

COMPETITION ACT, 2018

No. 4



of 2018

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An Act to provide for the establishment of the Competition and Consumer Authority and its mandate; for the establishment of the Competition and Consumer Board, its functions and proceedings; for the establishment of the Competition and Consumer Tribunal to adjudicate over breaches of the provisions of the Act; and for matters incidental thereto or connected therewith.

Date of Assent: 27/03/2018

Date of Commencement: ON NOTICE

ENACTED by the Parliament of Botswana.

PART I – *Preliminary*

Short title and commencement

1. This Act may be cited as the Competition Act, 2018 and shall come into operation on such date as the Minister may, by Order published in the *Gazette*, appoint.

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 and Consumer Authority continued 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 a bid rigging where the person requesting the bids is informed of the terms of the agreement before the time when the bid is made;

“Board” means the Competition and Consumer Board continued under section 6;

“complainant” means a person who has submitted a complaint or a request to investigate in terms of section 36;

“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;

- “day” means any day from Monday to Friday, and excludes Saturday, Sunday and a public holiday;
- “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 supply or distribution of goods, or the provision of any service, and includes partnerships and trusts;
- “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 and Consumer Board;
- “premises” includes any vehicle, vessel, aircraft or container;
- “professional rule” means a rule, as the Minister may prescribe, regulating a professional service or persons providing a professional service, and includes a designated rule, code of practice and a statement of principle;
- “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 same meaning assigned to it under the Small Business Act;
- “Tribunal” means the Competition and Consumer Tribunal established under section 62; and
- “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 in this Act, this Act applies to all the economic activities within, or having effect within, Botswana.

(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 provision of any service within any market in Botswana that is open to participation by other enterprises.

Cap. 43:10

Application

- (3) This Act shall 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) any service carried out under a contract of employment.

*Part II — Continuation of Competition and Consumer
Authority and Board*

Continuation
of Authority

4. (1) The Competition Authority established under section 4 of the repealed Act is hereby continued under the new name of the Competition and Consumer Authority and shall continue as if established under this Act.

(2) The Authority 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 regulators 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, outside Botswana;
- (j) advise the Minister on international agreements relevant to competition matters and to this Act;
- (k) investigate and evaluate alleged contraventions of Part VI;
- (l) grant or refuse applications for exemption in terms of Part VII;
- (m) authorise with or without conditions, mergers of which it receives notification under Part XI;
- (n) prohibit a merger, or refer a merger, of which it receives notification in terms of section 49, to an inspector in terms of section 50;
- (o) refer matters it has investigated under this Act to the Tribunal for adjudication;
- (p) prosecute before the Tribunal, matters referred to the Tribunal under paragraph (o);
- (q) deal with any matter referred to it by the Board under this Act; and
- (r) report the investigation of all criminal matters under this Act to the Botswana Police Service.

6. (1) There is established 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.

Competition
and Consumer
Board

(2) Notwithstanding the generality of subsection (1), the Board shall give general policy direction to the Authority.

7. (1) The Board shall consist of seven persons appointed by the Minister, in writing.

Membership

(2) In appointing members to the Board, the Minister shall select 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.

(3) The Chief Executive Officer shall be an *ex officio* member of the Board and shall not vote.

(4) The Minister shall appoint the Chairperson of the Board from amongst the members.

(5) The Vice Chairperson of the Board shall be elected by members from amongst their number.

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

Tenure of office

8. (1) A member shall hold office for a period not exceeding five years as may be specified in the notice appointing the member, and on the expiration of that period shall be eligible for re-appointment for a term not exceeding five years.

(2) In appointing members, the Minister shall so specify such periods of appointment such that the period of appointment of not more than one third of the members shall expire in any one year.

Disqualification

9. 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 or insolvent and has not been discharged, or

(ii) made an assignment, arrangement or composition with his creditors, which has not been rescinded or set aside;

(b) has, within a period of ten years immediately preceding the date of his or her appointment, been convicted —

(i) of a criminal offence within Botswana, or

(ii) outside Botswana, of an offence which if committed in Botswana, would have been a criminal offence,

and sentenced by a court of competent jurisdiction to imprisonment for six months or more without the option of a fine, whether that sentence has been suspended or not, and for which he or she has not received a free pardon;

(c) is a member of the National Assembly or *Ntlo ya Dikgosi*; or

(d) is a Councillor.

Removal of member

10. (1) The Minister may remove a member from office where the member —

(a) is absent without reasonable cause from three consecutive meetings of the Board of which that member has had notice;

(b) is inefficient in the performance of his or her duties;

(c) has been found to be physically or mentally incapable of performing his or her duties efficiently and a 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 Board; or

(e) has failed to comply with the provisions of section 12 (2) (a) and (b).

(2) A member may resign from the Board by giving 30 days notice, in writing, to the Minister.

(3) The office of a member shall become vacant —

(a) if he or she is disqualified in terms of section 9;

(b) if he or she is absent from three consecutive meetings of the Board without reasonable excuse;

- (c) upon his or her death;
- (d) upon the expiry of such time as the Minister may specify in writing, notifying the member of his or her removal from office by the Minister;
- (e) upon the expiry of the 30 days' notice in writing to the Minister of his or her intention to resign from office;
- (f) if he or she becomes physically or mentally incapable of performing his or her duties efficiently and a medical doctor has issued a certificate to that effect;
- (g) if he or she is convicted of an offence under the Act or any other Act for which he or she is sentenced to imprisonment for a term of six months or more without an option of a fine; or
- (h) if he or she is summarily dismissed by the Minister on the grounds of contravening the provisions of this Act.

(4) The Minister may, in writing, suspend from office, a member against whom criminal proceedings are instituted for an offence in respect of which a sentence of imprisonment without the option of a fine may be imposed, and whilst that member is so suspended, he or she shall not carry out any duties under this Act or be entitled to any remuneration or allowances as a member of the Board.

11. (1) 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 7, appoint another person who qualifies to be a member in place of the member who vacates office, until the expiry of a period which such member would have otherwise continued in office.

Filling of
vacancy

(2) Subregulation (1) shall not apply where the remainder of the period for which the member whose office has been vacated would otherwise have held office is less than six months.

12. (1) A member shall not —

- (a) engage in any activity that may undermine or undermines the integrity of the Board;
- (b) participate in making any decision of the Board 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; and

(c) at any meeting of the Board 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, 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) (c) and the Board makes a decision which benefits that member, that decision shall be void to the extent to which it benefits the member.

(5) A member 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 Board*

Proceedings
of Board

13. (1) Subject to the provisions of this Act, the Board may regulate its own proceedings.

(2) The Board shall hold its first meeting on such date and at such a place as the Minister may fix and thereafter the Board shall meet as often as is necessary or expedient for the discharge of its functions, which shall not be less than twice a year.

(3) Meetings of the Board shall be held at such places and times as the Board may determine and shall be convened by the Chairperson or the Chief Executive Officer.

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

(5) There shall preside at any meeting of the Board —

(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 selected for the purpose of that meeting by the members present.

(6) A decision of the Board 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.

(7) At any meeting of the Board, a quorum shall be constituted by not less than two thirds of the members.

(8) The Secretary of the Board shall cause proper minutes of the meetings of the Board to be taken and recorded.

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

14. An act, decision or proceeding of the Board shall not be invalid on account of —

Validity of decisions

- (a) the appointment of any member being defective; or
- (b) 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.

15. (1) The Board may, in its discretion, invite any person whose presence it deems necessary to attend and participate in the deliberations of any meeting of the Board, but such person shall not vote.

Co-opted members

(2) Sections 12 and 87 shall, with the necessary modifications, apply to a person invited to attend a meeting of the Board in terms of subsection (1).

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

Remuneration

PART IV — *Chief Executive Officer and other employees of Authority*

17. (1) The Authority shall have a Chief Executive Officer who shall be appointed by the Minister on the recommendation of the Board, and upon such terms and conditions as the Minister may determine.

Chief Executive Officer of Authority

(2) The Chief Executive Officer shall, subject to the general supervision of the Board, 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 Chief Executive Officer may, subject to the provisions of this Act, delegate the exercise of any of the Chief Executive Officer's functions under this Act, to any officer of the Authority.

18. (1) Subject to subsection (2), the Chief Executive Officer shall hold office for a term not exceeding five years and shall be eligible for re-appointment.

Tenure of office of Chief Executive Officer

(2) The Minister may, on the recommendation of the Board, terminate the appointment of the Chief Executive Officer for —

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

19. (1) 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.

Appointment of employees

(2) The Chief Executive Officer 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 Chief Executive Officer considers suitable.

(3) The Board shall on the recommendation of the Chief Executive Officer determine the conditions of service and remuneration of an inspector who is not in the full time service of the Authority.

Secretary

20. (1) There shall be a Secretary of the Board who shall be appointed by the Board on the recommendation of the Chief Executive Officer on such terms and conditions as may be specified in the instrument of appointment.

(2) The Secretary shall be responsible for —

- (a) taking the minutes of the meetings of the Board;
- (b) keeping the records of all decisions of the Board;
- (c) keeping the records of legal transactions of the Authority;
- (d) advising the Board on legal and procedural matters in respect of the deliberations and decisions of the Board; and
- (e) all business of the Board and be the liaison between the Board and other stakeholders.

(3) In the absence of the Secretary, the Chief Executive Officer may appoint any employee of the Authority to perform the functions of the Secretary until the Secretary resumes office or the vacancy is filled, as the case may be.

(4) In the performance of his or her functions, the Secretary shall be under the supervision of the Chief Executive Officer.

(5) The Board may, on the recommendation of the Chief Executive Officer, terminate the appointment of the Secretary, on such grounds referred to in the instrument of appointment or on the same grounds specified in relation to the Chief Executive Officer under section 18 (2).

Part V — *Financial provisions*

Funds of Authority

21. The funds of the Authority shall consist of —

- (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.

Financial year

22. The financial year of the Authority shall be a period of 12 months starting on 1st April and ending on 31st March each year.

Accounts and audit

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.

(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 Board.

(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 14 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 or her receiving the Authority's report, lay such report before the National Assembly.

Part VI — Control of restrictive agreements and dominant position

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 —

Prohibition
of horizontal
agreements

- (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; or
- (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.

26. Any officer or director of an enterprise who contravenes section 25 commits an offence and is liable to a fine not exceeding P100 000 or to a term of imprisonment not exceeding five years, or to both.

Criminal
sanction for
contravention
of section 25

Prohibition of vertical agreements

27. (1) An enterprise shall not enter into a vertical agreement with another 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.

(3) Any officer or director of an enterprise who contravenes this section commits an offence and is liable to a fine not exceeding P50 000.

Other horizontal and vertical agreements

28. (1) A horizontal agreement or vertical agreement other than the agreement referred to under section 25 or section 27 (1) respectively, may be prohibited by the Authority if, following an investigation by the Authority, such agreement —

- (a) is found to have the object or effect of preventing or substantially lessening competition in a market for goods or services in Botswana;
- (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.

(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, development or investment;
- (b) applies dissimilar 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 contacts.

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

- (a) constitutes a professional rule;
- (b) imposes obligations arising from a professional rule; or
- (c) constitutes an agreement to act in accordance with a professional rule,

unless the professional rule constitutes an infringement of section 25 or 27, or is considered to constitute an abuse of dominant position.

Threshold for determining prohibition

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

- (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; or
- (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.

30. (1) Sections 25, 27 (1), 28 (1) and 45 shall not apply to an agreement to which the only parties to the agreement are interconnected parties.

Interconnected enterprises

(2) Where the parties to an agreement are not interconnected 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, 27 (1), 28 (1) and 45, 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 interconnected if one of them is a subsidiary of the other or if both of them are subsidiaries of the same body corporate.

31. (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, the conduct is determined to amount to an abuse of a dominant position in any market, and such conduct shall include —

Abuse of dominant position

- (a) predatory conduct;
- (b) tying and bundling conduct;
- (c) loyalty rebates;
- (d) margin squeeze;
- (e) the refusal to supply or deal with other enterprises, including refusal of access to an essential facility;
- (f) requiring or inducing any customer to not deal with other competitors;
- (g) discriminating in price or other trading conditions; and
- (h) exclusive dealing.

(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 programmes for the development of the economy of Botswana, including industrial development and privatisation.

Threshold for determining dominant position

32. For the purposes of investigating the potential application of the prohibition on abuse of dominant position, the Authority shall 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 VII — *Exemptions and assessment criteria*

Exemptions

33. (1) Where the Authority finds, on investigation, that an agreement other than a horizontal agreement or a vertical agreement prohibited by sections 25 and 27 (1) respectively prevents or substantially lessens competition, the Authority may, subject to section 35, 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;
- (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 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 goods or services in question.

(2) Subject to section 35, 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 —
 - (a) shall be valid for such period as the Authority may consider appropriate;
 - (b) shall be subject to such conditions as the Authority may determine; and
 - (c) may, upon application in writing by any exempted person or exempted enterprise, be renewed for such period as the Authority may on a case by case basis 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.

34. Where —

- (a) the Authority determines that the information on which an exemption was based is materially incorrect;
 - (b) there is a material change in the circumstances regarding an exemption; or
 - (c) an enterprise does not comply with any of the conditions on which an exemption is granted,
- the Authority may, subject to section 35, revoke the exemption.

Revocation
of exemption

35. The Authority shall —

- (a) consult interested parties; and
- (b) consider any representation made by such parties, before it grants an exemption or revokes an exemption.

Consultations
on exemptions

*Part VIII — Investigation of horizontal
and vertical agreements*

36. (1) The Authority 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 the Authority has reasonable grounds to suspect that —

Investigation
by Authority

- (a) the practice in question —
 - (i) may constitute an infringement of sections 25 and 27 (1), and
 - (ii) is prohibited after an investigation in terms of sections 28 (1) and 31 (1); and
- (b) the thresholds referred to under section 29 or 32 are or may be satisfied.

(2) Where the Authority decides to conduct an investigation it shall as soon as is 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 practice 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 37, it may defer giving the 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 —

- (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, or
 - (ii) in the case of a body corporate, a director, 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; or
- (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, for an interview or to produce any document or article specified in the notice.

(5) If the Authority decides not to commence 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 complainant of the reasons for its decision.

Entry and
search of
premises

37. (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 agreement, a vertical agreement or an abuse of dominant position prohibited in terms of section 25, 27 (1), 28 (1) or 31 (1) respectively, 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 business hours —

- (a) enter into premises where information or documents are being kept by the enterprise;
- (b) search any person on the premises if there are reasonable grounds for believing that the person has possession of any documents or articles that have 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 information or documents are not provided, require any other person specified in paragraph (d) (iv) to state, to the best of his or her knowledge, how the relevant information may be retrieved or where the documents are to be found;
- (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 the computer system to —
 - (i) search any data contained in or available to that computer system,
 - (ii) reproduce any record from that data, or
 - (iii) seize any output from that computer system 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 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 an 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, is engaging in or is about to engage in a practice prohibited under section 25, 27 (1), 28 (1) or 31 (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 of the premises or the 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;
- (b) where none of the persons specified in paragraph (a) is present, affix a copy of the warrant to the premises in a prominent and visible position; and
- (c) allow an 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 of the premises or any other person in control of the premises consents to the entry and search of the premises and such consent shall not be unreasonably withheld.

(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 assisted by other persons specified in the warrant.

(8) An inspector who removes anything from any premises in accordance with subsection (2) (h) shall —

(a) issue a receipt for that thing to the owner of the premises or the person in control of the premises; and

(b) return that thing as soon as it is 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 inspector shall, if the premises are unoccupied or the occupier is temporarily absent, leave them as effectively secured as found by that inspector.

Privileged
information

38. (1) Nothing in this Part requires a person or an enterprise to disclose or produce information or a document if the person or the enterprise would in proceedings in court be entitled to refuse to disclose or produce it on the grounds of legal professional privilege.

(2) A person or an enterprise shall, 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 IX — Consideration of evidence, acceptance of undertakings and enforcement of directions

Consideration
of evidence

39. (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 section 25, 27 (1), (1) or 31 (1) may be occurring or may have occurred.

(2) The inspector shall produce a report on the basis of the documents and information gathered pursuant to the provisions of Part VIII.

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

Acceptance of
undertaking
or settlement
agreement

40. (1) An enterprise may offer an undertaking to the Authority in order 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 section 28 (1), or conduct falling within the scope of section 31 (1).

(2) The Authority may conclude a case on the basis of a settlement agreement if the Authority considers that the settlement agreement satisfactorily covers all concerns it has over the adverse effects for competition of the agreement or the conduct, and such settlement agreement shall be taken to the Tribunal to be made an order of the Tribunal.

41. (1) Where the Authority has reasonable grounds to believe that an enterprise has, without a reasonable excuse, failed to comply with a direction issued pursuant to the Authority's powers under this Act or with the terms of an exemption granted under section 33, the Authority may exercise the powers of investigation provided for in Part VIII.

Enforcement
of directions

(2) Where the Authority proposes to determine that such failure has occurred, it shall give notice of its intention to the enterprise concerned and consider any representations the enterprise wishes to make.

(3) The Authority may apply to the Tribunal for an order requiring the enterprise to make good the default within the 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 X — *Market inquiries*

42. (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 section 31 (2) or 33 (1) apply to the sector or type of agreement on the same basis they would have applied to an individual matter arising under section 25, 27 (1), 28 (1) or 31 (1).

43. For the purposes of an inquiry under section 42, 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 VIII.

Powers of
investigation

44. (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 42 (2) (a) and that either section 42 (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 section 25, 27 (1), 28 (1) or 31 (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 required to provide an effective remedy.

Part XI — *Control of mergers*

Acquisition of control of enterprise

45. (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) an amalgamation or other combination with an enterprise.
- (3) A person controls an enterprise if such 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).

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Exemptions from merger control

46. (1) The Minister may, by regulations, specify categories of merger to which a merger control in terms of section 48 shall not apply, by reference to —

- (a) the commercial or industrial sector involved;
- (b) the nature of the activities in which the enterprise is engaged; or
- (c) some aspect of the general public interest.

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

(3) Where a merger raises paramount issues of public interest, the Minister may, upon being notified of the merger by the Authority, provide comments in writing to the Authority within a reasonable period, and such comments shall be considered by the Authority in making its decision.

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

Threshold for merger control

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

48. No merger falling within section 47 may be implemented by any enterprise unless —

Mergers above permitted threshold

- (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 condition attached to the approval granted by the Authority; or
- (c) the period referred to under section 49 (4) 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.

49. (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 referred to in subsection (1).

(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 any one or more of the enterprises concerned and may suspend assessment of the merger 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 from the date on which the Authority receives the 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 51, 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 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.

Consideration of notification

50. (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 52.

(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 investigator or the Authority any document, affidavit, statement or other relevant information in respect of a proposed merger.

Hearing in relation to merger

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

(2) If the Authority determines that such a hearing or hearings are to be held, it shall, before the expiry of the period referred to in section 49 (4) or (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.

Assessment of merger

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

- (a) would be likely to prevent or substantially lessen competition, 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, take into account any factor which it considers to have a bearing on 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 benefit 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 size enterprises; or
 - (g) the merger may improve the ability of national industries to compete in international markets.

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

- (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 the Authority gives a conditional approval, the approval may contain such directions as it considers necessary, reasonable and practicable to remedy, mitigate or prevent any adverse effects of the merger.
- (3) The directions given by the Authority under subsection (2) may, among other things, require an enterprise or enterprises to —
- (a) divest such assets as are specified in the direction within a specified period; or
 - (b) adopt or desist from such conduct in relation to prices as specified in the directions before the merger can be completed or implemented.
- (4) The Authority shall —
- (a) give notice of the determination it has made and of any directions in relation to a merger —

Determination
on proposed
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.

Acceptance of
undertaking

54. (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.

(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 52.

(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.

Consideration
of rejected
merger

55. (1) The parties to a merger may, within 14 days after a decision to reject a merger is made, submit an application to the Authority requesting it to reconsider its decision pertaining to the merger.

(2) The application referred to in subsection (1) shall be accompanied —

(a) by a fee of 20 per cent of the original notification fee paid; and

(b) by any 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 had such fact, issue or evidence been submitted to the Authority, the Authority would have arrived at a different decision.

(3) Where the Authority is of the opinion that the information submitted by the parties for reconsideration is material to the extent that it may reconsider its decision, the Authority shall, within a period of 30 days, reconsider the application under subsection (1) after it has carried out an assessment of the merger in accordance with section 52.

Revocation of
approval of
merger

56. (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 —

(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.

(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.

57. Any person or enterprise aggrieved by a decision of the Authority in relation to a merger may, within 60 days from the date of the decision, lodge an appeal with the Tribunal.

Appeal on decision made by Authority on merger

58. (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 —

Merger implemented in contravention of Act

- (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 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.

(3) Any person or enterprise that implements a merger without —

- (a) first notifying the Authority; or
- (b) receipt of approval from the Authority in terms of section 48 (a),

shall be liable to a fine not exceeding ten per cent of the consideration or the combined turnover of the parties involved in the merger, whichever is greater.

59. (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 VIII in respect of similar matters falling within Part VI.

Enforcement of directions

(2) Where the Authority proposes to determine that a failure of compliance in terms of subsection (1) has occurred, it shall give notice of its intention to investigate to the enterprise concerned and consider any representations the enterprise wishes to make.

(3) The Authority may then apply to the Tribunal 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.

Exclusion of certain agreements and conduct

60. (1) An agreement giving effect to a merger as defined in section 45 or any provision directly related and necessary for the implementation of a merger, shall be excluded from the scope of sections 25, 27 (1) and 28 (1).

(2) Any conduct which results in a merger or which is directly related and necessary for the implementation of a merger shall be excluded from the scope of section 31 (1).

Compliance with other laws

61. An approval of a merger granted by the Authority shall not relieve an enterprise from obtaining such other approvals as may be required from other bodies in the exercise of their statutory responsibilities.

Part XII — *Competition and Consumer Tribunal*

Establishment of Tribunal

62. (1) There is established a Tribunal to adjudicate breaches of any of the provisions of this Act.

(2) The Tribunal shall consist of —

(a) a President of the Tribunal, who shall be a legal practitioner who qualifies to be appointed as a High Court judge;

(b) a Vice President of the Tribunal who is a legal practitioner who qualifies to be a High Court judge; and

(c) five other persons who have considerable knowledge and experience in the area of enterprise competition and consumer protection.

(3) A member of the Tribunal shall —

(a) be appointed by the Minister; and

(b) not qualify for appointment as a member of the Tribunal if he or she is a member of the Board or is an employee of the Authority.

(4) The Minister may, if he or she is satisfied that a person meets the requirements for qualification as a member of the Tribunal set out under subsection (2), appoint the person to sit on the Tribunal as an alternate to any of the substantive members of the Tribunal appointed under subsection (3).

(5) The Minister shall, by notice in the *Gazette*, publish the appointment of members of the Tribunal and their alternates, specifying the dates of their appointment and the period for which they are appointed to the Tribunal.

(6) The members of the Tribunal shall be paid such allowances as shall be determined by the Minister.

(7) There shall be a Registrar of the Tribunal appointed by the Minister, and such other employees as may be necessary to staff the Tribunal and enable it to carry out functions under this Act.

(8) The Registrar shall —

(a) register all orders or decisions made by the Tribunal;

(b) maintain and keep a proper record of all proceedings and correspondence of the Tribunal;

(c) have custody and keep an account of all awards payable or paid into the Tribunal and of all moneys paid into or out of the Tribunal and keep proper accounts;

- (d) compile and register statistics of all adjudicated cases; and
- (e) carry out such other duties as the Minister may, from time to time, determine.

63. (1) 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.

Jurisdiction of Tribunal

(2) Any matter under this Act shall not be referred to any other tribunal, magistrate's court or the Industrial Court.

64. A member of the Tribunal shall hold office for a period not exceeding five years, and shall be eligible for re-appointment.

Tenure of office of Tribunal

65. (1) A person shall not be appointed as a member of the Tribunal or be qualified to continue to hold office where the person —

Disqualification, removal and suspension of members of Tribunal

- (a) has, in terms of a law in force in any country —
 - (i) been adjudged or otherwise declared bankrupt and has not been rehabilitated or discharged, or
 - (ii) made an assignment to, arrangement or composition with his or her 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 within Botswana, or
 - (ii) outside Botswana, of an offence which if committed in Botswana, would have been a criminal offence, and sentenced by a court of competent jurisdiction to imprisonment for six months or more without the option of a fine, whether that sentence has been suspended or not, and for which he or she has not received a free pardon.

(2) The Minister may, in writing, suspend from office, a member of the Tribunal against whom criminal proceedings are instituted for an offence in respect of which a sentence of imprisonment may be imposed, and whilst the member is suspended, he or she shall not carry out any duties under this Act or be entitled to any remuneration or allowances as a member of the Tribunal.

(3) The Minister shall remove a member of the Tribunal from office if he or she is satisfied that the member —

- (a) has been found to be physically or mentally incapable of performing his or her duties efficiently and a medical doctor has issued a certificate to that effect;
- (b) contravenes this Act or otherwise misconducts himself or herself to the detriment of the functions of the Tribunal; or
- (c) has been convicted of an offence under the Act or any other Act for which he or she is sentenced to imprisonment for a term of six months or more without an option of a fine.

Vacation of office of members of Tribunal

66. A member of the Tribunal shall vacate his or her office and such office shall become vacant —

- (a) if he or she is disqualified, suspended or removed, or resigns, in terms of section 65;
- (b) if he or she is adjudged bankrupt or insolvent;
- (c) upon his or her death;
- (d) upon the expiry of such time as the Minister may specify in writing, notifying the member of the Tribunal of his or her removal from office by the Minister;
- (e) upon the expiry of one month's notice in writing to the Minister of his or her intention to resign from office;
- (f) if he or she becomes physically or mentally incapable of performing his or her duties efficiently and a medical doctor has issued a medical certificate to that effect;
- (g) if he or she is convicted of an offence under this Act or any other Act for which he or she is sentenced to imprisonment for a term of six months or more without an option of a fine; or
- (h) if he or she is summarily dismissed by the Minister on the grounds of contravening this Act.

Filling of vacancy

67. (1) Where the office of a member of the Tribunal becomes vacant before the expiry of the member's term of office, the Minister shall appoint the alternate of that member in place of the member who vacates office, until the expiry of a period during which such member would have otherwise continued in office.

(2) Subsection (1) shall not apply where the remainder of the period for which the member whose office has been vacated would otherwise have held office is less than six months.

Disclosure of interest and confidentiality

68. Sections 12 and 87 shall apply with the necessary modifications to the Tribunal, its members and employees.

Funds of Tribunal

69. Section 21 (a) shall apply with the necessary modifications to the Tribunal.

Proceedings of Tribunal

70. (1) The Tribunal shall sit as and when it has received a referral or a complaint.

(2) The Tribunal may call such witness or request the production of such documents as is necessary for the conduct of the proceedings before the Tribunal.

(3) A witness appearing before the Tribunal shall be entitled to the same allowances as those of a witness in proceedings before a magistrate's court.

Appearance before Tribunal

71. A person or enterprise appearing before the Tribunal may —

- (a) appear in person and may be assisted by any other person; and
- (b) produce such evidence as he or she is requested by the Tribunal to produce for the purposes of the proceedings.

Opportunity to make submissions concerning evidence

72. The Tribunal shall give a party to the proceedings an opportunity to present his or her case and, in particular —

- (a) to inspect any documents to which the Tribunal proposes to have regard in reaching a decision; and
- (b) to make submissions in relation to those documents.

73. (1) The Authority shall, within 12 months of completing the investigations conducted in accordance with section 39 —

Preliminary
hearing and
referral to
Tribunal

- (a) refer a matter to the Tribunal, if the Authority determines that a prohibited practice has been established; or
- (b) issue a notice of non-referral to the complainant in the prescribed form.

(2) Where the Authority —

- (a) does not refer a complaint to the Tribunal; or
- (b) does not issue a notice of non-referral to the complainant,

the Authority shall be considered to have issued a notice of non-referral to the complainant.

(3) Where the Authority issues a notice of non-referral to a complainant, the complainant may refer the complaint directly to the Tribunal subject to the procedure of the Tribunal.

(4) A referral to the Tribunal, whether by the Authority or by a complainant, shall —

- (a) be in the prescribed form; and
- (b) by notice in the *Gazette*, be published by the President of the Tribunal, specifying the name of the respondent and the nature of the conduct that is the subject of the referral.

(5) The Tribunal shall, where a matter has been referred to it —

- (a) determine a date, time and place to hold a preliminary hearing in respect of the matter; and
- (b) notify every party of the hearing on the date, time and place, in writing, 10 working days before the hearing.

(6) The Tribunal shall hold the preliminary hearing on the date, time and place determined by the Tribunal to confer on the —

- (a) nature and basis of the matter;
- (b) possibility for a prompt settlement of the matter; and
- (c) issues referred to in subsection (7).

(7) The following issues shall be addressed at a preliminary hearing —

- (a) the need for giving notice to any other party to a matter;
- (b) the admission of facts and other evidence by consent of parties;
- (c) the control and scheduling of discovery, including inspection and production of documents, admissions by parties, examination of parties and expert testimony;
- (d) narrowing the field of dispute between expert witnesses;
- (e) the possibility of settlement talks or possible mediation of the dispute; or
- (f) such other issues as may facilitate the just and speedy disposal of the matter.

Conduct of hearing

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

- (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 Tribunal shall decide whether to conduct hearings —
- (a) in public; or
 - (b) where the Tribunal considers that there is need to protect commercially confidential information, in a restricted session.
- (3) At any hearing by the Tribunal, a quorum shall be constituted by not less than two thirds of the members of the Tribunal.
- (4) For the purpose of conducting a hearing, the Tribunal may order any person to —
- (a) attend before the Tribunal and give evidence under oath or otherwise;
 - (b) furnish, in writing or otherwise, such particulars in relation to the matter as the Tribunal may require; or
 - (c) produce any document which the Tribunal considers relevant for purposes of the hearing.
- (5) An order given under subsection (4) may include the date on which or the time within which the order is to be complied with.
- (6) Any person who without reasonable cause fails to comply with an order made under subsection (4) 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.

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

Proposed decision by Tribunal

75. (1) If, after examining all the relevant evidence, the Tribunal proposes to make a decision to the effect that —

- (a) section 25 or 27 (1) has been infringed;
- (b) an agreement is subject to prohibition in terms of section 28 (1) and none of the circumstances specified in section 30 or 33 (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 31 (2) apply to the case,

the Tribunal shall give a written notice of its proposed decision to each enterprise that may be affected by that decision.

- (2) The Tribunal shall, in the notice issued under subsection (1) —
- (a) state the reasons for the Tribunal's proposed decision;
 - (b) state the penalties or remedial action that the Tribunal 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 Tribunal, and

- (ii) indicate whether either enterprise requires an opportunity to make oral representations at a pre-decision hearing before the members of the Tribunal.

76. (1) Where the Tribunal determines that a breach of the prohibitions under sections 25 and 27 (1) has occurred, the Tribunal shall give an enterprise or enterprises involved in any of the activities prohibited by sections 25 and 27 (1) 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.

Directions on horizontal and vertical agreements

(2) The Tribunal 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 amount of a penalty imposed in terms of subsection (2) shall not exceed ten per cent of the turnover of the enterprise during the breach of the prohibition up to a maximum of three years.

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

(5) A financial penalty payable in terms of subsection (2) shall be paid into the Consolidated Fund established by the Constitution.

77. (1) If, upon the examination of all evidence and the conclusion of a hearing, the Tribunal determines that —

Directions by Tribunal

- (a) an agreement constitutes an agreement referred to in section 28 (1), and that the circumstances provided for under section 33 (1) do not apply sufficiently to offset the adverse effects on, or the absence of, competition; or
 - (b) an abuse of dominant position has occurred or is occurring and section 31 does not apply to the matter or does not apply sufficiently to offset the adverse effects on, or the absence of, competition,
- the Tribunal shall give the enterprise or enterprises concerned such directions as the Tribunal considers necessary, reasonable or practicable.

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

- (a) the adverse effects on competition identified by the Tribunal; 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 the 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 Tribunal and the Authority with specified information on a continuing basis.

Directions on appeal against decision on merger

78. (1) Where a person or an enterprise aggrieved by a decision of the Authority in relation to a merger appeals the decision to the Tribunal, the Tribunal may —

- (a) refer the matter to the Authority with any directions it may deem necessary for the Authority to carry out its functions in relation to the merger; or
- (b) hear the matter afresh and call new evidence where necessary.

(2) Where the Tribunal hears the appeal in terms of subsection (1) (b), it may give a different decision to that given by the Authority, where necessary.

Application of remedies

79. Except where a concerned enterprise has —

- (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 Tribunal,
- the Tribunal 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 a preliminary hearing.

Interim relief

80. (1) Where an enterprise is —

- (a) party to an agreement falling within the scope of section 25 or 27 (1);
 - (b) party to an agreement which may prove, on investigation by the Authority, to fall within the scope of section 28 (1); or
 - (c) engaged in a conduct which may prove, on investigation by the Authority, to constitute abuse of dominant position but the Authority has not completed its investigation on the matter,
- the Tribunal 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.

(2) The Tribunal shall, before giving a direction under this section —

- (a) give a 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.

(3) A notice given under subsection (2) shall indicate the nature of the direction which the Tribunal is proposing to give and its reasons for wishing to give it.

(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 77 (1).

81. A person who fails to comply with a decision of the Tribunal commits an offence and is liable, upon conviction, to a fine not exceeding P50 000, or to imprisonment for a term not exceeding three years, or to both.

Penalties

82. The Tribunal shall, when determining a penalty consider the following factors —

Determination of penalties

- (a) the nature, duration, gravity and extent of the contravention;
- (b) any loss or damage suffered as a result of the contravention;
- (c) the level of profit derived from the contravention;
- (d) the degree to which the respondent has cooperated with the investigations conducted by the Authority in accordance with this Act, and with the Tribunal; and
- (e) whether the respondent has previous convictions under this Act.

Part XIII — Appeals

83. An enterprise or person aggrieved by any decision of the Tribunal may, within 30 days after the decision of the Tribunal, appeal or make an application for a judicial review to the High Court against that decision in accordance with the provisions of any law in force for the time being regulating appeals or applications for judicial review.

Appeals

84. Where a person aggrieved by a decision or determination made by the Tribunal appeals against or makes an application for a review of such decision or determination, the appeal or application shall not operate as a stay of execution or stay of proceedings before the Tribunal, unless the High Court so orders, and no intermediate act or proceeding shall be invalidated, except in so far as the High Court directs.

Decision of Tribunal binding

Part XIV — General provisions

85. (1) This section applies in relation to any case arising under Parts VI to XI of this Act.

Determination of relevant market

(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 section 29, 32 or 47, 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 purposes 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.

Relationship
with sector
regulators

(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.

86. (1) In this section, “regulator” means any regulatory body or any Government Department that regulates an enterprise that is being investigated by the Authority under this Act.

(2) The Authority and the regulators shall establish a mechanism through which they can maintain regular contact regarding their respective responsibilities.

(3) Where the Authority decides to investigate a matter which does not fall within the scope of section 3 (2) 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.

(4) 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.

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

(a) whether the regulator can place sector-specific expertise 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.

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

(7) 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 (5) have not been held.

Confidentiality

87. (1) A member of the Board, 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, such confidentiality shall subsist even after the termination of their terms of office or their mandates.

(2) Subsection (1) shall 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 92 (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 two years, or to both.

88. A member, any employee of the Authority or any other person acting under the direction of the Authority or the Board, or a member of the Tribunal, shall not, in his or her personal capacity, be liable in civil or criminal proceedings in respect of any act done in good faith in the performance of his or her duties under this Act.

Exemption from personal liability

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

Claims for damages or other money

- (a) only in respect of a breach of the prohibition under section 25 or 27 (1); and
- (b) following a judgment of the Court.

(2) The Authority shall provide the Court with such information, within its possession or control, as the complainant reasonably requests in relation to the Court's determination.

90. A complaint in respect of a prohibited practice may not be initiated more than three years after the practice has ceased.

Prescription of matters

91. A person commits an offence and is liable to a fine not exceeding P30 000 or to imprisonment for a term not exceeding two years, or to both if —

Offences and penalties

- (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 terms of section 36 (4) or 37 (2), or any provision under Part XI 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 an oath or affirmation required by the Tribunal,

- (ii) refuses, after having taken an oath or affirmation, to answer any question to which the Tribunal 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 Tribunal to be produced;
- (e) the person does anything calculated to improperly influence the Board, employee of the Authority or any member of the Tribunal, concerning any matter connected with the exercise of any power or the performance of any function of the Authority or of the Tribunal;
- (f) the person does anything calculated to influence —
 - (i) any employee of the Authority concerning an investigation in a way that is calculated to determine the outcome of such investigation, or
 - (ii) a member of the Tribunal in the performance of his or her adjudicative functions in a way that is calculated to determine the outcome of a decision;
- (g) the person does anything in connection with a hearing that would constitute contempt of court had the proceedings occurred in a court of law;
- (h) the person knowingly provides false information to the Authority, the Board or the Tribunal; or
- (i) the person defames a member of the Board or a member of the Tribunal in the member's official capacity.

Enforcement
at request of
another State

92. (1) Subject to subsection (2), the Authority may investigate any matter falling within the scope of this Act and make 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 an anti-competitive practice in Botswana is damaging competition in the other State.

(2) Subsection (1) shall apply where Botswana has entered into an agreement with that State to the effect that, on a basis of reciprocity, each party to the agreement shall 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.

Fees

93. The Authority may charge fees for —

- (a) the notification of mergers or applications for exemptions; and
- (b) opinions and other services.

Guidelines
and rules

94. (1) The Authority shall publish guidelines on the economic and legal analysis to be used in determining cases under this Act.

(2) The Authority shall publish procedural rules specifying the procedures it shall follow in carrying out its functions under this Act.

(3) The Minister may, on the recommendation of the Authority, prescribe professional rules.

(4) A list of all the professional rules under subsection (3), and copies thereof, shall be open for public inspection at the offices of the Authority.

95. (1) The Minister may, on the recommendation of the Authority, make regulations for any matter required to be prescribed under this Act and to give effect to the provisions of this Act.

Regulations

(2) Regulations made under this section may prescribe for any person who, without reasonable cause, fails to comply with the regulations to be guilty of an offence and liable to a fine not exceeding P200 000 or to imprisonment for a term not exceeding five years, or to both, and in the case of a continuing offence, to a fine of P350 per day for every day during which such offence continues provided that such fine shall not exceed P200 000.

96. The Competition Act (hereinafter referred to as “the repealed Act”), is hereby repealed.

Repeal of
Cap. 46:09

97. (1) Any subsidiary legislation made under the repealed Act and in force immediately prior to the coming into operation of this Act shall, in so far as it is not inconsistent with the provisions of this Act, continue in force and be of effect as if made under this Act.

Savings and
transitional
provisions

(2) All properties, assets, rights, debts, liabilities and obligations which have accrued to the Authority in terms of the repealed Act, shall, upon this Act coming into force, simultaneously pass and accrue to the Authority and be dealt with in terms of this Act.

(3) Any legal proceedings which, before coming into operation of this Act, were pending shall be continued or enforced by or against the Authority in the same manner as they would have been continued or enforced before the coming into operation of this Act.

(4) Any enquiry or proceedings, whether of a disciplinary nature or otherwise, instituted or pending in respect of any employee of the Authority before the date of commencement of this Act shall be dealt with, inquired into and determined in accordance with the procedures in place before the commencement of this Act.

(5) The employees and other staff appointed under the repealed Act shall continue to be employees and staff of the Authority, as continued under this Act.

(6) Every decision made under the repealed Act shall continue to have force and effect according to its substance as if it was made under this Act.

(7) Every approval to the implementation of a merger made under the repealed Act shall continue to be so approved as if approved under this Act.

(8) The repeal of the Competition Act shall not be construed as invalidating any process to resolve an investigation begun or undertaken under or in accordance with the provisions of the repealed Act.

(9) Notwithstanding the repeal of the Competition Act any proceedings commenced under the repealed Act shall be dealt with, inquired into and determined in accordance with this Act.

(10) Any penalty in respect of an offence under the repealed Act shall be imposed as if this Act had not come into operation, but where, under this Act, the penalty in respect of the offence is reduced or mitigated in relation to the penalty or punishment that would have been applicable before the coming into operation of this Act, the provisions of this Act relating to penalties shall apply.

PASSED by the National Assembly this 12th day of December, 2017.

BARBARA N. DITHAPO,
Clerk of the National Assembly.