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**Legislative Impact Assessment for Drafting Competition Bill**

# **Title of the proposal:**

Type of Legal Measure: **The National Competition Act of Bhutan**

Lead Ministry/Commission/Agency: **Competition and Consumer Affairs Authority, Ministry of Industry, Commerce and Employment**

Date of approval of Legislative Proposal:

Expected Date Of Adoption Day/Month/Year:

# **The background of the proposal:**

The presence of a healthy competition culture is a crucial element for achieving economic efficiency and maintaining a well-functioning economy. This culture drives the performance and efficiency of firms, leading to benefits such as lower prices, higher quality goods and services, increased innovation, and a wider range of choices for consumers. Additionally, it promotes allocative and productive efficiencies, stimulates innovation, and maximizes consumer welfare. By ensuring that resources are utilized effectively, competition also prevents the abuse of market power. The principles of the free market are essential for promoting allocative, productivity, and dynamic efficiency. Any efforts to impede these principles can result in a sub-optimal output and reduced consumer wellbeing.

Competitive markets provide level playing fields and opportunities to all competing firms, big or small, and allow free market entry and exit- new competent firms to enter, efficient firms to thrive and underperforming firms to exit.

On the contrary, anti-competitive behaviors and practices cause greater harm to the economy. The presence of monopolistic, oligopolistic, market cartels or dominant market positions results in higher prices, entry barriers, and artificial scarcity of goods or services, thereby undermining quality and limiting the choice for consumers.

Limited competition restricts opportunities for low-income entrepreneurs and investors to participate in business ventures, resulting in increased economic inequality and decreased innovation and growth. A robust competition policy is essential to encourage market competition, stimulate market activity and self-regulation, improve consumer welfare, and foster economic and inclusive development. Developing a culture of competition is reliant on the effective enforcement of competition laws and regulations within a supportive policy framework.

Competition policy and law are crucial because markets do not always self-regulate and may underperform. Anti-competitive practices by firms and inappropriate regulations are common causes of market failure, leading to reduced production levels and limited consumer choices. To address these concerns, government interventions through legislative, regulatory, and institutional reforms are necessary.

To this effect, a National Competition Policy (NCP) 2020 was endorsed with the following objectives to:

a. promote a market-based economy, driven by fair and healthy competition, with no entry barriers for new enterprises, prevent the abuse of market power by commercial monopolies and oligopolies;

b. enshrine competition as a guiding principle for all relevant policies and laws and to place a greater reliance on market forces to the extent feasible; and

c. promote and sustain competition in the market to enhance efficiency, innovation, and maximize consumer welfare; and

d. promote market self-regulation and dynamism

As much as the NCP intends to achieve its objectives, the policy is equally restrained by the limited authority the policy empowers in terms of:

1. Scope, legality, institutional set up and implementation as the provisions of the policy are supposedly non-binding and enforced through voluntary means.
2. The policy does not provide adequate power to effectively veto those laws/policies/rules that may be restrictive and anti-competitive.
3. The policy does not take in-depth account of the core issue of competition that has a serious bearing on market competition like;

3.1 Anti-competitive agreements – price fixing, horizontal & vertical agreement, cartel etc.

3.2 Abuse of dominance- market power, concentration, monopoly, etc.

3.3 Measures to address collusion, acquisition, mergers, amalgamation, etc

3.4 Penalties for anti-competitive practices.

Therefore, it is against this backdrop that a competition bill is found imperative to address the above shortcomings and enable the competition authority to effectively implement the laws governing market competition. The bill is expected to enhance the setting up of an effective institutional framework, and ensure that the government policies/laws conform to the basic principles of market competition.

In addition, the bill will be an important tool to address both structural and behavioral issues or market failure through the provisions of various interventive measures provided in the bill such as:

1. Competition Advocacy and Educational program

2. Institutional set up- power and functions of the enforcing agency

3. Measures to address anti-competitive behaviors like;

3.1 Anti-competitive agreements – price fixing, horizontal agreement, cartel etc,

3.2 Abuse of dominance- market power, concentration, monopoly etc.,

3.3 Collusion, acquisition, mergers, amalgamation etc.,

4. Penalties for anti-competitive behaviors

The policy and bill are expected to complement each other in creating a dynamic market that works for all.

# **Main objective of the proposal:**

The competition bill, in addition to the objectives of the policy shall help to strengthen and deliver following objectives:

1. Promote a market-based economy, driven by fair and healthy competition, with no entry barriers for new enterprises, prevent the abuse of market power by commercial monopolies and oligopolies.
2. Enshrine competition as a guiding principle for all relevant policies and laws and to place a greater reliance on market forces to the extent feasible.
3. Promote and sustain competition in the market to enhance efficiency, innovation, and maximize consumer welfare.
4. Promote market self-regulation and dynamism.
5. Prevent anti-competitive behaviors like abuse of dominance, mergers & acquisitions, cartels and other restrictive market behaviors.
6. Provide Institutional and regulatory framework to strengthen enforcement of the law.
7. Provide regulatory mechanisms and tools to tackle market failure and rent seeking behaviors of the firm and make interventions of the authority predictable and not arbitrary.
8. Improve economic efficiency and accelerate economic growth, productivity and investment.

# **Policy rationale for the proposal:**

Competition improves the efficiency and performance of the firms and businesses and benefits consumers through lower prices, better quality of goods and services, wider choice of goods and services, more innovation and accelerates economic growth, productivity and investment. On the contrary, insufficient market competition adversely affects economic efficiency, impacts consumer welfare, spurs anti-competitive practices and retards economic growth.

The presence of monopolistic, oligopolistic, market cartels or dominant market positions results in higher prices, entry barriers, and artificial scarcity of goods or services, thereby undermining quality and limiting the choice for consumers. Market failure results in a lower level of production and restricts consumer choices.

The National Competition Policy (NCP) 2020 was endorsed with the objectives mentioned above in section 3. However, the policy's effectiveness is limited since it only provides guiding principles, is voluntary, non-binding, and does not empower regulatory authorities to enforce competition in the market. The policy is also constrained by certain limitations mentioned in section 2.

Therefore, the competition bill is an impetus to address the above limitations, bring structural & behavioral changes and bring positive impact in the economy as follows:

1. Facilitate setting up the desired institutions or authorities with sufficient autonomy, resources, and authority to oversee overall competition matters in the country.
2. Provide regulatory frameworks, tools and mechanisms to tackle competition issues & market failure and empower competition authority to function in a predictable, efficient and transparent manner and take adequate and appropriate actions against the anti-competitive practices and behaviors in the market.
3. Facilitate the formulation of rules, regulations, standards and guidelines necessary to promote a market-based economy, driven by fair and healthy competition, with no entry barriers for new enterprises, and prevent the abuse of market power by commercial monopolies and oligopolies.
4. Facilitate to deal with competition issues broadly categorized under i) Monopoly or abuse of dominance; ii) Anti-competitive practices and behaviors and restrictive trade practices (market cartel & collusion, price and bid rigging); and iii) Regulation of mergers, acquisitions and takeovers.
5. Ensure that the government policies/laws conform to the basic principles of market competition.
6. Spur market competition, promote competition culture in all the sectors and establish competition regime in the economy.
7. Facilitate efficient market players to compete on a level playing field and create the same opportunities for all businesses.
8. Improved market & economic efficiency and accelerated innovation, productivity, investment and economic growth.
9. Enhanced consumer welfare through lower prices, better quality of goods and services, and wider choice of goods and services at competitive prices.
10. Makes an economy a better position to attract foreign direct investment and create a conducive climate for investment.
11. Promote market dynamism and self-regulation with free market entry and exit of the firms - new competent firms to enter, efficient firms to thrive and underperforming firms to exit.
12. General consumers will be protected from any unfair trade practices and anti-competitive practices & behaviors in the market.

# **Options to achieve the objectives:**

The National Competition Policy 2020 was adopted with the following objectives to promote healthy competition culture in the market:

1. promote a market-based economy, driven by fair and healthy competition, with no entry barriers for new enterprises, prevent the abuse of market power by commercial monopolies and oligopolies;
2. enshrine competition as a guiding principle for all relevant policies and laws and to place a greater reliance on market forces to the extent feasible;
3. promote and sustain competition in the market to enhance efficiency, innovation, and maximize consumer welfare; and
4. promote market self-regulation and dynamism

However, the policy document provides only guiding principles, is voluntary in nature, non-binding, and does not empower regulatory authorities to enforce competition in the market.

# **Impacts expected from the different options identified:**

## Creation of a new institution

The Competition Bill will not create a new institution since it is being implemented by the Competition and Consumer Affairs Authority, which is fully functional under the Ministry of Industry, Commerce and Employment. Therefore, there will be no additional administrative cost involved.

## Potential conflicts and inconsistencies between economic, social and environmental impacts that may lead to trade-offs and related policy decisions.

* + 1. **Legal Impact:**

One of the objectives of drafting the Competition Bill is to make the law predictable, realistic based on sound economic arguments, implementable, and harmonize with other laws and policies related to competition, if any. The law will only strengthen the institution that enforces it, provide adequate legal power to the authority for effective implementation and complement sectoral regulators under the aegis of frameworks of competition guiding principles.

* + 1. **Economic Impacts:**

The Competition law will improve economic efficiency, enhance business dynamism – rate of entry and exit in the market, support innovation, improve productivity through efficient resource allocation, accelerate economic growth and lead to inclusive growth. It will also provide a predictable and conducive environment for investment and attract foreign direct investment.

* + 1. **Social Impacts:**

The law will maximize consumer welfare through lower prices, better quality of goods and services, wider choice of goods and services, more innovation and accelerate economic growth, productivity and investment and improve the living standard of the people. The law will tackle the anti-competitive practices and behaviors in the market which will benefit the consumers.

## Impacts on a particular social group, economic sector (including size-class of enterprises) or region.

The drafting of the Competition Bill in its entirety will have a positive impact on social, economic and legal. The wide array of markets and sectors- primary, secondary and tertiary will benefit from fair market competition and level playing field and equal opportunities provided to businesses, irrespective of sizes. Further, the law will provide an enabling environment for all businesses, big or small, business participation and free market entry and exit which will lead to private sector development and inclusive growth.

## Powers and functions, decision makers, delegates and review of decisions

* + 1. **Clarity of power and function**

1. As per the constitutional provisions, a Bhutanese citizen shall have the right to practice any lawful trade, profession, or vocation; and require the State to encourage and foster private sector development through fair competition and by preventing commercial monopolies. To this, the Competition Bill will clearly specify the powers and functions of various authorities. The Act shall be under the custody of the Competition and Consumers Affairs Authority (CCAA), Ministry of Industry, Commerce and Employment (MoICE) and as a custodian, the CCAA shall exercise broad powers to render policy decisions in line with the Competition Bill.

The Consumer Protection Act (CPA) 2012 mandates to promote consumers safety and economic interest in the market place which complements the competition policy to enhance consumer welfare. Further, Section 4 (c) and (d) of the CPA 2012 under consumer rights, the consumers have right to fair, non-discriminatory and equitable treatment by businesses and have access to a variety of products, technologies and services at competitive prices.

The CCAA, as a lead agency, shall be responsible for the implementation of the Competition Bill. The power and function of the CCAA shall be responsible for review and monitoring of implementation of competition law and policy. The office should ensure compliance and enforcement of the principles of fair play by concerned organizations and business entities and maintain an effective and equitable balance between the interests of business and those of the public.

1. The powers and functions under the law shall not be concentrated under one authority; rather it shall spread across the various authorities and sectoral regulators depending on the nature of the work and mandates.
2. The proposed bill will provide legal status to CCAA and give various powers and functions to the ministry and the Authority to carry out its regulatory mandates effectively. While the ministry will have powers mostly related to policy issues and strategy, the Authority will have functions related to implementation of the provisions of the law and ministry’s decisions, where required.
   * 1. **Decision-makers and delegates**

For the purpose of effective implementation of the Competition Bill, decision making shall be categorized into two types. The ministry shall be vested with the power to make policy decisions while regulatory authority shall be empowered to make strategic and functional decisions related to the enforcement of the law. However, the decision of the ministry shall be based on the recommendation submitted by the CCAA, which will be in letter and spirit of the law.

* + 1. **Decision criteria**

The decision to be rendered by each of the authorities stated above shall not be discretionary or arbitrary. All decisions shall be guided by technical reasoning based on the legal provisions of the existing laws.

* + 1. **Review of decisions**

There shall be a process for the review of decisions rendered by a different authority, and any person who is aggrieved by the decisions rendered by the regulatory authority, shall seek redress from the ministry. Ultimately, an aggrieved person may refer the issues to the oversight agency outside the ministry, including filing a petition to the Court of law.

# **Justification of the Preferred Option**

* 1. **The recommended option and the rationale and reasons**

Competition law and policy play a crucial role in promoting market competition, enhancing consumer welfare, and contributing to economic development and inclusive growth. These measures are necessary to create a competition culture that relies on a supportive policy environment and effective implementation of laws.

Competition stimulates firms to improve their efficiency and performance, leading to lower prices, better quality goods and services, wider choices, and increased innovation. Since markets don't always self-regulate or perform optimally, competition policies are vital to tackle anti-competitive practices and inappropriate regulations that lead to market failure. The law is required to foster market dynamism and create a level playing field for all players to compete fairly and address any anti-competitive practices that hinder competition culture and economic efficiency.

The National Competition Policy 2020 was adopted to address underpinning competition issues, foster market competition and bring about market and economic efficiency that maximizes consumer welfare and contribute to economic growth, under the broad objectives mentioned above. Despite its potential to foster market competition, the policy's effectiveness is limited due to various constraints. These include its lack of legal authority to enforce, non-binding approach, and voluntary nature.

The current policy on market competition fails to adequately address the issue of competition, including abusive practices, mergers, cartels, and other restrictive behaviors. To address these shortcomings and improve the effective implementation of competition laws, a competition bill is proposed. This bill aims to establish an effective institutional and regulatory framework, ensure that government policies conform to market principles, and enable the competition authority to report directly to parliament on anti-competitive practices. By addressing both structural and behavioral issues, the proposed law will complement existing policies and help create a more dynamic market that benefits everyone.

* 1. **Have any accompanying measures to maximize positive impacts and minimize negative impacts been taken?**

The Competition and Consumer Affairs Authority being the nodal and regulatory authority to oversee the implementation of the competition law shall; in consultation with the relevant agencies; prescribe rules, regulations, standards and guidelines; where necessary and CCAA shall enforce such bye-laws for effective implementation of the law and maximize the intended positive impacts of the law and address the legal shortcomings.

# **Consistency with other Laws**

The **Information, Communications and Media Act of Bhutan 2018** has provisions to promote and regulate competition in ICT and media sectors, penalize and cancel business licenses for non-compliance and facilitate seeking remedies through BICMA and Competition and Consumer Affairs Authority. The relevant provisions related to competition in this Act are:

* Section 56 of the Act states that “a licensee shall not engage in any conduct which would have the effect or likely effect of obstructing fair competition...”
* Section 57 states that in the event of non-compliance by the licensee, the authority may direct the licensee to cease conduct which has, or may have, the effect of substantially lessening competition; cancel or suspend the license; direct the licensee to undertake remedial action; or impose a fine.
* Section 331 & 332 of the Act requires the ICT and Media facility to redress consumer complaints.
* Section 333 of the Act allows any person to file a complaint to the Competition and Consumer Affairs Authority and seek remedies.

The Act authorizes BICMA to regulate competition in ICT and Media sectors to channelize the practices of the ICT and Media facility or services into fair competition, and at the same time identifies the Competition and Consumer Affairs Authority as an apex body to deal with consumer complaints. The competition Act will only complement this Act, provide adequate regulatory policy and framework and strengthen the regulation of the competition in ICT and Media sector in a more coordinated and predictable manner.

Generally, sectoral regulators are required, supported by specific regulatory policy and framework, to regulate competition in specific sectors where there is natural monopoly and possibility of market failure is high. However, competition law should be an overarching competition policy in an economy to create, promote and protect competition and competition authority should have an upper hand in competition matters, as sectoral regulators are more exposed to groups of vested businesses in their industries and hence more prone to regulatory capture.

Beside this Act, there are no other laws that regulate competition.

# **Stakeholder Consultation**

* 1. **Which interested parties were consulted, when in the process, and for what purpose?**

Since the competition cuts across different sectors and there are some existing laws and policies related to the competition and agencies, directly or indirectly, involved in competition aspects, a national multi-sectoral task force representing various relevant agencies and sectors is instituted for stakeholder consultation, guiding the lead agency and providing strategic direction throughout the process of drafting the Competition bill.

The national stakeholders representing various government agencies, State Owned Enterprises, DHI owned companies, private sectors and business associations are as follows:

1. **Government Agencies:**
2. Department of Trade, MoICE
3. Department of Industry, MoICE
4. Department of Media, Creative Industry and Intellectual Property, MoICE
5. Department of Macro-Fiscal and Development Finance, MoF representing State Owned Companies
6. Royal Monetary Authority of Bhutan representing financial institutions and banking sectors
7. Bhutan InfoComm and Media Authority, MoICE
8. Office of Attorney General
9. Office of Registrar of Companies, MoICE
10. Regional Office of MoICE
11. **State Owned Enterprises:**
12. Represented by Department of Macro-Fiscal and Development Finance, Ministry of Finance
13. **Druk Holding Investment Companies**
14. Represented by Druk Holding and Investment (DHI)
15. **Financial Institution and Banking Sectors**
16. Represented by Royal Monetary Authority of Bhutan
17. **Private Sectors**
18. Bhutan Chamber of Commerce and Industry
19. **Business Associations**
20. Association of Bhutan Tour Operators
21. Association of Bhutanese Industries
22. Bhutan Exporter Association
23. Hotel and Restaurant Association
24. Automobile Association
25. Handicraft Association of Bhutan
26. Traders Association
27. Association of Bhutan Cable Operators
28. Construction Association of Bhutan
29. Association of Wood Based Industries
    1. **What were the results of the consultation?**

The stakeholders consultation meeting was conducted to have policy dialogue and feedback for mutual understanding and common consensus and discuss on the wide range of competition matters related to competition status and issues and prevailing anti-competitive practices in the market, how anti-competitive behaviors and practices are affecting businesses in the market, effectiveness of existing National Competition Policy 2020 in promoting and regulating market competition, prevailing laws and regulations related to the competition, need for National Competition law, proposed Competition Bill (Need for bill, Policy rationale, objective, impacts of the bill, etc.), among others. Some of the areas of discussion during the meeting are:

1. National Competition Policy 2020 and other laws and bye-laws related to the competition.
2. Status and issues of competition in the market and prevailing anti-competitive practices and behaviors in the market.
3. The impacts on businesses due to lack of market competition and anti-competitive behaviors and practices in the market.
4. How should the law address the competition issues in the market?
5. Legislative proposal on drafting National Competition Bill (Needs, policy rationale and objectives of proposed bill)
6. Likely positive and negative impacts of the proposed bill.

There is a widely held view that healthy market competition is necessary for facilitating efficient market players to compete on a level playing field, creating opportunities for small business and big industry alike, benefiting consumer by lowering prices and increasing choices of quality goods and services, eliminating market and economic inefficiency and making a positive contribution to economic growth. Conversely, less or lack of market competition disproportionately distorts market dynamism, encourages market monopoly, hurts the small businesses, contributes to rising inequalities, jeopardizes consumer welfare and impedes innovation and economic growth.

The most prominent anti-competitive practices and behaviors noted in various markets are price and bid rigging, market cartels and collusions, abuse of dominant market power, market entry barriers for small and medium enterprises, etc.

The competition in Bhutan, guided by the National Competition Policy 2020, is still in its nascent stage. There is no prominent competition seen in almost all array of sectors. The absence of or limited competition can be seen in the increase of market concentration and power, increasing ability of firms and businesses to influence prices and decreasing level of business dynamism- rate of entry and exit of the firms in the market.

The existing competition policy provides only policy guidance and lacks effectiveness in fostering market competition or regulating anti-competitive practices and behaviors in the market or achieving the stated objectives of the policy document. Despite the competition policy in place, the competition culture is still lacking and the anti-competitive practices continue due to failure of the policy to provide regulatory frameworks. The lead agency lacks the necessary vigor due to policy limitation or carry out competition activities in a limited manner within the premise of the policy. In general, the lackluster performance of competition policy is understood to be primarily due to the failure to recognize the importance of regulatory frameworks and power of the authority that enforces it.

To tackle anti-competitive practices, spur competition in the market, embed competition culture in all the sectors, establish a competition regime, self-regulate the market, foster market dynamism, regulate competition, and take appropriate actions against anti-competitive behaviors; a competition law with adequate regulatory frameworks and a supportive policy environment is inevitable. Further, the law is necessary to inhibit market failures contributed by anti-competitive behaviors and inappropriate regulations.

In cognizance of the complexities and multiplicity of the objectives and the need for addressing wide arrays of competition issues, it has been suggested to focus on the following while drafting the bill:

* + - 1. Adopt the model and best practices suggested by the international body customizing it to local needs to make the law realistic and implementable. It should be mindful that the law that cannot be properly implemented will be futile and counterproductive.
      2. The stated objective of the legislation should be to improve economic efficiency, maximize consumer welfare, increase inclusive growth and regulate anti-competitive behaviors by firms and other businesses.
      3. The competition authority that enforces the law should be vested with adequate power to function in a predictable and transparent manner.
      4. Provisions of the law should be practical and based on the sound arguments of economic efficiency and consumer welfare.
      5. Competition law should embrace and address:

1. Monopoly or abuse of dominance;
2. Anti-competitive practices and behaviors and restrictive trade practices.
3. Regulation of mergers, acquisitions and takeovers.
   * + 1. The exclusions and exemptions should be properly defined and carefully considered. Exceptions and exemptions should be realistic and minimal to the extent possible as competition law is most effective when applied broadly to the economy, including to state-owned enterprises and DHI companies.
       2. While drafting the bill and consulting with various stakeholders, some vested interest groups may lobby for exclusions and exemptions from the law mainly to protect inefficient businesses from competition. There has to be sound economic reasons and overwhelming benefits to consider exclusions and exemptions.
       3. The law should tackle any actions that represent anti-competition or are conducive to vested interests and collusion for limiting competition.
       4. It should facilitate setting up the desired institutions or authorities with sufficient autonomy, resources, and authority to develop and enforce rules and regulations. They should be vested with needed legal powers to impose measures and take actions on any market practices that undermine competitive market structures.
       5. Overcoming resistance from the businesses and other stakeholders by emphasizing the benefits of competition law and the contribution it can make to creating a good pro investment climate.