by reference to the commercial or industrial sector involved, the nature of the activities in which the enterprise are engaged, or some aspect of the general public interest.

(2) In the case of the categories of merger specified pursuant to subsection (1), the Minister may prescribe such alternative system of merger review as the Minister considers appropriate.

Threshold for merger control

54. A proposed merger is subject to control in terms of this Act if —

- (a) the turnover in Botswana of the enterprise or enterprises being taken over exceeds an amount prescribed by the Minister in consultation with the Commission;
- (b) the assets in Botswana of the enterprise or enterprises being taken over have a value prescribed by the Minister in consultation with Commission;
- (c) the enterprises concerned would, following implementation of the merger, supply or acquire a percentage determined by the Commission, of a particular description of goods or services in Botswana.

55. No merger falling within the provisions of section 54 may be implemented by any enterprise or enterprises unless —

- (a) the merger is approved by the Authority in accordance with the provisions of this Act;
- (b) the merger is implemented in accordance with any conditions attached to the approval granted by the Authority; or
- (c) the period within which the determination of a notification for a proposed merger has elapsed without the Authority having made a determination in relation to the merger.

Mergers above permitted threshold

56. (1) Where a merger is proposed, each of the enterprises involved shall notify the Authority of the proposed merger, in the prescribed manner.

Pre-notification of mergers

(2) Subject to the protection of confidential information, the Authority shall publish details of the notification.

(3) If, after receipt of a notification in terms of subsection (1), the Authority is of the opinion that, in order to consider the proposed merger, it requires further information, it may, within 30 days of the date of receipt of the notification, request such further information in writing from anyone or more of the enterprises concerned and delay publication of the notification until further information is received.

(4) Subject to subsection (5), the Authority shall consider and make a determination in relation to a notified merger —

- (a) within 30 days after the date on which the Authority receives that notification;
- (b) where the Authority requests further information under subsection (3), within 30 days after the date of receipt by the Authority of the information; or
- (c) if a hearing is convened in accordance with section 58, within 30 days after the date of conclusion of the hearing.

(5) Where the Authority is of the opinion that the period referred to in paragraph (a), (b) or (c) of subsection (4) should be extended due to the complexity of the issues involved, it may, before the expiry of that period, by notice in writing to the enterprises involved extend the relevant period for a further period, not exceeding 60 days, specified in the notice.

57. (1) For the purpose of considering a notified merger, the Authority may refer the notification of the proposed merger to an inspector for an investigation and report in relation to the criteria specified in section 59.

Consideration of notification

(2) As soon as practicable after a referral in terms of subsection (1), the inspector concerned shall —

- (a) investigate the proposal so referred; and
- (b) before a date specified by the Authority, furnish the Authority with a report on the investigation.

(3) Any person, including a third party not a party to the proposed merger, may voluntarily submit to the inspector or the Authority any document, affidavit, statement or other relevant information in respect of a proposed merger.

A.204

Hearing in
relation to
merger

58. (1) If the Authority considers it appropriate, it may determine that one or more hearings should be held in relation to a proposed merger.

(2) If the Authority determines that such a hearing or hearings are to be held, it must, before the expiry of the period referred to in section 56 (4) or section 56 (5), as the case may be, give reasonable notice to the enterprises concerned in writing and to other interested third parties —

(a) convening the hearing;

(b) specifying the date, time and place for the hearing; and

(c) stipulating the matters to be considered at the hearing.

(3) The Authority shall decide —

(a) whether to hold individual hearings with each of the enterprises and other interested parties, separately or to hold a single hearing attended by all the enterprises involved and by interested third parties; and

(b) whether to hold such hearings —

(i) in public, or

(ii) in camera, where it is necessary to protect commercially confidential information.

(4) The provisions of section 40 (3) and 40 (8) apply to a hearing in relation to a merger on the same basis as they apply to a hearing in terms of section 40.

Assessment of
merger

59. (1) In assessing a proposed merger, the Authority shall first determine whether the merger —

(a) would be likely to prevent or substantially lessen competition or to restrict trade or the provision of any service or to endanger the continuity of supplies or services; or

(b) would be likely to result in any enterprise, including an enterprise which is not involved as a party in the proposed merger, acquiring a dominant position in a market.

(2) The Authority may in addition, consider any factor which, the Authority considers bears upon the broader public interest in the proposed merger, including the extent to which —

(a) the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment attributable to a substantial lessening of competition or to the acquisition or strengthening of a dominant position in a market;

(b) the merger may improve, or prevent a decline in the production or distribution of goods or the provision of services;

(c) the merger may promote technical or economic progress, having regard to Botswana's development needs;

(d) the proposed merger would be likely to affect a particular industrial sector or region;

(e) the proposed merger would maintain or promote exports or employment;

(f) the merger may advance citizen empowerment initiatives or enhance the competitiveness of citizen-owned small and medium sized enterprises; or

(g) the merger may affect the ability of national industries to compete in international markets.

60. (1) In making a determination in relation to a proposed merger, the Authority may —

Determination
on proposed
merger

- (a) give approval for the implementation of the merger without conditions or subject to such conditions as it considers appropriate; or
- (b) decline to give approval to the implementation of the merger to the extent that it relates to a market in Botswana.

(2) Where conditional approval is given, the Authority's determination may contain such directions as the Authority considers necessary, reasonable and practicable to remedy, mitigate or prevent any adverse effects of the merger.

(3) Directions issued in terms of subsection (2), may inter alia, require an enterprise or enterprises to —

- (a) divest such assets as are specified in the direction within a period also so specified; or
- (b) to adopt, or desist from, such conduct in relation to prices, as is specified in the direction, before the merger can be completed or implemented.

(4) The Authority shall —

- (a) give notice of the determination made by the Authority, and of any directions in relation to a merger;
 - (i) to the parties involved in the merger, in writing, and
 - (ii) by notice in the Gazette, and
- (b) issue written reasons for its determination —
 - (i) if it prohibits or conditionally approves a merger, or
 - (ii) if it is requested to do so by any person.

61. (1) One or more enterprises may offer an undertaking to the Authority to address any concern that has arisen, or may be expected to arise, during the Authority's consideration of a notified merger.

Acceptance of
undertaking

(2) The Authority may make determinations in relation to the merger on the basis of such an undertaking if it is satisfied that the undertaking covers all the concerns that need to be addressed as part of the assessment under section 59.

(3) An undertaking accepted by the Authority shall be published in the form of a decision by the Authority.

(4) An undertaking accepted by the Authority shall have effect as if it were a direction.

62. (1) The Authority may at any time, after consideration of any representations made to it in terms of subsection (2), revoke a decision approving the implementation of a merger if —

Revocation of
approval of
merger

- (a) the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or
- (b) any condition attached to the approval of the merger that is material to the implementation is not complied with.

A.206

- (2) Where the Authority proposes to revoke its decision under subsection (1), it shall —
- (a) give notice in writing of the proposed action to every enterprise involved in the merger, and to any other person who in the opinion of the Authority is likely to have an interest in the matter; and
 - (b) call upon such persons to submit to the Authority, within 30 days of the receipt of the notice, any representations which they may wish to make in regard to the proposed action.
- 63.** (1) Where the Authority has a reasonable suspicion that a merger is being, or has been, implemented in contravention of the provisions of this Part, the Authority may give a direction in writing to the enterprise or enterprises involved —
- (a) requiring them to submit such information regarding the suspected merger as may be specified by the Authority; or
 - (b) restraining the parties from implementing the merger or taking steps such as the integration of activities or the disposal of assets that would pre-empt the taking of remedial action designed to restore the conditions of competition existing prior to the merger.
- (2) 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 a direction to the enterprise or enterprises involved —
- (a) not to complete or implement the merger;
 - (b) to sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger;
 - (c) to terminate any agreements, or provisions of an agreement, to which the merger was subject; or
 - (d) to take such further measures as may be necessary to restore the conditions of competition existing prior to the merger.
- 64.** (1) Where the Authority has reasonable grounds to believe that an enterprise has, without reasonable excuse, failed to comply with a direction issued by the Authority under this Part, the Authority may exercise in respect of this matter the powers of investigation provided for in Part VII in respect of matters falling within Part V.
- (2) Where the Authority proposes to determine that a failure of compliance in the terms of subsection (1) has occurred, it must give notice of its intention to the enterprise concerned and consider any representations the enterprise wishes to make.
- (3) The Authority may then apply to the Court for an order requiring the enterprise to make good the default within a time specified in the order.
- (4) The order may provide for all of the costs of, or incidental to, the application for the order, to be borne by the enterprise in default.
- 65.** (1) An agreement giving effect to a merger as defined in section 52 or any provision directly related and necessary to the implementation of a merger, is excluded from the scope of sections 25, 26 (1) and 27 (1) of this Act.

Merger
implemented
in
contravention
of Act

Enforcement
of directions

Exclusion of
certain
agreements
and conduct

(2) Conduct which results in a merger or is directly related and necessary to the implementation of a merger is excluded from the scope of section 30 (1) of this Act.

66. Approval of a merger granted by the Authority does not relieve an enterprise from obtaining such other approvals as may be required from other bodies in the exercise of their statutory responsibilities.

Compliance
with other
laws

PART XI — *Appeals*

67. Except as otherwise provided for in this Part, a decision or determination made by the Commission or direction given by the Commission is binding unless appealed to the High Court.

Matters subject
to appeal

68. (1) A person aggrieved by a determination of the Commission to the effect that an enterprise has or has not breached the prohibitions laid down in section 25 or 26 (1), may appeal to the High Court against the determination, and, where the Commission has determined that a breach has occurred —

Appeal against
horizontal and
vertical
agreements

(a) against all or part of any direction given by the Commission pursuant to section 43 (1); or

(b) against the imposition of a financial penalty by the Commission pursuant to section 43 (2) or against the level of any such penalty.

(2) In considering an appeal under subsection (1), the Court may fully review the facts and evidence on which the Commission relied —

(a) in reaching its determination;

(b) in formulating any directions; or

(c) in determining the amount and proportionality of any financial penalty.

69. An enterprise or person aggrieved by a determination of the Authority to issue or not to issue a direction, or by the terms of a direction —

Appeal against
abuse of
dominance

(a) following investigation of a restrictive agreement falling within the terms of section 27 (1);

(b) following investigation of abuse of dominant position; or

(c) in relation to a merger pursuant to Part X,

may appeal to the High Court against that determination.

70. (1) An enterprise or person aggrieved by any decision of the Commission may appeal to the High Court against that decision.

Other appeals

(2) In deciding an appeal under this Act, the Court shall apply the same principles as would be applied by a court on an application for judicial review.

71. (1) Following consideration of an appeal under section 68, and if the appeal is not dismissed, the High Court may confirm or set aside the determination that is the subject of the appeal, or any part of it, and may —

Outcome of
appeals

(a) remit the matter to the Commission for re-consideration;

(b) revoke, increase or reduce a financial penalty;

(c) give a direction of its own in substitution for that of the Commission; or

(d) make any other decision that the Commission could have made.

- (2) Following consideration of an appeal under section 69, the Court may —
 - (a) dismiss the appeal or quash the whole or part of the determination to which the appeal relates; and
 - (b) where it quashes the whole or part of that determination, remit the matter to the Commission for re-consideration.
- (3) An appeal against the Court’s judgment may be made to the Court of Appeal, but only —
 - (a) on a point of law arising from the judgment of the Court, or
 - (b) from any decision of the Court as to the amount of a penalty.

PART XII — *General provisions*

Determination
of relevant
market

- 72.** (1) This section applies in relation to any case arising under Parts V to X of this Act.
- (2) The criteria for determining —
 - (a) when goods or services are to be treated as goods or services of a separate description; and
 - (b) whether the share of supply or acquisition specified in sections 28, 31 or 54, where applicable, is fulfilled, shall be such as in any particular case appear to the Authority to be the most appropriate in the circumstances.
 - (3) For the purpose of establishing whether the share of supply criteria are satisfied, the share of the group as a whole is to be used where an enterprise —
 - (a) is a subsidiary of a group; or
 - (b) is otherwise party to arrangements by which enterprises are inter-connected within a group.
 - (4) When the Authority has opened an investigation because it is satisfied that the applicable criteria for share of supply or acquisition have been fulfilled, the Authority shall decide whether the goods or services used in calculating such share of supply or acquisition also constitute the relevant market for the purpose of assessing the effects on competition or whether some alternative definition of the market should be substituted for this purpose.

Relationship
with sector
regulators

- 73.** (1) In this section, “regulator” means any regulatory body listed under Schedule II , or any Government Department that exercises functions of prudential or economic regulation.
- (2) The Minister may, by order, amend Schedule II.
 - (3) The Authority and the regulators shall establish a mechanism through which they can maintain regular contact regarding the exercise of their respective responsibilities.
 - (4) Where the Authority proposes to investigate a matter which does not fall within the scope of section 3 (3) but involves an enterprise which is in other respects subject to the jurisdiction of a regulator, the Authority shall notify the relevant regulator of the proposed investigation.

(5) A regulator is entitled to make written representations to the Authority on a matter under investigation, which involves an enterprise which is subject to the jurisdiction of the regulator.

(6) The Authority and the regulator shall hold consultations to determine —

- (a) whether the regulator can place sector-specific expertise, including inspectors, at the disposal of the Authority and assist with the Authority's investigation; or
- (b) whether the regulator should give oral evidence at any hearing convened by the Authority to consider the case.

(7) An inspector provided by a regulator pursuant to subsection (6) (a) shall not be inhibited by any requirement imposed under the statutes cited under Schedule II from conducting an investigation on the same basis as that on which the Authority could itself conduct the investigation in terms of the provisions of this Act.

(8) The Authority shall consider any written representations submitted by a regulator on any merger considered by the Authority where the merger involves one or more enterprises that are subject to prudential or economic regulation by the regulator.

(9) The determination of the Authority on any matter falling within the scope of this section shall be final, except where consultations in terms of subsection (6) have not been held.

74. (1) A member of the Commission, an employee of the Authority, or an inspector appointed in terms of this Act, shall not disclose confidential information with respect to any enterprise or individual, that has been obtained in terms of the provisions of this Act while the business continues to be carried on or during the lifetime of the individual.

Confidentiality

- (2) Subsection (1) does not apply to a disclosure of information —
 - (a) made with the consent of the person carrying on the business or with the consent of the individual concerned;
 - (b) made in circumstances where the information is in the form of a summary or collection of information so framed as not to enable information relating to a particular enterprise or to a particular person to be ascertained from it;
 - (c) that is already in the public domain;
 - (d) made to facilitate the performance of a function of the Authority, such as giving reasons for its decisions;
 - (e) made in proceedings under this Act;
 - (f) made in connection with the investigation of a criminal offence; or
 - (g) made to the competition authority of another country in connection with a request by that country for assistance in terms of section 77 (1).

(3) A person who contravenes the provisions of this section commits an offence and is liable to a fine not exceeding P30 000 or to imprisonment for a term not exceeding 2 years, or to both.

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Claims for damages or other money

75. (1) An action for damages or other sum of money by any person or enterprise may be made —

- (a) only in respect of a breach of the prohibition under section 25 or 26 (1); and
- (b) only if the breach is established by a determination of the Authority, or following an appeal against the determination, by a judgment of the Court.

(2) The Authority shall provide the Court before which the action is brought with such information within its possession or control as the plaintiff reasonably requests relating to the Authority's determination.

Offences and penalties

76. (1) A person commits an offence and is liable to a fine not exceeding P30 000 or to imprisonment for a term not exceeding 2 years, or to both if —

- (a) the person hinders, opposes, obstructs or unduly influences any person who is exercising power in terms of this Act or performing a duty conferred or imposed on that person by this Act;
- (b) having been required in the terms of section 35 (4) or 36 (2) to produce information to the Authority, the person fails, without reasonable cause, to provide that information;
- (c) having been duly summoned to attend a hearing, the person fails, without reasonable cause, to attend;
- (d) being in attendance as required, the person —
 - (i) refuses to take the oath or affirmation required by the Commission;
 - (ii) refuses, after having taken the oath or an affirmation, to answer any question to which the Authority may lawfully require an answer or gives evidence which that person knows is false, or
 - (iii) fails to produce any document or thing in that person's possession or under that person's control lawfully required by the Commission to be produced;
- (e) the person does anything calculated to improperly influence the Commission, any member or employee of the Authority concerning any matter connected with the exercise of any power or the performance of any function of the Authority;
- (f) the person anticipates any decision of the Commission concerning an investigation in a way that is calculated to influence the proceedings;
- (g) the person does anything in connection with an investigation that would constitute contempt of Court had the proceedings occurred in a court of law;
- (h) knowingly provides false information to the Authority; or
- (i) defames a member of the Commission in the member's official capacity.

(3) Where a person fails to comply with an order of the Commission, the person commits an offence and is liable to a fine not exceeding P500 000 or to imprisonment for a term not exceeding 10 years, or to both.

77. (1) Subject to subsection (2), the Authority may investigate any matter falling within the scope of this Act and make an appropriate determination of the case where a competition authority duly constituted in another State so requests and where that authority proves to the Authority that there are reasonable grounds to believe that anti-competitive practices in Botswana are damaging competition in the other state.

Enforcement
at request of
another State

(2) Subsection (1) applies where Botswana has entered into an agreement with that state to the effect that, on a basis of reciprocity, each party to the agreement will exercise the principle of comity on the basis described in subsection (1) in investigating and determining cases falling within its jurisdiction at the request of the other party.

78. The Authority may charge fees for —

Fees

- (a) orders regarding the investigation of restrictions on competition;
- (b) reviews of mergers of enterprises; and
- (c) opinions and other services.

79. (1) The Authority shall publish —

Guidelines
and rules

- (a) guidelines on the economic and legal analysis to be used determining cases under this Act;
- (b) guidelines on the principles to be used in determining any penalty or remedy imposed in terms of section 25 and section 26; and
- (c) procedural rules specifying the procedures it shall follow in carrying out its functions under this Act.

(2) The Minister shall, publish a list of all professional rules prescribed under Schedule I.

(3) The Minister shall provide the Authority with a list of the professional rules referred to under Schedule I and copies of those rules.

(4) A list of all the professional rules prescribed under Schedule I and copies of those professional rules, shall be open for public inspection at the offices of the Authority.

80. The Minister may make regulations for any matter required to be prescribed under this Act and to give effect to the provisions of this Act.

Regulations

SCHEDULE I
(Section 27 (3))

Rules of professional bodies to which section 27 (3) of the Act does not apply

PART I – *Scope of Exclusion*

| | |
|-----------------------------|---|
| General Provisions | <p>1 (1) To the extent to which an agreement (either on its own or when taken together with another agreement) —</p> <ul style="list-style-type: none"> (a) constitutes a designated professional rule; (b) imposes obligations arising from a designated professional rule; or (c) constitutes an agreement to act in accordance with such rules, <p>section 27 (3) of the Act does not apply to the agreement.</p> <p>(2) In this Schedule —</p> <p>“designated” means designated by the Minister under paragraph 2 of the Schedule;</p> <p>“professional rules” means rules regulating a professional service or the persons providing, or wishing to provide, that service;</p> <p>“professional service” means any of the services described in Part II of this Schedule; and</p> <p>“rules” includes regulations, codes of practice and statements of principle.</p> |
| Designated rules | <p>2 (1) The Minister must establish and maintain a list designating for the purposes of this Schedule, rules —</p> <ul style="list-style-type: none"> (a) which are notified to him under paragraph 3 of the Schedule; and (b) which, in his opinion, are professional rules. <p>(2) The list is to be established by an order made by the Minister and the designation of any rule is to have effect from the date of the order.</p> |
| Application for designation | <p>3. Any body regulating a professional service or the persons who provide, or wish to provide, that service may apply to the Minister for rules of that body to be designated and must provide a copy of such rules to the Minister.</p> |
| Reviewing the list | <p>4 (1) The Minister must send the Commission the list of rules established under paragraph 2 of the Schedule, as amended from time to time, together with a copy of the rules themselves.</p> <p>(2) The Commission must keep the list under review and if it considers that some or all of the rules of a particular body should no longer be designated or that rules which are not designated should be so designated, the Commission must advise the Minister accordingly.</p> <p>(3) Nothing in this Schedule prevents the Commission —</p> <ul style="list-style-type: none"> (a) from taking action against designated professional rules if it is satisfied that the rules constitute an infringement of the prohibitions in section 26 (1) or 27 (1) of the Act; or (b) from opening an investigation to establish whether an abuse of dominant position in the terms of section 31 of the Act is occurring or has occurred. |
| Removal from the list | <p>5 (1) If the Minister receives advice from the Commission to the effect that a designation should be revoked in whole or in part, he must consult any other Minister who has functions in relation to the professional services concerned.</p> <p>(2) Having considered the advice of the Commission and any advice resulting from consultation under subparagraph (1), he may by regulation revoke the designation.</p> |
| Inspection | <p>6. The Commission is to make the list of designated professional rules, and a copy of the rules themselves, available for public inspection.</p> |

PART II – *Professional Services*

| | |
|--|--------------------------------|
| 7. The services of advocates and attorneys as governed by the Legal Practitioners Act (Cap. 61:01). | Legal |
| 8. The performance of surgical and dental operations, and the provision of medical, dental or surgical advice or attendance, as governed by the Botswana Health Professions Act (Cap. 61:02). | Medical and dental |
| 9. The testing of sight. | Ophthalmic |
| 10. Any services which constitute veterinary surgery within the terms of the Veterinary Surgeons Act (Cap. 61:04). | Veterinary |
| 11. The services of nurses and midwives, as governed by the Nurses and Midwives Act (Cap. 61:03). | Nursing and Midwifery |
| 12. The services of physiotherapists. | Physiotherapy |
| 13. The services of chiropodists. | Chiropody |
| 14. The services of architects. | Architectural |
| 15. The making or preparation of accounts or accounting records and the examination, verification and auditing of financial statements, as governed by the Accountants' Act (Cap. 61:05). | Accounting and auditing |
| 16. Insolvency services within the meaning of Insolvency Act (Cap. 42:02) | Insolvency |
| 17. The services of registered patent agents. | Patent Agency |
| 18. The services of parliamentary agents. | Parliamentary agency |
| 19. The services of surveyors of land, of quantity surveyors, of surveyors of buildings or other structures and of surveyors of ships, as governed (inter alia) by the Land Survey Act (Cap. 33:01) Part II of which deals with surveyors. | Surveying |
| 20. The services of persons practising or employed as consultants in the field of — | Engineering and Technology etc |
| (a) civil engineering; | |
| (b) mechanical, aeronautical, marine, electrical or electronic engineering; | |
| (c) mining, quarrying, soil analysis or other forms of mineralogy; | |
| (d) agronomy, forestry, livestock rearing or ecology; | |
| (e) metallurgy, chemistry, biochemistry or physics; or | |
| (f) any other form of engineering or technology analogous to those mentioned in sub-paragraphs (a) to (e) | |
| as governed (inter alia) by the Engineers' Registration Act (Cap. 61:06). | |
| 21. The provision of education or training. | Other |
| 22. The services of Ministers of religion. | Educational |
| 23. Any other professional services to which the provisions of this Schedule have been declared applicable by order of the Minister. | Religious |

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SCHEDULE II
(Section 73 (I))

Regulators who must be consulted by the Competition Commission

1. Bank of Botswana (supervision of commercial banks) under the functions conferred by the Banking Act (Cap. 46:04)
2. Botswana Telecommunications Authority under the functions conferred the by Telecommunications Act (Cap. 72:03)
3. Non-Bank Financial Institutions Regulatory Authority under the functions conferred by the Non-Bank Financial Institutions Regulatory Authority Act (Cap. 46:08)
4. Civil Aviation Authority of Botswana under the functions conferred by the Civil Aviation Authority Act (Cap. 71:04).

PASSED by the National Assembly this 15th day of December, 2009.

B.N. DITHAPO,
Clerk of the National Assembly.