



**MERGER REGULATION IN BOTSWANA:
DOES THE COMPETITION ACT 2009 ADEQUATELY
PROVIDE FOR MERGERS?**

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ABBREVIATIONS

BIDPA	- Botswana Institute of Development and Policy Analysis
CEDA	- Citizen Entrepreneurial Development Agency
CB	- Clover Botswana
CSA	- Clover South Africa
DTCB	- Diamond Trading Company Botswana
ICN	- International Competition Network
SACU	- Southern African Customs Union
SADC	- Southern African Development Community
WTO	- World Trade Organization
UNCTAD	- United Nations Conference of Trade and Development

CHAPTER ONE: INTRODUCTION

1.1 INTRODUCTION

A developing nation such as Botswana needs to have legislation and infrastructure in place catering for most if not all of its economic needs. This enables a country to compete and maintain recognition in the global economy. This paper advocates for development and operation of a competition law with particular focus on mergers and whether their provisions are satisfactory.

Competition law prohibits restrictive trade practices by ascertaining whether a specified type of economic activity has the effect of preventing or substantially lessening competition. Whilst a firm may build market power through unilateral conduct, the easiest way for a firm to establish or enhance market power is by acquiring or merging with other firms.¹ Mergers deal with changes in the structure of a market or industry.² Although not abuses of dominant power as such, there is a need to regulate mergers and acquisitions because of the potential for abuse that such concentrations of market power carry with them.³

Mergers have potential to result in an entity having a higher market share than what a competition act authorizes. The regulation of mergers is imperative for assessing whether its end results are anti-competitive or pro-competitive. Prohibition of restrictive practices in competition legislation is two fold. It may either be *per se* or it may allow for the use of a rule of reason. Where an economic activity is *per se* prohibited it cannot be justified. Where it allows for a rule of reason there is an allowance for argument to justify it.

Based on the foregoing as well as the explanations and discussions which will be alluded to in this paper, the regulation of

¹ M Brassey Competition Law 1ed (2002) 225.

² Supra.

³ P Brussick & SJ Evennet 'Should Developing Countries Worry About Abuse of Dominance' WLR 286.

mergers in Botswana was elected to analyze the competency of its provisions. The timing for promulgation of the legislation has been impeccable as it gave immediate rise to filing of mergers with international companies.⁴

1.2 FACTS ON BOTSWANA

1.2.1 BACKGROUND

Previously a British Protectorate the Republic of Botswana attained Independence in 1966. The country has been enjoying a multi party democracy for the past four decades with no political turmoil.⁵ It has uninterrupted civilization, leadership, progressive social policies and significant capital investment; which has made it one of the most stable economies in Africa. Botswana is well known for its high HIV/AIDS infection rates and one of Africa's most progressive and comprehensive programs for dealing with the disease.⁶ The current President of Botswana is Seretse Khama Ian Khama, who has been in power since April 2008.⁷ His Vice President is Ponatshego Kedikilwe who was appointed in August 2012.⁸

1.2.2 GEOGRAPHY

Botswana is a landlocked country in the heart of Southern Africa. Botswana shares its borders with Namibia in the west and north, Zambia in the north, Zimbabwe in the north east and South Africa in the east and south.⁹ The country covers an area of 581,730 square kilometres; much of the land is flat and covered with thick sand layers in the Kalahari Desert. It is approximately 1,000 metres above sea level.¹⁰

⁴ The first merger to be filed and authorized in Botswana was between Alexander Forbes and Marsh UK.

⁵ <https://www.cia.gov/library/public> accessed on 15 May 2013.

⁶ Ibid 5.

⁷ Ibid 5.

⁸ Ibid 5.

⁹ Botswana Report to the African Commission on Human and People's Rights (ACHPR) 2010 at p 7.

¹⁰ Ibid at p 8.

Rainfall varies from 650mm per year in the north-east to less than 250mm in south-west. Drought is a recurring problem although in the early 2000's record rainfall brought serious flooding. Botswana experiences extremes in climate, with cold winters and hot summers.¹¹

The nation is rich in mineral deposits. Diamond, coal, copper and nickel are mined in large quantities. Other minerals that are mined include gold, soda ash and salt. The country has a semi arid landscape with only approximately 5 per cent of the land being uncultivated. Cattle ranching is the most significant agricultural enterprise. Farming is mainly at subsistence level and relies on cattle, sheep, goats, maize, sorghum, beans, peanuts, cotton seed and other dry land crops.¹²

1.2.3 PEOPLE

The US Central Intelligence Agency estimates that as at July 2013 the population was 2, 127, 285.¹³ This estimate takes into account the effects of access mortality due to AIDS; this can result in lower life expectancy, higher mortality, higher death rate, lower population growth rates and distribution of population by age and sex that would otherwise be expected.

The population is predominantly Tswana with 78.2 per cent being Tswana speaking people. The two official languages are English and Setswana. Other languages spoken are Kalanga 7.9 per cent, Sekgalagadi 2.8 per cent, English 2.1per cent, other 8.6 per cent and unspecified 0.4 per cent.¹⁴

¹¹ Ibid 5.

¹² Ibid 9 at p 8.

¹³ Ibid 5.

¹⁴ Ibid 5.

1.2.4 ECONOMY

Botswana has maintained one of the world's highest economic growth rates since attaining independence.¹⁵ There has however been negative economic growth in 2009 with the economic sector shrinking by 30 per cent after the global crisis reduced the demand for Botswana's diamonds.¹⁶ Although the economy recovered in 2010, GDP growth has slowed down. Through fiscal discipline and sound management, Botswana transformed itself from one of the poorest countries in the world to a middle-income country with a per capita of GDP of US\$16 800 in 2012. Diamond trading has fuelled much of the expansion and currently accounts for more than one-third of GDP, 70-80 per cent of export earnings and about one-third government revenues.¹⁷

At present a major international diamond company, the Diamond Trading Company of Botswana (DTCB) has signed a 10 year deal with Botswana to move its diamond aggregation and trading business from London to Gaborone by the end of 2013. The move will support Botswana's downstream diamond industry.¹⁸

1.2 PURPOSE OF THE STUDY

The purpose of this study is to assess how competition law has evolved in Botswana and how the Competition Act (the Act) came into existence. It will outline and highlight all the processes and time that went into finally drafting a bill which was finally assented to by Parliament. It will answer the question whether mergers have been adequately provided for in Botswana. Until recently Botswana did not have legislation providing for competition law.¹⁹ The government, together with researchers and economists saw the need for development of a

¹⁵ Ibid 5.

¹⁶ Ibid 5.

¹⁷ Ibid 5.

¹⁸ Ibid 5.

¹⁹ The Competition Act was promulgated in 2009 and took effect in 2010.

competition regime to regulate this sector. The highlights and shortcomings of this process will be noted and assessed as having contributed to the nature of the legislation as it now is.

The provisions of Part X²⁰ of the Competition Act 2009 will be brought to the fore. The provisions drafted for merger regulation in the Act form the basis and control of mergers in Botswana. Promulgation of competition legislation, as previously stated, is imperative for purposes of fostering economic growth in Botswana. In so far as mergers are concerned there might be growth in that international companies and organizations will be likely to invest in Botswana companies and possibly merge with them or even take them over. In this regard, the legislation providing a competition regime should be able to fulfil needs of economic contributors locally and internationally. This makes it necessary to assess whether provision for mergers in the Act successfully acts as an aid in commercial growth and additionally serves the proper purpose which it was meant to.

In the author's view, the reason why a piece of legislation has to undergo amendments at a later stage arises from drafting errors and oversights. In addition the history of a particular country is important in the drafting of an Act as it is that history that contributes to the current state of the economy and therefore history should also be a consideration in the drafting of legislation.

1.3 SYNOPSIS OF CHAPTERS

Chapter Two will discuss the development of competition law in Botswana. The chapter will address the following issues; the origin of competition law, and its development in Botswana taking into consideration the drafting and implementation of the Act and what it sought to achieve. This development can be traced as far back as 1996

²⁰ Sections 52 to 66.

with the WTO Competition Policy²¹ and will be followed by Regional Trade Agreements²² which obliged member states to begin the process of developing competition policies and eventually drafting legislation. Concurrently with these regional agreements, Botswana went on to draft an Economic Mapping Report.²³ After submission of the Report, other national policies leading up to drafting of the Act were implemented. These will be discussed in line with the question if this paper.

Chapter Three will expound on the provisions for merger regulation in terms of the Act. It will analyze sections which have practically become the reason for contentious issues in merger regulation and also commend those that foster for the aims of competition. Further, where there appears to be any likely problems or issues of contention with respect to merger regulation these will be assessed. Concerns in respect of merger threshold and operation of public interest will be brought to light. This chapter will also discuss some of the merger decisions of the Competition Authority since it started operating in 2011.

Chapter Four will provide a comparative analysis. This scrutiny will be between competition regimes in South Africa and Zambia. It will explore how each of these jurisdictions has developed their Competition Law in respect of mergers and make comparisons with Botswana. Zambia and South Africa have been particularly selected for the comparative study as the competition laws of these jurisdictions were used for benchmarking purposes in drafting of the Act. The chapter will expound on what Botswana has benefited from and what it desisted from doing and more importantly what improvements may be relevant and necessary going forward in Botswana.

²¹ Hartzenburg, Trudi 'Competition Policy in SADC' 2002 Trade and Industrial Policy Strategies Annual Forum 1.

²² Southern African Customs Union Agreement 2002 and the 2004 Amendment as well as the Southern African Development Community Agreement on Trade 2000.

²³ The final report on this Policy was drafted by the Botswana Institute for Development Policy Analysis and presented to the Ministry of Trade, Industry, Wildlife and Tourism in 2002.

Chapter Five will be the concluding chapter. This Chapter will give final remarks on the core elements of this mini dissertation and also make recommendations in respect of main issues deciphered.

1.4 REASON FOR COMPARITIVE ANALYSIS

Since Competition Law is still very much in its infancy stage and the legislation is relatively new, it is important to look at how other countries have provided for the regulation of mergers and made amendments to these provisions over time. The comparative analysis will also be used to highlight any mistakes that countries with older competition law regimes made, which the Botswana legislation has been able to avoid, or those that are similar and may need to be rectified at a later stage.

The two countries selected for the comparative analysis are one of the first four countries in Southern Africa to have a competition policy.²⁴ It will be interesting to assess how their competition law has evolved over the years and draw lessons from same.

1.5 METHODOLOGY

This research will be desk-top based. The Competition Act will be critically analyzed in so far as it relates to merger regulation. There will also be an analysis of the jurisprudence on the subject matter. International and regional agreements on Competition law and policy will also be used. Legislation and jurisprudence from other countries will be used for the comparative analysis.

²⁴ The other two countries are Zimbabwe and Tanzania.

CHAPTER TWO: DEVELOPMENT OF COMPETITION LAW IN BOTSWANA

2.1 INTRODUCTION

The Competition Act was passed in 2009.²⁵ The road towards promulgating the Act took close to a decade. The benefits of the competition legislation include economic improvement nationally, by enhancing and ensuring fair trading practices and competition. At an international level, competition legislation makes a country more attractive to foreign investors. In relation to mergers, large multinational companies seeking to merge with companies in Botswana will want to know whether there is a proper regulatory frame work in place, thus ensuring that their interests are safeguarded. Moreover from an international perspective, if parent or holding companies decide to merge, their affiliates around the world would also have to engage in structural changes. Thus, having in place adequate legislative structures to implement same is important. On the other side of the coin, the legislation would protect local companies from exploitation by large multinationals who may seek to dominate the market and leave no room for competition.

This Chapter demonstrates development of a competition law regime in Botswana. It provides a detailed background showing the theoretical aspects of this development. The background provided addresses the questions being raised herein and provides a foundational basis. It will therefore expound on the link between the development of the law and the operation of the Act so far as mergers are concerned.

The Chapter will give reasons for engaging in the process and highlight policy considerations for drafting of the Act. It will demonstrate that the reasons for the introduction of competition legislation were largely economical and formulated on policies. The shortcomings in the preparation and drafting stages which eventually had an effect on the functioning and regulation of mergers in Botswana will be evidenced.

²⁵ Act No. 17 of 2009.

There will be focus on whether the assistance provided was adequate for the functioning of mergers.

Competition or Anti trust²⁶ law has been defined in many contexts. But the principle purpose has been formulated around the structuring of the market for goods and services by the imposition of controls designed to promote competition within that market.²⁷ The first piece of anti trust legislation was passed in Canada in 1889 and was known as the Act for the Prevention and Suppression of Combinations in Restraint of Trade. This Act was assented to in response of public concern over pricing practices of organized groups of companies known as combines.²⁸ Thus, the passing of the Act was a way of regulating the functioning of the combines. Mergers and monopolizations were first introduced in 1910.²⁹

In America it saw its advent as legislation enacted initially by the federal government and later by the individual state governments to regulate trade and commerce by preventing unlawful restraints, price fixing and monopolies to promote competition and encourage the production of quality good and services at the lowest prices. The primary goal was to safeguard public welfare by ensuring that consumer demands were met by the manufacture of goods and sale at a reasonable price.³⁰ Over the years competition law moved to other parts of the world and has been largely based on the development in Canada and the United States.

One of the main purposes of competition law has been alluded to as being the remedying of some of the situations in which the free market system breaks down.³¹ It follows therefore that competition law is greatly linked to economics or more specifically the functioning of the economy.

²⁶ This is the term used to refer to Competition law in the United States and will be used as a synonym herein.

²⁷ Brassey (Note 1) p 1.

²⁸ Ross T.W, 'Introduction: The Evolution of Competition Law in Canada', Faculty of Commerce and Business Administration, University of British Columbia, Vancouver, BC, Canada, V6T 1Z2 3.

²⁹ Ibid at p5.

³⁰ West's Encyclopaedia of American Law available at <http://iris.nyit.edu/~shartman/mba0101/trust.htm> accessed on 4 June 2013

³¹ M Furse *Competition Law of the EEC and UK* 4ed (2004) 1.

One author on the subject has elucidated that economics can be employed in two main ways in relation to competition law.³² First because competition law is aimed in part at remedying market failure, a general macro-economic argument can be made as to the existence of such market failure and the costs imposed by it. Secondly, micro-economic arguments are likely to be relied upon in individual cases to justify intervention or to defend a company's position.

This being said it is submitted that in promulgating or passing anti-trust laws, a state must always be aware of the economics involved and be sure to include them in enacting such legislation. It has been submitted that developing countries deserve an antitrust law that fits the facts of their markets and responds to their condition and needs,³³ and they deserve a law so designed and so characterized that their people will embrace it as sympathetic and legitimate rather than reject it as foreign. Thus the processes discussed in this chapter will be an indication of the extent to which these factors were considered.

The formal introduction of competition law in Botswana demonstrates what was described by the United Nations Conference on Trade and Development (UNCTAD) as an example of an all-inclusive approach.³⁴ And in being an all inclusive approach the expectation would be that all aspects of this particular field of law are catered for. The complete processes leading to promulgation of the Act are elucidated on below.

³² Ibid at p7.

³³ EM Fox '*Economic Development Poverty and Antitrust: The Other Path*', South Western Journal of Law and Trade in the Americas 2007 126.

³⁴ UN Conference on Trade and Development, Capacity-building on Competition Law and Policy for Development, *A Consolidated Report*, 2008.

2.2 INTERNATIONAL AND REGIONAL INFLUENCE

International, regional and national activities for the development of the legislation occurred somewhat simultaneously. The path to development and drafting of a single statute in respect of competition law in Botswana can be vaguely traced as far back as the 1996 Singapore WTO Ministerial Conference.³⁵ At this conference competition policy became one of the new issues on the WTO agenda. Four working groups were set up, and among the four, was the Trade and Competition Working Group.³⁶ It was aimed at enhancing of Trade and Competition policies and laws.

The UNCTAD in its Manual on the Formulation and Application of Competition Law³⁷ notes objectives and benefits of competition law. The most widely stated objective of anti-trust law legislation is to improve economic efficiency and thus contribute to economic development. Three benefits are stated, the first is that this type of law puts pressure on firms to produce and distribute their products at the lowest possible cost. Secondly it benefits consumers by ensuring that prices are kept down and are reduced in step with any cost reductions. The last benefit is that it allows firms the opportunity to introduce new products or processes or enter new markets, thus contributing toward technological advance and higher quality goods and services.³⁸ These are the static and efficiency gains that economists usually attribute to competition.

An effective competition law properly implemented and enforced, is essential to the preservation of competition and the realisation of the benefits that can flow to developed and developing countries alike. This notwithstanding, the manual notes that even though a country has effective competition law legislation there will still be presence of

³⁵ Ibid 21 at p 2.

³⁶ http://en.wikipedia.org/wiki/World_Trade_Organization_Ministerial_Conference_of_1996 accessed on 13 June 2013.

³⁷ 2004 Edition.

³⁸ UNCTAD Manual on the Formulation and Application of Competition Law 2.

limitations in its operation and application.³⁹ The UNCTAD has made vast contributions and provision of assistance to developing countries in so far as developing cooperating competition policies is concerned. These contributions are evidenced for example by the drive on Botswana to engage in an economic mapping study to assess the state of the economy as preparation for implementing a competition policy and finally drafting an act.

In 2000, the Southern African Development Community (SADC) assented to the SADC Protocol on Trade. There were five objectives set out in the protocol. The fourth objective read as follows:

“4. To enhance the economic diversification and industrialisation of the region.”

With such an objective in place, the protocol clearly aimed at making provisions for ways of enhancing economies of member states. As a developing community, the regional organization admittedly aims to make positive improvements towards economic development. And as has been reiterated from the beginning of this paper, having in place a mechanism of regulating competition in an economy is key, especially for developing countries. Alas the protocol at Article 25 provides for a competition policy, reading as follows:

“Member states shall implement measures within the community that prohibit unfair business practices and promote competition.”

This article therefore made it compulsory at regional level for all member states to have in place national competition laws. Member states with no competition laws would have to commence the processes of preparation geared at putting the legislation in place.

In 2002, member states of the Southern African Customs Union (SACU) entered into an agreement in recognition that their previous

³⁹ Ibid p2.

agreement concluded in 1969 no longer catered for the needs of the customs union in line with developments in the 21st century.⁴⁰ This agreement was concluded bearing in mind the different levels of development of member states and the need for their integration in the global economy. Similarly to the SADC protocol, one of the objectives of the SACU Agreement was:

“(e). to enhance economic development, diversification, industrialization and competitiveness of member states.”

Again likewise to the SADC Protocol, the SACU Agreement provided for a competition Policy. Article 40 of the agreement states as follows:

“ 1. Member states shall agree that there shall be competition policies in each member state and

2. Member states shall cooperate with each other with respect to enforcement of competition laws and regulations.”

Article 40 therefore aims to harmonize states in development of competition laws so that they may learn from and assist each other. Read together, the SADC Protocol and the SACU Agreement by their provisions mandating states that do not have competition policies, hard-pressed them to start making headway into development of same. Although the economies of member states of these organizations are not generally on the same rank, at a regional level member states are able to assist one another in progression of drafting competition laws.

⁴⁰ 2002 Southern African Customs Union (SACU) Agreement p 1.

2.3 THE BOTSWANA PRIVATISATION POLICY

In 2002, the Botswana Government published a Privatisation Policy. This policy defined privatisation as a process of transferring ownership of public enterprises to private owners.⁴¹ This process encompasses all the measures and policies aimed at strengthening the role of the private sector in the economy. It may be submitted at this point that having an anti-trust policy and legislation strengthens the aims of privatisation. Privatisation changes the distribution of power in a society, and by so doing it diminishes control of the economy by the state.⁴² As a result, public support has to be a major consideration in any privatisation programme.

The reasons why a state would want to privatise its entities differ from country to country, however the main objectives are similar. These objectives include promoting competition; improving efficiency and increasing productivity in enterprises; increasing direct citizen participation in the ownership of assets; withdrawing from commercial activities which no longer need to be undertaken by the public sector; reducing the size of the public sector and relieving the financial and administrative burden of the government in undertaking and maintaining a constantly expanding network of services and investments in infrastructure. In promoting competition, it will be necessary to regulate and ensure that it is fair.⁴³

Paragraph 63 of the Privatisation Policy provides for legal and regulatory reform. For privatisation to succeed the legislative, regulatory and policy environment should not impede the application of commercial principles. It goes on to connote that privatisation requires complementary measures to remove beauracracic restrictions that prevent all firms from operating effectively and efficiently. This being said, the Privatisation Policy observes the need for a competition law. It

⁴¹ Republic of Botswana, *'Privatisation Policy for Botswana, Government Paper No. 1 of 2000'*, (2000) para 22.

⁴² Note 41.

⁴³ Ibid 41 para 29.

explains that competition is fundamental if firms are to court the market for profits and not the government for favours. Further provision is made to the effect that to act as an aid to the success of privatisation, a competition law will have to be enacted clearly delineating the powers, right and responsibilities of competitive entities.⁴⁴

In continuation, submission is made that public policy issues involving anti-competitive practices must be considered in relation to a privatisation process. The reason given for this is that once a public enterprise has been privatised, its behaviour as well as the behaviour of other private sector businesses in relation to mergers and acquisitions needs to be within the regulatory framework addressing critical issues in this area.⁴⁵ Therefore, the Policy concludes that measures and institutions to regulate anti-competitive behaviour of firms would have to be put in place.

The Privatisation Policy concludes by indicating the need to enact a competition law providing for the establishment of a multi-product regulatory authority and specifying its functions. This Policy put the government in a position of knowledge in terms of what would be essential in drafting an act that complemented privatisation.⁴⁶

It is opined that prior to promulgating a competition act, a policy is necessary for purposes of placing a government in a better position with regards to elements that need to be included in the act. In this respect provisions for mergers would have to be drafted taking into consideration private stakeholders and their contributions towards the functioning of competition law, as well as to their contribution toward economic growth, thus fulfilling objectives of the policy. The policy acted as a stepping stone to the development of an act and put into consideration some aspects of what would have to be included in legislation.

⁴⁴ Note 41 para 68.

⁴⁵ Note 41 para 68.

⁴⁶ Note 41 para 96.

2.4 THE ECONOMIC MAPPING FOR BOTSWANA

In 2002 the Botswana Institute for Development and Policy Analysis (BIDPA)⁴⁷ submitted a final report on the Economic Mapping Study for Botswana (the Report). This report was submitted to the Ministry of Trade Industry Wildlife and Tourism⁴⁸ and was prepared in response to an invite by UNCTAD and the Ministry to map out the economic structure of Botswana in order to identify the key constraints on competition in all sectors of the economy.⁴⁹ BIDPA engaged in research on the state of the economy and more importantly the need for development of a competition law framework.

The preparation of the Report was the first step within the jurisdiction towards the actual drafting of the Competition Act. The Report explicitly states that it is clear that in drafting good quality competition legislation; there should be an understanding of the market conditions prevailing in the economy.⁵⁰ Its main objective was to provide a detailed analysis of the market for key industries in an attempt to identify the basic conditions and characteristics of the market for the various industries. It is imperative that a competition policy be devised so as to be able to implement the privatisation policy.⁵¹ This is evidence that the conclusions reached in the Privatisation Policy held water in respect of development of a competition framework in Botswana.

At the beginning of this chapter, the relationship between competition and the economy was enunciated. This relationship has also been alluded to in the Report. It postulates that most economists agree that there is a positive relationship between competition and economic growth. The functioning of the two was assessed theoretically and practically. From a theoretic point of view competition expels inefficient

⁴⁷ BIDPA is a non-governmental research organisation whose mandate is development of policy analysis and capacity building.

⁴⁸ The function of this Ministry as it then was has been separated and it is now only known as the Ministry of Trade and Industry.

⁴⁹ BIDPA, Economic Mapping for Botswana, Final Report 2002 para 1.

⁵⁰ Note 49 para 2.

⁵¹ Note 49 para 18.

enterprises from the market; it helps remaining enterprises increase their efficiency and competitiveness. The possible and expected result of this would be economic growth. Practically, industries facing vigorous competition in the domestic market are more successful than those protected by regulations.

According to the Report, the 1990's were characterized by a rise in globalization and mergers between many large international entities. This growth made it difficult for developing countries such as Botswana to hide behind protective walls of import tariffs and other barriers to foreign competition, or to stop anti-competitive behaviour of local subsidiaries of merging large multinational corporations. Thus making it necessary to have an own internal mechanism of regulating competition in line with international needs.⁵²

The Report at paragraph 24 went on further to stipulate that more firms and more countries operate in a greater number of markets, thus increasing the number of markets and competition nationally and internationally. This has made competition a matter of prime concern of both governments and firms. A clear reflection of a country's competitiveness is how much foreign investment it attracts. Aside from its advantages, globalisation brings about a lot of challenges. These challenges will of course differ from country to country. A clear understanding of these complexities would be helpful in formulating practical policies to address any issues arising in a quest to promote growth and prosperity.⁵³

Firms within an economy should be geared towards responding quickly to the changing market needs and conditions. This is why it is then necessary that there be competent institutions in place for policy making, creating and enforcing legal and regulatory systems and dealing with anti-competitive business practices.⁵⁴ The Report concluded that Botswana must adapt its economic structure, legal and regulatory

⁵²Note 49 para 23.

⁵³Note 49 para 25.

⁵⁴Note 49 para 26.

environment and production and marketing mechanisms in order to effectively participate in the mainstream of international trade and investment.⁵⁵ These considerations it is submitted would surely improve the competitiveness of Tswana firms internationally.

The Report further pointed out that having in place a competition framework is a way of diversifying the economy. The need to diversify the Botswana economy has been reflected in National Development Plans 7 and 8⁵⁶ as well as in Vision 2016.⁵⁷ The private sector has to play an increasing role in development; and in order for it to thrive, competition has to be promoted and encouraged. The Report at paragraph 39 alluded that a relatively un-diversified economy typically has difficulty adjusting to external shocks such as a downturn in the diamond market which is Botswana's livelihood, say for example in the event of another global economic recession. More diversified economies were noted to be generally better able to respond and adjust to such shocks. According to the Report increasing diversification of the Botswana economy would involve more competition among all economic agents, especially by giving consumers, resource suppliers and producers more choices and better opportunities.⁵⁸

The government has in place citizen empowerment entities such as the Citizen Entrepreneurial Development Agency (CEDA). This entity was established to provide financial and technical support for business development in a view to promote viable and sustainable citizen owned businesses. The Report notes that because most citizen empowered companies will have little capital and expertise, government assistance will be necessary.⁵⁹ It suggests mechanisms that could be used to

⁵⁵ Ibid.

⁵⁶ Botswana produces a series of Development Plan every five years which sets out among other economic goal sand targets to be achieved at the end of each plan.

⁵⁷ This is a strategy by the Botswana government to propel its socio economic and political into a competitive, winnings and prosperous nation by the year 2016.

⁵⁸ Note 49 para 39.

⁵⁹ Note 49 para 49.

improve citizen economic empowerment and as a result have positive implications on competition.⁶⁰

These suggested methods include preferential procurement policies and licence allocation and privatization. It was found that the increased participation of citizens in key sectors of the economy provides a sense of economic and social security and may attract foreign investment. Therefore an effective citizen empowerment programme can create a competitive economic environment that will reduce the role of government in key sectors of the economy. CEDA acts as such a citizen empowerment programme. As more and more Batswana go into business through this initiative, there arises the possibility that they will seek to expand and merger with other businesses locally, or be part of large multinationals. It is submitted that laws aimed at regulating mergers and acquisitions, will protect citizens from the possible adverse effect of large multinationals that they merge with.

The Report includes a discussion on Competition Law and Policy. Therein it broadly defines competition policy as meaning a full range of measures that may be used to promote a competitive market structure and behaviour in an economy, and this includes competition law dealing with anti-competitive practices of enterprises. Narrowly, it refers to the set of laws and policies adopted by a country to prevent or remedy restrictive business practices by both private and public enterprises.⁶¹

A country's competition policy has to first of all include policies that enhance competition in local and national markets. Secondly it should include a competition law designed to prevent anti-competitive business practices by firms and unnecessary government intervention in the market place.⁶² As such a policy should be peculiar and distinct to a particular economy to ensure that it fully serves its purpose. This meant that a competition law or policy drafted would have to be fitting for the local market and the needs of the market sufficiently.

⁶⁰ Ibid.

⁶¹ Note 49 para 27.

⁶² Note 49 para 28.

At the time of presentation of the Report, the interface between trade and competition policy had intensified.⁶³ The main reason for this being the growing integration of the world economy, which implied that anti-competitive business practices increasingly have trans-border dimensions.⁶⁴ Additionally with the expansion of trade and investment, foreign countries were seen to be concerned with whether national competition laws are adequate to deal with possible anti-competitive practices by domestic companies.⁶⁵ It became a concern for developing countries which had not yet developed competition laws that they would not be able to address possible abuse of market power in their economies. It is hereby submitted that a competition law would have to provide for cross-border mergers bearing in mind trans-border and cross border transactions. In addition a Competition law for Botswana would have to ensure that it fulfils this and in drafting a competition act, international standards would have to be met.

Firms compete in a market place for consumers' money; consumers should therefore get value for their money.⁶⁶ A competition policy should therefore protect consumers from the power of monopolies and collusive behaviour of firms working together to strip the consumer from its power to choose from alternative products.⁶⁷ Merger regulation should be drafted bearing this in mind. Provisions would have to consider issues of public interest, as that extends to the effect that regulation has on consumers as beneficiaries of the process. These provisions would have to enhance public confidence in the law.

Competition Policy was levelled against development.⁶⁸ A developing country should have a competition policy designed to take appropriate account of its level of economic development and the long

⁶³ Note 49 para 31.

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Note 49 para 32.

⁶⁷ Note 49 para 32.

⁶⁸ Part C the Report

term objective of sustained economic growth.⁶⁹ The reasons for this are partly because of the potential effects of international merger movement and also because of privatisation.

Developing countries are not necessarily at the same level of development, some are more industrialized than others and have higher institutional capabilities, and sight of this should not be lost. It was also enunciated that competition policies adopted in more developed countries like the USA may not be appropriate for a country like Botswana.⁷⁰ It is however submitted, notwithstanding this factor, the competition policies of the more developed world may be used as an aid for development of competition policies in the developing world. Further, due to economic stance and history, a developing country should be guided by different principles in promulgation of competition laws from those of the more developed world. Care and precision as to the state of the economy should be a factor that sticks out in drafting of competition legislation.

2.5 THE COMPETITION POLICY FOR BOTSWANA

The Ministry on the recommendations made in the Report, drafted a Competition Policy for Botswana (the Policy). The Policy was published by the Botswana government in July 2005. The rationale for the Policy was based on the need to maximise the benefits of trade and investment liberalisation, deregulation, privatisation and to protect the benefits generated by competition from erosion by anticompetitive practices in an unregulated environment.⁷¹

The Policy provides a framework to prevent and redress anti-competitive practices and conduct by firms.⁷² It was necessary to have one because it would provide the best means of ensuring that the economy's resources are put to their most efficient use by encouraging

⁶⁹ Note 49 para 33.

⁷⁰ Note 49 para 34.

⁷¹ Republic of Botswana, *National Competition Policy for Botswana*, Ministry of Trade and Industry, July 2005 para 1.1.

⁷² *Ibid* para 1.2.

enterprise efficiency and widening choice.⁷³ The Policy sets out a broad framework with which government will respond to anti-competitive challenges in the market place and ensure that firms operating in various sectors of the economy adhere to policy and regulatory requirements.⁷⁴ By so doing the government would have to in drafting of legislation, consider all aspects of the economy and market which would be affected by the legislation and ensure that they are well provided for.

Three factors with immense bearing need to be considered from the outset.⁷⁵ These are efficiency, competitiveness and consumer welfare. Efficiency is indispensable to the ability of any economy to attract investment flows from both international and domestic sources. Competitiveness is a critical success factor in the ability of any economy to effectively compete for the attraction of investment flows, especially foreign direct investment. The Policy recognizes the important role of competitiveness as underpinning continued growth and sustainability of the economy at both micro and macro levels.⁷⁶ Consumer welfare is important because it serves as a public interest phenomenon encompassing choices and rights of consumers.⁷⁷ It is submitted that these factors are important for the functioning of merger regulation, especially where public interest issues arise as it forms an integral part of merger regulation.

Guiding principles⁷⁸ provide a foundation on which a competition law must be drafted and gives a guide on what ought to be included and given precedence. It is important not to be too over swayed by these guiding principles in drafting of competition legislation, they should be considered but not forgetting the economic and social situation in a country as well as resources for implementation. Bearing this in mind,

⁷³ Ibid.

⁷⁴ Note 71 para 4.

⁷⁵ Note 71 para 5.2.

⁷⁶ Note 71 para 5.2 (b).

⁷⁷ Note 71 para 5.3 (a)

⁷⁸ Note 71 para 6.

other laws and administrative policies which may have been deterrents to free competition would have to be amended accordingly.

The Policy set out strategic policy considerations which government deemed to be necessary,⁷⁹ and only those relevant to this paper will be briefly discussed below. The first one was the establishment of a Competition Authority to regulate the Policy and related legislation. The importance of this in relation to mergers is that the Authority would act as a body ensuring that regulation of mergers best serves interests of the country as well as those of competing firms. Secondly, the Policy sought to ensure the consistency of the other policy considerations.

Public awareness and support for competition enforcement as well as the need for provision for mergers and acquisitions were encapsulated in the Policy. This would be done so as to safeguard competition in the market place by reviewing mergers and acquisitions.⁸⁰ The Policy emphasizes the need for a regulatory framework.⁸¹ Therein it sets out that in order to ensure compliance with and adherence to locally and internationally acceptable anticompetitive business behaviour and conduct, the government will formulate a Competition Act, which will regulate the market place.

Paragraph 10 provides for institutional arrangements which would be necessary for the formulation, review and monitoring of the competition policy. The responsibility of having in place institutional arrangements and of drafting legislation was placed with the Ministry of Trade and Industry and a Competition Authority to be established would be responsible for implementation of the Policy and the Competition Act.

Success of the Policy was placed on action by government.⁸² The government would have to first of all establish an independent Competition Authority which would successfully deal with and regulate mergers. Secondly it would have to ensure compliance of enforcement of

⁷⁹ Note 71 para 8.

⁸⁰ Note 71 para 8.1 (f).

⁸¹ Note 71 para 9.

⁸² Note 71 para 10.

the rules of fair play and lastly maintain an effective and equitable balance between the interests of business and those of the public. It is submitted that this meant government would have to ensure that a Competition Act is drafted to the satisfaction and needs of the Policy as well as all other policies that preceded it. This action will be addressed in the next part of this chapter.

It is submitted with due respect that the Policy did not really highlight any new factors from those set out in the economic mapping study and appears to have mostly contained a summary of what was in the economic mapping. It was a continuation and implementation of recommendations made in the Report. The Policy had more thorough provisions for the institutional framework. They both set out the structural and other considerations and structures that necessary in establishing an effective competition regime.

2.6 THE BOTSWANA COMPETITION ACT OF 2009

In April 2013 the Director of Legal and Enforcement of the Competition Authority made a presentation to the breakout session of the International Competition Network (ICN) Unilateral Conduct Working Group. He submitted that the Botswana Competition Act is a hybrid of Competition law of provisions of Zambia, South Africa, England, Mauritius and Australia.⁸³ Consultations also took place with the Swedish, Swiss and Chinese Governments.⁸⁴ It is submitted that although this was helpful to the passing of the Act, it caused inherent problems not only in respect of the regulation of mergers but also the Act as a whole. In addition to all the policy considerations set out in the preceding parts of this chapter, there was a lot more that went into the actual drafting of the Act. The Botswana Government engaged in a lot of consultation in drafting of the Act and did so with assistance and guidance from the

⁸³ Morotsi DT, Director of Legal and Enforcement: Competition Authority Botswana '*Unilateral Conduct Standard for Developing Countries (A case of Botswana)*' Break Out Session of the ICN Unilateral Working Conduct Working Group held in Warsaw Poland, April 2013.

⁸⁴ UN Conference on Trade and Development, '*Review of Capacity-Building and Technical Assistance on Competition Law and Policy*', (2010) 7.

UNCTAD. Consultations and workshops geared at educating and preparing the drafters of the Act for same were conducted.⁸⁵

The UNCTAD has published documentation in respect of the assistance to developing countries for drafting of competition legislation. Provision of this assistance was divided into capacity building activities⁸⁶ and technical assistance activities.⁸⁷ These were meant to provide understanding of the issues involved in formulation and enforcement, which is imparted to participating officials and experts from developing countries.⁸⁸ It is submitted here that the approach of the UNCTAD sought to be more practical in seeking to ensure that all policy considerations and objectives are fulfilled. This was now a move away from all the theoretical aspects that were formulated before actual drafting took place. It was a step in the right direction.

The UNCTAD emphasizes the importance of the relationship between competition policy and other development policies.⁸⁹ In 2006, assistance was provided to the Botswana Government with the aim of creating an understanding of the interface between competition law and policy and other government policies including privatisation, regulatory reforms, trade liberalization, investment regimes and the need to address poverty reduction concerns.⁹⁰ Capacity-building was also provided for the formulation of national competition laws and it drew attention to the need to ensure coherence between the creation of a competition culture pursued by the Government.⁹¹ Additionally it underscored the importance of putting in place well functioning commercial courts and mechanisms for judicial review for the effective enforcement of competition law. This preparation in the context of Botswana is welcome. The need for commercial courts would however not fit into the Botswana judicial

⁸⁵ Ibid at p8.

⁸⁶ These activities relate to long term assistance seeking to create sustainable technical and institutional capacity for the effective formulation of competition law and policy.

⁸⁷ These activities seek to provide specific expertise that are non-recurrent.

⁸⁸ Note 84 at p 13.

⁸⁹ Note 84 p 14.

⁹⁰ Note 84 at p 15.

⁹¹ Ibid.

system which does not have a vast variety of specialised courts; it is limited to industrial labour courts and livestock theft courts. This notwithstanding setting up of courts specialised in this area will enhance the nature of the Botswana judicial system.

Two consultative meetings were held in 2006 between officials from the Ministry of Trade and Industry, the Attorney General's office and other stakeholders to discuss the draft Competition Bill and corresponding application guidelines.⁹² It is submitted that this sought to assess the status of the drafting process as well as provisions of the Act and how the Regulations would be related to them. This was beneficial in the sense that it ensured that preparations were proceeding accordingly.

In the drafting stages, and as a further way of providing assistance, the UNCTAD organised study tours for officials from the Ministry of Trade and the Attorneys General's office to the Swedish and Swiss competition authorities.⁹³ The purpose of these tours was to improve the understanding on Botswana's officials in the different aspects of the functioning of a competition authority namely; its structure, functions and competencies as well as the roles that these authorities play in promoting consumer welfare and competitive markets. These were not provided for the benefit of actual personnel that would be later employed in the Competition Authority. This was meant to be of an advantage; however it was a potential problem for the Competition Authority which would later be established. The personnel employed would either have to possess previous experience in the functioning of a competition authority or similar institution, or conversely have to start from scratch in educating themselves on the practical functioning of a competition authority. If employees are not aware of the functions of a competition authority then training courses would have to be organized for them. This is something which could have been avoided by providing the training before the Authority began its official operation. This could in turn have adverse consequences resulting from a reverse functioning.

⁹² Note 84 at p 18-19.

⁹³ Note 84 at p 22.

The effectiveness of the performance of the competition authority would be wanting in that public trust would be likely to be lessened due to lack of skilled officials as their ability to handle issues would be in doubt.

As mergers are specialised there would be a need to have specialised courts for this purpose.⁹⁴ This was levelled against the fact that mergers need to be decided timeously and in the event that there are appeals to the High Court,⁹⁵ the High Court may not be able to dispense with the decisions expeditiously due to existing backlog. The Act was drafted with a view to have independence in decision making on matters before the Competition Authority. The UNCTAD as part of its assistance to developing countries provided training of competition case handlers.⁹⁶ However this assistance was not extended to Botswana. It is submitted that there ought to have been some sort of training provided to employees of the Authority once it started functioning and to judicial officers in respect of the processes and in particular the challenges associated with deciding of whether a merger should be effected or not, as well as on appeals relating to mergers.

In 2009 the Botswana government passed the Competition Act.⁹⁷ The Act applies to all economic activity within, or having effect within Botswana.⁹⁸ Operation of the Act was not effected all at once. Parts I to IV became operative first, on 9 July 2010. Under Part II of the Act the Competition Authority is established⁹⁹ as a body corporate capable of suing and being sued. The responsibility of the Authority is to prevent and redress anti-competitive practices in the economy and remove constraints on the free play of competition in the market.¹⁰⁰ The Act also sets out specific responsibilities of the Authority and these include

⁹⁴ Kaboyakgosi G, 'Implementing Competition Law in Botswana', BIDPA Library Blog, Thursday 26 August 2010.

⁹⁵ Section 67 of the Act provides for appeals to the High Court.

⁹⁶ Note 84 at p6.

⁹⁷ No. 17 of 2009 Laws of Botswana.

⁹⁸ Section 3

⁹⁹ Section 4.

¹⁰⁰ Section (5) 1.

regulating the merging of enterprises¹⁰¹ and prohibiting or referring of mergers which it receives notification of under Part X.¹⁰² The Authority is also responsible for referring matters investigated under the Act to the Commission,¹⁰³ prosecute before the Commission, matters referred to the Commission¹⁰⁴ and deal with any matter referred to it by the Commission under the Act¹⁰⁵.

Section 9 of the Act establishes the Competition Commission. It is the governing body of the Authority. The Competition Authority and the Competition Commission are closely linked in merger regulation and personnel. The shortcomings of the institutional structure of the Competition Authority and the Competition Commission will be discussed in Chapter 3. Part X of the Act provides for the control of mergers and the next chapter will assess issues in respect of such control.

2.7 CONCLUSION

The development canvassed above demonstrates that there was a lot of arrangement and implementation of policies seeking to ensure that Botswana is aware of the imperative considerations necessary for implementation of a competition law. Botswana felt the need to promulgate competition law following pressure from international and regional levels. Preparation at national level ensured that most of the necessary steps involved in drafting of legislation were engaged in. The state of the economy was observed and the necessary institutional frameworks that had to be set up were identified.

Thus far, this paper has addressed all the theoretical aspects of the competition framework in Botswana. The link between the theoretical considerations and the actual drafting of the Act were elaborated upon. It is commendable that Botswana engaged in a thorough process for promulgating competition legislation. However as is often the case, when

¹⁰¹ Section 5 (2) (d).

¹⁰² Section 5 (2) n.

¹⁰³ Section 5 (2) (o).

¹⁰⁴ Section 5 (2) (p).

¹⁰⁵ Section 5 (2) (q).

drafting a totally new type of legislation, there are anomalies in the legislation and these in turn affect the operation and functioning of mergers. The current flaws in the Act affecting merger regulation are a result of the preparation and drafting stages. Chapter 3 will look directly into whether the framework and institutions created do in fact perform their necessary function in so far as regulation of mergers is concerned and assess whether the policy considerations which influenced drafting of the Act are suitable for the Botswana economy.

CHAPTER 3 - MERGERS AND THEIR OPERATION IN BOTSWANA - A PRACTICAL REVIEW

3.1 INTRODUCTION

Mergers and their regulation form an integral part of antitrust law in every jurisdiction. In broad terms in a merger or an amalgamation, the assets and liabilities of two or more companies are pooled into a single company which may be either of the combining companies or a newly formed company.¹⁰⁶ Mergers arise by way of agreement between parties, the result being that one entity assumes control over the other. There are three different categories of mergers - horizontal, vertical and conglomerate, attracting decreasing levels of concern in the order stated.¹⁰⁷

A horizontal merger is between two firms selling identical or similar products in the same geographic area. It eliminates competition between the two firms.¹⁰⁸ A vertical merger entails a combination of the activities of parties in a vertical relationship such as between a manufacturer and its distributor.¹⁰⁹ Conglomerate mergers generally cover all other types of mergers where the parties have no apparent economic relationship.¹¹⁰ The interpretation section of the Act only defines horizontal and vertical mergers.

Through the Competition Act (Specified Parts Commencement Date) Order 2011,¹¹¹ Parts V to XII of the Competition Act commenced function. The whole Act was now in force and the Competition Authority started operating. Part X of the Act provides for Control of Mergers. The reasons for merger control are vast. However for the most part they are

¹⁰⁶ Cassim F H I, *Contemporary Company Law* Juta Law, Second Edition 2012 p 676.

¹⁰⁷ Note 1 at p225.

¹⁰⁸ Ibid.

¹⁰⁹ Brassey (Note 1) at 225.

¹¹⁰ Ibid.

¹¹¹ Statutory Instrument No 82 of 2011, published on 14th October 2011.

controlled because competition authorities are concerned with just one issue, namely the assessment of the competitive effects of mergers¹¹²

This chapter discusses the pertinent issues arising so far as merger control in Botswana is concerned. It concerns itself with the practical aspects of merger control and regulation. Focus in this chapter will be on the control of mergers under Part X of the Botswana Competition Act; the link between mergers in the Companies Act¹¹³; the issue of merger thresholds; structural shortcomings of the competition authority and competition commission and decided mergers levelled against the assessment criteria used. Discussion of these issues will explore how same has had or will be likely to have practical implications on merger regulation which derives basis and existence from the policy considerations and the process of drafting.

3.2 CONTROL OF MERGERS UNDER PART X OF THE BOTSWANA COMPETITION ACT

The Act provides that a merger occurs when one or more enterprises directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise.¹¹⁴ This essentially means that one business takes over another and the two operate as one. This acquisition of control over the whole or part of another enterprise may be achieved in any manner, including the purchase or lease of shares, an interest, or assets of the other enterprise in question;¹¹⁵ or amalgamation or other combination with that enterprise.¹¹⁶ The Act only gives the two preceding descriptions, however it does not restrict a merger to only these because it uses the word 'including'. The forms for merger filing,¹¹⁷ as read in the Regulations,¹¹⁸ require transaction information. Indication of what the transaction involves

¹¹² R Whish "Competition Law", Butterworths, 4ed (2001) 721.

¹¹³ Chapter 42:01 of the Laws of Botswana.

¹¹⁴ Section 52 (1)

¹¹⁵ Section 52 (2) (a)

¹¹⁶ Section 52 (2) (b)

¹¹⁷ Form J

¹¹⁸ Regulation 16

is limited to foreign direct investment, a management buy out or a buy back of shares. The Act and the Regulations both have limits in specifications of transactions which qualify as notifiable mergers. The wording of the Act demonstrates that these are not the limits for types of transactions which may be deemed to constitute mergers. These provisions are a guide of what constitutes a merger.

Before enterprises proposing to merge can do so, they have to notify the Authority of their intention in the prescribed manner.¹¹⁹ Upon receipt of a merger notification, the Authority shall publish details of the notification in local newspapers.¹²⁰ Where the Authority requires further information to that provided in the notification, it shall request same within 30 days of receipt of the notification. When this occurs publication of the notification will be delayed until the requested information is received.¹²¹ The Authority shall consider and make a determination of a notified merger within 30 days of receipt of the notification¹²² and where further information was requested the determination shall be made within 30 days after receipt of the additional information.¹²³ In addition the Authority is given the liberty to extend the determination of a merger and shall give the enterprises involved notice of same.¹²⁴ These are commendable and clear provisions. The only contention is that the determination period is rather short for a new competition authority with modest expertise.

Examination of the merger filing forms establishes that they use plain language, therefore filling them in presents no difficulty. These forms are based on provisions in the regulations, and they bring out questions on issues that are not provided for in the Act. For example, failing firm defence is addressed in the forms, but its meaning and function is not set out in the Act. This it is submitted, has the potential of creating difficulties practically when practitioners have to fill out these

¹¹⁹ Section 56 (1).

¹²⁰ Section 56 (2) and this publication is subject to confidentiality.

¹²¹ Section 56 (3).

¹²² Section 56 (4) (a).

¹²³ Section 56 (4) (b).

¹²⁴ Section 56 (5).

forms because there are no corresponding provisions for failing firms in the legislation.

The failing firm defence is invoked where parties demonstrate that in the absence of the acquisition the target firm would not have remained a competitor because it has financial difficulties or is on the verge of insolvency.¹²⁵ A merger notice shall be accompanied by a merger fee of 0.01 percent of the merging enterprises' combined turnover in Botswana, whichever is higher.¹²⁶ This fee is not applicable to the turnover or assets of an enterprise which is party to a merger if the enterprise has been bankrupt for at least three consecutive financial years¹²⁷ or where the assets of the company are being disposed of following a liquidation process.¹²⁸ Moreover, the Form J under the heading Transaction Information requires that where an enterprise relies on the 'failing enterprise defence'¹²⁹ information relating to same should be submitted with the filing notice. This is evidence of inclusion of the failing firm defence in the Regulations, whereas same does not appear in the Act. The Act should be amended to provide for these principles so as to ensure analogous purpose of the Act and the Regulations.

Section 57 provides that in considering a notified merger, the Authority may refer the notification of the proposed merger to an inspector for an investigation and report. The criteria to be used are specified in section 59 and will be dealt with later on in this chapter. The interpretation section of the Act does not define what an inspector is nor does it set out any qualifications that such a person should possess. The inspector, it is provided, shall investigate the proposal and furnish the Authority with a report on the investigation.¹³⁰

¹²⁵ European Commission Guidelines on the assessment of horizontal mergers under EU Merger Regulation (2004/C 31/03) para 90.

¹²⁶ Regulation 16 (2).

¹²⁷ Regulation 16 (3) (a).

¹²⁸ Regulation 16 (3) (b).

¹²⁹ At paragraph 12 of Form J.

¹³⁰ Section 57 (2).

Section 8 provides for appointment of employees. This is done by the Commission on the recommendation of the Executive Secretary.¹³¹ The Executive Secretary is given powers to appoint full time or part time inspectors from among employees of the Authority or any other person considered suitable.¹³² The Executive Secretary shall also determine the conditions of service and remuneration of an inspector who is not in the full time service of the Authority. The Regulations also do not provide for the qualifications of an inspector. They only provide for the identification card which an inspector must possess when entering the premises of an enterprise to conduct an inspection.¹³³ This omission in respect of the office of inspector creates a lacuna which may affect effectiveness in operation of the merger regulation.

It is submitted that the role of an inspector is a very sensitive one in merger control. The qualification and role of an inspector should therefore be provided for in a broader and more detailed manner. It is commendable that inspectors may be appointed on a part time basis due to the fact that there will be differing and diverse enterprises in some cases requiring a person of a certain type of skill and qualification to conduct an inspection. A certificate of inspection alone does not guarantee absence of hostility to enter upon premises for purposes of inspection.

Preparation and drafting of the Act was dominated by continuous declarations that a competition act would have to meet international standards for it to be attractive to large international companies and therefore boost confidence in a country. One such way of boosting international confidence it is submitted, would be by having adequate provision for cross border mergers. The Act is not clear as to the aspect of cross border notification. It does not specify what is to happen where the Act is applicable to foreign mergers. What is to happen in situations where parties to a merger are not in Botswana, but have subsidiaries in

¹³¹ Section 8 (1).

¹³² Section 8 (2).

¹³³ Regulation 12.

Botswana that would be indirectly acquired as a result of the merger? On interpretation of the Act it is submitted that it would be applicable and therefore a submission would have to be made with the Competition Authority. This is evidenced by section 3 of the Act which provides for application. The section stipulates that the Act applies to all economic activity within, or having effect within the Botswana.¹³⁴

The Act provides that subject to the protection of confidential information, the Authority shall publish details of notification.¹³⁵ The extent of the details to be published in a notification is not clear. The Authority publishes information by stating the name of the entities involved and going further to state the nature of the proposed transaction as well as what it will entail.¹³⁶ Since the extent of confidentiality is not provided for, interested parties may wish to have more information or the parties themselves may feel that some of the information is confidential for their purposes and do not wish for it to be disclosed. The parties may rely on section 37 which entitles an enterprise to refuse to enclose or produce information or a document on the grounds of legal privilege indicating that the document is *inter alia* of economic value and constitutes confidential information by not providing such information for fear that it will be published. Confidential information is not defined in the Act, and this is an omission. However, notwithstanding this omission, given that confidential information is fact based and can only be determined with reference to the particular facts of each case, the lack of a definition may be beneficial.

Regulations may be prescribed for categories of transactions which are exempt from merger control.¹³⁷ This will be done by reference to the commercial or industrial sector involved, the nature of the activities in which the enterprises are involved or some aspect of general public interest. Thus far, no regulations have been passed to this effect. Nonetheless, existence of a provision of the calibre is laudable.

¹³⁴ Section 3 (1).

¹³⁵ Section 56 (2).

¹³⁶ This is done pursuant to Section 56 (1).

¹³⁷ Section 53

As a safeguard, mergers implemented in contravention of the Act are catered for.¹³⁸ This section is invoked where the Authority has reasonable suspicion that a merger is being, or has been, implemented in contravention of Part X¹³⁹ of the Act. The parties will be required to submit information regarding the suspected merger¹⁴⁰ or the Authority will restrain them from implementing the merger or take steps such as disposal of assets that would pre-empt the taking of remedial action designed to restore the conditions of competition existing prior to the merger.¹⁴¹

The Authority may engage in an investigation to determine that a merger has been implemented in contravention of the Act. Where it is satisfied that this has transpired, it may give direction to the enterprises involved as follows; not to implement the merger,¹⁴² to sell or dispose of in any other specified manner, any shares, interest or other assets it has acquired pursuant to the merger,¹⁴³ to terminate any agreements or provisions of an agreement to which the merger was subject,¹⁴⁴ and to take such further measures as may be necessary to restore the conditions of competition existing prior to the merger. This is a protection of the market from unfair competition. It is very impressive that provisions in respect of merger control go as far as making a provision such as this.

3.3 THE LINK BETWEEN MERGERS IN THE COMPANIES ACT AND IN THE COMPETITION ACT

Part XIV of the Companies Act¹⁴⁵ provides for amalgamations. The definition of amalgamation is synonymous with that of a merger, therefore an amalgamation may be said to be a form of merger. Two or more companies may amalgamate, and continue as one company, which may

¹³⁸ Section 63.

¹³⁹ This part relates to control of mergers.

¹⁴⁰ Section 63 (1) (a).

¹⁴¹ Section 63 (1) (b).

¹⁴² Section 63 (2) (a).

¹⁴³ Section 63 (2) (b).

¹⁴⁴ Section 63 (2) (c).

¹⁴⁵ Chapter 42:01 Laws of Botswana.

be one of the amalgamating companies or may be a new company.¹⁴⁶ The provisions and requirements for amalgamations are not stringent. For an amalgamation to succeed in terms of the Companies Act there has to be an amalgamation proposal. This proposal has to contain *inter alia* the following information¹⁴⁷, name of the amalgamated company; the registered office of the amalgamated company; full names and residential addresses or addresses of directors or the company secretary; the share structure of the amalgamated company; the manner in which the shares of each amalgamating company will be converted into the shares of the amalgamated company.

The amalgamation proposal is to be approved by the board of directors by way of resolution.¹⁴⁸ It will resolve that in its opinion the amalgamation is in the best interests of the company and that it is satisfied on reasonable grounds that the company will immediately after the amalgamation becomes effective satisfy the solvency test. The amalgamation proposal has to be registered with the office of the Registrar of Companies which examines the proposal to satisfy itself that all requirements have been met.¹⁴⁹ If all requirements are met then an amalgamation certificate will be issued.¹⁵⁰

Under the Companies Act, final say as to whether companies may merge or amalgamate lies with the company itself, that is, with the Board of Directors. This may be contrasted with the situation under the South African Companies Act which goes further to require that for a merger to succeed there has to be compliance with the necessary requirements under competition law.¹⁵¹ This allows for stricter regulation of the process and also provides a link between different pieces of legislation, whose provision seek to achieve a similar purpose. This is absent in the case of Botswana. Despite this, where an amalgamation meets the criteria for a

¹⁴⁶ Botswana Companies Act, section 113.

¹⁴⁷ Ibid section 223.

¹⁴⁸ Ibid section 224.

¹⁴⁹ Ibid section 226.

¹⁵⁰ Ibid section 228.

¹⁵¹ Section 113 South African Companies Act.

merger under the Act then it will apply. The link between the provisions in these acts demonstrates that mergers do not operate in isolation to other legislation

3.4 THE ISSUE OF MERGER THRESHOLD

From the wording of the Act, not all mergers are subject to control. For a merger to be subject to the approval of the Authority a certain threshold has to be met. This is provided for under section 54 of the Competition Act as follows:

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

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

Regulation 20¹⁵² provides for merger threshold amounts thus:

“20. A proposed merger is subject to control in terms of the Act if -

- (a) the combined annual turnover in Botswana of the merging enterprises exceeds 10 000 000; or*
- (b) the combined assets in Botswana of the merging enterprises exceeds P 10 000 000; or*
- (c) The enterprises concerned would, following implementation of the merger, supply or acquire at least 20*

¹⁵² Ibid 99.

percent of a particular description of goods or services in Botswana.”

There is an inconsistency between the provisions of the Act and those in the Regulations. Based on section 54 (a), the Regulations should provide for a threshold amount that will be the limit of the turnover in Botswana of the enterprise or enterprises being taken over. If the prescribed amount is less than what the enterprise being taken over in Botswana makes, the merger will be controlled. Therefore, as an example, if the threshold is P 10 000-00 and the enterprise makes a turnover of P 20 000-00 then the merger will be controlled. If the enterprise makes less, the merger will not be controlled. Going by what Regulation 20 (a) provides, the Act should have provided that a merger will be notifiable first of all where the combined annual turnover in Botswana exceeds an amount prescribed or set by the Minister. The provisions of the Act and those of the Regulations as quoted above are at parallels in that they cannot be reconciled.

In terms of section 54 (b), the Regulations should provide a threshold amount of the value of assets of the enterprise being taken over. If the amount is more than the prescribed value, the merger will be controlled and if it is not, then the reverse will suffice. The Regulations should accordingly have required the Act to provide that where the combined assets in Botswana of the merging parties exceeds a prescribed amount then there will be notification of the merger. Again the same argument as in the preceding paragraph suffices because neither provision intertwines with the other.

According to section 54 (c), a threshold percentage provided should upon implementation of the merger cause the concerned enterprises to supply or acquire a percentage of a particular description of goods. And similarly regulation 20 (c) provides that where following implementation of the merger, the enterprises concerned would supply or acquire at least 20 per cent of a particular description of good and

services in Botswana, then the merger will be notifiable. Here there exists a proper co-relation between the Act and the Regulations.

The Act in terms of section 54 (a) and (b) therefore considers the target or target enterprises as the merger threshold determination. On the other hand, regulation 20 (a) and (b) consider the combined target and acquiring enterprises values. There is an anomaly here. The two have to be at par with one another and this is absent.

The Interpretation Act¹⁵³ provides for the interpretation of the Constitution and other enactments in Botswana. This act provides that an instrument shall be construed subject to this act¹⁵⁴ and further that subject to sub section (1) this act and the instrument shall be construed as one.¹⁵⁵ As further authority, in the case of *Maauwe and Another v The Attorney General*¹⁵⁶ the court held that where an instrument is inconsistent with the principal legislation then that instrument is ultra vires the principal legislation and will be deemed to be of no force and effect.¹⁵⁷ As a result, with respect to the inconsistency between section 54 and regulation 20 of the Act, the provisions of the Act will take precedence.

Another interesting aspect of merger threshold provisions is the valuation of the turnover or assets of the target enterprise in determining merger threshold. The Act makes it clear that all the assets or the annual turnover of the target enterprise are considered in the merger threshold. However in other jurisdictions such as South Africa the limits are based only on the value of the assets being transferred.¹⁵⁸ Parties to a merger may mistakenly assume that it is the transferred assets or business that is used to consider the merger threshold and not the entire assets or turnover of the target enterprise. It is submitted that it is possible for enterprises to not understand why a transaction becomes notifiable in

¹⁵³ Chapter 01:04 of the Laws of Botswana.

¹⁵⁴ Ibid section 31 (1).

¹⁵⁵ Ibid section 31 (2).

¹⁵⁶ 1999 (1) BLR 275 (HC).

¹⁵⁷ See also *Botswana Motor Vehicle Insurance Fund v Marobela* (1999) 1 BLR 21 (CA).

¹⁵⁸ A further comparison to South African provisions will be made in Chapter 4.

instances where they sell a small amount of its assets leaving out the bulk of its assets which have more value.

There exists a clear drafting error which needs to be corrected going forward. The regulations should either be amended to be consistent with the Act or vice versa for a regularised threshold determination to operate. Even though in law it is clear that principal legislation takes precedence over statutory instruments, this is not always clear to the layman. Continued existence of this inconsistency is likely to cause confusion for entities when determining the threshold amount to be paid, they may go for the threshold provided in the Regulations which is wrong. This will in turn cause problems for the Authority which will have to return amounts paid for being incorrect. Rectification of this drafting error will benefit both the Authority and its customers. As has been illustrated, having in place an anti-trust act makes a country attractive globally for investment, and since thresholds are an important aspect of merger regulation there should be no uncertainty or anomalies so far as provision for them is concerned.

3.5 INSTITUTIONAL SHORTCOMINGS OF THE COMPETITION AUTHORITY AND THE COMPETITION COMMISSION

This component of the chapter elucidates on the institutional framework of the Authority and the Commission and how the two clash in function which influences the operation of mergers. The Commission plays a dual role which creates the potential of bias in decision making in respect of merger hearings. The Act creates an inter-dependent relationship between the Competition Authority (the Authority) and the Competition Commission (the Commission). The Commission appears to act as a watchdog over the Authority. These two structures and the link emanating within them will be elucidated upon below.

The Competition Authority is created under section 4 of the Act. Section 6 provides that the Authority shall have a Chief Executive Officer to be called an Executive Secretary who shall be appointed by the

Minister after consultation with the Commission and upon such terms and conditions as the Minister may determine. The Executive Secretary is responsible for the day to day management and functioning of the Authority. In dispensing these functions, this officer will be subject to the general supervision of the Commission.¹⁵⁹ Other functions of the Executive Secretary such as recommendation of appointment of senior officers of the Authority are also subject to the final decision on the matter being made by the Commission¹⁶⁰. The Authority can prosecute matters before the Commission,¹⁶¹ refer matters it has adjudicated to the Commission,¹⁶² and it may also deal with any matter referred to it by the Commission.¹⁶³ For this reason the Commission plays an administrative role over the Authority.

The Commission is created under section 9. The Commission is conferred with quasi judicial functions in addition to its administrative functions, because it is given power to determine competition cases.¹⁶⁴ The glitch in the structure is raised in that the Authority is given the power to investigate and prosecute complaints relating to anti-competitive behaviour, yet the Executive Secretary who would have presided over or authorised the investigation is enjoined to sit as Secretary of the Commission in any adjudicative process.¹⁶⁵ This means that the Executive Secretary will be in a position of conflict in that he is aware of the information in issue before the Commission.

The provisions relating to the function of the Commission, it is submitted, place the Commission in a vulnerable role. The Commission is constituted by 7 members.¹⁶⁶ These members are not necessarily trained in the area of competition, and are appointed by the Minister from selected persons having expertise in industry, commerce, economics,

¹⁵⁹ Section 6 (1).

¹⁶⁰ Section 8.

¹⁶¹ Section 5 (2) (p).

¹⁶² Section 5 (2) (o).

¹⁶³ Section (5) (q).

¹⁶⁴ Section 9 (2).

¹⁶⁵ Section 6 (2).

¹⁶⁶ Section 10 (1).

law, consumer affairs or public administration¹⁶⁷ and are all appointed on a part time basis. These officers have not received any training for purposes of implementing merger decisions or any other issue in competition law for that matter. This places the actual decision making at risk in that the personnel making important competition law decisions, such as determination of mergers, are not learned on the subject. The Commission it is submitted, may then possibly have to rely on employees of the Competition Authority for support and guidance in their decision making process. This may create over dependence on the Authority. It is submitted that this places the Commission in a questionable position so far as dispensing of its quasi-judicial functions is concerned.

The Commission has a duality of roles. It firstly sits as a board giving guidance to the Authority and as a Tribunal hearing and determining cases. This duality creates a problem in that the independence of the Commission as an adjudicating body cannot be guaranteed. This goes against aims of operation of a competition law in requiring that decision making be on an impartial basis. In addition, the issue of informational bias is raised. By the time the Commission sits to determine cases, it will have already been aware of them whilst sitting as a Board. Having prior knowledge may lead to members of the Commission pre-judging merger cases which are brought before them. Where loyalty of an institution such as the Commission appears to move towards the Authority, the result could be that Commissioners are so committed to the objectives of the Authority that they might be incapable of holding the balance fairly between those objectives and other interests.¹⁶⁸

In terms of section 67 of the Act, matters brought before the Commission are appealable to the High Court. The Authority is entitled to appear before the Commission and like any other party that appears before the Commission is also entitled to appeal decisions of the

¹⁶⁷ Section 10 (2).

¹⁶⁸ Kebonang Z, 'Towards a Tipping Point: The Botswana Competition Act and the Nemo Judex Rule' Unpublished.

Commission to the High Court. Since the Commission oversees operation of the Authority, where the Authority decides to appeal its decisions to the High Court, it would have to convene a meeting to pass a resolution enabling the Authority to properly appear before the High Court. In this regard, the Commission plays the role of adjudicator and then appellant and this is clearly an institutional hiccup in terms of structure. The Commission is marred with likelihood of bias and it is submitted that this is likely to be raised on appearance before the Botswana high court. To date no matters from the Commission have been appealed to the high court. This however does not mean that none will ever arise. When any matter reaches the high court by way of such an appeal, it is likely that the issue of institutional bias may be raised.

The administrative law principle *nemo iudex in causa sua* rule translates literally into ~ no one should be a judge in their own case. This rule is linked to the legal principle that each person appearing before a judicial body has the right to an independent and impartial tribunal. It is submitted that both derive from the principle that justice must not only be done, but also be seen to be done in the eyes of the public.

Independence relates to the relationship between an adjudicator and the parties appearing before him. Where there is a strong relationship between the adjudicator and a party appearing before him, then the independence of the adjudicator is compromised. It is important that there be no doubt as to the fairness and due process in a matter, as these ensure that the adjudication in a matter was done with neutrality and fair mindedness. It is notable that independence and neutrality are not synonymous. In *Gillies v Secretary of State for Works and Pensions*¹⁶⁹ the court stated as follows:

“Impartiality is not the same as independence, although the two are closely linked. Impartiality is the Tribunal’s approach to deciding cases before it. Independence is the structural or institutional framework which secures this

¹⁶⁹ [2006] 1 WLR 781.

impartiality, not only in the minds of the tribunal members but also perceptions of the public.”

The Commission as noted above resolves disputes and disagreements on issues investigated by the Authority and at the same time it plays an administrative role over the Authority.¹⁷⁰ In addition the Executive Secretary of the Authority who is responsible for the day to day functioning of the Authority also sits as Secretary of the Commission.¹⁷¹ There is a duality of roles being performed by the same person and this somewhat compromises the independence and impartiality of the Commission.

There is no clear separation in the institutional set up of the Authority and the Commission and this raises the potential of bias in decision making. In *R v. Lippe*¹⁷² the test for institutional bias was stated as follows:

“Whether having regard inter alia to the parties who appear before a decision maker, a fully informed person would harbour a reasonable apprehension in a substantial number of cases.”

Based on the above principle therefore, the Commission must not only be free from bias, but must also be *seen* as being unbiased. Presence of the likelihood of bias or indeed actual bias in the minds of the public may result in loss of confidence in the Commission going forward. And it is therefore submitted that there has to be a clear cut separation of power in the provisions and operation of the Authority and the Commission. Again there is a drafting error which was not anticipated on a practical level and needs to be amended. The connection and inter dependence between the two offices should be eradicated. The two offices should be completely independent of one another.

¹⁷⁰ Section 9 (1).

¹⁷¹ Section 9 (2) (b).

¹⁷² [1991] 2 SCR 114.

3.6 ASSESSMENT OF MERGERS

At this juncture, the chapter discusses the assessment of mergers and links the criteria used for decision making in merger control with the provisions for assessment. Commentary will be made as to how the criteria provided for merger assessment has influenced the acceptance or rejection of decided mergers in Botswana thus far. Some mergers have been given conditional approval where there appears to be anti competitive behaviours which can be remedied. At the time of writing this paper, the Authority had decided on 36 mergers¹⁷³ most of which have been implemented. Several merger decisions have been selected for discussion herein to demonstrate the link with assessment.

Section 59 (1) provides for the assessment of a proposed merger. The Authority shall first determine whether the proposed transaction:

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

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

Therefore in assessing a merger the Authority will have to weigh a broad number of factors and assess whether based on the particular sector in which the business operates there would be lessening or restriction in competition and further whether there would be dominance in the market of that particular business as a result of the merger.

Public interest is an important consideration in the regulation of mergers; it takes the enquiry further by seeking further justification. It is vital because it provides a broader spectrum of regulating mergers by

¹⁷³ Botswana Competition Authority
http://www.competitionauthority.co.bw/index.php?option=com_content&view=article&id=83&Itemid=75 last accessed on 30 July 2013.

engaging in an assessment of further benefits to a country's economy other than lessening of competition and abuse of dominance. Public interest considerations weigh more heavily in developing countries than they do in developed countries.¹⁷⁴ Thus, section 59 (2) provides that in addition the Authority may consider any factor which bears upon broader public interest in the proposed merger. This is to the extent that:

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

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

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

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

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

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

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

In deciding a proposed merger, the Authority has to consider all of the requirements of section 59 to the extent they are relevant to a particular proposed merger. The merger decisions discussed below give an insight on the deliberations engaged in by the Authority.

¹⁷⁴ PS Mehta *Evolution of Competition Laws and their Enforcement, A Political Economy Perspective* 1ed (2012) 174.

In the Anglo American/DeBeers merger, Anglo American PLC sought to acquire 40% of the shares in De Beers.¹⁷⁵ In assessing this merger, the Authority noted that there were no substantive competition concerns that will arise in the mining sector or in the sale of diamonds. The market involved in this merger is one that forms the driving force of the Botswana economy which is diamonds. The merger it was found would not result in lessening of competition as the transaction involved a share buy back between two shareholders in De Beers. The Authority also stipulated that although the merged entity in the sale of rough diamonds is a monopoly, there was no established track record of abuse of dominant market power in this particular market to warrant abuse of dominance under the Act.¹⁷⁶

The merger would have a positive significant effect on public interest in Botswana in terms of technical or economic progress which is seen as relevant to the development of Botswana. The merger would create more value in the upstream mining operations and management functions. Another important consideration in the decision making process of this merger was the fact that the Government is involved in decision making process undertaken by Debswana and DTCB which could serve as a regulatory measure which would deter Anglo American from abusing its position in the market.

In arriving at its decision the Authority was cognisant of the fact that there was dominance, yet it still authorised the merger. The fact that the merger involved a driving force of the Botswana economy was clearly an influential factor. Consideration was made as to the overall effect of the merger on the functioning and operation of the economy. A government will look to make sure that its economy continues to grow, even more so that in this case it was by way of a share buy-back by a pre-existing shareholder. This may not always be good for the greater good of the economy. It is important that provision be made for government intervention in merger regulation so as to regulate state the

¹⁷⁵ This merger decision was published on the 29th of February 2012.

¹⁷⁶ Section 2.

limit of state intervention. This would be a protection against possibility of any nepotism or corruption from senior government officials. It is noteworthy, however that, the application section of the Act¹⁷⁷ binds the State to the extent that it engages in trade or business for the production, supply or distribution of goods or the provision of any service within any market in Botswana that is open to participation by other enterprises.

Another interesting approved merger was the acquisition of 100% issued share capital in Bokamoso Private Hospital by Kalend (Pty) Ltd.¹⁷⁸ Bokamoso is a private hospital which began its operations in the early 2000's and due to financial constraints the hospital was placed under liquidation and was acquired by a new entity. This merger was authorised despite the fact that the market share covered by this merger was 35%, which is 10% more than the dominance threshold. The Authority based its decision on the fact that it did not expect the market structure to change any time soon in Botswana. This merger was in the market of health services and allowing it was good for the growth of that sector as better medical and health services would be afforded to Botswana and also bearing in mind that there are only two private hospitals in Botswana. On a public interest assessment, this decision satisfies section 59 (2) (b) which provides for improvement in distribution of services as a public interest consideration.

The Authority has approved a merger based on the commitment by an enterprise to enhance the economy with respect to a particular market. One such example is in the case of Clover South Africa (CSA) which acquired 30% of the shares in Clover Botswana (CB).¹⁷⁹ CSA made a commitment to expand their business in Botswana by assisting in the upstream of the raw milk supply industry and in particularly small scale dairy producers. The undertakings were that CSA shall:

¹⁷⁷ Section 3.

¹⁷⁸ This merger decision was published on the 21st of May 2012.

¹⁷⁹ This merger decision was published on the 27th of June 2012.

- (a) *identify a local farmer and allow the same to develop his dairy business, through providing technical assistance with regard to good dairy practice;*
- (b) *help start cluster farming on Botswana by firstly, identifying land that is suitable for dairy farming with access to electricity and water. Secondly contacting financing institutions and give the security that all milk produced will be collected and processed by CB; and*
- (c) *support the farm by providing dairy management training and technical advice, sourcing of good quality cows and be used as a training facility for future dairy farmers and herd managers who want to produce milk on a commercial basis.”*

By authorizing the merger on these conditions, the Authority has to conduct a review in future to ensure that the undertakings made by CSA were in fact fulfilled. It is submitted that this is an enhancement to citizen empowerment initiatives which falls under the provisions for public interest.¹⁸⁰ And further, the Authority has placed itself in a position of accountability in future, and this is praiseworthy.

In April 2013, one of the largest supermarket chains in Botswana selling fast moving consumer goods, Choppies Enterprises Limited (Choppies) submitted a merger notification. The Authority notified the public of the proposed merger between Choppies, Supasave (Pty) Ltd (Supasave) and Megasave (Pty) Ltd (Megasave).¹⁸¹ In terms of the notice, Choppies sought to acquire all the shares in Supasave and Megasave. At the time of submission of the notice, Choppies had a total of 70 retail stores in Botswana and South Africa and an estimated market share of 30% in the fast moving consumer good market in Botswana. Supasave was in the same industry as Choppies and Megasave was incorporated for the purpose of sourcing and supplying stock to

¹⁸⁰ Section 59 (2) (f).

¹⁸¹

http://www.competitionauthority.co.bw/index.php?option=com_content&view=article&id=80&Itemid=68 accessed on 20 July 2013.

Supasave. Supasave operated 6 stores in Botswana before the merger went through and accounted for less than a percentage of the market share.

This notification raised a lot of public controversy in Botswana. Public speculation was that Choppies sought to enter into the merger to block another player in the market, Sefalana Holdings which had shown interest in acquiring Megasave and Supasave.¹⁸² Some commentators did not see any problem with the proposed merger. The argument being that the only aspect which appeared to make no sense was why Choppies would go for such a small entity and also how the merger would be of any benefit to consumers.¹⁸³

On the other hand Dr Tebogo Magang, a lecture in Corporate Governance and Management at the University of Botswana had a pessimistic approach towards the merger. In his view, success of the merger would result in Choppies taking control of the market and possible increase in prices. He further opined that consumers and employees were not likely to benefit from the merger and that what would possibly occur was the restructuring of the enterprise resulting in possible job losses.¹⁸⁴ This would go against the public interest considerations in the Act. Sefalana notified the Authority of its objection to the merger.

The Competition Authority after conducting a hearing for the opposition of the merger approved it. It stated that in assessing the merger, substantial competition concerns arose in the fast moving consumer goods market in Gaborone, Molepolole and Palapye.¹⁸⁵ This was explained to be due to the fact that the merging parties were close competitors in both product and geographic market dimensions. The Authority continued by stating that the proposed merger is expected to

¹⁸² http://www.botswanaguardian.co.bw/index.php?option=com_content&view=article&id=467-choppies-plans-to-takeover-supersave&catid=28&Itemid=175 accessed on 22 July 2013.

¹⁸³ Ibid.

¹⁸⁴ Note 182.

¹⁸⁵ Gaborone is the capital city of Botswana, Molepolole and Palapye are one of the largest villages in Botswana approximately 50km and 300 km respectively away from the capital.

enhance the acquiring enterprise's already existing dominance.¹⁸⁶ Dominance was in particular expected to demonstrate itself in enhanced buyer power in the upstream market which is not necessarily likely to result in Choppies being a low priced retailer as evidenced in a comparative pricing survey done by the Authority.

The Authority continued to state that given the competition issues that arose, on the other hand there is a glaring reality that the target enterprises are confirmed competitive failures that is failing firms. It then stated that ordinarily, the decision should be rejected. It noted further that the transaction raised plausible competition concerns which on a balance of probabilities could not be ignored despite the failing firm defence. Inclusion of the failing firm defence in the assessment of this merger is indication that even though the defence has not been explained in the Act, and only alluded to in the Regulations, it is an applicable defence. An equal submission is therefore made that the Act should be amended to include this principle as part of the assessment criteria to match up with the Regulations.

The Authority noted that it had satisfied itself with the failing firm realities of the case and in particular the absence of counter notification and further that it would not want to have a market situation that is uncontrollable and disastrous to the welfare of employees as a result of the eminent exit of Supasave and Megasave from the relevant markets on Gaborone, Molepolole and Palapye.

Based on the above, the Authority stated that it would cautiously and reluctantly approve the transaction with the condition that:

“Choppies should take over the two entities as going concerns but Choppies within the next five years should provide the Authority with a reasonable exit plan (including a public notice) to divest from the target outlets which are in the vicinity of existing Choppies outlets...”

The decision of the Authority in this merger is evidence that in making its decisions there are a lot of considerations that come into play. The controversies raised in the Choppies merger are similar to those raised in the Wal-Mart/Massmart merger in South Africa, in respect of the effect on competition.

Most of the mergers notified to the Authority since it began its operation in November 2011 have been authorised, however some have been refused. On the 10th April 2012 the Authority refused a merger involving the acquisition of 100% issued shares in Shield Security by G4S (Botswana) Limited. This merger was to be in the market of the provision of security services. The Authority propounded that on the assessment of the proposed merger there were competition concerns that would arise in the security services industry in Botswana. Should the merger have gone through, there would have been a 53 per cent market share in the security services market and a 33 per cent market share in the alarm and response market share, which were both significantly above the 25 per cent threshold dominance.

The acquiring enterprise was considered to have substantial market power in view of the market structure for security services in Botswana. Further, it was found that the proposed transaction would likely result in the removal of a “small but significant” competitor particularly in the alarm and response services market in Botswana and by so doing would enhance G4S’s continued dominance in the market. The Authority further found that there was no demonstration of likely public benefit in the proposed merger and there would be no public benefit which would outweigh any detriment attributable to the strengthening of a dominant position in a market by G4S and to the removal of a “small but significant” competitor, despite the commitment made by the parties to maintain employment.

The decision in this merger contrasts with the decisions in the Clover and Choppies mergers discussed above. Despite undertakings made by the G4S, the merger was still unable to go through. This

demonstrates that the Authority does in fact in its assessment, go through considerations as provided for in the Act and also on a practical sense in view and in light of the way markets operate at a particular time. This is praiseworthy considering that it is relatively new.

The provisions for the assessment of mergers are broad in that they are not limited to the likelihood of lessening competition and abuse of dominance. They encompass what may be described as a developing country perspective in consideration merger regulation. This stems from the economic differences in developed and developing countries and therefore requiring far more considerations as opposed to raw competition.

3.7 CONCLUSION

This chapter enunciated on the operation of mergers in Botswana. It noted the shortcomings in drafting which have led to problems in regulation and also problems likely to arise. Suggestions for reform were made in respect of irregularities and shortcomings so as to improve on the functioning of the merger system going forward. It was demonstrated that although there are anomalies, there are aspects of merger regulation which are praiseworthy. The methods used for merger assessment thus far by the Authority are praiseworthy. Even though there is need and room for improvement the system is not a complete disaster. Because it is relatively new and is evolving, the necessary enhancements should be welcome.

CHAPTER 4 - COMPARITIVE ANALYSIS

4.1 INTRODUCTION

This chapter discusses the regulation of mergers in the Republic of South Africa and in Zambia on a comparative basis with Botswana. The reason for this comparative analysis is to assess how other jurisdictions in Southern Africa with a longer and more developed history in merger regulation have dealt with same.

A brief history of competition law in these jurisdictions will demonstrate that they have gone through a lot of transformations in respect of their competition law. They have had to effect amendments to their legislation and in particular to the way mergers have been dealt with. By benchmarking, Botswana has been able to avoid some of the problems which both South Africa and Zambia went through before amending and repealing their competition legislation. There are some complete adaptations in South African and Zambian competition laws which have been put in the Botswana Act.

Arrangement and function of institutional and regulatory frameworks in the chosen jurisdictions will be discussed. These are important in so far as merger regulation is concerned because they are the structures through which decision making in respect of mergers is conducted. In that regard their set up and structure has to be fitting for proper operation and implementation of merger law.

4.2 THE REPUBLIC OF SOUTH AFRICA

4.2.1 A BRIEF HISTORY OF SOUTH AFRICAN COMPETITION LAW

The Competition Act of 1998¹⁸⁷ (the SA Act) regulates competition in South Africa. The country has gone through various changes in the nature of its competition policy and law. The first piece of legislation geared at regulating competition was the Regulation of Monopolistic

¹⁸⁷ No 89 of 1998.

Conditions Act 24 of 1955. This act was in operation for 24 years and it was the first major comprehensive legislation for the regulation of monopolistic conditions in South Africa.¹⁸⁸ As the name suggests, the scope of this act was limited to monopolistic conditions which today are known as restrictive practices. The Board of Trade and Industry was charged with investigating conduct, recommending remedies and negotiating and supervising compliance.¹⁸⁹ This board had no independent powers of investigation or relief. The 1955 Act was limited in scope, therefore it was not effective. A commission of enquiry was set to analyze its inefficiencies. This commission was known as the Mouton Commission and it gave its report in 1977.

One of the weaknesses found under the 1955 Act was its inability to deal effectively with the merger problem.¹⁹⁰ Horizontal and vertical mergers could fall within the definition of a monopolistic condition, but conglomerate activity, except where it restricted competition fell outside the 1955 Act.¹⁹¹ The Mouton Commission made various considerations in its report, with the starting point being that a competition policy for South Africa should view the economy as a total concept [in which] both the private and public sector are included.¹⁹² From as far back as the 1970's and despite the political situation in South Africa there has been recognition of the salient features of a well functioning competition law.

The Mouton Commission recognized that whether there was effective competition in a particular situation depended on the structure of the market, its behaviour and the economic performance of the players in the sense of effective utilisation of resources, economic growth, generation of profits, an equitable distribution of income and development of skills work and opportunity for all.¹⁹³ Structure, behaviour and performance had to be taken into account for a proper evaluation of the

¹⁸⁸ Brassey (Note 1) at p63.

¹⁸⁹ Competition Law and Policy in South Africa, An OECD Peer Review, 2003 at p12.

¹⁹⁰ Mouton Commission Report para 138.

¹⁹¹ Ibid para 137.

¹⁹² Ibid para 195.

¹⁹³ Brassey (Note 1) p 69.

market situation and its effects on the public interest.¹⁹⁴ The Mouton Commission also called for a new competition body with more resources, stronger penalties against violations of orders and the extension of the law to cover mergers.¹⁹⁵ It also called for a new institutional structure that would have followed the UK's 'tripartite' system of a supervising ministry, a separate enforcement body and a more independent decision making tribunal.¹⁹⁶

The end result of the Mouton Commission's recommendations was the enactment of the Maintenance and Promotion of Competition Act (the 1979 Act)¹⁹⁷ which came into effect in 1980. The 1979 Act did not adopt all recommendations of the Mouton Commission, such as the proposal to have a Merger Tribunal. As the years progressed, this legislation proved to be problematic. At the attainment of independence in 1994, reviewing competition policy was on the top mandates agenda of the newly elected democratic government.¹⁹⁸ In 1995 the Department of Trade and Industry (the DTI) embarked on a three year project of consultation with experts and stakeholders to develop a new competition policy framework and released Guidelines in 1997.¹⁹⁹ Among others, the Guidelines noted that the 1979 Act lacked both pre-merger notification and meaningful post merger power of control.²⁰⁰

Following extensive consultations, the Competition Act of 1998 was finally drafted and took effect in 1999. This legislation was not only intended to deal with pure competition issues but was also intended to be a mechanism to restructure industry in South Africa as well as to meet claims of previously disadvantaged communities, small business and labour.²⁰¹ The SA Act has been in operation for 15 years and its

¹⁹⁴ Note 190 para 46.

¹⁹⁵ Brassey (Note 1) at p 13.

¹⁹⁶ Ibid.

¹⁹⁷ 96 of 1979.

¹⁹⁸ Brassey (Note 1) at p14.

¹⁹⁹ Ibid at p16.

²⁰⁰ Ibid.

²⁰¹ Brassey (Note 1) at p 88.

provisions on merger regulation and the institutions set up for same are exemplary.

4.2.2 MERGER CONTROL UNDER THE SOUTH AFRICAN COMPETITION ACT OF 1998

Mergers are provided for under Chapter 3 of the SA Act.²⁰² Section 11 provides for thresholds and categories of mergers. An innovation in the SA Act is that it provides for two thresholds.²⁰³ The Minister²⁰⁴ in consultation with the Commission first of all determines a lower and higher threshold of combined annual turnover or assets, or a lower and higher threshold of combinations of turnover and assets in South Africa, in general or specific industries for purposes of determining categories of mergers.²⁰⁵ The next step is formulating a method of calculation of the annual turnover or assets to be applied in relation to the thresholds.²⁰⁶ This determination may be changed by the Minister in consultation with the Competition Commission.²⁰⁷

It is submitted that the provision for change in threshold, is outstanding in the sense that it allows for adjustment to the current state of the economy at any given point in time. Under Botswana law, there is no provision for change in threshold. The current threshold amount is likely to become obsolete overtime; depending on economic progression or regression. A provision similar to that in South Africa is safer and should be adopted.

Before the threshold can be determined, a notice has to be published in the Gazette setting out the proposed threshold and method of calculation for purposes of section 11²⁰⁸ and the notice will invite written submissions on the proposal.²⁰⁹ There is a six month period given

²⁰² Section 11 to 18.

²⁰³ D Lewis Chairperson of the Company Tribunal, *'Competition Act 1998- Merger Regulation'*.

²⁰⁴ The Minister of Trade and Industry.

²⁰⁵ Section 11 (1) (a).

²⁰⁶ Section 11 (1) (b).

²⁰⁷ Section 11 (2).

²⁰⁸ Section 11 (3) (a).

²⁰⁹ Section 11 (3) (b).

for the publication of the new determined threshold. The notice of the new threshold published in the Gazette must specify the new threshold; the method of calculating it and the effective date of the threshold,²¹⁰ again this is commendable as it gives crisp and elaborate regulation.

The SA Act categorises mergers into three under section 11 (5) as follows:

“(a) “a small merger” means a merger or a proposed merger with a value at or below the lower threshold established in terms of section 11 (a);

(b) “an intermediate merger” means a merger or proposed merger with a value between the lower and higher threshold established in terms of section 11 (a); and

(c) “a large merger” means a merger or proposed merger with a value at or above the higher threshold established in terms of section 11 (a).”

The threshold will determine the category in which a merger falls. The current threshold took effect as at 1st April 2009. The SA Commission must be notified of all intermediate mergers and acquisitions if the value of the proposed merger equals or exceeds R 560 million²¹¹ and the annual turnover or asset value of the transferred/target firm is at least R 80 million.²¹² If the combined annual turnover or assets of both the acquiring and transferred/target firms are valued at or above R 6.6 billion, and the annual turnover or asset value of the transferred/target firm is at least R 190 million the merger falls under the category of a large merger and must be notified as such.²¹³

As a way of providing assistance to practitioners, the SA Commission has developed a merger notification calculator to determine whether a merger is small, intermediate or large based on the amended

²¹⁰ Section 11 (4).

²¹¹ The calculation is done by either combining the annual turnover of both firms or their assets.

²¹² <http://www.compcom.co.za/merger-thresholds/> last accessed 30 July 2013.

²¹³ Ibid.

thresholds.²¹⁴ Where it is small it is only notified on request of the Competition Commission.²¹⁵ The categorization of mergers is impressive based on the size and performance of the South African economy. Owing to this categorization, intermediate and large mergers are not assessed by the same office. Intermediate mergers are considered by the South African Competition Commission.²¹⁶ Whereas in the case of a large merger, after it has been notified to the South African Competition Commission, it is referred to the South African Tribunal for determination by that office. In the context of Botswana, it is submitted that this is something that should be considered in future, bearing in mind that the economy continues to grow.

Section 12 defines what a merger is. It appears that the Botswana definition of merger as well as what constitutes control is a total adaption of the provisions in the SA Act. Section 12A (1) provides for consideration of mergers. Similarly to the Botswana Act, in considering a merger, the first consideration to be made by the Competition Commission or the Competition Tribunal is whether the merger is likely to substantially prevent or lessen competition. The section further provides further that:

“(a) if it appears that the merger is likely to substantially prevent or lessen competition then determine-

(i) whether or not the merger is likely to result in any technological, efficiency or other pro competitive gain which will be greater than, and offset, the effects of any prevention and lessening of competition that may result or is likely to result from the merger, and would not likely be obtained if the merger is prevented; and

(ii) whether the merger can or cannot be justified on substantial public interest grounds by assessing the factors set out in subsection (3); or

²¹⁴ The calculator is not meant to replace any independent legal advice and is non binding on the SA Commission.

²¹⁵ Section 13.

²¹⁶ Section 14.

(b) otherwise determine whether a merger can or cannot be justified on public interest grounds by assessing the factors set out in subsection (3)."

This further provision makes the enquiry more stringent and therefore the analysis of determination is taken a notch higher. Further provision is made for determination of whether a merger is likely to substantially prevent or lessen competition by stating that an assessment of the strength of competition of the relevant markets and that the firms in the market after the merger will behave competitively or co-operatively taking into account any factor that is relevant in the market.²¹⁷ The SA Act provides a number of market factors. In the context of Botswana there is no provision for such thorough market assessment.

What appears to be a market assessment provision in the Botswana Act isolated in Chapter XII under the heading General Provisions. Market assessment for mergers is grouped with market assessment for other restrictive practices. Moreover it is not the same provision as under the SA Act which is intended to determine whether there has been lessening of competition in a particular market. In the Botswana Act provision is for determination of a market in an industry by looking at the goods and services provided. It is humbly submitted that market assessment for mergers in Botswana be provided in a similar manner as under the SA Act.

Section 12A (3) provides that when determining whether a merger can or cannot be justified on public interest grounds, the SA Commission and the SA Tribunal must consider the effect the merger will have on the following :

"(a) the particular industrial sector or region;

(b) employment;

²¹⁷ Section 12A (2).

(c) the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive;

(d) and the ability of national industries to compete in international markets.”

The public interest enquiry appears to be limited only to these four grounds.²¹⁸ The public interest enquiry under the Botswana Act is broader and largely different to the enquiry under the SA Act. A complete adaptation of the enquiry in the SA Act would not work under Botswana law as it is mostly based on the political history of South Africa which has no bearing on Botswana. The current adaptation of public interest under Botswana law is practical to function in the context of Botswana.

Due to the categorization there are different provisions for notification and implementation of mergers. One such provision that needs mention herein is that in notifying intermediate and large mergers there is a requirement that a copy of the merger notice be provided to any registered trade union that represents a substantial number of its employees,²¹⁹ or employees or representatives concerned if there are no such registered trade unions.²²⁰ The SA Tribunal has recognized that the SA Act extends to employees and that trade unions have the right to timeous information about the potential impact of a merger on employment.²²¹ Botswana does not have a corresponding provision. It is submitted that such a provision be included in the Botswana Act, to protect employees.

In terms of section 18 (1), the Minister may participate as a party in any intermediate or large merger to make representations on the public interest grounds set out in section 12A (3). The Minister in this respect is a representative of the government. The South African government recently intervened in the Wal-mart and Massmart Merger. Following

²¹⁸ Brassey (Note 1) at p275.

²¹⁹ Section 13A (2) (a).

²²⁰ Section 13A (2) (b).

²²¹ Unilever Plc v Competition Commission CEPPWAWU [2001-2002] CPLR 336 (CT).

Wal-mart's announcement of the merger and notification to the SA Commission, the Economic Development Department appointed an expert panel to conduct research on the implications of the proposed merger. The expert panel reported that owing to the size and international exposure of Wal-mart, employment, the welfare of local manufacturers and small business would be affected by the transaction.²²² This type of provision should also be introduced in Botswana. This way, where the government appears to be overly involved or interested in a merger or where it intervenes it will have unquestionable legislative backing.

4.2.3 THE INSTITUTIONAL AND REGULATORY FRAMEWORK OF THE COMPETITION ACT OF SOUTH AFRICA

The institutional arrangement under the SA Act is divided as follows; the Competition Commission (the SA Commission), the Competition Tribunal (the SA Tribunal) and the Competition Appeal Court (the Appeal Court).²²³ It is important to note at this juncture that in South Africa, a specialized court dealing specifically with competition law matters has been established.

Section 19 provides for the establishment and constitution of the Competition Commission. The Commission is the equivalent of the Authority under Botswana law. However, the SA Act has better provisions for this office. The SA Commission has jurisdiction throughout South Africa, is a juristic person and must exercise its functions in accordance with SA Act. The SA Commission is independent and subject only to the constitution and the law²²⁴ and further it must be impartial and perform its functions without fear, favour or prejudice.²²⁵ Provisions are made for activities which the Commissioner, Deputy Commissioner and members of staff of the SA Commission may not engage in. These include participating in any investigation, hearing or decision concerning a matter

²²² Staple J and Masamba M, 'Fourteen Years Later: An Assessment of the Realisation of the Objectives of the Competition Act of 1998' 18.

²²³ Chapter 4 of the SA Act.

²²⁴ Section 20 (1) (a).

²²⁵ Section 20 (1) (b).

in respect of which that person has a direct financial interest or any similar interest²²⁶ and making private use of, or profit from, any confidential information obtained as a result of performing functions in the Commission.²²⁷

Each organ of state must assist the SA Commission to maintain its independence and impartiality to effectively carry out its powers and duties.²²⁸ This crisp codification makes the operation of the SA Commission clear. It ensures that there is transparency which it is submitted encourages confidence in this office. These provisions should be adopted under the Botswana Act to make its provisions less ambiguous and foster towards improvement is the Authority's function in respect of merger regulation.

The functions of the SA Commission are set out elaborately just like those of the Authority. In addition to the functions set out, the SA Commission is expected to report to the Minister on any matter relating to the SA Act²²⁹ and enquire into and report to the Minister on any matter concerning the purposes of the SA Act. Submissions made to the Minister, must then be tabled before the National Assembly. The SA Act places a lot of reliance on the Minister and consultation with Parliament. Although this ensures tighter regulation, it may in some circumstances fiddle with and interrupt the independence in function of the SA Commission.

Section 22 provides for the appointment of a Commissioner. The office of commissioner under the SA Act is synonymous with that of executive secretary of the Authority. The Commissioner is appointed by the Minister and must be a suitable person with qualifications and experience in economics, law, commerce, industry or public office.²³⁰ Again the SA Act has crisp and clear provisions which guide with the

²²⁶ Section 20 (2) (b).

²²⁷ Section 20 (2) (c).

²²⁸ Section 20 (3).

²²⁹ Section 21 (2).

²³⁰ Section 22 (1).

functioning of competition law and merger regulation. This clarity ensures that there is no confusion in respect of the functioning of this office.

Provision is made for the appointment of a Deputy Commissioner who will act as an assistant to the Commissioner or perform the functions of commissioner where they are unable to dispense with their duties. This is necessary for purposes of ensuring that an important office in merger regulation is never left vacant. Under the Botswana Act the same person who acts Executive Secretary of the Authority also sits as the Chairperson of the Commission²³¹. Under the SA Act, there is a distinction which clears the possibility or likelihood of any institutional bias.

Unlike the Botswana Act, the SA Act makes provision for the office of inspector under a specific provision.²³² The inspector is appointed by the Commissioner from employees of the SA Commission or from a selection of any other suitable person.²³³ However, just like the Botswana Act, there is no provision as to the qualification of such an officer. This adaptation has left Botswana law wanting and as alluded to in chapter two should be remedied.

The SA Tribunal is established under section 26. It is comparable with the Commission under Botswana law and it is established in the same way as the SA Commission and it is noted that it is a Tribunal of record.²³⁴ The SA Tribunal is constituted by a chairperson and more than 3 but not less than 10 other women or men appointed by the President.²³⁵ It is remarkable that under the SA Act appointment is by the President which contrasts with the situation under Botswana law. It is submitted that under the SA Act this office is treated with a lot more seriousness than under the Botswana Act. Involvement of the President in the appointment of personnel for the SA Tribunal takes it to a higher level of consultation and will also probably ensure greater precision in selection of the most

²³¹ The Botswana Commission is synonymous with the SA Tribunal.

²³² Section 24.

²³³ Section 24 (1) .

²³⁴ Section 26 (1) (c).

²³⁵ Section 26 (2).

ideal person for the post. There is nothing stopping Botswana from adopting a similar provision.

An interesting further provision is that all members of the Tribunal must represent a broad cross section of the population of South Africa and must comprise persons with sufficient legal training to satisfy the requirement of section 31 (2) (a). The Botswana Act also provides for specific qualifications to be held by the members of its Commission.²³⁶ It does not however have provision for representation across a broad cross-section of the population and such a provision may not ever be necessary under Botswana law, because Botswana does not have the ethnic differences which South Africa suffered so gravely under the apartheid era.

The third segment of the institutional and regulatory framework in South Africa is the SA Appeal Court. It has been set up as an independent body which specifically deals with matters relating to the operation of competition law. A visit to this court's website demonstrates that the bulk of cases are in respect of merger regulation.²³⁷ Its set up and function is therefore paramount in respect of merger regulation.

The SA Appeal Court is established and constituted under section 36 of the SA Act. It is a court contemplated under section 166 (e) of the Constitution²³⁸ with a status akin to that of the South African High Court,²³⁹ having jurisdiction throughout South Africa²⁴⁰ and is a court of record.²⁴¹ As this court is on equal footing with the High Court, its decisions may be appealed to the South African Supreme Court. Where a matter has any constitutional implications it may be appealed to the South African Constitutional court.

²³⁶ Section 20 (2) Competition Act Botswana.

²³⁷ <http://www.compcom.co.za/> last accessed 2 August 2013

²³⁸ Section 166 (e) of the constitution provides for establishment of courts.

²³⁹ Section 36 (1) (a).

²⁴⁰ Section 36 (1) (b).

²⁴¹ Section 36 (1) (c).

The SA Appeal Court constitutes of at least 3 judges appointed by the president of South Africa²⁴² one of whom will be the judge president. Matters may reach this court by way of review or appeal from the SA Tribunal.²⁴³ Having this third tier of regulation is commendable and will ensure expeditious settling of merger decisions.

Regulation of mergers is a specialised field and setting up of courts dealing with their control is very impressive. Although the Botswana economy is not as diverse as the South African economy, it is submitted that because of the distinct nature of competition law and more specifically merger regulation, Botswana should consider competition law specialised courts. The down side of this would be that judges may incorrectly interpret competition law because of its specialised nature.²⁴⁴

The SA Act has clear and elaborate provisions relating to its institutional and regulatory framework in so far as merger regulation in South Africa is concerned and this is appreciated. It is submitted that Botswana should learn from the way in which provisions have been drafted and more importantly how they function. There is clear and undisputed separation in the institutional framework, which is not the case in Botswana.

4.3 ZAMBIA

4.3.1 BRIEF HISTORY OF ZAMBIAN COMPETITION LAW

Competition law in Zambia developed in the early nineties. The country's trade regime became considerably liberalised and this was followed by substantial decentralisation and deregulation in other spheres of economic activity.²⁴⁵ The Zambian economy was a mixed welfare economy with social welfare as the main objective. However liberalisation of state enterprises as well as on the trade front in the wake of Zambia's

²⁴² Section 36 (5).

²⁴³ Section 37.

²⁴⁴ Brusick & Evannet (Note 3) at p 286.

²⁴⁵ GK Limpile *CUTS International Competition Regimes*: <http://competitionregimes.com/pdf/Book/Africa/59/Zambia> accessed 6 August 2002.

structural adjustment policy had a drastic effect on the country and led to emergence of conditions which necessitated the creation of a competition policy.²⁴⁶

Zambia moved towards a competitive market regime by reducing the role of the government in the economy and removing high levels of ownership concentration through market liberalisation, privatisation and public participation.²⁴⁷ The government sought to put in place a competition enforcement mechanism that would ensure that the gains of privatisation and the new investment that was coming into the country would not be eroded by the anti-competitive conduct of private monopoly and dominant players in the new liberalized economy.²⁴⁸ Thus the Competition and Fair Trading Act of 1994 (the 1994 Act)²⁴⁹ was promulgated to deal with and prohibit anticompetitive practices.

The 1994 Act was premised on two underlying principles. The first was that any behaviour which had the object, or effect, of substantially lessening competition in a market was prohibited.²⁵⁰ Prohibited conduct included mergers and acquisitions which essentially lessen competition in a substantial market. During its operation it became apparent that the 1994 Act was beset by a number of inconveniences which were *inter alia*, the definition of mergers and notification of mergers and coverage of public interest.²⁵¹ The enforcement authority under the 1994 Act which was a commission also faced challenges relating to issues of limited investigative powers, a wide institutional mandate and absence of a leniency programme.²⁵²

As a result of the problems experienced under the 1994 Act, Zambia engaged in the formulation of a national competition and

²⁴⁶ Ibid.

²⁴⁷ Limpile GK in the part on Zambia in 'Review of Recent Experiences in the Formulation and Implementation of Competition Law and Policy in Selected Developing Countries: Thailand, Lao, Kenya, Zambia and Zimbabwe' United Nations, New York and Geneva (2005).

²⁴⁸ UNCTAD Voluntary Peer Review on Competition Law and Policy: Zambia Overview, United Nations, New York and Geneva (2012) 4.

²⁴⁹ Cap 417 of the Laws of Zambia.

²⁵⁰ Limpile (Note 247) at p 5.

²⁵¹ Ibid.

²⁵² Limpile (Note 247) at p6.

consumer policy. The country only engaged in formulation of a policy when it sought to repeal already existing legislation due to arising inconveniences. This differs from the situation in Botswana where there was policy formulation to analyze and assess the state of the economy before drafting legislation. Although having a policy before drafting is commendable, in the case of Zambia it was more beneficial as problem areas were already identified.

The policy was approved by the Zambian cabinet²⁵³ and part of its implementation framework covered the issue of institutional arrangements. It states that the institutions that are important for implementation of competition law are the commission, sector regulators and the judiciary working together with stakeholders.²⁵⁴ Failure of adequate operation of the institutional framework under the 1994 Act meant that there was a gap in control and regulation of mergers. In 2010, the 1994 Act was repealed and replaced by the Competition and Consumer Protection Act (the 2010 Act).²⁵⁵

4.3.2 MERGER CONTROL UNDER THE ZAMBIAN COMPETITION AND CONSUMER PROTECTION ACT 2010

Mergers are provided for under Part IV of the 2010 Act. A merger is defined in the same way as under the Botswana Act, save that the 2010 Act continues to provide that a merger also occurs when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of a business.²⁵⁶ Likewise a merger is deemed to have occurred in the same way as in the Botswana Act, and there is an additional provision for circumstances where a joint venture occurs between two or more independent enterprises.²⁵⁷ Whereas with control of an enterprise the same provisions as in the Botswana Act are used. It is noteworthy that in the 1994 Act, provision for

²⁵³ Republic of Zambia: National Competition and Consumer Policy, May 2009, Ministry of Commerce, Trade and Industry, Lusaka.

²⁵⁴ Ibid at p 25-26.

²⁵⁵ Act No 24 of 2010.

²⁵⁶ Ibid at Section 24 (1).

²⁵⁷ Ibid Section 24 (2) (c).

mergers was very scanty and not elaborate. The 2010 Act and the Botswana Act were promulgated around the same time. These provisions appear to be an adaptation of section 12 of the SA Act. Botswana and Zambia possibly resorted to drawing lessons from South Africa, as the sections in place had been tested and worked effectively over a long period of time. Although the economies of the three countries are not on the same footing, from a developing country perspective, this adaptation of like provisions suffices for operation in each country.

Under the 2010 Act, mergers are reviewable under two instances.²⁵⁸ Firstly where a merger meets a certain threshold²⁵⁹ and secondly where the merger falls below the set threshold but the Zambia Commission deems it to be reviewable based on a number of factors.²⁶⁰ The threshold for merger determination is set by the Minister in consultation with the Zambia Commission.²⁶¹ A year after the promulgation of the 2010 Act, the Minister had still not set a threshold,²⁶² the result of this being that all mergers were therefore notifiable. The Regulations were promulgated in 2011.²⁶³ A merger transaction shall require authorisation by the Zambia Commission where the combined turnover or assets, whichever is higher, in Zambia of the merging parties, is at least fifty million fee units in their last financial year, for which the figures are available.²⁶⁴ Despite the absence of timeous publication threshold, provisions under the 2011 Zambia Regulations are consistent with the 2010 Act; this is in contrast to the anomaly under Botswana law.

The Zambia Commission may review mergers falling below the threshold where it reasonably believes *inter alia* that the merger is likely

²⁵⁸ Section 25.

²⁵⁹ Section 26.

²⁶⁰ Section 27.

²⁶¹ Section 26 (5).

²⁶² Hofmeyer CD, *New Merger Thresholds to be Introduced in Zambia*, Creamer Media Reporter, 14 May 2011.

²⁶³ Statutory Instrument No 97 of 2011, Competition and Consumer Protection (General) Regulations, gazetted on 19th August 2011.

²⁶⁴ Under the Regulations, a fee unit is equivalent to Kwacha 180. The merger notification threshold of 50 million fee units therefore amount to Kwacha 9 billion (About US\$ 1.9 million at 2012 exchange rate).

to create a position of dominance in a localised product or geographic market²⁶⁵ or where the merger may substantially lessen competition.²⁶⁶ This condition came as a reform under the 2010 Act. It is submitted that a similar provision would be valuable under the law of Botswana. It would be useful to regulate mergers that would act as harm to fair competition despite being below the set threshold.

The 2010 Act has a provision relating to Market Assessment.²⁶⁷ Under this section, the Zambia Commission has to carry out a market assessment of the proposed merger to determine the likely effects of the proposed merger in the relevant market, on trade and the economy in general. It involves further enquiry which is a move in a positive direction. The impediment which would arise in implementing such a provision is whether there would be people with the relevant expertise and experience to engage in a proper market assessment. This is also a new reform to competition law in Zambia. In the South Africa discussion above,²⁶⁸ it was noted that the provisions for market assessment in Botswana are lacking and should be included in the legislation. The same observation and submission is made herein.

Section 30 of the 2010 Act makes provision for competition assessment of a merger; this is the actual assessment of the merger. The first step is to consider whether a merger is likely to prevent or substantially lessen competition in Zambia.²⁶⁹ On noting that this is a general provision, the 2010 Act provides under section 30 (2) as follows:

“(2) Notwithstanding the generality of subsection (1), the Commission shall in considering a proposed merger, take into account the likely and actual factors that affect competition in a defined market including

²⁶⁵ Section 27 (1) (a).

²⁶⁶ Section 27 (1) (b).

²⁶⁷ Section 29.

²⁶⁸ At 4.2.2.

²⁶⁹ Section 30 (1).

- (a) *the levels of concentration of players in the relevant market;*²⁷⁰
- (b) *the creation or strengthening of barriers to market entry;*
- (c) *the level of imports in the relevant market;*
- (d) *the extent to which there is countervailing buyer or supplier power in the relevant market;*
- (e) *the availability of substitute products in the relevant market;*
- (f) *the likelihood of the merger removing from the market an existing effective and vigorous competitor;*
- (g) *the dynamic characteristics of the market including growth, innovation, pricing and other inherent market characteristics; and*
- (h) *the risk that a position of dominance may be abused.”*

Under Botswana law the assessment is limited to restrictive practices, abuse of dominance and consideration of public interest issues. The 2010 Act provides specifications of further considerations that the Zambia Commission has to bear in mind when assessing a merger. These additional considerations broaden the spectrum for regulation and make the assessment procedure easier because there is an elaboration.

The 2010 Act has distinct provisions relating to the public interest assessment, in the sense that there is a separate section for same.²⁷¹ This goes a step further into the enquiry of assessing a merger and is yet another reform to the new legislation in Zambia. One of the public interest assessments under the 2010 Act is considering public interest in respect of saving a failing firm.²⁷² It is therefore submitted that additional provision

²⁷⁰ This is an inception of the principles under European Union competition law.

²⁷¹ Section 31.

²⁷² Section 31 (c).

dealing with the assessment of mergers and public interest is necessary in the context of Botswana.

In terms of the 2010 Act the period allowed for assessment of a merger is 90 days from the date of application for authorisation of the proposed merger.²⁷³ This is similar to the SA Act where assessment has to be done within 60 days.²⁷⁴ Under the Botswana Act it is only 30 days.²⁷⁵ It is submitted that the determination of mergers is a delicate issue, requiring ample time. Therefore a 30 days determination does not suffice as sufficient time for that purpose. The proposition is that Botswana should extend this period.

Even before repealing the 1994 Act, Zambia was able to successfully monitor a foreign merger takeover in the telecommunications sector.²⁷⁶ In 2005 the Zambia Commission received a formal notification from the MTN Group Limited of South Africa (MTN SA). MTN SA sought to purchase 100 percent of the capital of Telcel Zambia Limited (Telcel). The Zambia Commission considered that the acquisition was more likely to bring pro competitive benefits to the Zambian mobile telecommunications sector by increasing the investment and employment and by upgrading technology.

The Commission granted final takeover subject to specific conditions. The first condition was that 10 percent of the capital of Telcel be blocked in Special Purpose Vehicle (SPV) for Zambian public ownership and would be released to the public within fifteen to eighteen months. Secondly, within six months after taking over, MTN SA was mandated to identify a senior management official to be a Trade Practices Compliance Officer, in constant touch with the Zambia Commission. The constant communication would be for ensuring the implementation of undertakings and compliance with the 1994 Act. This goes to show that even though the 1994 Act was repealed, it still served

²⁷³ Section 32 (1).

²⁷⁴ Section 13 SA Act.

²⁷⁵ Section 56 (1) Botswana Competition Act.

²⁷⁶ P Brusick and SJ Evennett *'Should Developing Countries Worry About Abuse of Dominant Power'* (2008) WLR 287.

and relevant and necessary purpose in merger regulation, that should go by noticed.

4.3.3 THE INSTITUTIONAL AND REGULATORY FRAMEWORK UNDER THE COMPETITION AND CONSUMER PROTECTION ACT OF ZAMBIA

The institutional framework under Zambian Law is two tier. The Zambia Competition Commission which was established under the 1994 Act continues to exist under the 2010 Act. It has been renamed the Competition and Consumer Commission (the Zambia Commission).²⁷⁷ Akin to Botswana and South African law the Zambian Commission is established as a body corporate capable of suing and being sued.²⁷⁸ Mergers are reviewed by the Commission, which is constituted under the First Schedule.

The composition of the Board of Commissioners shall be by a representative from the Ministry responsible for commerce, a representative of the Attorney General, five other members with experience and knowledge relevant to the Act appointed by the Minister. The Board shall appoint an Executive Director on such conditions as it may determine.²⁷⁹ The Executive Director shall be the chief executive director of the Commission and shall be responsible under the direction of the Board for the day to day running of the Commission.²⁸⁰ The 2010 Act goes on to provide that the Executive Director shall be an ex-officio member of the Board.²⁸¹ There are clear and crisp provisions for the Zambia Commission similarly to the SA Act.

Part VII of the 2010 Act provides for investigations and determination by the Commission. In particular the 2010 Act provides for remedies in respect of merger control. Where the Commission after investigation comes to the conclusion that an enterprise is a party to a merger and creation of the merger has resulted or is likely to result in a

²⁷⁷ Section 4 (1).

²⁷⁸ Section 4 (2).

²⁷⁹ Section 6 (1).

²⁸⁰ Section 6 (2).

²⁸¹ Section 61 (3).

substantial lessening of competition within a market of goods or services, it may give the enterprise such directions as it considers necessary and practicable to remedy same.²⁸²

The remedies provided are in relation to a prospective merger²⁸³ or a completed merger.²⁸⁴ With regard to a prospective merger the remedies include: requiring an enterprise to desist from completion or implementation of the merger insofar as it relates to a market in Zambia, divest such assets as specified in a direction within the period so specified in the direction, before the merger can be implemented or adopt or desist from such conduct including conduct in relation to prices as is specified in a direction as conduct of proceeding with the merger. In the case of a completed merger, the Commission may require an enterprise to divest itself of such assets as are specified in a direction within the period so specified in the direction or adopt or to desist from such conduct including conduct in relation to prices as is specified in the direction as a condition of maintaining or proceeding with the merger. This section is new to Zambia and is comparable to section 63 of the Botswana Act.

Section 67 provides for the establishment of the Competition and Consumer Protection Tribunal (the Zambia Tribunal). The Zambia Tribunal serves the same purpose as the Commission in Botswana. Its membership consists of a legal practitioner of not less than ten years who shall be the Chairperson²⁸⁵, a representative of the Attorney General who shall be the Vice-Chairperson²⁸⁶ and three other members who shall be experts with no less than five years experience and knowledge, in matters relevant to the 2010 Act. The 2010 Act further provides for persons who are disqualified from appointment to the Tribunal.²⁸⁷ These provisions ensure that no stone is left unturned; the legislation leaves

²⁸² Section 61 (1).

²⁸³ Section 61 (2).

²⁸⁴ Section 61 (3).

²⁸⁵ Section 67 (1) (a).

²⁸⁶ Section 67 (1) (b).

²⁸⁷ Section 67 (4).

nothing to assumption or further clarification by the courts. The structure of the Zambia Tribunal is distinct in membership and seeks to cater adequately for membership.

Three members of the Zambia Tribunal form a quorum²⁸⁸ for its proceedings. Decisions are made by way of majority vote at a sitting or in a meeting and where there is an equality of votes; the person presiding shall have a casting vote in addition to their deliberative vote.²⁸⁹ A party to a hearing has the option of being represented either by a legal practitioner or by any other person or may appear in person.²⁹⁰ Decisions made are in the form of a judgement and each party and person affected by the decision shall be furnished with a copy thereof.²⁹¹ Where a member of the Zambia Tribunal has an interest in a matter he has to disclose such interest and shall not take part in the proceedings.²⁹² Where necessary the Zambia Tribunal may use assessors or experts for the purposes of proceedings.²⁹³ In Botswana, a quorum is formed by half of the members of the Commission²⁹⁴ and decision making is similar to that in Zambia. There are no provisions for recusal under the Botswana Act. This is a necessary reform for the development of Botswana competition law.

Powers of the Zambia Tribunal include taking a course which may lead to the just, speedy and inexpensive of any matter.²⁹⁵ Persons giving false evidence to the Zambia Tribunal regarding material facts are liable to conviction or to a fine.²⁹⁶ The 2010 Act is couched in wide terms covering for a wide variety of issues and scenarios likely to arise, and this is very admirable.

²⁸⁸ Section 70 (1).

²⁸⁹ Section 70 (2).

²⁹⁰ Section 70 (3).

²⁹¹ Section 70 (4).

²⁹² Section 70 (5).

²⁹³ Section 70 (6).

²⁹⁴ Section 16 (7) Botswana Competition Act.

²⁹⁵ Section 71 (1) (b).

²⁹⁶ Section 72.

Section 73 provides for decisions in respect of mergers. Where a merger is implemented in contravention to the 2010 Act the Zambian Tribunal may order a party to the merger to sell any shares, interest or other assets it has acquired pursuant to the merger²⁹⁷ or declare void any provision of an agreement to which a merger was subject.²⁹⁸ In addition or in lieu of making the preceding orders the Zambian Tribunal may direct any firm, or any person to sell any shares or interests or assets of the firm if the prohibited practice cannot be adequately remedied in terms of the 2010 Act²⁹⁹ or is substantially conduct by that firm previously found by the Zambian Tribunal to have been a prohibited practice.³⁰⁰ Where a party is aggrieved by a decision of the Zambia Tribunal, they may appeal to the high court.³⁰¹

It is very impressive that provisions in respect of functioning of the Zambia Commission and the Tribunal go a notch higher and stipulate the manner in which merger cases shall be determined. This is evidence that under Zambian law, the key role played by mergers in competition law is recognised and catered for. This recognition exists under Botswana law as well. For Zambia it took a new Act to recognize the need for such a provision, whereas because of the fortune of benchmarking, Botswana was able to benefit first hand.

4.4 CONCLUSION

As a result of the anomalies that arise in the Botswana Act, it is submitted that a review of function be engaged in so as to amend and improve on the provisions of merger regulation and the institutional framework. It goes without saying that because the Botswana Act is still new and in addition because the competition law itself is still in its infancy stage, there are sure to be oversights, errors and omissions. The comparative analysis has demonstrated that in the benchmarking

²⁹⁷ Section 73 (1) (a).

²⁹⁸ Section 73 (1) (b).

²⁹⁹ Section 73 (2) (a).

³⁰⁰ Section 73 (2) (b).

³⁰¹ Section 75.

exercise the drafters of the Botswana Act elected to incept some provisions and left out others. Some of the provisions that were left out were not and possibly would not be beneficial to Botswana. However there are some provisions which it is submitted should have been included in the Botswana Act as they would have been an aid to the operation and control of mergers.

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CHAPTER 5 - CONCLUSIONS AND RECOMMENDATIONS

5.1 CONCLUSIONS

The central aim of this paper was to assess whether the Botswana Competition Act adequately provides for the regulation of mergers. In so doing this paper engaged in a discussion of the processes involved in the drafting of competition legislation in Botswana. It was found that the steps employed in the preparation and drafting stages of the Act were crucial and imperative. They assisted Botswana in terms of perspective and direction on how to proceed in drafting legislation. One of the goals of competition law and particularly mergers is to aid commercial growth. By their introduction and implementation in Botswana, this purpose has to some extent been achieved. A competition law, no matter how well drafted will always have limitations in operation.

By necessary implication the policies formulated and assistance sought benefited the eventual outcome of merger regulation. International and regional co-operation showed that Botswana was not alone in the need to introduce this area of law and to meet international standards in its provisions for same. The country placed itself in a good position by taking note of its economic state and welfare of citizens. National processes harmonized with lessons from across borders and ensured that in the end there were workable provisions on which mergers could be regulated. Nevertheless there were oversights and omissions which currently act as impediments to the operation of merger regulation. This is both on the part of the actual provisions for merger control and on the institutions established for the control of same. Competition law is a totally new concept in Botswana and coupled with the enigmatic prima facie nature of this type of law, there are high chances that legislation will be marred with inefficiencies and drafting errors calling for amendment.

Illustrations on the development and nature of requirements in respect of mergers in South Africa and Zambia have demonstrated that because these countries have more experience in their competition law

regimes, they have to date been able to establish more articulate and definite provisions in respect of merger law. South Africa in particular has been able to tackle the issue of merger regulation from a developing country perspective to ensure catering to the needs of all its citizens. By benchmarking, Botswana was privy to benefit which placed its provisions on a better level compared to if there had been no advantage of using neighbouring jurisdictions as a springboard. This is more so that these jurisdictions had already gone through repealing of their acts to passing new laws. The drafters of the legislation however did not provide mechanisms for training of personnel that would be actually involved in the ensuring that mergers were correctly regulated. This was perhaps left open because of anticipation of on the job training and experience.

The final result being that the regulation of mergers in Botswana, although workable, has not been provided for to the full extent necessary for adequate functioning and requires panel beating in some respects so as at to perfect it.

5.2 RECOMMENDATIONS

As a way of wrapping up the elucidations made herein, below are recommendations on the findings. The engagement by Botswana in the elaborate process of preparation for promulgation of legislation shows that in finally promulgating the legislation the country could have been limited to leave the Act as it is because of limitation of resources, expertise and manpower. The recommendations made herein, therefore bear in mind that it may take some time for these to be implemented. To implement them more resources and expertise will be required. A route towards effective amendment and re-structuring could be to return to the UNCTAD for assistance, as well as to other competition law networks such as the ICN.

It is recommended that:

1. The irregularity between section 54 of the Act and regulation 20 should be cleared off once and for all by effecting an

amendment. The provision in the Regulations must be in accordance with the Act. Alternatively, the Act could be silent on the manner of threshold determination and only state that the Minister shall in consultation with the Authority prescribe the threshold determination by way of regulation.

2. The legislature should also consider having provisions allowing for a change in threshold over time as is the case in South Africa. Inclusive in this would be preparation of a merger threshold calculator. This would allow for changes depending on the economic state of the country at any particular time. It would ensure existence of a realist threshold at all times.
3. Mergers falling below thresholds should also be subject to regulation where they are likely to have bad impact on the competition. This will demonstrate that Botswana is alive to the reality that it is not only the mergers above threshold that act as a risk to fair competition.
4. There is a need for clarity in respect of cross boarder mergers. Presently the issue is dealt with in the interpretation of application section. However the importance of this issue dictates that it is fully dealt with, particularly because an effective act catering for cross border mergers may be deemed attractive in the international for purposes of investment by multinational corporations.
5. The determination period for mergers be increased to 60 days to allow for a more elaborate and thorough determination.

6. Merger notification should go as far as involving notification to Trade Unions and Employee representatives personally and not only leaving notices up to being in the newspapers.
7. Provisions for government intervention in specified merger situations should be introduced. Inclusion of these provisions will boost confidence and transparency in the merger system. These provisions should go as far as including protection from sabotage from government officials based on personal interest.
8. The definition section of the Act should also be amended to accordingly provide for the office of inspector. Inclusion of the failing firm defence is necessary.
9. The institutional bias of the Commission and the Authority should be cleared. Structure, constitution and function of these offices should be separate and distinct so as to ensure greater public confidence in their existence. This should be made clear in the legislation by stipulating the independence and impartiality of these institutions.
10. The appointment of the Chief Executive Officer of the Authority and the Commissioner should not only be done in consultation with the Minister, but should go as far as the President. A committee of experts should be established on an ad hoc basis to provide assistance in making these appointments.
11. The Act should also make provision for recusal of officers from matters wherein they have a personal interest and also classify classes of persons who may not qualify for office.

12. The legislature should also consider assessing the prospects and challenges of success of setting up of specialised courts to deal with competition cases going forward. This will be an immense benefit to the court structure and also ensure that institutions are already in place as the economy expands. The quorum of these courts could comprise high court judges and economists who understand the theory function behind mergers.

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