



## FROM THE EDITORIAL DESK

We are pleased to present to you this first issue of the Botswana Competition Bulletin. The objective of this newsletter is to provide our stakeholders with an update on competition policy and law matters in Botswana.

We will through this newsletter regularly update you on activities carried out by the Competition Authority and the Competition Commission of Botswana such as investigation and adjudication of cases, merger decisions and stakeholder interactions. We will also update you on major regional and international developments in competition law.

The newsletter will be published every two months. We value your feedback and kindly request you to submit any comments and suggestions to the Editorial Team.



## Competition Commission now Adjudicates Cases

The Competition Commission can now sit to determine cases brought before it. This follows the publication of the Rules for the Conduct of Proceedings of the Competition Commission in the Government Gazette. The Rules set out the procedures to be followed in the adjudication process and will assist those who come before the Commission.

The effect of publishing the Rules is that the Competition Authority can now refer competition cases to the Competition Commission for determination. Where the Authority has discontinued investigations and not referred a matter to the Competition Commission, the complainant may use

the Rules to refer the matter itself to the Competition Commission. Enterprises may also use the Rules to apply for interim relief from the Competition Commission.

Furthermore, the Guidelines of the Competition Commission on the Principles to be Used in Determining any Penalty or Remedy have also been published. In terms of the Competition Act, the Competition Commission may make orders imposing financial penalties on enterprises that have breached sections 25 and 26 of the Competition Act.

The Rules and the Guidelines are available on the Competition Authority website [www.competitionauthority.co.bw](http://www.competitionauthority.co.bw)

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# MERGER DECISIONS BY THE COMPETITION AUTHORITY

## JANUARY – FEBRUARY 2013

The Competition Authority authorised the following Mergers in January and February after it determined that they will not result in substantial lessening of competition and have no significant negative effect on public interest in Botswana:

### ❑ ACQUISITION OF 25% EQUITY CAPITAL IN CATHAY FORTUNE INVESTMENTS LIMITED BY CHINA-AFRICA LIANTUO MINING

The CA authorised the acquisition of 25% equity capital in Cathay Fortune Investments Limited by China-Africa Liantuo Mining Co., Ltd. In its decision, the CA said though the merged entity has a shareholding in a firm that is dominant in the copper and silver mining, and concentrate production market in Botswana, there is no established track record of abuse of dominant market power in this market to warrant a threat of abuse of dominance post transaction implementation, as defined under Section 2 of the Competition Act

### ❑ ACQUISITION OF PINNOCK HOLDINGS (PTY) LTD AND SACHET INVESTMENTS (PTY) LTD CONTRACTS BY YALDA LIMITED

The CA authorised the acquisition of Pinnacle Holdings (Pty) Ltd and Sachet Investments (Pty) Ltd contracts by Yalda (Pty) Ltd on the grounds that the merger assessment showed that there were no substantive competition concerns that arise in the design, supply, delivery and installation of on-board computers, innovative technology and related equipment for locomotives, and the fuel transport industry in Botswana.

### ❑ ACQUISITION OF 100% INTEREST IN REINFORCING STEEL CONTRACTORS BOTSWANA BY CA STEEL (PTY) LTD

The CA authorised the acquisition of 100% interest in Reinforcing Steel Contractors Botswana by CA Steel (Pty) Ltd on the grounds that no substantive competition concerns arise in the steel and reinforcing solutions product market in Botswana.

In its decision, it took cognisance of the fact that though there is a vertical relationship between the activities of Reinforcing Steel Contractors Botswana and the business interests of the CA Steel (Pty) Ltd shareholders in Murray and Roberts, the proposed transaction is not likely to result in a substantial lessening of competition, nor endanger the continuity of service, due to the absence of geographical overlap between the activities of the merging parties in Botswana.

In addition, there is no established track record of abuse of dominant market power in the market to warrant a threat of abuse of dominance post transaction implementation, as defined under Section 2 of the Competition Act

### ❑ ACQUISITION OF ALL THE OUTSTANDING ISSUED SHARE CAPITAL IN HANA MINING LIMITED BY CUPRIC CANYON CAPITAL LP

The Authority authorised the proposed acquisition of all the outstanding issued share capital in Hana Mining Limited by Cupric Canyon Capital LP. The proposed transaction was approved on the grounds that there were no substantive competition concerns that will arise in the minerals exploration market, on account of the proposed transaction in Botswana.

The CA said it is optimistic that Cupric Canyon Capital LP considers developing smelting capacity in Botswana in the foreseeable

future.

### ❑ ACQUISITION OF 100% ISSUED SHARE CAPITAL IN CAMP MANAGEMENT SERVICES BOTSWANA (PTY) LTD BY SERVEST (PTY) LTD

The CA authorised the proposed acquisition of 100% issued share capital of Camp Management Services Botswana by Servest (Pty) Ltd. The Authority determined to authorise the proposed transaction on the grounds that the analysis of the facts of the merger assessment showed that there were no substantive competition concerns that arise in the catering and camp management services product market in Botswana.

In addition, the proposed merger is not expected to have any significant negative effect on public interest in Botswana in terms of employment, in that no retrenchments or redundancies are expected to occur at the target's enterprise in Botswana, based on the parties' submission.

The Authority also took cognisance of the fact that the proposed transaction demonstrates Servest's commitment to afford citizen employees an opportunity to participate in the staff share incentive scheme which is funded 100% by Servest.

Pursuant to the provisions of Section 55 of the Competition Act, the Authority approved the acquisition of 100% issued share capital in Camp Management Services Botswana by Servest (Pty) Ltd, following the undertaking made by the acquiring enterprise that from the effective date of the proposed transaction, the qualifying employees of the target enterprise shall be entitled to participate in the acquiring enterprise's employee share incentive/benefit scheme; and the employee share benefit scheme will be applicable to present and future citizen employees of the target enterprise on the same basis.

### ❑ ACQUISITION OF INTELLECTUAL PROPERTY RIGHTS OF CERTAIN OVER-THE-COUNTER PRODUCTS OF GLAXOSMITHKLINE PLC BY ASPEN PHARMACARE HOLDINGS LIMITED

The Competition Authority authorised the proposed acquisition of intellectual property rights of certain over-the-counter (OTC) products of GlaxoSmithKline PLC (GSK) by Aspen Pharmacare Holdings (Aspen).

The Authority determined to authorise the proposed transaction on the grounds that the analysis of the facts of the merger showed that there were no substantive competition concerns that will arise in the OTC pharmaceutical product markets, and no significant negative effect on public interest in Botswana have been identified.

In making its determination, the CA said the proposed transaction is not likely to result in a substantial lessening of competition, nor endanger the continuity of the service, due to the fact that the existence of post-merger competitive constraints which will be imposed by other players in the pharmaceutical market would help to ensure that business rivalry is maintained to govern the commercial behaviour of the acquiring firm.

Furthermore, the acquiring firm does not possess any market dominance and consequently no threat of abuse of dominant market power is anticipated, post transaction implementation, as defined under Section 2 of the Act.

For full details on the merger decisions go to:

[www.competitionauthority.co.bw](http://www.competitionauthority.co.bw)

# The Competition Authority and the University of Botswana Co-host Panel Discussion



The Competition Authority and the University of Botswana Economics Society jointly hosted a panel discussion on February 27th entitled “The Role of Competition Regulation on Sustainability of Botswana’s Economic Growth and Development”.

The panel discussion that was held at the University of Botswana was attended by over 130 students from different faculties, lecturers, Competition Authority staff members and a member of the Competition Commission Dr. Jay Salkin.

The panellists were the Director of Mergers and Monopolies at the Competition Authority Ms Magdeline Gabaraane and Senior Lecturer at the Economics Department Mr Obonye Galebotswe.

In her presentation, Ms Gabaraane gave an overview of Botswana’s Competition Act of 2009 and the rationale for competition law.

She also informed the audience about the merger review process and why mergers are regulated. Linking competition policy and economic development, Ms Gabaraane concluded that competi-



Ms Magdeline Gabaraane and Mr Obonye Galebotswe at the panel discussion

tion law in any economy requires serious application and protection. She said the fields of competition and industrial economics need to be developed in Botswana.

For his part, Mr Galebotswe said there are currently two schools of thought, one for and against competition law. However he said there is a positive link between economic policy and economic development. He called for the Competition Authority’s intervention on non-tariff barriers which he said create vertical chains of monopolies. He further decried growing

differences in the price of similar goods in chain stores in areas where they have market dominance and where they don’t, and said the Authority does not seem to intervene.

The UB students posed a lot of questions and sought clarification on the mandate of the Competition Authority, and the long term impact of competition regulation on Botswana’s economic development. Some of the burning issues raised by the students included monopolies in Botswana’s poultry industry and the UB Bookstore.

## The Competition Authority Enters into Mutual Settlement with AON and BOMAID

The Competition Authority has entered into mutual settlement agreements with Botswana Medical Aid Society (BOMAID), and AON Holdings.

This is after BOMAID and AON Holdings respectively filed notices of appeal to the Competition Commission against the determination of the Authority in mergers notifications they filed.

AON Holdings and BOMAID were both aggrieved by the determination of the Authority. The Authority had in December 2012 rejected the merger notifica-

tions brought by AON and BOMAID citing public interest concerns and directed that in each of the transactions if any party wanted to sell shares held by CEDA Venture Capital, they should sell to citizens that are not part of the current shareholding to broaden citizen empowerment.

The settlement agreements as signed by the Authority and each party contain a condition that in the event either Aon Holdings or BOMAID disposes of shares acquired from CEDA Venture Capital Fund when it exits its investment, both

parties should offer the shares first to a Motswana partner or partners.

The transactions as notified by the parties have, after the signing of the settlement agreements been implemented. The mutual settlement means that the matter will not come before the Competition Commission for adjudication.

In addition, the effect of the transaction is that the transactions that were initially rejected by the Authority can now be implemented under the terms of the settlement.



Assistant Minister of Trade and Industry Mr Keletso Rakhudu and MP for Barolong Mr Kitso Mokaila at Goodhope

# THE COMPETITION AUTHORITY AT OPERATION METLHALA YA KHUMO

In order to increase awareness about its role and mandate, the Competition Authority participated in the “Metlhala ya Khumo” outreach programme organised by the Ministry of Trade and Industry in Goodhope on February 25th.

Metlhala ya Khumo is an annual event in which the ministry brings its departments and parastatals under one roof to explain its mandate and services. The event was officially opened by the Assistant Minister of Trade and Industry Mr Keletso Rakhudu who encouraged the Goodhope community to take advantage of Government programmes offered by the Ministry.

Mr Rakhudu told the Good Hope audience that the Competition Authority’s mandate is to create an environment which allows fair competition in Botswana that benefits all economic actors and consumers. He said the main objective is to facilitate fair market access, participation and growth in the national economy through monitoring and elimination of anti-competitive and restrictive business behaviour such as cartels (price fixing, bid-rigging, market allocation) and abuse of dominant or monopoly power, which may be through excessive pricing or creation of barriers to entry and growth.



## 2012 Record Penalty Year For Competition Authorities

The year 2012 was a record penalty year for global competition law authorities, with companies worldwide being fined more than five Billion US dollars, double the total fines levied in 2011.

The European Commission imposed its largest total penalty in a single case last year, when it fined seven companies including Philips, LG Electronics and Panasonic a total of about \$1.92bn for operating two cartels which fixed the price of cathode ray tubes for nearly a decade.

The global trend towards harsher penalties is also evident in South Africa. In 2012, administrative fines of about R934m were paid by companies for violations of the Competition Act. Most of these fines (R482m) were paid by companies who engaged in price-fixing, market allocation and collusive tendering in a cartel.

For example, Lafarge Industries SA paid R148.7m for its participation in a cement cartel, Foodcorp paid R88.5m for its involvement in a white maize milling and wheat milling cartel and Oceana paid R34.7m for its role in fixing prices in the pelagic fishing market. Fines of over R2bn have been levied since the Act was promulgated in 1998.

Meanwhile rules governing criminal conduct in cartels are in place around the world. In fact, the personal risk to individuals who participate in cartels is increasing, according to Heather Irvine, a director at Norton Rose in South Africa.

For instance, developments in the United States and Canada suggest that individuals are likely to face even harsher prison sentences in future. The length of the prison sentences served by executives convicted of cartel conduct in the US has increased steadily since the 1990s from an average of about eight months, to nearly 17 months.

The Canadian competition legislation was amended in 2009 in order to increase prison terms for cartel executives to up to 14 years, and fines up to 25 million Canadian dollars. (Source: Moneyweb)

## Competition Commission Raps Big Four Accountants

Britain's four biggest accountancy firms have been heavily criticised by the Competition Commission. The regulator has accused PWC, Ernst & Young, Deloitte and KPMG of being too dominant and not always meeting a shareholder's needs.

The four accountancy firms act as auditors for 90% of the UK's stock-market listed big companies. They have also been criticised in the past for not doing enough to warn of the financial crisis. Critics say accountants failed to scrutinise the banks' balance sheets properly, missing the warning signals that led to government bailouts.

The concern is that the relationship between auditors and company management becomes too comfortable with a "tendency for auditors to focus on satisfying management rather than shareholders' needs", said Laura Carstensen, chair of the Audit Investigation Group.

The Competition Commission pointed out that companies do not tend to change their auditors - with almost a third of the big companies having used the same one for more than 20 years.

The Big Four argue that the market is competitive and say many big clients doubt that smaller

firms could build up their expertise fast enough.

"We are very clear that we report to the shareholders and engage with the Audit Committee as their representatives," said PWC's Richard Sexton. This was echoed by Ernst and Young, who said that competition in the market was "healthy and robust".

Deloitte said it did not believe that the current market led to high prices, as contended by the Competition Commission, and added:

"We categorically disagree that auditors typically place the interests of management over shareholders." However, one of the smaller rivals to the Big Four, the BDO, said it was pleased that the report had confirmed "significant flaws" in the market. The report is a preliminary one, with the final version due to be published in October. No evidence of tacit collusion was found.

Europe and the US are looking into new rules for accountants. US audit regulators are also considering forcing companies to change auditors at regular intervals. The European Commission wants to break up the Big Four, splitting their audit and their consulting businesses. Any new division would have to use a different name. (Source: BBC)

## SOUTH AFRICAN COMPETITION COMMISSION PROBES R30 BILLION CONSTRUCTION CARTEL

A probe has shown that top South African construction companies fixed state and other contracts worth billions of rands. According to the City Press newspaper, affidavits detail a decades-long, formal kickback and price-fixing racket that allegedly involved prominent names in the industry.

At least 11 affidavits were made by executives from Stefanutti Stocks - one of the country's biggest construction firms - to the Hawks serious economic offences in-

vestigator and the National Prosecuting Authority, the newspaper reported. The statements were also handed to the Competition Commission for its probe into construction industry tender-rigging, thought to involve contracts worth at least R30 billion. Some of the companies allegedly involved in the bid-rigging were: Wilson Bayly Holmes Ovcon (WBHO), Stocks & Stocks civil engineering, Murray & Roberts, Group Five, Concor, and Aveng.

According to the affidavits the projects "fixed" included the National Stadium (FNB Stadium) in Soweto, the Coega development project in the Eastern Cape, Green Point soccer stadium in Cape Town, the Nelson Mandela Bridge in Johannesburg, and the Gautrain.

In their statements the executives admit they may be guilty of fraud, corruption and racketeering, and offer to co-operate with police in exchange for immunity from prosecution. (Source: Moneyweb)

## Competition Authority to host Second National Stakeholders Conference on Competition

The Competition Authority will host its Second National Stakeholders Conference on Competition on March 14, 2013. The aim of the annual conference is to engage with stakeholders on competition policy and law developments in Botswana, and to solicit and receive feedback from them for action. The one day conference will be held at the Gaborone

International Convention Centre under the theme Towards a Culture of Fair Competition. Participants will be drawn from Government, parastatals, trade unions, the legal fraternity, BOCCIM and the business community, non-governmental organisations, Members of Parliament and Local Authorities.



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