

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Global Forum on Competition**

**COMPETITION LAW AND STATE-OWNED ENTERPRISES**

**Contribution from Botswana**

**- Session V -**

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More documentation related to this discussion can be found at: [oe.cd/csoes](http://oe.cd/csoes).

Please contact Ms. Lynn Robertson [E-mail: [Lynn.Robertson@oecd.org](mailto:Lynn.Robertson@oecd.org)], if you have any questions regarding this document.

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## *Competition Law and State-Owned Enterprises*

### **- Contribution from Botswana -**

#### **1. Introduction**

1. The Botswana Competition Act<sup>1</sup> is the primary legal instrument that regulates competition in Botswana. It does so by creating the Competition Authority (“Authority”) and clothing it with such powers to ensure that it prevents, redresses anticompetitive practices and removes any constraints on the free play of competition in the market.
2. The paper seeks to explain the extent and scope of application of competition law in Botswana, and address the poignant issue of whether competition law, and indeed the Authority’s powers can be used to regulate conduct of State Owned Enterprises (“SOEs”).

#### **2. Jurisdiction of Competition Authority**

3. The jurisdiction and application of competition law and the extent of application of the powers of the Authority are clearly spelt out in the Competition Act.<sup>2</sup>
4. Section 2 of the Act, provides as follows in defining an “enterprise”;  
*“means a person or group of persons whether or not incorporated, that carries on business for gain or reward in the production, supply or distribution of goods or the provision of any service”*
5. The scope, extent and application of the Competition Act is articulated by section 3 (1), and provides that;  
*“Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having effect in Botswana”*
6. Similarly Section 3 (2) of the Act provides that;  
*“This Act binds the State to the extent that the State engages in trade or business for the production, supply or distribution of goods or the provision of any service within any market in Botswana that is open for participation by other enterprises”*
7. Section 3(2) of the Act reinforces the obligation that the State will only be held accountable or be regulated for competition issues to the extent that it engages in trade in any market that is open for participation by other enterprises.
8. It is therefore clear that in Botswana, competition regulation will apply to the State provided it engages in trade in a market open for participation by other enterprises. Strikingly, the Act does not define “State”. We therefore have to look elsewhere for the definition of a State. An ordinary literal meaning of state for purposes of our paper is the ordinary meaning of the word and we submit that it means the Republic of Botswana.

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<sup>1</sup> Cap 46:09 of the Laws of Botswana.

<sup>2</sup> Ibid.

9. In a nutshell, if the Republic of Botswana through its Government Department, Ministry or any legal entity participates in trade that is open to participation by other enterprises then it can be subjected to competition regulation. So SOEs are subjected to competition regulation provided they have competitors in that market as Section 3(2) of the Act indicates.

10. The State can have a variety of business models in pursuing its governmental and socio-economic objectives. It can have agencies that are purely for nonprofit and only to pursue public policy objectives, for instance Competition Authority, Botswana Unified Revenue Services and Bank of Botswana (“BoB”). Logically, this set of state enterprises are not involved in the buying and selling of any product and services to the extent that they can be said to be market participants, in other words such enterprises are not involved in commercial activities.

11. On the other side, the State can be a major shareholder or sole ownership in a company that is registered with the Companies Registry with a sole mandate of engaging in commercial activities and can be said to be a market participant. Some of the examples of this category includes Okavango Diamond Company,<sup>3</sup> Botswana Oil<sup>4</sup> and GABCON,<sup>5</sup> and competition regulation would apply as this set of SOEs meet the thresholds for definition of an enterprise and, as such, are market participants. In 2018 Botswana Oil applied to the Botswana Energy Regulatory Authority<sup>6</sup> to be given an exclusive import license of petroleum products in Botswana. This application was rejected on the basis that Botswana Oil will have import monopoly and would likely distort competition in the petroleum market. Although Botswana Oil is an SOE, it met the thresholds of an enterprise hence the rejection of its license application on reasons which, amongst other things, include competition related ones. The Authority has also assessed mergers in mining industry involving BCL and Norilsk. BCL is a company fully owned by State.

12. As stated above, competition regulation applies to all economic activity but this is subject to various exceptions. The most problematic exception is with respect to statutory monopolies.

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<sup>3</sup> A rough diamond marketing company registered under the Companies Act, and wholly owned by Botswana Government. Its competitors are the other rough diamonds marketing companies in Botswana and abroad.

<sup>4</sup> A company registered under the Companies Act, wholly owned by Botswana Government to ensure security and efficiency of supply of petroleum products in Botswana. The company also manages state owned strategic fuel reserves and naturally it competes with multinational fuel retailers.

<sup>5</sup> A joint venture company between Botswana Railways, a state owned enterprise and Transnet Freight Rail. This company operates a dry port, container terminal in Botswana. It also, at the downstream level competes with logistics companies in the delivery of containers to customers.

<sup>6</sup> A parastatal formed by an Act of Parliament to regulate amongst other things, energy and petroleum in Botswana.

13. In terms of the Act, competition regulation does not apply to an enterprise operating on the basis of a statutory monopoly.<sup>7</sup> These monopolies are in the utility services market and include, water, electricity, rail and the export of meat.<sup>8</sup>

14. In so far as the text and import of the provision, it provides that statutory monopolies are totally immune from the application of competition law. The framers of the Act should have intended that a monopoly since it is Government/State owned should never be subject to competition regulation, because it is akin to the state fighting one of its own organs using state resources. The other plausible reason is that enterprises operating on the basis of statutory monopoly can never harm competition because they provide key public utility services and act in the public interest. But all these reasons fly in the face of the ultimate import of competition which is to enhance consumer welfare.

### 3. Challenges

15. The Act uses various words such as “State” in section 3 (2) of the Act and confers qualified immunity on conduct of SOEs. On the other hand, the Act confers absolute immunity from competition regulation to enterprises operating on the basis of Statutory Monopoly in terms of section 3(3) (b). This dichotomy of definitions of State enterprises as implicated by the two sections and status of differing protection from application of competition Act is problematic. To alleviate this challenge, it is our view that the absolute immunity provision of statutory monopolies should be lifted and the test set out in section 3(2) of the Act, be the only one to determine if a “State’s” conduct fall within the ambit of competition regulation.

16. There has been numerous complaints from customers about the performance of statutory monopolies in Botswana. The complaints vary, and mostly are that the prices charged for their services are exorbitant and are not innovative and lack efficiency. However due to the statutory exception embedded in the Act, the Authority’s interventions cannot be fully utilised to the extent of prosecution. In, most cases the Authority has taken a calculated approach and sensitized monopolies about benefits of competition.<sup>9</sup> Similarly the Authority investigated a case involving the allegations of abuse of dominance and refusal to deal by Botswana Meat Commission (BMC), a statutory monopoly in Botswana. The allegation was that BMC refused to supply tallow to suppliers who used it for manufacturing soap. The Authority in assessing the conduct was limited on the redress options available to it because of the immunity provision conferred on statutory monopolies.

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<sup>7</sup> See section 3 (3) (b) of the Competition Act, which provides that; This Act does not apply to enterprises operating on the basis of statutory monopoly in Botswana.

<sup>8</sup> Botswana Meat Commission, Botswana Power Corporation, Botswana Railways, and Botswana Water Utilities.

<sup>9</sup> Botswana Power Corporation, a statutory monopoly and PPC Cement, a private Limited Company had entered into an exclusive agreement for purchasing of Fly Ash from BPC which is a by-product of burnt Coal. After engaging the parties BPC provided Fly Ash to other cement producers.

17. It can therefore be said that when statutory monopolies, through their non-primary mandates enter into some forms of perceived anticompetitive conducts the Authority, due to the immunity in the Act, would approach the issue in a conciliatory and advocacy route and sensitise the statutory monopoly about importance of competition.

#### 4. Conclusions

18. Based on the foregoing, competition law is applicable to SOEs provided: they are market participants; meet the threshold for definition of enterprise; and operate in the market open for competition by other enterprises. Competition regulation can be enhanced if the absolute immunity conferred on enterprises operating on basis of statutory monopoly can be lifted. This will make application of the law very clear and not possible to a variety of interpretations which places limitations on the mandate of the Authority to redress anticompetitive practices committed by statutory monopolies.

19. There has been cases<sup>10</sup> that the Authority could have investigated and possibly referred for prosecution whereby some of the Statutory Monopolies were alleged to be distorting competition but due to the immunity provision the Authority was unable to fully regulate and prosecute to the full extent of the law. A good example is in relation to complaints from members of the public and consumers at large about the excessive prices charged by these monopolies and how their lack of innovation may erode consumer welfare.

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<sup>10</sup> Supra, footnote 8.