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Competition Law and Cross-Board Membership: Should Directors Sit on Their Competitors' Boards?

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Introduction

The purpose of competition law is aimed at ensuring that enterprises effect their market-based decisions in an independent manner (i.e., without the overt knowledge of what other enterprises may be considering). The general theory of harm posits that sitting on competitors' boards is a recipe for receiving inside information and, thus, averting competition from occurring between the competing enterprises.

However, does competition law really prohibit competitors from sitting on each other's Boards? On the other hand, why would any competitor want to, or be allowed to, sit on a fellow competitor's board?

The Purpose/Object Clause and Functions of a Competition Authority

The purpose of competition law and the establishment of a competition authority is aimed at monitoring markets for any conduct or agreement that removes independent market decisions by market players. The preambular sections of legislation usually set the tone. For instance, the object clause to the Competition and Consumer Protection Act No 24 of 2010 of Zambia ("CCP Act") states that the purpose of the Act is to safeguard and promote competition; and to protect consumers against unfair trade practices. Section 5 of the CCP Act clothes the Competition and Consumer Protection Commission ("CCPC") with functions to: investigate and assess restrictive agreements, abuse of dominant positions, and mergers; investigate unfair trading practices and unfair contract terms and impose such sanctions as may be necessary; and do all such acts and things as are necessary, incidental or conducive to the better carrying out of its functions under this Act. Would such functions touch on interfering with who sits on a Board?

Black's Law Dictionary defines a "Board of Directors" as the "governing body of a corporation, elected by the shareholders to establish corporate policy, appoint executive officers and make major business and financial decisions[2]." The relevant legislations provide the definition of who a director is. For instance, the Companies Act of Zambia[3] defines a director as:

> "a person appointed as a member of the board of directors and includes an *alternate director*, by whatever name designated"

It is most likely that any competition authority would be curious as to why and how any enterprise would allow a competitor to sit on its Board. Although it is common for Boards in a single economic unit to have interlocking directorships, it is highly questionable for independent enterprises to do the same. In this regard, are competitors prohibited from doing so in terms of competition law?

A Look at Southern Africa

On 12th September 2022, the Competition Commission of South Africa ("CCSA") published the Draft Guidelines on the Exchange of Competitively Sensitive Information under the Competition Act ("Guidelines").[4] The gravamen of the document deals with the exchange of "competitively sensitive information." In this

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[2] Black's Law Dictionary, 9th Edition, 2009 (Brian A. Garner, Editor-in-Chief)

[3] Section 3 of Act No.10 of 2017. Similar definition can be inferred from the section 4(4) of the Competition Act of South Africa (2020 amendment)

[4] Accessible at: https://www.compcom.co.za/wp-content/uploads/2022/09/Reworked-Draft-guidelines-on-the-exchange-of-information-12September-2022-CC-website.pdf.

respect, the Guidelines define **"**competitively sensitive information**"** as[5]:

information that is important to rivalry between competing firms and likely to have an appreciable impact on one or more of the parameters of competition (for example price, output, product quality, product variety or innovation). Competitively sensitive information could include prices, customer lists, production costs, quantities, turnovers, sales, capacities, qualities, marketing plans, risks, investments, technologies, research and development programmes and their results.

Looking at the definition of "competitively sensitive information", it is clear that competitors sitting on each other's Boards would be likely to violate the intent and spirit of the Guidelines.

Is sitting on a competitor's Board synonymous with a conspiracy to collude?

The subject of "collusion" is a central theme in competition law and viciously enforced under cartel or related horizontal prohibitions. While South Africa has the Guidelines indicated above, there are no similar guidelines in any of the SADC Member States, except that one should look closely at the definition of "agreement", which most legislations cover. The question would, thus, be couched: would a director sitting on a competitor's board (with full knowledge) be deemed to have "agreed" to share "competitively sensitive information"?

The table below provides a snapshot of some of the key definitions in several SADC Member States' competition legislations:

[5] paragraph 2.5

Country Conduct	Botswana[5]	Eswatini[6]	Namibia[7]	South Africa[8]	Zambia[9]	Zimbabwe[10]
Agreement	• Any form of agreement, whether or not legally enforceable, entered into between enterprise and is implemented or intended to be implemented in Botswana • A decision by an association of enterprise • A concerted practice	When used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable;	Includes a contract, arrangement or understanding, whether or not legally enforceable;	Includes a contract, arrangement or understanding, whether or not legally enforceable;	Any form of agreement, whether or not legally enforceable, between enterprises which is implemented or intended to be implemented in Zambia and includes an oral agreement or a decision by a trade association or an association of enterprises	"Restrictive practice" means— (*a*) any agreement, arrangement or understanding, whether enforceable or not, between two or more persons, or (*b*) any business practice or method of trading; or (*c*) any deliberate act or omission on the part of any person, whether acting independently or in concert with any other person; or (*d*) any situation arising out of the activities of any person or class of persons; which restricts competition directly or indirectly to a material degree…[11]

[5] Section 2 of Competition Act No. 4 of 2018 of Botswana
[6] Section 2 of Competition Act of 2007
[7] Competition Act No. 2 of 2003
[8] Competition Act No. 89 of 1998
[9] Competition & Consumer Protection Act No. 24 of 2010
[10] Competition Act No. 7 of 1996

Country / Conduct	Botswana[5]	Eswatini[6]	Namibia[7]	South Africa[8]	Zambia[9]	Zimbabwe[10]
Collusion	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined
Tacit Collusion	Not defined	Not defined	Not defined	Not defined	Not defined	Not defined
Concerted Practice	Cooperative or coordinated conduct between enterprises achieved through direct or indirect contact, that replaces their independent action but does not amount to an agreement	Not defined	deliberate conjoint conduct between undertakings achieved through direct or indirect contact that replaces their independent actions;	Cooperative or coordinated conduct between firms achieved through direct or indirect contact, that replaces their independent action, but which does not amount to an agreement	a practice which involves some form of communication or coordination between competitors falling short of an actual agreement but which replaces their independent action and restricts or lessens competition between them	Not defined

From the foregoing, the word "agreement" is so ambiguous and extensive in its application that it is easy to infer the existence of such an agreement across the selected countries based on interlocking directorship. Notably, section 4(1)(a) of the Competition Act of South Africa is instructive in that it provides that an agreement between, or concerted practice by, firms or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship[12] and has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological efficiency or other pro-competitive gain resulting from it outweighs that effect.

Section 4(2) of the South African Act[13] presents the interesting presumption of the existence of an "agreement" where there is an interlocking directorship, with a qualification as indicated below:

> "An agreement to engage in a restrictive horizontal practice . . . is presumed to exist between two or more firms if -
>
> (a) anyone of those firms owns a significant interest in the other, or they have at least one director or substantial shareholder in common; and
>
> (b) any combination of those firms engages in that restrictive horizontal practice."

The presumption is however not merely, because of the interlocking directorship but rather a combination of the interlocking directorship followed by engagement in a restrictive horizontal practice. It therefore

[11] Section 2(1)

[12] Section 1(1)(xv) of the Competition Act 1998 (2020 amendment) defines "horizontal relationship" as a relationship between competitors. [similar definition under section 2 of the Eswatini Competition Act]. Another synonymous definition is that of "horizontal agreement" found in the Botswana Competition Act of 2018, which has also included "potential competitors."

[13] 2000 amendment

follows that interlocking directorship in and of itself is not a trigger to an assumption of the existence of a restrictive horizontal agreement until any combination of the firms in which the two or more directors engage in such conduct. There is however a possible rebuttal under section 4(3) of the same Act, which provides that:

> "A presumption contemplated in subsection (2) may be rebutted if a firm, director or shareholder concerned establishes that a reasonable basis exists to conclude that the practice referred to in subsection (1)(b) was a normal commercial response to conditions prevailing in that market".

The proposition of "competitively sensitive information" will be a good test in the near future of section 4(2) in South Africa. Other than the presumption under section 4(3) (supra), the South African legislation has gone further to encapsulate defenses even where there is a noted restrictive horizontal agreement in the market place, which defenses are that[14]:

(a) a company, its wholly owned subsidiary as contemplated in section 1(5) of the Companies Act, 1973, a wholly owned subsidiary of that subsidiary or any combination of them; **or**

(b) the constituent firms within a single economic entity similar in structure to those referred to in paragraph (a).

Interestingly, there are no similar provisions in the respective competition legislations in Southern Africa of the countries surveyed under this article. In almost all the legislation, the definition of "agreement" is, however, so broad as to allow for the interpretation of a competition authority, tribunal or courts to include interlocking directorships as a prohibited horizontal agreement.

In addition to South Africa, the Zimbabwean Competition Act's definition of "restrictive practice" is so expansive that it would likely capture an interlocking directorship between competitors as an anti-competitive conduct, on the face of it. Of course, such a finding would be dependent on the evidence available to the Competition and Tariff Commission, particularly regarding the observed market decisions of the specific competing enterprises sharing a director(s) (whether in the horizontal or vertical context), and the actual behavior of the director(s). Given the nascent stage of the development of home-grown competition law jurisprudence in a number of countries in Southern Africa, it is most likely that a number of them would follow the approach of the South African competition authorities. Caution must however be sounded that any presumptions or defenses not expressly provided for in a specific national legislation would be a difficult plea before any such country's adjudication panel.

Conclusion

It would be unwise for competitors to consciously share directors even where the law may not expressly be prohibitive of the practice or arrangement. The individual director must equally be wary of sitting on competing boards. The intent and spirit of competition law are to prevent the wanton sharing of "competitively sensitive information" amongst competitors. Equally, there would be concerns of conflict of interest regarding corporate governance ethos.

Where interlocking director arrangements do exist, enterprises are advised to seek legal counsel on how to adequately address associated risks by implementing the necessary checks and balances to avoid being framed as being part of a restrictive horizontal agreement. In other words, interlocking directorship is a red flag that clients must be made aware of. A convergence of laws across countries in southern Africa would be a good step to ensure that their integrated economies are subject to a certain predictable level of competition enforcement mechanism.

[14] Section 4(5) of the Competition Act of 1998 (2020 amendment) of South Africa