

WHAT CONSTITUTES BEING IN THE SAME MARKET FOR PURPOSES OF CALCULATING MARKET SHARE - (Tatenda Dumba, Senior Associate)

A proposed merger is subject to notification in terms of the Competition Act, Cap 46:09 ("Competition Act") if the turnover or asset value of the target enterprise exceeds BWP10 million or if the merged enterprise would, following implementation of the proposed transaction, supply or acquire 20% of the goods or services of a particular description in Botswana.

Determining whether a proposed merger meets the prescribed financial thresholds (assets or turnover) is relatively easy because this will be revealed by the latest financial statements and accounting records. However, gauging the market power or market share that the merged enterprises would end up with is usually harder to determine.

Section 2 of the Competition Act defines the relevant market as the geographical or product market to be used for the purpose of assessing the effects of a practice, conduct or agreement on competition. The geographic market may be national, a district, city, town or village. The boundaries of the geographic area or dimensions are usually clear and straightforward but factors to take into account are transport costs, the degree of cross border trade, trade barriers and regulatory constraints. However, the product market is a component of a relevant market which identifies all the products that are considered by consumers to be close substitutes.

Defining a market and whether a market share exists is crucial to the Competition Authority in order to curb anti-competitive behaviour. This allows the Competition Authority to undertake an analysis or investigate the market power of a supplier. The difficulty with the market share assessment is the lack of public statistical data information which is available in respect of all industries and, furthermore, companies may be understandably reluctant to share their information with their competitors.

The Competition Authority has indicated that in defining the relevant market for the purposes of the Competition Act, the significant and non-transitory increase in price (SSNIP test) should be used, being that if there were to be a significant (5% to 10%) increase in the price of the relevant product, consumers would divert to the other product. This is in terms of their Market Definition Guidelines.

In other words: if product A and product B are considered substitute products and if product A's price is significantly increased, would there be diversion to product B by the consumers? If that is the case, then it would be considered that the products should be viewed as being part of the same market for the purposes of the market share. It appears that the Competition Authority may form the view that a notification requirement applies to any market in which the respective enterprises of product A and product B merged and after such merging the products would supply at least 20% of the goods in Botswana.

It should be noted that the SSNIP test may be difficult to apply because it is hypothetical. Therefore, it is used as a guideline in which market definition can be gathered and analysed as opposed to a rigid determinant.