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RUSSIA**

PLENARY SESSION: “NEW CHALLENGES: NEW COMPETITION POLICY”

Remarks by Deputy Commissioner, Hardin Ratshisusu

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Good day colleagues and dear friends.

It is my pleasure to attend the 8th International Legal Forum here in St. Petersburg as we discuss emerging and cutting edge global developments in competition law.

I especially wish to thank Mr Igor Artemiev, the Head of the Federal Antimonopoly Service of Russia, for the invitation and warm welcome. The fraternal relations between our competition authorities, within the BRICS community, has gone beyond meetings in conferences to meaningful cooperation in investigations and research, which we ought to be proud of.

Today I reflect on new challenges for competition regulation, drawing on some perspectives on this subject from Professor Joseph Stiglitz, whose seminal work is also in a book published by the Oxford University Press in 2017 entitled **Competition Policy for the New Era: Insights from the BRICS Countries** (edited by Tembinkosi Bonakele, Eleanor Fox and Liberty Mncube). The book’s title is fitting for the topic under discussion today.

Professor Stiglitz notes that, *“Neoclassical theory taught that one could explain economic outcomes without reference, for instance, to institutions. It held that a society’s institutions are simply a façade; economic behaviour is driven by the underlying laws of demand and supply.”* Stiglitz notes that these orthodox assumptions are premised on the belief that market regulation should be minimal given that markets will self-regulate and generate efficiencies to the betterment of society. However, he further notes that this notion of market outcomes and performance is devoid of history and the role of political and economic power.

In South Africa, for instance, prior to 1994 and in the era of apartheid, the entire economy was designed to exclude black South Africans from meaningful economic participation. During this time, government suppressed market competition and promoted anticompetitive behaviour through state-sanctioned monopolies and cartels.

Following the advent of democracy in 1994, the new South African government gave high priority to redressing the economic imbalances which corresponded with the racial divisions in the country. Strong competition policy became and still remains an important industrial policy tool in attaining this.

To this end, the current Competition Act was introduced in 1998 and became operational on 1 September 1999 - with new institutions established, namely, the Competition Commission (the investigative body), the Competition Tribunal (the adjudicative body) and the Competition Appeal Court (the appellate body).

The entry of South Africa into the international arena following democratic elections in 1994 also meant that it became signatory to free-trade agreements. This had an impact on industrial policy relating to matters such as tariff determination and intellectual property rights.

Notwithstanding these post 1994 changes, South Africa's market structures have remained largely unchanged with high levels of concentration and very little economic transformation.

Previously state-owned entities still remain dominant in markets with very little meaningful and pervasive market entry by small to medium-sized firms. For South Africa, this demands competition law and policy that is geared towards addressing these developmental concerns which challenge the orthodox approach to market regulation. This will require looking at competition regulation and market conduct in new ways.

To this end, again Professor Stiglitz posits a way of thinking differently and adopting new approaches to competition law and policy in that -

“...competition authorities should focus not just on mergers that reduce competition, or explicit agreements that lead to cartel or cartel like behaviour or other plain vanilla antitrust violations. Instead competition authorities should rather focus on any conduct that is likely to prevent, lessen, or distort competition, for instance by facilitating raising prices...creating entry barriers; or raising rivals’ costs. Such conduct should be proscribed even if there might be some “public good” justification. Use should be made of a public interest test, not just in mergers but also in conduct. More generally, competition policy should be concerned not just with the existence of competition, but also with the nature of competition.”

In keeping with the maturation of South Africa as a new democracy, between the years of 1999 - 2004 the competition authorities (Commission, Tribunal and Competition Appeal Court) spent these formative years building institutional capacity for enforcement.

In 2004, the Commission introduced the Corporate Leniency Policy which led to an increased number of cartels being uncovered in strategic economic sectors such as food and construction.

Competition authorities have since 1999 levied administrative penalties of about R7 billion, with the greater part of the penalties levied in the period 2008 to 2017. Remedies, including divestitures, have also been imposed to address market concentration and public interest concerns.

The economic challenges that face South Africa today require a strong policy response to the issue of economic concentration and inequality.

From a competition regulatory perspective, we are seeing a rise in cross-border cartels including those in automotive components and foreign currency trading. We have also prioritised investigations relating to the high cost of pharmaceuticals, building on the collaborative work in the BRICS Working Group.

To this end the Competition Commission will continue its investigations in these markets and challenge the role of intellectual property rights to the extent that these rights lead to detriment in society. The Commission has previously intervened in these types of markets in relation to antiretroviral drugs (ARVs) and achieved significant outcomes which led South Africa being the world leader in the ARV roll out programmes.

From a merger control perspective, we are also seeing a rise in cross-border merger transactions, recently in agricultural markets including Dow/Du Pont, Bayer/Monsanto, ChemChina/Syngenta as well as in beer with ABInBev acquiring SABMiller.

This will require that as a regulator, we actively apply our minds to new approaches to competition regulation and enforcement, recognising specific needs and demands of South Africa, the African region and its global position. This will require innovative competition regulation and enforcement which addresses developmental economic priorities.

2018 marks South Africa as Chair of BRICS. The theme for the 10th BRICS Johannesburg Summit is: *“BRICS in Africa: Collaboration for Inclusive Growth and Shared Prosperity in the 4th Industrial Revolution.”* South Africa recognises that innovation and the pursuit of a knowledge economy will allow us to better exploit our comparative and competitive advantages.

Technology and innovation also have important roles to play in the lives of ordinary South Africans and competition regulation must work towards ensuring that markets work for the betterment of society. The Commission is therefore cognisant of the role that tech giants such as Facebook, Apple, Amazon, Microsoft, Google and Netflix are playing on the global agenda.

South Africa is a country with a population of just under 57 million people with approximately 22 million people with access to the internet, a figure that is growing annually. Access to such technologies has meant that disruptors such as Uber, Taxify and Netflix have been able to make inroads within South Africa increasing consumer choice, somewhat lowering the cost of transportation and broadcasting.

On the other side of the coin however, the role of technology and the use of big data has come under severe criticism especially in the wake of Facebook and data leaks

and the growth of fake news. From a competition perspective, the European Community has recently prosecuted and fined Google €2.4 billion for manipulating search results in order to favour its own offerings over those of rivals and entrenching its dominance of the search engine and online shopping sectors. This raises regulatory issues of how competition authorities deal with technology in their assessment of markets as well as considering issues of consumer protection in seeking to regulate such ubiquitous firms.

The policy thinking towards big tech giants and dominant firms generally, is changing.

South Africa is also thinking about how to tackle market power and its abuse, this through the introduction of a Competition Amendment Bill which raises some solutions to dealing with market power and market concentration. New thinking and new approaches towards competition regulation also requires that regulators share their experiences and continue deep and meaningful cooperation in seeking to regulate for effective competition.

In conclusion, I set out what I believe are the **five** uppermost challenges that competition policy should seek to tackle and address at present:

- **First** – the rise in the use of data and associated connectivity in markets which are at the heart of the fourth industrial revolution.
- **Second** – the continued growth of multinationals through mega-mergers, creating even larger firms that are dominant across different markets, value-chains and countries.
- **Third** – trade agreements that include conditions which entrench the dominance of multinational firms rather than the promotion of competition and development in affected domestic markets.
- **Fourth** – growing wealth inequality, primarily in developing countries, but also in developed countries. Competition policy should seriously confront questions of the distribution of wealth and resources in markets, access to markets by small and medium sized firms and dismantling barriers to entry, both regulatory and non-regulatory.
- **Fifth** – the pervasive nature of cartels in local and global markets. Cartels are increasingly employing subtle techniques including algorithms and other market signalling techniques that require an urgent global response.

Competition authorities, globally, should therefore be at centre of tackling these new challenges to ensure competitive, growing and inclusive markets.

For the past 8 years, BRICS competition authorities have taken active and practical steps to enhance cooperation in competition regulation, recognising that challenges that lie ahead require joint concerted effort as markets are increasingly becoming more complex and less constrained by borders. It is therefore imperative that these relationships are further cemented and continue in earnest.

Thank you