

Experience on Competition Policy

“The Case of Botswana”

Monnane M. Monnane
Research Fellow



Botswana Institute for Development Policy Analysis

TABLE OF CONTENTS

1	INTRODUCTION.....	3
2	BACKGROUND.....	3
3	LAWS AND REGULATIONS AFFECTING COMPETITION IN BOTSWANA.....	4
3.1	THE COMPANIES ACT	4
3.2	THE INDUSTRIAL DEVELOPMENT ACT.....	4
3.3	THE TRADE AND LIQUOR ACT	6
3.4	PUBLIC PROCUREMENT AND ASSET DISPOSAL ACT.....	7
3.5	TELECOMMUNICATIONS ACT.....	7
3.6	CONSUMER PROTECTION ACT	8
4	NATURE OF MARKET/COMPETITION.....	8
5	COMPETITION POLICY AND LAW.....	10
5.1	INTRODUCTION	10
5.2	MAIN OBJECTIVES OF COMPETITION POLICY.....	11
5.3	POLICY FRAMEWORK FOR COMPETITION.....	11
5.4	THE SCOPE OF COMPETITION POLICY	12
5.5	STRATEGIC POLICY CONSIDERATIONS.....	13
5.6	REGULATORY AND INSTITUTIONAL FRAMEWORK	14
5.7	AVAILABILITY OF PRIVATE RIGHTS OF ACTION	16
6	INTERFACE BETWEEN COMPETITION AND ECONOMIC REGULATION	16
6.1	FINANCIAL SERVICES	16
6.2	THE POWER SECTOR.....	16
7	REGIONAL INTEGRATION.....	17
8	CONCLUSIONS	17
9	REFERENCES.....	19

1 Introduction

Botswana does not have a Competition Law or Competition Policy. However, the need for a Competition Policy and Law has long been recognized. The Competition Policy is, therefore at the final phase of development. The Draft Competition Policy was presented to Parliament in August 2005. This is expected to be followed by the development of the Competition Law. This paper attempts to profile competition policy and law related developments in Botswana so far, and concludes with the appreciation for the 7 up3 project. The rest of the Paper is organized as follows: Chapter 2 is the background of the Botswana economy, followed by a profile of laws and regulations affecting competition in Botswana in Chapter 3. This Chapter also touches a bit on some policies affecting competition in Botswana. Chapter 4 gives a brief note on the nature of the Botswana market and Chapter 5 summarises Botswana's Draft Competition Policy. Chapter 6 is a brief account of the interface between competition and economic regulation in two sectors, Financial Services and the Power Sector. Chapter seven is a note on the regional competition agenda. Chapter 8 concludes.

2 Background

At Independence in 1966, Botswana was dependent mainly on agriculture for her livelihood. Beef production was the mainstay of the economy in terms of output and export earnings. Prospects for rapid economic development seemed bleak and Government depended on foreign aid not only for investment projects but also to finance most of its recurrent expenditures.

However, with the discovery of diamonds in the early 1970s, the country has recorded remarkable social and economic transformation. Government revenues come from minerals, the Southern African Customs Union (SACU), income from investment of foreign exchange reserves and non mineral income tax, and the recently introduced Value Added Tax (VAT).

The economy has grown at an average growth rate of about 9 percent during the past two decades. During 2004/5, the economy grew by 5.7 percent in real terms, a slower performance compared to the 2002/3 growth rate of 7.8%. The country's population stands at round 1.8 million people, which represents an annual population growth rate of 2.4 percent between 1991 and 2001. The population growth rate in Botswana has been declining over the years. Annual growth rates between 1971 and 1981, and 1981 and 1991 were 4.5 percent and 3.5 percent respectively. While the AIDS pandemic might have contributed somewhat to the population decline in recent years, it must be noted that there was a decline also during the pre – HIV/AIDS era. Indeed factors such as declining fertility rates, increased women participation in economic activities, increased literacy rate, access to better health care etc, may have had a profound effect on the population growth.

Crude death rate rose from 11.5 per 1000 people in 1991 to 12.4 per 1000 people in 2000, reversing the decreasing trend recorded between 1981 (13.9) and 1991, primarily due to HIV/AIDS. Life expectancy at birth also decreased from 65.3 years in 1991 to 55.7 years in 2001.

Because of the country's location in the sub-tropical high pressure belt of the southern hemisphere in the interior of Southern Africa, and away from Oceanic influences, rainfall is low and temperatures are high. There is, therefore, high inter-annual variability of rainfall and drought is a recurring element of Botswana's climate.

3 Laws and Regulations Affecting Competition in Botswana¹

The Economic Mapping Study, which informed the development of Botswana's Competition Policy, identified some laws that regulate entry into business generally or entry into particular business sectors in Botswana. Obviously, these laws have a direct impact on the limits to competition in the market.

3.1 The Companies Act

The Companies Act² is the first key statute regulating market entry or the establishment of a business in Botswana. The Companies Act provides rules and regulations on the formation, registration, management and administration, and dissolution of various types of companies.

A review of the Act was commissioned with a brief that underlined the need for a legal and regulatory framework that would encourage a competitive or less restrictive commercial environment and would facilitate domestic commercial activity and the flow of foreign investment. Also required was a regulatory framework "more friendly" to small businesses that would complement objectives of the policy on promotion of the role of SMMEs in the economy (SMME Policy, 1999).

The review of the Act has been completed. A new law is in the offing, proposing drastic changes of the rules, regulations and procedures on incorporation and registration, management and administration of some companies, and shareholding and dealings in shares.

3.2 The Industrial Development Act

This Act regulates entry into manufacturing businesses that are not otherwise regulated by specific pieces of legislation. The Act establishes an Industrial Licensing Authority responsible for, amongst others, the supervision of industrial

¹ This section borrows heavily from Professor Ngo'ngola's submission to the Economic Mapping Study.

² Cap. 42:02,

development, and for the issue of licences for the manufacture of products offered for sale in Botswana.

Among the grounds listed in section 5 that the Authority can invoke for refusing to grant a manufacturing licence are the following:

- a. that the capital, technical skills or raw materials available are, in the opinion of the Authority, inadequate to secure the successful establishment and operation of the enterprise, and failure of the applicant's enterprise might prejudice the successful development of the industry concerned;
- b. that a licence for the manufacture of the proposed product "has already been granted to some other person in respect of the same part of Botswana and such licence is an exclusive licence";
- c. that the granting of the licence, in the opinion of the Authority, would not be "in the best interests of the economy or public will of Botswana or of the particular industry concerned"; and
- d. that the applicant has already been issued with or applied for licences in respect of four or more manufacturing enterprises under this Act and could only be considered for a further licence with the written approval of the Minister.

These grounds reflect an attempt to effect an industrial development policy that has since undergone important revisions and reorientation.³ Botswana's industrial development policy still is broadly concerned with diversification of the economy. The revised policy takes into account changes to domestic and international trading environments brought about by globalisation and regional and multilateral trading arrangements. It advocates reorientation of industrial development towards the opportunities and challenges presented by these developments. Exclusive manufacturing licences are not compatible with the new, highly competitive international trading environment and, particularly, with Botswana's commitments under the World Trade Organization (WTO). The revised policy recommends amendments to the Act to remove provisions relating to the grant of such licences.⁴

There are other aspects of the Industrial Development Act that should be revisited together with provisions on exclusive licences and some of the grounds enumerated in section 5 are the duration of licences issued under the Act, and the policy of reserving some manufacturing businesses for citizens of Botswana. Licences are granted for a period of one year, renewable from year to year. This is probably too short a period and a strain on the administration of the licensing system. The reservations policy may serve other goals articulated in the policy on SMME's, such as: development of citizen entrepreneurial skills, empowering citizens to control increasing proportions of economic activity in the country,

³ Republic of Botswana, *Industrial Development Policy for Botswana*, Ministry of Commerce and Industry, Government Paper No. 1 of 1998, Government Printer, Gaborone.

⁴ Republic of Botswana, *Industrial Development Policy*, para. 3.18. p. 12.

encouraging economic diversification and creation of sustainable employment opportunities. But, it so far has had the distasteful effect of allocating mostly menial activities to citizens. As the SMME's policy also acknowledges, it has the potential of inhibiting the flow of foreign capital, technical and managerial skills into the reserved sectors, and of encouraging fronting and other illegalities. The SMME's policy recommends relaxation of the reservation policy, so that joint ventures between citizens and non-citizens may be allowed in some medium scale enterprises, as long as citizen partners will have not less than 45 per cent of the beneficial shareholding. It is better to pursue policies like citizen empowerment through measures other than regulation or restriction of entry into certain lines of businesses.

3.3 The Trade and Liquor Act

This Act has been under review for some time.⁵ The Act regulates entry into businesses for the supply of goods and services, mostly to end-users. It establishes a national authority and local licensing authorities for the issue of licences in respect of trades or businesses such as import and export, agency, auctioneers, pharmacy, general dealing, wholesale and retail, supermarket, motor dealers, garage and workshop, petrol stations, dry cleaning and laundromats, hairdressers and restaurants.⁶ A distinct part of the Act also regulates the sale or supply of intoxicating liquor in specified places.⁷

The grounds for rejecting an application for a trade licence include: (a) that the applicant is a minor; or (b) that the issue of a licence would conflict with town planning or zoning schemes or health or other regulations.⁸ (c) that licenses have to be renewed within twelve months, and (d) certain types of licences or businesses are reserved for citizens of Botswana.

Another issue of concern relates to the sweeping powers of the Minister to suspend, cancel, or withdraw a licence at any time if, in his/her opinion, this is in the interests of the inhabitants of a particular area or of Botswana generally. It is asserted that the Minister "shall not be obliged to furnish reasons for any decision taken by him in terms of this section, and such decision shall be final and shall not be questioned in any court." In order to promote a vibrant, competitive trading environment, this provision could be replaced by one suggesting that a tribunal or a competition regulator shall consider appeals against decisions of the Minister or any other licensing authority.

⁵ The Act was passed as No. 29 of 1986. It was substantially amended by Act No. 15 of 1993 and it is currently awaiting its second major revision.

⁶ Sections 3, 4, 5 and 7.

⁷ Part IV, sections 28 to 46.

⁸ Section 14 as replaced by section 11 of the Trade and Liquor (Amendment) Act, No. 11 of 1993.

3.4 Public Procurement and Asset Disposal Act

This Act is mainly concerned with procurement of works, supplies and services for Government and disposal of public assets. It provides for a board, whose functions and powers include ensuring that some of the following principles are observed by procuring entities.

- (a) an open, competitive economy and changing external obligations in relation generally to trade and specifically to procurement, which dynamically impact on a continual basis on domestic procurement policy and practice;
- (b) competition among contractors by using the most efficient and competitive methods of procurement or disposal to achieve the best value for money;
- (c) fair and equitable treatment of all contractors in the interests of efficiency and maintenance of a level playing field.

However, Section 66(1) of the Act, which states that “Pursuant to its economic and social objectives, the Government may from time to time introduce reserved and preferential procurement and asset disposal schemes, which shall be consistent with its external obligations and its stable, market oriented, macroeconomic framework”. A disturbing observation is that while such schemes are expected to be time bound and non-discriminatory within targeted groups, they will exclude participation of some players. This may be construed by some as uncompetitive, and may be deemed to contradict the envisaged Competition Policy and Law, as well as the principles of competition outlined above.

3.5 Telecommunications Act

The Telecommunications Act regulates the provision of telecommunications services. Unlike, the Public Procurement and Asset Disposal Act discussed above, the Telecommunications Act has no profound citizen preference. The Act is also more explicit on the promotion of competition in the sector. Section 17(2) (c) states that, the regulator, the Botswana Telecommunications Authority shall:-

“promote and maintain competition among persons engaged in commercial activities for, or in connection with the provision of telecommunications services, and promote efficiency and economy on the part of persons so engaged”

Section 20(1) states that the Authority “shall be responsible for monitoring competition in the telecommunications sector”. Section 20(2) gives the authority the power to report any contravention to the Attorney General who shall then deal with any such contravention as he considers appropriate.

In addition, Section 48(1) states that telecommunications services shall, as far as practicable, and within the framework of the licensing system established by the Act, be provided on a competitive and non discriminatory basis.

While this Act is pro-competition, it has serious overlaps with a model competition law. For example, like a competition law, in addition to the above, the Act prohibits, among others, forming cartels, use of dominant position in a market for the purpose preventing entry into the market, collusion between operators etc. This means that the passing of the competition law and the establishment of a Competition Authority will necessitate the revision of this Act. The Act may require surgery to transfer the competition functions of the BTA to the Competition Authority.

3.6 Consumer Protection Act

Botswana's Consumer Protection Act is fairly new (1998). The Act establishes a Consumer Protection Office, under a relevant Government Ministry. The main functions of the office include, among others, investigating "unfair business practices", and would preside over the settlement of disputes relating to "unfair business practices". A business practice is described as such:-

- (a) any business agreement, accord or undertaking of a business nature;
- (b) any scheme, practice or method of trading, including any method of marketing or distribution; or
- (c) any advertising, type of advertising, or any other manner soliciting business.

It follows, therefore, that undertaking any of the above in an "un fair" manner constitutes violation of the Consumer Protection Act. It is anticipated that the same would be in violation of the Competition Law once in place. This Act may therefore require substantial re-writing in light of the provisions of the Competition Law, once in place. Like in the case of the Telecommunications Policy, The Act may require surgery to transfer the competition functions of the Consumer Protection Office to the Competition Authority.

4 Nature of Market/Competition

Without a through study to determine the nature of competition in the market, it is difficult to provide an updated market situation for Botswana, especially that the Botswana economy is a fast growing economy, and market conditions change fast as well. As a measure of the nature of competition in the market, the Economic Mapping Study undertaken estimated the economy's nature of competition by calculating concentration levels and the results indicated high levels of concentration in the Transport sector (CR3 of 65.7 percent in 2000) followed by Hotel and

Restaurants (CR3 of 64.8 percent) and Agriculture (CR3 of 63.6 percent). A case in point where competition is restricted is the Botswana Meat Commission (BMC). The BMC Act of 1966 reserves the exportation of live animals or their edible products for the abattoir unless the Minister of Agriculture permits otherwise in writing. In addition, the permit should be issued with the BMC's consent according to section 21 of the control of export of cattle and licensing of export slaughter houses.

The Manufacturing and Finance sectors had concentration ratios of between 50 and 55 percent. The least concentrated industries, and probably the most competitive industries, were Wholesale and Retail Trade (26.8 percent) and Construction (40 percent).

Table 1: Market Concentration by Industry

INDUSTRY AND CONCENTRATION CATEGORY	Sample Data						Total Number of Registered Firms
	Number of Firms			CR3			
	1995	1997	2000	1995	1997	2000	
AGRICULTURE				96.0	55.1	63.3	91
0 – 20	32	31	31				
20 – 40	1	2	1				
40 – 60	1	0	0				
MANUFACTURING				33.1	43.8	50.2	1042
0 – 20	113	124	127				
0 – 20	1	1	1				
HOTELS AND RESTAURANTS				66.2	63.5	64.8	275
0 – 20	18	19	19				
40 – 60	1	1	1				
CONSTRUCTION				59.2	37.7	40.0	569
0 – 20	40	48	46				
20 – 40	1	0	1				
FINANCE				51.4	56.2	55.0	107
0 – 20	15	16	15				
20 – 40	1	0	1				
TRANSPORT				69.2	65.4	65.7	
0 – 20	26	29	27				
60 – 80	1	1	1				
WHOLESALE AND RETAIL TRADE				34.6	29.5	26.8	1918
0 – 20	69	79	83				

Source: BIDPA, 2002.

4.1 Anti-Competitive Practises

Uncompetitive practises have been identified in sectors such as construction, property, beef export and mining. For example, according to the Botswana Meat Commission Act of 1996, the exportation of life animals or their edible products is solely reserved for the Botswana Meat Commission (BMC) unless the Minister of Agriculture permits otherwise in writing. This has resulted in some farmers raising concern on the BMC monopoly of the beef export market and have appealed to government to liberalise the sale of live animals and their products outside the country were prices seem favoaurable.

As for the mining sector, Debeers (through Debswana) continues to dominate mining in the country. As a result, the reporter (29.04.05) has observed that the Government of Botswana needs to consider working with other players in the diamond industry to reduce dependence on De Beers. This, it is alleged, will help achieve balance in information

gathering and enhance rapid learning of the industry. It has also been recommended that government should consider transferring some of its shareholding in mining and processing companies to citizens.

A study undertaken by the South African Institute of International Affairs on the experience of South African firms doing business in Botswana revealed that some companies complained that the playing field is tilted in favour of companies owned by locals, particularly in the construction and property development sectors.

The government plays a disproportionate role in the latter sector, and is the chief developer of office space (because of the inability of the local private sector to fill the gap). As a result, Botswana companies are said to be awarded contracts ahead of South African firms, even if their bids are less competitive.

5 Proposed Competition Policy

5.1 Introduction

The decision by Government to formulate the Competition Policy came out of among others, Government's concerns about the likelihood of private anticompetitive practices emerging, thus undermining Government's reform objectives. Like any model competition policy, the Botswana competition policy is expected to provide a coherent framework that integrates privatisation, deregulation, and liberalisation of trade and investment into a strategy for promoting a dynamic market led economy. In addition, the new SACU Agreement (2002) states that the SACU Council established under the agreement "shall develop policies and instruments to address unfair trade practices between Member States". In this vein, the Agreement indicates that "Member States agree that there shall be competition policies in each Member State" and that "Member States shall cooperate with each other with respect to the enforcement of competition laws and regulations". It is imperative, therefore, that Botswana adopts a Competition Policy and enacts a Competition Law.

The Competition Policy is thus expected to provide a framework for preventing anticompetitive practices and conduct by firms and creates a business friendly environment that encourages competition and efficient resource allocation. This in turn promotes investment and innovation, broadens choice for consumers, reduces monopoly rents and consumer prices, and raises the quality of goods and services produced. It follows, therefore, that healthy competition drives firms to be more efficient, and to pass on the benefits of efficiency to consumers. An adequate legislative and policy framework is therefore required to protect consumers and firms from anticompetitive practices that raise prices and reduce output.

5.2 Main Objectives of Competition Policy

The main objectives of the Competition Policy are to:

- (i) enhance economic efficiency, promote consumer welfare and support economic growth and diversification objectives;
- (ii) prevent and redress anticompetitive practices in the Botswana economy and remove unnecessary constraints on the free play of competition in the market;
- (iii) prevent and redress unfair practices adopted by firms against consumers and small businesses in Botswana;
- (iv) complement other Government policies and laws;
- (v) create certainty and support development objectives such as citizen economic empowerment and access to essential services without prejudice to the overall efficiency and competitiveness objectives pursued by Government; and
- (vi) Ensure deregulation where regulation is no longer needed

In essence, the main objectives of Competition Policy are to maintain and promote competition in order to achieve efficient use of resources, protect the freedom of economic action of firms and, as the ultimate goal, to promote consumer welfare.

5.3 Policy Framework for Competition

On the basis of best practices in countries that have put in place a successful Competition Policy, the elements on which to build a policy framework for Competition Policy in Botswana include, inter-alia:

- (i) adoption of liberal international trade and investment policies;
- (ii) repeal or amendment of Government laws and regulations that unjustifiably limit competition, e.g., legislated entry barriers, professional licenses, minimum price laws, land policies, and exclusive licensing in certain sectors;
- (iii) access to essential services, e.g. telecommunications and broadcasting, electricity and water;
- (iv) reform of existing public monopoly structures, through among other means, privatization, with appropriate regulatory framework.
- (v) a level playing field for all participants, including competitive neutrality for Government businesses and removal of state subsidies that distort competition;

- (vi) separation of industry regulations from industry operations, e.g., dominant firms should not set technical standards for new entrants;
- (vii) prohibition of anticompetitive conduct through a comprehensive Competition Law; and
- (viii) adoption of a comprehensive approach that applies to all government policies affecting competition in all sectors of the economy, taking into account the possible exemption of certain sectors that are of public interest to the economy.

5.4 The Scope of Competition Policy

In most jurisdictions, Competition Policy applies to all market transactions and to all entities engaged in commercial transactions. All exceptions to the application of the Policy will be explicitly identified in the Competition Policy and incorporated in the Competition Law so that there are no ambiguities.

There are essentially two broad principles which underline Competition Policy. These are:

- (i) that any behaviour which has the purpose or effect of lessening competition in a market is prohibited by Competition Policy; and
- (ii) some anticompetitive behaviour can be authorised on the basis of “public interest”, i.e., when total welfare gains to society outweigh the costs.

The main types of anticompetitive conduct expected to be prohibited in the Botswana Competition Policy include:

- (i) anticompetitive agreements and exclusionary provisions, including primary and secondary boycotts, with a *per se* ban on price fixing and boycotts;
- (ii) misuse of market power for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competition;
- (iii) exclusive dealing, which substantially lessens competition;
- (iv) resale price maintenance for goods; and
- (v) mergers and acquisitions that substantially lessen competition in the relevant market.

Conduct that may substantially lessen competition can, however, subject to its merits, be permitted by **authorisation**. Authorisation is a mechanism that provides immunity from legal proceedings for certain arrangements or conduct that may otherwise contravene Competition Law. Authorisation can be granted on the grounds of public

benefit, i.e., when the benefits to the public of the anticompetitive conduct outweigh the costs. Authorization was initially used most notably by Australia, but has subsequently been adopted by several Commonwealth countries, including Zambia and Zimbabwe.

Competition Policy will also deal with the interests of consumers. It will be a means of protecting consumer's rights, especially the right to full and accurate product information. It will provide consumer protection through regulation in markets where vigorous competition creates an incentive for businesses to seek competitive advantage through misleading claims about product value, quality, place of origin or impact on the environment.

To this end, the provisions in the Consumer Protection Act dealing with unfair trade practices and restrictive business conduct affecting consumers will be brought under the jurisdiction of the Competition Authority. The consumer protection measures dealing with anticompetitive practices will include:

- (i) a general prohibition of misleading or deceptive conduct;
- (ii) specific prohibitions for false or misleading representations;
- (iii) product safety provisions;
- (iv) prohibiting unfair practices, including suspect conduct in the supply of goods and services to consumers; and
- (v) conditions and warranties in consumer transactions and actions against manufacturers and retailers.

5.5 Strategic Policy Considerations

The following strategic policy considerations will be critical for the success of the Competition Policy.

- (i) ensuring coherence between Competition Policy and other Government development policies;
- (ii) developing public awareness and stakeholder support for competition ;
- (iii) establishing clear jurisdictional responsibilities between the Competition Authority and sector regulators;
- (iv) opening up competition in public monopolies and in privatized public enterprises paragraphs;
- (v) including mergers and acquisitions as well as small-scale firms within the ambit of the proposed Competition Law;
- (vi) determining whether Internet selling and telemarketing (E-Commerce) as well as pyramid selling should be included within the ambit of the Law ;

- (vii) providing consumer protection from unfair business practices and
- (viii) exceptions and exemptions from the proposed Competition Law and identification thereof.

5.6 Regulatory and Institutional Framework

The effective implementation of the Competition Policy will require the establishment of a sound regulatory and institutional infrastructure. In this regard, the first priority is to prepare the proper regulatory framework for Competition Policy. The second aim is for Government to carry out an information and advocacy campaign amongst all stakeholders about the objectives and requirements of the proposed competition policy. The third requirement is to set up the machinery that will formulate and enforce a Competition Law and establish the credibility of its enforcement powers. The primary responsibility for the implementation of the Competition Policy will rest with a **Competition Authority** to be established within the parameters of a Competition Law.

The proposed Botswana Competition Authority is envisaged to have the following features

- (i) Independence and insulation from external interference.
- (ii) Transparency and well designed administrative mechanisms and regulations.
- (iii) Clear separation of investigations of anticompetitive behaviour from the application of the Competition Law, prosecutions and adjudication functions.
- (iv) Checks and balances with rights of appeal, reviews of decisions, and access to information on legal and economic interpretations.
- (v) Expeditious and transparent proceedings that safeguard sensitive business information.
- (vi) Provisions for imposing significant penalties.
- (vii) Proactive advocacy functions.

The effectiveness of the Competition Policy in addressing anticompetitive practices depends on the enactment of a meaningful Law and its enforcement by a Competition Authority and by the Courts. Experience in other countries reveals that enforcement issues are one of the main challenges in introducing a Competition Law. Existing enforcement capabilities should dictate the approach to the new Law. It would be counterproductive to adopt a complex policy approach that would be difficult or impossible for the relevant authorities to implement. A simple enforcement system can compensate for the inadequacies of the legal system by minimising participation of the judiciary.

The Competition Law will empower the Competition Authority to investigate and determine whether there has been an infringement of the Law. Effective powers of investigation are a key requirement for deterring anticompetitive behaviour. These powers will enable the Authority to obtain the information it needs in the process of applying the Competition Law.

The administration of Competition Law will require resources. Care should be taken, however, to ensure that Government funding does not compromise the independence of the Competition Authority. The Competition Authority will have the power to charge fees for the services it renders.

A **Competition Tribunal** will be set up, if sufficient anticompetitive behaviour cases arise. Alternatively, the existing Court system will handle anticompetitive behaviour cases. The Competition Tribunal or the Court system will have matters referred to it by the Competition Authority and may:

- (i) judge any prohibited conduct related to prohibited practices;
- (ii) decide on remedies in cases of prohibited conduct;
- (iii) make decisions on any other matters brought before it;
- (iv) hear appeals from and review decisions of the Competition Authority; and
- (v) make any decisions necessary for the performing of its functions in terms of the Act.

Parties may appeal any final Tribunal or Court decision to the **Competition Appeal Court**, which has the status of a High Court. The Competition Appeal Court will be the final body to which cases from the Competition Tribunal or the Court system can be referred. Its function will be to review and then confirm, amend or set aside any decision resulting from appeal other than to consent to orders which allow appeals to the Supreme Court or the Constitutional Court.

Remedies and Sanctions

The Competition Law will envisage an array of remedies and sanctions that may be imposed as circumstances warrant. Unless adequate powers to redress violations of Competition Law are put in place to prevent the recurrence of those violations, the Law will quickly become ineffective.

Some countries impose criminal sanctions and imprisonment for certain anticompetitive practices such as the formation of illicit cartels as remedies against anticompetitive conduct. The Government will consider such sanctions as possible deterrents for non-compliance with Competition Law.

The objectives of sanctions and remedies will be to redress the following:

- (i) to compensate a person or business that has suffered loss or damages as a result of the contravention of Competition Law by a competitor;

- (ii) to undo the effects of any contravention of Competition Law;
- (iii) to prevent future contravention of the Act, and to promote and encourage community-wide compliance with the national Competition Law; and
- (iv) to provide deterrence and, as a secondary or incidental outcome, exact retribution.

5.7 Availability of Private Rights of Action

Botswana is a Common Law country hence a private right of action is available under the Constitution. Consequently, a person/firm that suffers damages as a result of the conduct of another that violates the Law may recover the amount of loss or damage by action against the violator. Such action must be commenced within a specified period from the date on which the offending conduct occurred. Competition Law will provide for a right of private action for firms or persons who consider the conduct of their competitors unfair, illegal or detrimental to them.

6 Interface between Competition and Economic Regulation

This section deals with two sectors, namely the Financial Sector and the Power Sector.

6.1 Financial Services

The Financial Sector in Botswana consists of the Central Bank (Bank of Botswana), four Commercial Banks, two investment banks, one stock exchange, two stock broking firms, three insurance companies, pension funds, a few asset management companies and fund administrators, one building society, and two financial parastatals. For the purpose of this paper, we will focus on the banking sector.

Commercial banks are regulated and supervised by the Central Bank, the Bank of Botswana under the 1995 Banking Act. The Act provides a legal framework for the ownership and supervision of banks. The banking sector is fairly liberal and competitive. Entry into this sector by foreigners is largely unrestricted. There are no limitations on the number of foreign banks into the financial sector. In addition, there are no discriminations between local and foreign banks. In fact entry into this market is encouraged through a 15% tax incentive, 10% lower than the prevailing 25% corporate tax, up to the year 2020, aimed at attracting foreign financial services companies to establish themselves at the country's Financial Services Centre. However, banks have to satisfy prudential requirements such as the capital requirement of P5 million (aprox US\$ 1.1. million).

6.2 The Power Sector

The Power Sector in Botswana is dominated by a monopoly government owned Botswana Power Corporation (BPC). This means that the BPC is the sole generator of

electricity in Botswana. However, legally, any operator can generate electricity and sell at a price lower than that of the BPC. The Energy Affairs Department (EAD) in the Ministry of Minerals, Energy and Water Resources is the regulator and is responsible for licensing new entrants and thus determining the degree of competition within the sector.

Such licensing should take place following close consultation with the existing operators (in this case the BPC). In so doing, the Minister shall take into consideration, the existing or future plans of BPC with regard to the generation and supply of electricity for Botswana, giving precedence to the interests of the BPC. This may be seen to inhibit the development of competition in the industry.

6.3 The Construction Sector

The construction sector is regulated by the Public Procurement and Asset Disposal Board. The Board keeps a register of eligible contracts. Contracts are only awarded to registered companies. The majority of small contractors are citizen owned, while the bigger companies are foreign owned.

In terms of registration, the construction sector is quite liberal. However, in terms of contracts awards, citizen contractors are given better incentives as compared to their foreign counter parts. Small to medium tenders are largely reserved for citizen contractors under the local preference scheme. While this is understandably meant to encourage the development of citizen contractors, it is anti competitive and has leads to inherent inefficiencies. On a number of occasions such preference of local contractors has resulted in many unfinished projects by local contractors.

7 Regional Integration

The New Southern African Customs Union (SACU), of which Botswana is a member, requires that members have a competition policy (Article 40). It states that “member states shall cooperate with each other with respect to the enforcement of competition laws and regulations. Article 41 also states that “the Council shall develop policies and instruments to address unfair trade practices between Member States.

The Southern African Development Community (SADC) also recognizes the importance of a regional Competition Policy, but is yet to develop one.

8 Conclusions

Botswana does not have a Competition Law or Competition Policy. However, the need for a Competition Policy and Law has long been recognized. The Competition Policy is, therefore at the final phase of development. The Draft Competition Policy was presented to Parliament in August 2005. It is expected that this will be followed by the development

of a Competition Law. The Competition Policy is expected to, among others, guard against;

- anticompetitive agreements and exclusionary provisions, including primary and secondary boycotts, with a *per se* ban on price fixing and boycotts;
- misuse of market power for the purpose of eliminating or damaging a competitor, preventing entry or deterring or preventing competition;
- exclusive dealing, which substantially lessens competition;
- resale price maintenance for goods; and
- mergers and acquisitions that substantially lessen competition in the relevant market.

The relevance of the Policy cannot be questioned because while further research is still required, preliminary findings are that there are anticompetitive practices within the Botswana market, particularly within sectors such as mining and beef export.

9 References

1. Botswana Daily News, 10.03.05, Government Printer, Gaborone.
2. Botswana Institute for Development Policy Analysis (2002) “Economic Mapping Study”, Gaborone, Botswana
3. Government of Botswana (2003), “National Development Plan 9”, Gaborone, Botswana
4. Government of Botswana, Botswana Power Corporation Act(), Gaborone, Botswana
5. Government of Botswana, Public Procurement and Asset Disposal Act, No. 10 of 2001, Gaborone, Botswana
6. Government of Botswana, Privatisation Policy for Botswana, No1 of 2000, Gaborone, Botswana
7. Government of Botswana Consumer Protection Act, No 21 of 1998, Gaborone, Botswana
8. Government of Botswana, Industrial Development Act, No. 17 of 1988 (as amended)
9. Government of Botswana, Trade and Liquor Act, No. 29 of 1986 (as amended)
10. Government of Botswana, Companies Act, CAP 42:01 (as amended, 1995)
11. Government of Botswana, Banking Act No. 13 of 1995.
12. Government of Botswana, Telecommunications Act, No. 15 of 1996.
13. Government of Botswana, Public Procurement and Asset Disposal Act, No. 10 of 2001.
14. Government of Botswana (1999), Policy for Small and Medium Scale Enterprises, Gaborone, Botswana.
15. Government of Botswana (1997), New Industrial Development Policy, Gaborone, Botswana