

COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

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ELIG Gürkaynak Attorneys-at-Law

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Competition Enforcement Agencies Handbook 2019

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Competition Enforcement Agencies Handbook 2019

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Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

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Questions and answers

How long is the head of agency's term of office?

The Competition Act 2009 (the Act) provides for the appointment of the chief executive officer for a period of five years and shall be eligible for reappointment.

When is he or she next due for reappointment?

The current chief executive officer's contract commenced on October 2017.

Which posts within the organisation are political appointments?

The chief executive officer and members of the Competition Commission (the Commission) including the chairperson are appointed by the Minister of Trade and Industry. The Commission is the governing and adjudicative body for the Competition Authority (the Authority) and comprises seven members. In appointing members to the Commission, the Minister

considers people with a background in industry, commerce, economics, law, consumer affairs or public administration and this is in accordance with the Competition Act.

What is the agency's annual budget?

The Authority has a budget of roughly 30 million pula and is largely funded by the government of Botswana.

How many staff are employed by the agency?

The Authority has a total establishment of 33 staff members. The professional establishment encompasses 23 professional staff, including 15 economists and four lawyers. The rest are support staff.

To whom does the head of the agency report?

The head of the Authority is the chief executive officer who reports to the Commission, which is the governing and adjudicative body.

Do any industry-specific regulators have competition powers?

No.

If so, how do these relate to your role?

Not applicable, but section 73(3) of the Act provides for the establishment of some mechanisms through which the Authority and sector regulators could maintain regular contact regarding the exercise of their respective responsibilities. The Act also provides that the determination of the Authority in any matter with the sector regulators shall be final except where consultations were not undertaken. The Authority has since entered into memoranda of understanding with some regulators.

May politicians overrule or disregard authority's decisions? If they have ever exercised this right, describe the most recent example?

No, the Authority is established as an independent body. Investigations by the Authority are referred to the Commission for independent adjudication. The decision of the Commission is final and can only be overruled by the High Court and subsequently by the Court of Appeal. The Act, however, empowers the Authority to make decision on merger cases, and its decisions can only be appealed to the High Court and subsequently the Court of Appeal.

Does the law allow non-competition aims to be considered when taking decisions?

Yes, the Act provides that public interest factors be considered when making decisions on merger cases, abuse of dominance cases and other horizontal and vertical agreements, which are not prohibited per se. Such public interest factors include employment, promotion of exports, citizen economic empowerment, protection of micro and small businesses, and so on.

Which body hears appeals against the agency's decisions? Is there any form of judicial review beyond that mentioned above? If so, which body conducts this? Has any competition decision by the agency been overturned?

The decision by the Authority is appealed to the Commission, thereafter to the High Court and finally the Court of Appeal. However, merger decisions are taken by the Authority and appeals in this case are made straight to the High Court.

There is no explicit provision for judicial review against decisions made by the Commission and, as indicated above, all contentious cases against the decision of the Commission are appealed to the High Court and final appeal to the Court of Appeal. However, judicial review may be entertained by the courts where the Authority has omitted or refused to exert its influence or failure to enforce a provision of the law (ie, an order of mandamus).

Has the authority ever blocked a proposed merger?

Yes, the Authority has blocked three merger transactions in the security, medical and insurance industries, and transport holdings since the Act came into operation in October 2011.

Has the authority ever imposed conditions on a proposed merger?

Yes.

Has the authority conducted a Phase II investigation in any of its merger filings?

Yes.

Has the authority ever pursued a company based outside your jurisdiction for a cartel offence?

No, all cartel cases investigated so far have involved local-based companies.

Do you operate an immunity and leniency programme? Whom should potential applicants contact? What discounts are available to companies that cooperate with cartel investigations?

Yes. The Leniency Policy was published in June 2014 and the Authority has not yet received any application. The point of contact is the chief executive officer. The maximum discount is 10 per cent of turnover.

Is there a criminal enforcement track? If so, who is responsible for it? Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?

Yes, the Botswana Police Service.

Are there any plans to reform the competition law?

Yes, the Act has been reviewed and has presidential accent. It is waiting operationalisation by the Minister of Investment Trade and Industry.

When did the last review of the law occur?

The Act has been reviewed.

Do you have a separate economics team? If so, please give details?

Yes, the Authority does have a separate economics team, being the department of Competition and Research Analysis and Mergers and Monopolies.

Has the authority conducted dawn raid?

Yes, section 36 of the Act empowers the Authority to enter and search any premises where there are reasonable grounds to suspect that an enterprise may be engaged in anticompetitive practices.

Has the authority conducted a dawn raid?

Yes.

Has the authority imposed penalties on officers or directors of companies for offences committed by the company?

No, the new Act waiting operationalisation provide for personal liability by directors or officers of enterprises in case of cartels.

What are the pre-merger notification thresholds, if any, for the buyer and seller involved in a merger?

A proposed merger is subject to control in terms of the Act if:

- the turnover in Botswana of the enterprise or enterprises being taken over exceeds 10 million pula;
- the assets in Botswana of the enterprise or enterprise being taken over have a value of 10 million pula; or
- the enterprise concerned would, following implementation of a merger, supply or acquire at least 20 per cent of a particular description of goods or services in Botswana.

Are there any restrictions on investments that involve less than a majority stake in the business?

No.

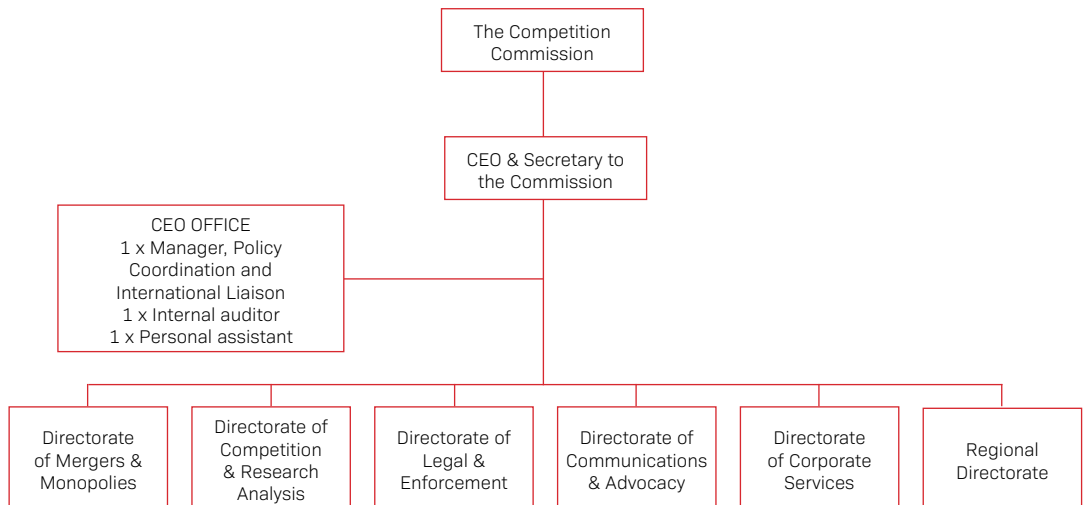
What discounts are available to companies that cooperate with cartel investigations?

The first enterprise to come forward is given a total immunity from prosecution where the Authority has not commenced investigation. The enterprise is given up to 100 per cent reduction in financial penalty, where the enterprise is the first to come after investigation. Any subsequent leniency applicants are given up to 30 per cent reduction in the financial penalty.

Does the authority conduct criminal investigations and prosecutions for cartel activity? If not, is there another authority in the country that does?

No, the Authority will soon conduct criminal investigations and prosecutions for cartel activity under the new Act as it provides for criminal sanctions for cartel activity.

Organisation chart



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