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***NATIONAL COMPETITION POLICY FOR BOTSWANA***

**MINISTRY OF TRADE AND INDUSTRY**

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## 1.0 INTRODUCTION

- 1.1 Globally, competition policy has become a central element of the structural reform process. Therefore, the rationale for this Competition Policy lies in the need to maximise the benefits of trade and investment liberalisation, deregulation, privatisation and to protect the benefits generated by competition from erosion by anticompetitive practices in a deregulated environment. The Policy also aims to address problems related to the globalisation of cartels, abuse of market dominance and monopolisation of key sectors following the opening up of markets and the increase in cross-border trade; matters connected therewith, and incidental thereto, as well as investment flows.
- 1.2 Competition Policy, thus, provides a framework to prevent and redress anticompetitive practices and conduct by firms and to create a business friendly environment that encourages competition and efficient use of resources. This, in turn, promotes investment and innovation, broadens choices for consumers, reduces monopoly rents and consumer prices and raises the quality of goods and services produced. Healthy competition thus drives firms to be more efficient and to pass on the benefits of efficiency to consumers.
- 1.3 Botswana has had an open economy since independence in 1966 and has consistently sought to strengthen the functioning of markets. In pursuit of this goal, Government has been developing and implementing policies and programmes for promoting the development of a dynamic private sector.
- 1.4 Notwithstanding the forgoing, there is concern about the emerging private sector anticompetitive practices, which are likely to undermine Government's economic reform objectives.
- 1.5 The purpose of this policy paper, therefore, is to establish the parameters and the strategic policy considerations that will guide the drafting of a competition law. It also addresses the regulatory and institutional infrastructure that will ensure the effective implementation and enforcement of a competition law.

## 2.0 BACKGROUND

- 2.1 The formulation of this Competition Policy was preceded by an Economic Mapping Survey that took into consideration factors such as: the policy's likely impact on unemployment; the increasing dominance of foreign companies in the Botswana economy; the need to safeguard and promote the growth and development of citizen-owned small and medium enterprises; and other Government policy initiatives such as the diversification of the economy.
- 2.2 The Economic Mapping Report revealed, *inter alia*, that there is market dominance in the meat industry, the cement industry, the sugar industry, beverages, mining and the motor vehicle distribution sectors. Firms in these sectors enjoy substantial market power where tendering for public procurement may be open to collusion amongst bidders in their respective markets. Market dominance or the possibility that it could be created and subsequently abused is a key consideration in the design and application of a competition policy and its related legislation.
- 2.3 The survey also pointed out that there is a rapid increase in the number of supermarkets and chain stores and a rise in franchising as well as the proliferation of forms of distance selling, which exclude local firms.
- 2.4 There exists regulation of market entry that constitutes obstacles to competition in some sectors such as utilities and telecommunications. For example, Section 4 of the Electricity Supply Act (CAP 73:01] gives precedence to the interests of the Botswana Power Corporation.
- 2.5 **"The Legislative Inventory of Botswana Laws Relevant for a Competition Policy"** concluded that almost every piece of legislation relating to or affecting business activity has some bearing or impact on competition. Therefore, the envisaged formulation of the Competition Law will take cognizance of this fact.
- 2.6 The Competition Policy has been formulated as a strategy for enhancing Botswana's ability to promote free entry in the market place by investors and all firms, irrespective of their size; the attraction of both domestic and foreign investment flows; innovation and transfer of technology from intellectual property rights-holders; unfettered competition; acceptable business behaviour and conduct; fair business practice; efficiency; competitiveness; and consumer welfare.

### 3.0 DEFINITIONS

3.1 The following definitions are adopted for the purpose of the Competition Policy:

- a) **Acquisition:** means directly or indirectly, acquiring or agreeing to acquire:
  - i) shares, voting rights or assets of any enterprise; or
  - ii) control over management or assets of any enterprise.
- b) **competition:** means activity arising from the operations of two or more entities offering products and services in a manner that is consistent with acceptable competitive business behaviour and conduct, disabuse of dominant power in the market place, and fair business practices.
- c) **competitiveness:** as distinct from competition, refers to the ability of two or more entities to offer products and services whose quality and prices compare favourably with those of competitors in specific market segments.
- d) **Conglomerate Merger:** means a group or corporation formed by the merging of two or more separate and diverse firms.
- e) **Consumer:** means any person who:
  - i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment for personal use or resale;
  - ii) hires or avails of any service for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment for commercial use or for resale.
- f) **Exclusions and Exemptions:** refer to conditional arrangements under which Government may exclude and exempt certain economic activities or firms from the ambit of the Competition Policy and/or its related legislation.

- g) **Horizontal Agreements:** refers to explicit or implicit arrangements by firms selling identical or similar products in the same market through strategies such as price fixing, output restraints, bid rigging, and division of markets amongst themselves in order to curtail inter-firm competition.
- h) **Vertical Agreements:** means arrangements between firms at different levels of the market structure aimed at establishing the price levels such as the *minimum or maximum resale price* at which their goods and services should be sold.
- i) **Market:** means the relevant market which may be determined by the Competition Authority with reference to the relevant product market or the relevant geographic market or with reference to both markets;
 

**Merger Control:** refers to action or measures aimed at preventing the creation of undertakings that have the incentive and ability to result in dominant power in the market through acquisitions or other structural combinations.
- k) **Monopolisation:** means the conduct and practice of a firm with a dominant position of at least 40% or more market share and significantly larger than that of its biggest rival to maintain, enhance or exploit their dominant power in the market place.
- l) oligopoly: refers to a state of limited competition between a small number of producers or sellers.
- m) **Predatory Pricing:** refers to a form of abuse of dominance, which consists of selling a product or service in a given market at a price below the average cost with the aim of eliminating smaller competitors.

#### 4.0 THE NEED FOR THE POLICY

4.1 Competition Policy is necessary because it provides, through competitive markets, the best means of ensuring that the economy's resources are put to their best use by encouraging enterprise efficiency and widening choice. It is also necessary because where markets work well, they provide strong incentives for good performance, thus, encouraging firms to improve productivity, reduce prices and innovate whilst rewarding consumers with lower prices, and a wider choice of high quality goods and services.

4.2 The Competition Policy, therefore, sets out a broad framework with which Government will:

- a) Respond to anticompetitive challenges in the market place; and
- b) Ensure that firms operating in various sectors of the economy comply with and adhere to the Policy and regulatory requirements.

## **5.0 POLICY FRAMEWORK FOR COMPETITION**

5.1 The Competition Policy lays down broad parameters within which the conduct, operational behaviour and practices of firms will be regulated. Its framework covers various aspects, including guiding principles; policy objectives, and strategic policy considerations, which include, *inter alia*, alignment of the Competition Policy with other Government policies as well as interface between a Competition Authority and other regulatory bodies.

5.2 At the outset, the Competition Policy also recognizes the importance of the following factors:

### **a) Efficiency**

This Policy recognizes that efficiency is indispensable to the ability of any economy to attract investment flows from both domestic and foreign sources. It also recognizes that efficiency enhances business growth prospects by engendering product and service competitiveness as well as the availability of a wider consumer choice.

### **b) Competitiveness**

Like efficiency, competitiveness is a critical success factor in the ability of any economy to effectively compete for the attraction of investment flows, particularly foreign direct investment. This Policy, therefore, recognizes the important role of competitiveness in underpinning the continued growth and sustainability of the economy at both micro and macro levels.

- b) Prevent and redress unfair practices adopted by firms against consumers and small businesses in Botswana;
- c) Prevent and redress anticompetitive practices in the Botswana economy and remove unnecessary constraints on the free play of competition in the market;
- d) Complement other Government policies and laws;
- e) Enhance the attractiveness of the Botswana economy for foreign direct investment by providing a transparent, predictable and internationally acceptable regulatory mechanism for firms to engage in economic activities;
- f) Support other policy initiatives such as citizen economic empowerment and access to essential services without prejudice to the pursuit of the overall efficiency and competitiveness of the economy; and
- g) Achieve deregulation where regulation is no longer needed.

## **8.0 STRATEGIC POLICY CONSIDERATIONS**

**8.1** Government recognizes that the following strategic policy considerations are critical for the success of Botswana's Competition Policy:

### **a) Establishment of a Competition Authority**

Government will establish a Competition Authority whose responsibility will be to implement the Competition Policy and its related legislation.

### **b) Ensuring Consistency of the Competition Policy With Other Government Policies**

- i) In order to strengthen Government's ongoing efforts to create and maintain a more conducive environment for stimulating and enabling the growth and diversification of the economy, the Competition Policy will be consistent with other policies such as the Policy on Small, Medium and Micro Enterprises, Industrial Development Policy and the Privatisation Policy.

- ii) In addition, Government will maintain a non-interference and competitive environment whilst ensuring consistency between this Policy and other socio-economic development policy initiatives.
- iii) Government will work in collaboration and harmony with other countries and organizations at the bilateral and multilateral levels to respond to existing and potential cross-border anticompetitive practices, including but not restricted to, various types of anticompetitive behaviour, abuse of dominant position in the market and various types of anticompetitive combinations.
- iv) The principles of competition should be embedded in the process of policy making, legislation and enforcement, and applied at both local and central Government levels.

**c) Development of Public Awareness and Support for Competition Enforcement**

Implementation of the Competition Policy will be accompanied by the development and implementation of a strategy for educating the public and stakeholders on its important role in the economy and to the nation, in general. In this regard, Government will develop and implement educational and awareness campaigns aimed at ensuring that all stakeholders, including the general public, civil society organisations, politicians, public servants, the legal fraternity, the business community, sectoral regulators, academics, and the media clearly understand this Policy.

**d) Interfacing the Competition Authority With Other Sector Specific Regulatory Bodies**

- i) Government recognises the important role and advantages of having sector or industry specific regulators such as the Bank of Botswana and the Botswana Telecommunications Authority. However, Government will ensure that all sector specific regulatory bodies fall under the ambit of the Competition Law.

- ii) Legislation related to this Policy and other existing pieces of legislation, which have a direct or indirect bearing on the Competition Policy, will be harmonised and interfaced in order to ensure consistency and fairness in their application.
  - iii) In sectors characterised by economic/commercial activities, complex science, engineering and technology or having natural monopoly or other special elements, the Competition Authority and Sector Specific Regulators collaborate and complement each other.
- e) **Structural Reform of Public Monopolies**
- i) Government remains fully committed to restructuring public enterprises within the broader framework for increasing the role of the private sector in the economy. Government will, therefore, continue to look into ways of structurally reforming public monopolies operating in sectors such as telecommunications, water, electricity and meat export with a view to opening up some of the services they provide to competition.
  - ii) Government will, however, retain monopoly powers, where necessary, to provide major infrastructure facilities whilst at the same time opening up activities like connection and distribution services to competition.
  - iii) In keeping with the objectives of the Privatisation Policy and this Policy, Government will, prior to introducing competition in a market traditionally supplied by public enterprise or monopoly, undertake a review of the entity or entities concerned. Such a review will take into consideration the commercial objectives of the business as well as the merits and de-merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly.

**f) Mergers and Acquisitions**

In order to safeguard competition in the market place, Government will, if and when necessary, review mergers and acquisitions, including joint ventures and other forms of business alliances.

**g) Professional Services**

In order to ensure that laws such as those which regulate professional associations and any other laws that have a direct or indirect bearing on competition do not inhibit the effective working of competitive markets, Government will include all professional associations, whether enacted by law or not, within the ambit of both this Policy and its related legislation.

**h) Consumer Protection**

i) Through this Policy and its related legislation, consumers will be protected from any deceptive and fraudulent behaviour of sellers. In this regard, the formulation of a Competition Law will take into account the provisions of the Consumer Protection Act [CAP 42:07] that deal with unfair business practices. In addition, administration of the Consumer Protection Act will be placed under the Competition Authority. The thrust of Consumer Protection under this Policy will include:

- aa) Maintaining an institutional emphasis on consumer welfare objectives;
- bb) Reducing the opportunity for business to deny consumers the benefits of competitive markets in the short-term by engaging in unfair business practices;
- cc) Promoting dialogue between consumers and their stakeholders;
- dd) Providing market-driven inducements to domestically traded goods and services to meet basic standards of fair trading; and
- ee) Cooperating and networking regional and international competition authorities and sector specific regulators to

exchange and share information and ideas on principles of competition administration.

i) **Small Scale Firms**

This Policy seeks to promote the efficiency and competitiveness of small scale firms which form a large proportion of the industrial base in Botswana. In this regard, small scale firms will be included within the ambit of this Policy in order to challenge and encourage them to think and act strategically in building and sharpening their competitive edge.

Exclusions and Exemptions

- i) The dynamic nature of the market environment dictates that exclusions and exemptions of certain economic activities and firms from the competition policy and its related legislation be granted conditionally taking into account factors such as:
- aa) The economic activity's strategic importance and national interest to the country;
  - bb) The extent to which social benefits to be gained from exclusions and exemptions outweigh the costs;
  - cc) The extent to which the size of the market share affected will not substantially lessen competition;
  - dd) The extent to which efficiency and external competitiveness will be enhanced as a result of exclusions and exemptions;
  - ee) Convincing proof or evidence that a sector regulatory body acting within its powers expressly approved the firm or organisation's action in question (***explicit exclusion and exemption***); and
  - ff) Convincing proof or evidence that the application of the Competition Policy and/or its related legislation is displaced by sector specific regulatory regimes or other manifestations

of state ownership or directive (*implicit exclusion and exemption*).

ii) Taking the foregoing scenario into consideration, Government will grant the following conditional exclusions and exemptions from the Competition Policy:

a) **Public Utilities**

i) The provision of infrastructural facilities for public utilities such as land-line telecommunications, water, and electricity require huge capital outlays, which take long to recoup given the paucity of Botswana's population and the resultant small market base. Since this situation may constrain private sector investment in this sub-sector, Government may exclude and exempt the provision of some of the infrastructural facilities from this Policy.

ii) The aforementioned exclusions and exemptions notwithstanding, Government may include the provision of services such as public utility connections and distribution services within the ambit of this Policy.

b) **Collective Bargaining**

In order to prevent employers from exploiting workers under the pretext of free competition, Government will exempt and exclude collective bargaining by unionised workers from the ambit of this Policy. Furthermore, the Government's Policy of social protection for workers through the Labour Law and minimum wages shall remain in force.

c) **Intellectual Property Rights**

The Policy recognises the important role intellectual property (patents, trade marks and copyrights) plays in Botswana's human and economic development endeavours and the need to protect and safeguard the interests of intellectual property rights-holders. Therefore, as a way of protecting intellectual property rights from infringement and in order to promote the development of creations and innovations,

intellectual property rights will be exempted and excluded from the ambit of this Policy.

## **9.0 REGULATORY FRAMEWORK**

9.1 In order to ensure compliance with and adherence to locally and internationally acceptable anticompetitive business behavior and conduct, Government will formulate a Competition Act, through which competition in the market place will be regulated.

## **10.0 INSTITUTIONAL ARRANGEMENTS**

10.1 Institutional arrangements for the formulation, review, and monitoring of the implementation of the Competition Policy and its related legislation will remain the responsibility of the Ministry of Trade and Industry whilst the Competition Authority will be responsible for the implementation of this Policy and enforcement of the Competition Act.

10.2 For the Competition Policy to succeed, Government will:

- a) Establish an Independent Competition Authority;
- b) Ensure compliance and enforcement of the rules of fair play; and
- c) Maintain an effective and equitable balance between the interests of business and those of the public.

10.3 As part of its responsibility to implement the Competition Policy and its related legislation, the Competition Authority will have power to enforce the Competition Act, including conducting investigations, prosecuting transgressions of the Competition Act, and presiding over disputes. Parties aggrieved by the decision of the Competition Authority will have the right to appeal to the High Court.