

LESOTHO

COMPETITION POLICY

Final Draft

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FOREWORD

This policy paper outlines the National Competition Policy (NCP) for Lesotho and is the outcome of a policy formulation process that began in 2002. The NCP is based on the findings of two issues papers; the Economic Mapping for the Kingdom of Lesotho (hereafter referred to as the *Economic Mapping*) and the Inventory of Lesotho Legislation with a Bearing on Competition (hereafter referred to as the *Legislative Inventory*). Both these reports were informed by feedback from stakeholders meetings and the deliberations of the Competition Reference Group. The preparation of the *Economic Mapping* and the *Legislative Inventory* also benefited from interviews with various stakeholders in the economy. In effect, a process of extensive consultation with stakeholders was used to test the formulation of the NCP.

The Government of Lesotho, and the Ministry of Trade, Industry, Cooperatives and Marketing, remains committed to genuine consultations, as illustrated by the continuation of the Competition Reference Group, which will continue to advise and assist the Ministry in the development and preparation of the Competition Law to give effect to the NCP. In addition, the Government will ensure that wider stakeholder consultations continue as implementation occurs.

In formulating the NCP, the Government has applied the flexibility as embodied in economic theory and the United Nations Conference on Trade and Development (UNCTAD) Model Law and internationally accepted standards and principles to take account of the unique circumstances of the Lesotho economy. Lessons have also been drawn from the experience in competition law enforcement in neighbouring and other SACU member countries. Having understood the pivotal role of competition policy in the economy, the Government is committed to ensuring the viability of Basotho economic participation while adhering to the social obligations of a developing nation. In addition, due cognisance has also been given to obligations arising from international agreements and treaties. The NCP constitutes an important tool, which in the long term will enhance the competitiveness of domestic firms, foster sustainable economic development and uplift Lesotho consumers.

The financial and substantive contribution by UNCTAD from the initial stage of the preparation of the background papers until the final stages of the NCP formulation is gratefully acknowledged. Getting interministerial teams to work can be difficult and my gratitude goes to the Competition Reference Group which overcame such difficulty and successfully coordinated the process of the development of this policy.

Honourable Mpho Malie

Minister of Trade and Industry, Cooperatives and Marketing

Date: January 2007.

DEFINITIONS

Abuse of Dominance: Abuse of dominance occurs when a dominant firm or group of firms, substantially prevents or lessens competition, by engaging in acts that aim to eliminate or discipline competitors, or simply to stop potential competitors from entering the market in question.

Anti-competitive Practices: behaviour with the effect of restricting or preventing competition intended to enrich those who engage in it. Anti-competitive practices are classified into three categories: (i) collusive arrangements, agreements or understandings, which can be further subdivided into two groups i.e. *horizontal* (between competitors, sometimes referred to as cartelization) e.g. price fixing, bid rigging and allocation of market shares amongst firms, or *vertical* (between firms active at different stages in the production or marketing chain of a product) e.g. resale price maintenance and franchising; (ii) abuse of dominance e.g. predatory pricing, refusal to supply, restricting access to an essential facility, exclusive dealing and tied selling; and (iii) mergers and acquisitions.

Cartel: An agreement among two or more firms in the same industry with the aim to earn higher profits by restricting competition. Cartel members may co-operate on matters such as raising or fixing prices, carving up the market either by way of allocating customers or territories, restricting industry output and bid-rigging.

Competition Advocacy: Competition advocacy is a complement to competition law enforcement. It encompasses those activities aimed at promoting competitive market principles in other policy and regulatory processes. It refers to the participation of the body responsible for competition law enforcement in the formulation of other public policies with the view to ensuring coherence and consistency of these policies with competition culture and goals. Competition advocacy extends to awareness building activities for consumers and private economic actors.

Competition: competition characterises the independent and uncoordinated mechanism that organizes the actions of rival buyers and sellers in a market as they strive to achieve their business objectives. Under such conditions of competitive rivalry, the resulting pattern of supply and demand determines what shall be produced, in what quantities, and at what price.

Competition Policy: The full range of policy measures that have a bearing on competition in an economy, including the application of law dealing with anti-competitive practices. More narrowly, it refers to the design and implementation of laws adopted by a country to prevent or remedy restrictive business practices by enterprises, whether private or public. **Competitiveness**, which is distinct from and should not be confused with competition, is the capability of firms to compete in markets. Competition can be a catalyst for competitiveness and *visa versa*.

Competition Law: Legislation enacted to administer and enforce the objectives of competition policy.

Competitive Fringe: A large number of firms within an industry, each having a negligible market shares. The combined market share of the competitive fringe is often substantially less than that of the dominant firm.

Concentration: The relationship between the number of sellers in an industry and the output of that industry. An industry is concentrated if very few firms account for a large proportion of its output.

Dominance: A position of market leadership brought about by having a market share that is substantially above that of competitors and the ability to behave independently of competitors and consumers. Dominance alone is not considered anti-competitive unless it is abused. The concept of dominance is often used synonymously with market power.

Economic Efficiency: arises when inputs in a production process are combined such that a given scale of output is achieved at the lowest possible cost. For example, if a firm can maintain or increase existing output levels at lower cost it experiences an increase in efficiency. Competition stimulates firm to search for efficiency.

Market Power: The ability of a firm or firms to either raise, drop and maintain prices above or below the level that would prevail under conditions of competition resulting in a restriction in the quantity of a good or service on the market.

Per se Rule: A legal precedent that stipulates that an action is intrinsically illegal regardless of any defence or justification proffered. The *per se* approach is the opposite of the rule of reason approach.

Rule of Reason: a legal approach used by competition authorities whereby an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anti-competitive effects in order to decide whether or not the practice should be prohibited. The rule of reason approach is the opposite of the *per se* approach. Such a case does not constitute an exemption. Approval is often conditional.

Sector Regulator: An agency with the mandate to regulate a specific sector of the economy.

Merger: When two or more firms join to become one entity. Also termed concentrations, mergers are classified into three types: (i) *horizontal merger*, which is a merger between firms that produce and sell the same products i.e. a merger between competing firms; (ii) *vertical merger*, which involves a merger between firms operating at different stages of production e.g. a bakery merging with its supplier of flour; and (iii) *conglomerate merger*, whereby firms in unrelated business e.g. a food processing firm and a mining firm fuse. Mergers can be motivated by a variety of reasons, including to increase economic efficiency, to acquire market power, to diversify, to expand into different geographic markets, to pursue financial and research and development synergies etc.

INTRODUCTION

The Rationale

1. Competitive markets provide the best means of ensuring that the economy's resources are put to their best use. Where markets work well, they provide strong incentives for good performance - encouraging firms to improve productivity, to reduce prices and to innovate; whilst rewarding consumers with lower prices, higher quality, and wider choice. By encouraging efficiency, competition in the domestic market - whether amongst domestic firms or between them and firms outside Lesotho's borders - also contributes to our international competitiveness.
2. Deregulation, import liberalization, a liberal investment regime and in certain cases privatization, are among other policy instruments that can often be a source of competition. .
3. Where markets operate freely and effectively, competition can be expected to bring all the benefits mentioned above. However, markets can and do fail. Competition policy is therefore used to ensure the efficient workings of markets and to avoid such market failures.
4. Many Basotho feel that they have not benefited from the market-friendly reforms that have so far been instituted. Many also believe that the prices of goods in Lesotho are higher than equivalent goods in other countries, particularly in South Africa. This might be due to a variety of reasons, which may be related to Lesotho's size, system of taxation or other structural constraints. However, higher prices may also be due to anti-competitive behaviour, which competition authorities should tackle.
5. It can be expected that the market-based policies introduced by the structural adjustment programmes will have resulted in an increase in competition-enhancing new entry in the Lesotho economy. However, it is also often the case that after some time, and in response to increased competition from liberalization and deregulation that industries undergo a certain degree of consolidation and become increasingly concentrated over time. That subsequent concentration may signify a softening of competition and underlines the need for the frequent monitoring of markets and the crucial role of competition enforcement measures. Government is therefore concerned about the likelihood of private anticompetitive practices emerging and undermining its reform objectives.
7. It is important to note that anti-competitive practices may emanate from Basotho firms and foreign firms, and indeed public enterprises and regulatory sources. Moreover, industrial policy initiatives and investment policy incentives can often inadvertently create anti-competitive effects. Consequently, it will be necessary to apply competition rules universally to all commercial activity, including assessing existing and future regulatory initiatives.

8. Undeniably, Lesotho's small size and its emergent product and services market and the constraints imposed by its development status may render the economy particularly vulnerable to anti-competitive practices because domestic firms may frequently be too small relative to the efficient scale of most production and thus encourage rationalization in the form of mergers. Consequently, domestic market conditions are thought to tend to favour oligopolistic and monopolistic competition. As a result, there is a strong potential for abuse of dominant position (encompassing a variety of anti-competitive practices), whether by local or foreign actors. The risks of coordination among firms are likely accentuated by the odds that personal and business interactions on an ongoing basis between a small group of top managers and investors create incentives for the preservation of traditional business spheres. Since public expenditure still plays a significant role in the economy and also happens to be one of the instruments for pursuing the national industrialization strategy, these circumstances make it all the more important for policies to assure the conditions for the growth of a vibrant competitive fringe in the economy.

9. An adequate and coherent legislative and policy framework is thus necessary in order to protect consumers, and firms, from anti-competitive practices.

10. Competition policy, backed by a competition law, will also help Lesotho to deal with competition problems related to globalisation. There is a growing international perception that as governments have eliminated the barriers to trade through liberalisation, private business practices have increased and are diluting the benefits of liberalisation. Indeed, by adopting a formal competition policy and enacting competition legislation, Lesotho will join the ranks of many developed countries and an increasing number of developing countries who are fighting this encroachment of anticompetitive practices. Competition policy is necessary to ensure that the economic gains and opportunities afforded by freer international trade are maintained and provide important economic benefits to consumers as well as to industry.

11. Competition policy and law provide the legal basis for undistorted competition and thus contribute to transparency and predictability in domestic markets. Competition policy can thus be a strategic tool for economic development because it not only creates an environment that is attractive to both domestic and foreign investment but also ensures that the benefits from foreign direct investment are maximised. It achieves this objective by assuring that foreign investors' economic activity is governed by a principles-based and internationally acceptable regulatory mechanism, which specifies what is considered to be acceptable corporate behaviour. Additionally, competition policy is essential for ensuring the realisation of the benefits of the ongoing privatisation and deregulation programme, particularly in the light of the challenges posed by the privatisation of monopoly public enterprises and the enduring constraints posed by the small size of economy.

STATUS OF COMPETITION IN THE LESOTHO ECONOMY

12. Lesotho is generally regarded as having an open economy. The degree of openness in the Lesotho economy is influenced by its most striking feature, its geo-political location. It is totally surrounded and heavily dependent on its neighbour South Africa, both as the source of imports and as a source of livelihood for Lesotho's surplus labour (albeit the latter has diminished in importance in recent decades). Lesotho is also a member of the Southern African Customs Union (SACU), which obliges the free movement of goods between it and its neighbour and the other member countries of the Union. Moreover, under the Southern African Development Community (SADC) Trade Protocol signed in 1996, Lesotho has been compelled to remove import restrictions over the last 8 years.

13. It can be argued that the free entry of imports into the Lesotho economy enhances competition and consumer welfare because imports impose price discipline on local economic actors and offer more choices to consumers. The fact remains however that domestic conditions favour concentrated market structures in most sectors of the economy. Many sectors exhibit a structure in which there is a dominant firm (or group of firms) and a competitive fringe. South African firms (or their affiliates) play an important role in the services, wholesale, retail and manufacturing sectors.

14. Indeed, the *Economic Mapping* confirms that levels of concentration at the sectoral level are high. Concentrations were found to be particularly high in the financial intermediation (83.5 per cent), telecommunications (98 per cent) and manufacturing (food and beverages 83.5 per cent; apparel 51 per cent and other 91.5 per cent) sectors.¹ There were also reports of alleged abuse of dominance in the commercial banking sub-sector and other issues of concern with respect to consumer protection. The wholesale and retail sector has substantially lower concentration levels (26 per cent) owing to the significant presence of small and medium-sized players in this segment of the market; however vertical restraints in retail trade and distribution are cause for concern. It will be the responsibility of the Competition Directorate to investigate specific cases of anti-competitive practices and other business arrangements that may arise from these market structures, e.g. resale price maintenance, complex vertical agreements among suppliers and distributors, exclusive dealing and abuse of intellectual property rights. In addition, mergers and acquisitions are taking place without proper assessment with regard to their implications for market structure and competition.

15. Besides the economic reforms that have already been mentioned, Lesotho has embarked on other significant initiatives. Notable among these is privatisation, which has a bearing on competition and necessitates competition policy and competition law; particularly in the light of the size of the Lesotho economy where there is a need to guard against the risk of private monopolies replacing public monopolies. In view of the Governments renewed focus on efficiency and strengthening competitiveness, it is also necessary to focus attention on putting in place adequate regulation in this context.

¹ 4-firm concentration ratios for the period 2001-2002 except for telecommunications, which is a 3-firm concentration ratio. *Economic Mapping* Table 7.

16. Furthermore, the *Economic Mapping* suggests that existing industrial policy strategies such as the reservations policy, licensing policies and tax incentives may impose undue restrictions on competition and foster inefficiencies in the local economy. It is desirable that regulatory measures and all other public policy have a least restrictive effect on competition.

17. Public procurement accounts for up to 20 per cent of GDP in Lesotho and is a key industrial policy instrument whereby Government gives preferential treatment to indigenous small and medium sized companies in order to promote private sector deepening and inject a redistributive thrust to economic development. Public procurement is an important and often lucrative source of contracts for the private sector in any economy. To be sure, the management of public procurement is an issue even at the multilateral level, where it is a subject of heated debate and negotiations centred on market access. While there is no concrete evidence of collusive tendering in the Lesotho economy, according to the *Economic Mapping*, there is ample anecdotal evidence that suggests that bid rigging may be prevalent and may warrant investigation. Lesotho is particularly vulnerable because it is small. This means that fewer overseas (including those from neighbouring SACU countries) suppliers or service providers may find the quantities to be supplied profitable. In addition, domestic supply capacity is still weak such that competition from this quarter is negligible when confronted with giants from neighbouring South Africa. It is therefore desirable to have an effective competition policy and law to investigate and counter collusive tendering.

The Status of Competition in the Lesotho Economy

The Lesotho economy exhibits monopolistic and oligopolistic competition in a number of sectors. For example:

1. Average sector concentration is relatively high with financial intermediation and the telecommunications being the most concentrated sectors;
2. Some Government policies and regulations constitute barriers to competition and are a constraint on firm efficiency, particularly smaller firms;
3. Public procurement may be open to collusive practices between local and foreign firms; and
4. Competition from imports and foreign investment originates mainly from South Africa

18. As an open economy, Lesotho is vulnerable to cross-border anti-competitive practices that escape national control. SACU member states are responding to these threats by considering regional cooperation mechanisms for the effective application of national competition laws. On her part, by enacting and enforcing a national competition law, Lesotho will also embark on fulfilling her obligations under SACU articles 41 and 42. Likewise, putting in place a domestic competition enforcement system will assure effective participation by Lesotho in other regional initiatives on competition policy at

the SADC level, as well as at the multilateral level, contributing to coherent and balanced policy choices in the overall interest of Lesotho's development.

THE MAIN OBJECTIVES OF COMPETITION POLICY

19. The primary objectives of the Competition Policy are to protect and maintain the process of competition in the Lesotho economy in order to achieve an efficient use of resources and safeguard consumer welfare by restraining anti-competitive and unfair trade practices. The Government of Lesotho views competition not as an end in itself, but ultimately a means to development; development that is inclusive. In this context the Competition Policy also has as secondary objectives the fostering of greater participation in the national economy by Basotho nationals, and promoting SMEE growth and employment.

20. The socio-political values embodied in the concept of inclusive development and the current status of development in the country obligates the Competition Policy to weigh the primary objective of economic efficiency against that of fostering greater ownership of the economy by Basotho nationals. It is conceivable that conflicts will arise between achieving economic efficiency and inclusiveness. It will be necessary to seek an appropriate balance between these two policy objectives taking care not to undermine long-term economic development.

Objectives of Lesotho's Competition Policy

The objectives of the Competition Policy are:

1. Enhance economic efficiency and promote consumer welfare
2. Prevent and redress anti-competitive practices, including the regulation of mergers
3. Prevent and redress unfair trade practices
4. Support development objectives such as increased economic participation by Basotho, SMEE development and employment creation without undue prejudice to overall efficiency and competitiveness objectives;
5. Complement other Government policies, including privatisation and deregulation; and
6. Cultivate a competition culture through competition advocacy.

THE COMPETITION POLICY FRAMEWORK

Growth, Efficiency, Development and Inclusiveness

21. The competition policy is grounded in the overarching context of Vision 2020 and the Poverty Reduction Strategy Paper (PRSP), which provide the overall perspective for

Government policies and interventions in virtually all aspects of the economy including economic, social and political. Particularly evident in both the Vision 2020 and the PRSP is the social contract that has human wellbeing as its main thrust and calls for confronting the challenges of employment creation, sustainable economic growth, public sector reform and democratisation.

22. Since 1988, beginning with the launch of its first structural adjustment programme that sought to increase the efficiency of the public sector and improve the environment for private-sector growth through tax reform and streamlined investment incentives, Lesotho continues to strive to strengthen the functioning of domestic markets and the NCP is firmly located in the context of Governments determined support of an efficient private sector that can compete locally, regionally and globally. Lesotho embarked on a gradual transition to a private enterprise-led economy and in the furtherance of this objective a privatisation programme has been adopted with the first sales of public enterprises carried out in 1997. Among the objectives of the privatisation programme is to broaden the direct participation of the population in the control and ownership of productive assets and to increase productive efficiency and growth. In this context, the time is ripe to review whether the opening up of markets to competition, including in the context of liberalisation and deregulation and investment and industrial policy reforms, has resulted in increased efficiency and promoted consumer welfare.

23. Competition policy is a necessary and complementary Government initiative to facilitate private sector deepening and foster coherence and consistency in the overall reform strategy. In the long term, the principal factors that will enhance Lesotho's competitiveness are growth in firm productivity and efficiency, which in turn depend on the existence of a dynamic private sector operating under conditions of competition. Such conditions can often be lacking in an economy undergoing reform and this will constrain the ability of an emerging private sector to compete in the new environment. It is the role of the Government to facilitate and promote the development of competitive advantage by local firms by providing the necessary environment for the growth of a competition culture in the economy.

24. Institutional and regulatory restraints, in addition to private ones, can have a significant distortionary impact on competition. A comprehensive competition policy must take into account all Government policies and regulations that have an effect on competition, in any and all sectors of the economy. Laws and regulations can bring about distortions to competition and indeed the *Legislative Inventory* identifies a number of opportunities for Lesotho to reduce or rationalise cumbersome regulatory procedures to provide greater freedom and scope for the private sector. Specifically, Annex 2 of the *Legislative Inventory* lists a number of provisions contained in 14 different pieces of legislation ranging from licensing regulations to acts establishing and governing the activities of sector specific regulators that will require amendment or repeal in order to be consistent with the NCP. These pieces of legislation include the Price Control Act, the Hotels and Restaurants Act, the Export and Import Control Act, Lesotho Liquor Commission Repeal Order, the Agricultural Marketing Act, the Trading Enterprises Order and the Trading Enterprises Regulations, the body of laws governing professions

(e.g. Legal Practitioners Act), the Aviation Act, Lesotho Water and Sewerage Authority Order, Lesotho Telecommunications Authority Act (and regulations), the Lesotho Electricity Authority Act, the Financial Institutions Act and the Industrial Property Order. Such legal reforms would be complementary to competition enforcement activities and would not only enhance the benefits of competition but would also lead to a more equitable distribution of these benefits among private economic actors.

25. The Government of Lesotho's commitment to a competitive domestic economy is premised on the following principles:

- Competition fuels competitiveness and dynamism;
- The universal and balanced application of competition rules engenders healthy competition and leads to efficiency in the allocation of resources;
- Competition policy is not inconsistent with and provides an appropriate, credible and transparent assessment process by which to evaluate anti-competitive conduct that might nevertheless be in the public interest as embodied in regulatory initiatives and socio-economic developmental goals;
- and
- Ongoing economic reforms, changing international and regional trade and investment conditions demand a competition policy that is consistent with and supports the general thrust of Lesotho's developmental aspirations.

THE SCOPE OF APPLICATION OF THE COMPETITION POLICY AND LAW

26. Competition Policy will apply to all market transactions, relating to all manner of goods and services and all entities engaged in commercial transactions regardless of their ownership. In this context, the commercial activities of publicly owned enterprises fall under the ambit of the Competition Policy.

27. The two broad principles that underlie the Policy and the law are:

- i) Any behaviour which has the purpose or effect of lessening competition is subject to scrutiny
- ii) Specific anti-competitive behaviour can be permitted in the "public interest" where public interest is defined as the incidence where the total welfare gains to society arising from an anti-competitive practice outweigh the costs from that same practice

28. The evocation of the public interest argument will thus always involve an explicit case-by-case assessment and evaluation of the overall public benefit of an anti-competitive practice or conduct.

29. It is conceivable that an activity carried out or conducted by an enterprise or sector designated as strategic by virtue of its impact on the economy or type of product or

service, may merit exemption from the provisions of competition policy and law. Where such cases arise, blanket exemptions will be avoided. Exemptions will apply to specific activities and be subject to periodic review. Exemptions are not intended to derogate from competition policy oversight. It is recommended that the decision to exempt an activity or conduct rest with the Minister, subject to Cabinet approval. It is desirable that the Competition Directorate assesses all potential exemptions. It is recommended that the Competition Directorate have the power to independently identify and submit requests for exemptions to the Minister and to evaluate applications for exemptions submitted to the Minister.

GUIDING PRINCIPLES AND GENERAL APPROACH

30. The policy is concerned with defending competition in the market in order to increase economic welfare; it is not concerned with defending competitors. It is also not a price control measure as prevailing market conditions will be free to determine prices.

31. The Competition Policy accommodates social concerns because competition is relevant only to the extent to which it meets socially desirable objectives. It is recognised that whenever competition policy is used for purposes other than economic efficiency the risks of achieving an unsatisfactory solution to a competition problem are high. However, although the inclusion of socio-political objectives may jeopardise the pursuit of economic efficiency, it is also true that their inclusion will allow for a wider range of interest groups to claim ownership of the strategy. Moreover, the inclusion of socio-political objectives gives the Competition Policy the legitimacy and popular support needed for the development of a competition culture.

32. It will be important to first consider whether the same objectives might be attained through other public policies and to ensure that the use of competition policy in this manner does not introduce additional distortions in the market (see also paragraph 29).

33. The main types of anti-competitive conduct to be scrutinised by competition policy in Lesotho include:

- i) Collusive agreements and exclusionary practices, including hard core cartels;
- ii) Abuse of dominant position for the purpose of eliminating or lessening competition, including collective dominance;
- iii) Vertical and horizontal restraints to competition;
and
- iv) Mergers and acquisitions, including joint ventures.

34. Conduct that may substantially lessen competition can, subject to individual merit, be permitted by a once-off authorisation. Authorisation is a mechanism that

provides immunity from legal proceedings for a certain arrangement or conduct that may otherwise contravene competition law. Authorisation can be granted on the basis of public interest.

Approaches to horizontal and vertical restraints to competition

35. The *per se* illegality rule and the **rule of reason** are two important approaches used in the enforcement of competition policy and law. The Competition Policy and Law of Lesotho will apply the *per se* approach to all anti-competitive market conduct for which there are no pro-competitive benefits and the rule of reason approach for conduct which, depending on the circumstances of each case, may have redeeming features.

36. Given the Lesotho economy's predisposition to monopolistic and oligopolistic competition, particular care needs be taken when enforcing competition policy to strike the correct balance between economies of scale and lower concentration levels. In addition, market power solutions could not overly rely on structural remedies and conduct regulation will be the favoured approach. Dominance in and of itself is not an offence, however, abuses of dominant market position will be vigorously prosecuted. Since the natural conditions in a small economy such as Lesotho facilitate collusion among oligopolists, prohibiting collusion is a central regulatory task of the Competition Policy and Law. In this context, practices such as cartelisation, price-fixing and bid rigging will be prohibited and will attract high penalties. However, it is recognised that in the context of a small economy, some agreements that restrict competition may have pro-competitive benefits (including cooperative arrangements and joint ventures) and as such a rule that categorically prohibits all agreements is not desirable. On the other hand, it is recommended that the Competition Law allow enough flexibility for oligopolistic markets to be investigated whenever the market structure or the conduct of oligopolists prevents or restrict competition, whether or not this amounts to an abuse of dominance. Similarly, joint ventures, including among conglomerates, should be analysed according to their likely long-term dampening effect on competition. Joint ventures of a lasting nature, which perpetuate a situation of limited competition between the parties of the agreement, should be subject to the same rules that apply to mergers.

37. It is not the intention of the Competition Policy to prevent domestic firms from overcoming competitive disadvantages that result from limited domestic demand. Hence, the recommended merger approach is one that is flexible and gives adequate consideration to contestability considerations and does not focus on structural considerations alone. However, it is recognised that the social impact of some mergers may be large and in such cases economic efficiency may not be primary consideration. In such cases, it is recommended that decisions on public interest grounds that go against the economic efficiency benefits of mergers be mandated to the Minister, subject to Cabinet approval.

38. In the interest of safeguarding small firms' ability to compete in the economy, it is the aim of the Competition Policy and Law to address disadvantages faced by smaller firms with regard to access to information and weaker bargaining position in their

competition and dealings with larger firms as well as penalise large firms for unconscionable behaviour through the promotion of mandatory or voluntary industry codes of conduct.

Guiding Principles

- i) The balanced adoption of *per se* and **rule of reason** approaches;
- ii) Appropriate sanctions and remedies to redress anti-competitive practices;
- iii) Appropriate safeguards to ensure small firms ability to compete; and
- iv) Timely processing of cases, procedural fairness and respect for due process and confidentiality.

39. It is the aim of the Competition Policy that enforcement mechanisms will take account of the necessity for a cost-effective and timely review of all competition cases with proper attention accorded to procedural fairness and respect for due process and confidentiality.

STRATEGIC POLICY CONSIDERATIONS

40. The following strategic policy considerations are critical for the success of the Competition Policy and Law.

(i) Competition policy and other government policies

41. Since the objective of Competition Policy is to guarantee current and potential competition across all sectors of the economy it follows that there is an extensive interface between competition policy and other public policies. The nature of this interface may be such that the objectives of other public policies are complementary or indeed are in conflict to competition policy. The supremacy of one policy goal over another is determined by prevailing cultural and societal values and not by Competition Policy; however, it is important that Government maintain a non-intrusive and transparent policy framework, which has a neutral impact on competition in all sectors of the economy. In this context, consistency and coherence between other broader development policy measures and Competition Policy is paramount.

42. As a way to ensure across the board policy consistency and coherence, all parts of government will have the obligation to adopt an approach to policy-making that is least restrictive of competition. In this context, what is proposed is a holistic approach that would give statutory powers to the proposed Competition Directorate to make representations by way of providing opinions or advocate for competition in policy making processes across Government. In order to facilitate this course of action it is also recommended that the necessary institutional mechanisms, such as inter-Government policy forum, be established.

(ii) Awareness-building and growing a competition culture

43. The shift to a market economy is a long process, which necessitates cultural change. Consequently, a constituency for competition has to be nurtured and the culture of competition inculcated in the population. There is a general lack of awareness in the general public, including within the private sector and in Government generally, of issues relating to competition and the benefits of competition policy. It is proposed that the holistic approach that gives statutory powers to the proposed Competition Directorate to make representations by way of providing opinions or advocate for competition in policy making processes across Government be extended to encompass a competition advocacy function targeting the general public and business. The proposed Competition Directorate should also develop a close relationship with the local university and other relevant academic institutions and put in place a variety of programmes relating to competition economics and law in order to develop local knowledge and skills in this area.

44. In line with the objective of growing a constituency for competition in the population and ensuring trust in the enforcement mechanism, it will be important that competition enforcement activities and processes take due accord for the need for the speedy and cost-effective resolution of cases and the need to adhere to the principles of natural justice.

(iii) Competition policy and sector-specific regulation

45. In principle, there is no conflict between the scope of Competition Policy as outlined in paragraphs 26-29 and sector specific regulation. Indeed, although a sector-specific regulator and a competition enforcement body may have different legislative mandates, employ different approaches and have different perspectives, play complementary roles in fostering competitive markets and safeguarding consumer welfare. However, sector-specific regulation serves a number of other legitimate policy objectives that it is necessary to ensure are pursued in a manner least restrictive to competition. What is proposed is a four-prong policy approach to address the interface with sector-specific regulations:

- Empower the proposed Competition Directorate to provide policy advice and make representations before sector regulators;
- Impose an obligation on sector regulators to make policy decisions that are least restrictive of competition;
- Assign statutory power to the proposed Competition Directorate to determine the conditions for regulated conduct to be exempt from competition policy and law; and
- Adopt a policy that any new proposal for regulation should include a competition impact analysis and a sunset clause (a clause providing a time frame for the regulation).

46. The Competition Policy recognises that there may be advantages in assigning sector-specific regulators competition competencies in sectors or industries characterised by complex technologies or having natural monopoly or other special elements. In such cases assigning concurrent jurisdiction on competition issues is the sensible approach. It is envisaged that this situation is pertinent in –

- i) the case of the mergers in the banking sector (for prudential reasons),
- ii) regulating access in the telecommunications, broadcasting and electricity sectors.

Apart from the specific competition issues mentioned above, the proposed Competition Directorate would have the sole competition competency on all other competition issues in these sectors. For all other sectors, the proposed Competition Directorate has sole competency on all issues pertaining to competition. However, the Competition Directorate will always consult the authority responsible for the regulation of water affairs when dealing with competition cases in the water sector. Further, the Directorate shall establish formal working relationship with the Procurement Policy and Advice Division of the Ministry of Finance and Development Planning and other sector regulators.

47. In this context, it is necessary to resolve the question of the "division of labour" between the proposed Competition Directorate and the relevant sector-specific regulator for the sectors and industries mentioned. It is proposed to include a specific provision in the competition legislation specifying concurrent jurisdiction and directing each of the sector regulators specified and the proposed Competition Directorate to establish Memoranda of Agreement on the division of labour within 60 days of the establishment of the proposed Competition Directorate, failing which the Minister has the power to mandate a division of labour. The time limits built into this process are necessary in order not to undermine confidence in the new competition legislation and in order to minimise uncertainty, and to curtail forum shopping and mischievous litigation.

48. In order to facilitate close cooperation and policy consistency and coherence in the overall regulatory regime, it is also recommended that the necessary institutional mechanisms, such as a regulator's policy forum, be established.

(iv) Structural reform of public monopolies

49. Allowing private sector participation in a country's important sectors is creating increasing opportunities and promoting competition. However, in cases of public and natural monopolies, the economy remains susceptible to market failures. Indeed, in many countries privatization of public monopolies has often been accompanied by the creation of new sector/industry-specific regulators in order to ensure the success of market reforms. It is proposed to impose an obligation on the Privatisation Unit of the Ministry of Finance to request an assessment of the merits of separating any natural monopoly elements from potentially competitive elements of the public monopoly being considered

for privatisation before the entity is privatised in order to take into account any competition issues that will need to be addressed in the privatisation.

(v) Competition policy and privatisation

50. In addition to the issues covered by paragraph 49, which pertain to pre-emptive structural measures to unbundle state-owned entities before they are sold off, the question of incentives to attract the highest possible bid for public assets being privatised has to be resolved. Bearing in mind that privatisation is intended to enhance competition, it is important that markets remain contestable and that such incentives do not foreclose the industry or sector to potential entrants and open the door for the establishment of a private monopoly. It is proposed that the proposed Competition Directorate have statutory oversight over incentives relating to the granting of exclusivity periods and exemptions from competition policy and law, and that such incentives include a competition impact analysis and a sunset clause. It is proposed that the Privatisation Unit be obligated to seek guidance and clearance from the proposed Competition Directorate on such matters before approaching or confirming incentives to potential investors.

(vi) Competition Policy and intellectual property rights

51. Competition policy accepts the legitimacy of intellectual property rights (IPRs). However, tensions do arise when the exercise of IPRs amounts to anticompetitive behaviour that goes beyond what is contemplated in those rights. Indeed, granting of exclusive or monopoly rights to intellectual property holders confers dominance on the rights holder and by the same token gives them the possibility to wield this power in an anticompetitive way. For instance, firms can accomplish anti-competitive goals by using their IPRs to facilitate tied selling, exclusive dealing arrangements, the allocation of markets, the restricting of imports and refusals to license. IPRs have given rise to numerous competition problems in many jurisdictions and it is important to take into account the need for control of the abuse of IPRs. Consequently, the scope of the proposed competition law is fully expected to capture potential abuses of IPRs in its treatment of horizontal and vertical anti-competitive practices. Further, and in this context, as recommended by the *Legislative Inventory* and the *Economic Mapping*, Section 36 (8) of the Industrial Property Order 1989, which catalogues anti-competitive abuses of intellectual property rights, should be incorporated into the proposed competition law and the control of such practices be the sole responsibility of the competition authority (see also paragraph 55).

(vii) Mergers and acquisitions

52. The proposed approach is that mergers, in general, are positive phenomena that can serve the public interest. However, some mergers have the potential to seriously harm competition because of the attendant risks brought by increased concentration, such that, a case-by-case analysis of the potential efficiencies in each specific market setting is desirable and an optimal balance between the merger's benefits and detriments ascertained. It will be important to take into account the legal and regulatory

environment in which mergers take place, such as stock exchange regulations and practices, bankruptcy legislation etc. In this context, complementary legislative reforms with respect these and other legislation affecting firm entry and exit in the economy should be considered. (See also paragraphs 36-37 and 46.)

(viii) Micro, small and medium-sized enterprises (SMMEs)

53. The activities of small-scale enterprises are unlikely going to warrant the attention and prosecution under competition policy and law because their scale of operation is such that their activities have negligible, if any, impact on competition. However, illegal practices subject to *per se* prohibitions in the competition law (such as fixing of prices and bid rigging) shall equally apply to this category of enterprises. An explicit exemption from the application of competition policy and law for this category of enterprises is neither necessary nor envisaged. (See also paragraph 38).

(ix) E-commerce and the modern economy

54. It would be prudent that the enforcement practices, powers and procedures of the proposed Competition Directorate are broadly defined to encompass transactions of goods and services over the Internet, through telemarketing and other business models of the modern economy. In this context, for example, it is desirable that as part of their search powers, enforcement officials have adequate powers to conduct computer searches and obtain records of e-mail messages etc. including in cases where the server is located outside Lesotho borders. Similarly, it would be advisable for the procedural provisions of the Competition Law to address the sharing of information with Lesotho and foreign law enforcement agencies both within SACU and abroad, as well as address issues of confidentiality.

(x) Consumer protection and unfair trade practices

55. Work is already under way to formulate and promulgate consumer protection policy and legislation. There is a recognised advantage in keeping the basic competition statute separate from that governing consumer protection law. There are, however, cost advantages and other gains that can be derived from the synergies achieved through the enforcement of competition and consumer protection by a single enforcement agency. Similarly, synergies can also be reaped in relation to having separate unfair trade practices legislation enforced by the competition enforcement body (e.g. section 36 and Part VI of the Industrial Proper Order No. 5 of 1989). It is envisaged that the proposed Competition Directorate shall have additional enforcement responsibilities encompassing consumer protection and unfair trade practices. Notwithstanding the potential synergies and economies that have been mentioned, it will be necessary to ensure that competition enforcement activities are not compromised. Being more individual in nature and in the context of a developing country, consumer protection and redress cases are typically numerous and time consuming. It will be necessary to adequately staff and fund the Competition Directorate in line with the additional responsibility for consumer

protection. Bearing in mind that consumer protection legislation (which is concerned with dishonesty, misrepresentations and information asymmetries in dealings between traders and individual consumers) is conceptually different from competition law (which is concerned with the misuse of market power by economic players in competing in the market), should it initially not be possible to achieve the appropriate staffing and funding levels we recommend the Competition Directorate focus only on consumer protection and unfair trade practices that have an impact on competition, or affect a large number of consumers. Consequently the mandate on consumer protection and unfair trade practices would be interpreted to be confined to providing consumers with competitive prices and product choices, and safeguarding them against harm arising from anti-competitive practices and unfair trade practices which have an impact on competition. This interpretation would fall away once adequate funding and staff levels are attained.

(xi) Exemptions

56. See paragraph 29.

INSTITUTIONAL FRAMEWORK

57. It is proposed that a Competition Directorate be created in the Ministry of Trade, Industry, Cooperatives and Marketing within the parameters of a Competition Law. The primary responsibility of the Competition Directorate will be the enforcement of the Competition Law. The Competition Directorate, headed by an Executive Director and staffed by economists and lawyers (and other professions as may be necessary), will be responsible for the investigation (as a result of complaints received or at its own initiative) and resolution of competition cases, including the imposition of sanctions where necessary. The Executive Director of the Competition Directorate will report to a (part-time) Board of Competition Commissioners – a quasi-judicial body, which will constitute the adjudicative arm of competition enforcement. Competition cases that cannot be resolved through consent orders at the level of the Competition Directorate will be heard by the Board of Competition Commissioners. The High Court will rule on appeals to decisions by the Board of Commissioners. Independent private action on competition cases is envisaged through the proposed Commercial Court. The simplicity of the proposed enforcement system is intended to minimise the participation of the judiciary in order to ensure the speedy and cost effective resolution of competition cases. Such an enforcement system is also intended to compensate for any inadequacies in the existing courts system.

58. The Competition Directorate will be autonomous in its investigations and decision-making. In this context, no intervention in the form of ministerial discretion, save for that outlined in paragraphs, is envisaged in competition enforcement. Similarly, the Board of Commissioners will be autonomous in its decision-making, which decisions shall be binding on all parties in competition cases.

Main features of Competition Directorate

1. Autonomous and insulated from external and political interference;
2. Clear separation of investigations and adjudication functions;
3. Transparent administrative mechanisms and regulations;
4. Checks and balances by way of review of decisions by Board of Commissioners, rights of appeal to the High Court, and access to information on legal and economic interpretations of the Law;
5. Expeditious and transparent proceedings that safeguard sensitive business information;
6. Provisions for imposing significant penalties;
7. Pro-active advocacy functions.

59. The Competition directorate will be responsible for informing all stakeholders on the objectives and provisions of the Competition Law, and the legal and economic interpretations of the Law. In this context, the Competition Directorate will have the responsibility to develop detailed administrative rules and regulations to govern its enforcement activities.

60. The Directorate shall ensure that relevant staff members are provided with adequate training to enable them to discharge their duties efficiently; the Directorate shall also facilitate the development of a competition policy and law cadre in Lesotho; see paragraph 43 above.

60. The Competition Law will envisage an array of sanctions and remedies (including interim injunctions) that may be imposed as circumstances warrant. The Law will quickly become effective and enforcement activities will be rendered useless unless adequate powers to redress violations of Competition Law are put in place.

61. The enforcement of the Competition Law will require adequate resources. The status of the Competition Directorate as a department in the Ministry of Trade, Industry, Cooperatives and Marketing should not compromise the funding and autonomy of the Competition Directorate. In addition the Competition Directorate will have the power to charge fees for certain of the services it provides e.g. authorizations, advisory opinions and merger pre-notifications. See also paragraph 55.