

Keynote Speech for Deputy Commissioner Hardin Ratshisusu
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Theme: Africa Free Trade Liberalisation

Topic: Scope for the AfCFTA Competition Policy Protocol

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Captains of Industry, University Deans present here today, Research luminaries, Speakers, Members of the Media, Esteemed Guests, Ladies and Gentlemen.

Good morning.

Thank you for the invitation to address you today at the 2nd International Engaged Scholarship Conference.

It is my pleasure to be here to shed light on a development that holds the potential to shape the economic landscape of the African continent.

Introduction

In February 2023, this year, the Assembly of the Heads of State of the African Union took a monumental step by adopting a protocol on competition policy for the African Continental Free Trade Area (AfCFTA).

Today, I would like to share insights on the scope and significance of this competition policy protocol.

An event of this nature is particularly important, not only because it talks to the development of Africa, but also because competition policy is one of the key complementary tools for trade policy. It is also having a direct connection with

business, as it ensures that markets are competitive and also open for challenger firms and start-ups.

Since this is an event largely attended by academics, I also consider it befitting to commend those universities that offer competition regulation (either in their law, economics or business faculties) as one of the subjects in their academic programmes.

I have structured my remarks as follows:

First, I'll provide a brief outline of the AfCFTA;

Second, some statistics on the number of competition authorities worldwide, over time;

Third, the significance of the AfCFTA protocol on competition policy;

Finally, key areas where the AfCFTA protocol on competition policy can make a difference.

The AfCFTA Agreement

On 21 March 2018, the Heads of State of the African Union adopted the agreement establishing the AfCFTA, which subsequently entered into force on 30 May 2019.

The AfCFTA agreement reflects the resolve for the African continent to achieve the African Union's Agenda 2063 to realise a single continental market, where persons, capital, goods and services move freely. This agreement is a game changer for the continent, it paves a path towards accelerated and sustainable development. It is for trade to increase within the continent.

Among the protocols integral to this vision are those addressing competition policy, investment, and intellectual property rights.

AfCFTA Competition Protocol

The protocol on competition protocol policy, which negotiations I had the privilege to chair during the time South Africa was chair of AfCFTA structures, came about out of extensive negotiations from March 2021 to September 2022. Its primary aim is to provide an integrated and unified continental competition regime.

The protocol on competition policy seeks to regulate competition within the AfCFTA to prevent anti-competitive practices to ensure that the projected gains from trade liberalization are not undermined by these practices.

It also aspires to develop the capacity of continent to tackle anti-competitive business practices and promote economic integration and sustainable development in the AfCFTA market.

This protocol therefore provides Africa with an opportunity to tackle anti-competitive practices and mergers that have a continent-wide impact, which is the main existing regulatory gap on the continent, as shown in a number of studies.

In particular, the World Bank in collaboration with the African Competition Forum released a report in 2016 entitled, *Breaking Down Barriers, Unlocking Africa's Potential through Vigorous Competition Policy*. This report made significant findings on progress on competition policy in Africa, and I mention a few crucial ones.

- It found that competition policy can play a central role in achieving the vision of a prosperous Africa.
- African markets are restricted by business practices undermining competitive dynamics and by government actions creating barriers to competition.
- Most African countries perceived to have lower levels of competition than other countries globally.
- Lack of competition in goods in African markets, particularly food items, connectivity costs and key products such as cement and fertilizer, harms households through high prices – and the poorest are hit the hardest.
- Cartels are the most harmful anti-competitive practices, but anti-cartel enforcement remains relatively weak in Africa.

The United Nations Economic Commission for Africa ARIA IX (nine) *Report for Competition Policy: Assessing Regional Integration in Africa* released in 2019 also made similar observations, recognising the need for a coherent competition policy for the African continent. This report implores African countries to integrate competition principles into their economic policies, emphasising the role of competition in addressing inequalities and promoting inclusive growth.

The protocol on competition policy responds to this reality. It primarily focuses on the regulation of economic activity on the continent, targeted at seven objectives.

First, to provide for an integrated and unified African continental competition regime.

Second, to enhance competition within the AfCFTA for improved market efficiency, inclusive growth, and the structural transformation of the African economies.

Third, to ensure that gains from AfCFTA trade liberalization are not negated or undermined by anti-competitive practices.

Fourth, to develop and strengthen the capacity of State Parties to deal with anti-competitive business practices.

Fifth, to provide a continental platform for research, information exchange, capacity

building, training, consultation, cooperating, and coordinating on competition policy and law in Africa. This can also be beneficial to academic institutions.

Sixth, to promote economic integration and sustainable development in the AfCFTA Market.

Seventh, to manage the interrelationships of competition regimes and sectoral regulatory laws at the national, regional, and continental levels.

The adoption of this competition policy protocol introduces prohibitions on various anti-competitive practices, abuse of dominant positions, mergers and acquisitions, and other forms of anti-competitive conduct.

Importantly, the protocol establishes the AfCFTA Competition Authority and the Competition Tribunal as enforcement bodies to ensure the effective regulation of these practices. This is consistent with other advanced regions such as the European Union, who have placed competition policy at the centre of market integration.

Professor Eleanor Fox, who is a world-renowned scholar in antitrust and competition policy, makes this observation:

“Africa needs a competition voice at the center, just as the European Union and the US each has a competition voice at the center. The central voice should speak to both internal-market (continent-wide) problems and global problems. Absent that voice, Africa will remain uncoordinated at home and a price-taker in the world. The developed world will continue to go first, setting the rules and foreseeing the outcomes with respect to all of the megamergers, world cartels, big tech abuses, and other global restraints that significantly impact Africa.”

The adoption of a competition policy protocol for Africa gives the continent the instrument to regulate cross-border firm conduct that significantly affect continental markets, in a coherent and coordinated way.

Some statistics on the number of competition authorities worldwide, over time

There has been significant rise of jurisdictions with competition laws around the world in the past 50 years.

In 1970, for instance, only 12 jurisdictions had a competition law, with only 7 of them having a functioning competition authority. Today, we have more than 140 competition authorities in developed and developing countries around the globe. This number is constantly growing, with new authorities being established.

To date, Africa has at least 29 countries with competition laws and at least 4 regional economic communities with competition laws (more prominently COMESA, ECOWAS and EAC).

Several other factors, according to the OECD, have contributed to the proliferation of competition authorities, among these being globalisation, technological advancements and increased awareness amongst consumers and businesses.

Key areas where AfCFTA competition policy protocol can make a difference

Competition policy can make a difference in the regulation of significant cross-border mergers, and in tackling anti-competitive practices such as cartels and abuse of dominance at a continental level.

Mergers:

Merger regulation is intended to ensure that mergers do not increase levels of market concentration in a way that weakens competition in a market as well as lead to unintended socio-economic outcomes.

Significant cross-border mergers that have had a significant impact on the continent from 2015 to 2023 signify the rich experience of the regulation of large cross-border mergers on the continent. These include *AB InBev/SAB Miller*, *Dow/Du Pont*, *ChemChina/Syngenta*, *Bayer/Monsanto*, *Heineken/Distell* and *Akzo Nobel/Kansai Piant*.

These mergers show an encouraging trend with most competition authorities coordinating and aligning decisions, particularly where conditions were imposed on mergers.

At a global level, the alignment of decisions is best illustrated in *Dow/Du Pont*, determined in 2017, and *Bayer/Monsanto*, determined in 2018.

In *Dow/Du Pont*, a global divestiture remedy was imposed, requiring the divestment of all the additional active ingredients which Dow was acquiring from Du Pont, including the associated research development business linked to the development of the affected active ingredients.

Similarly, in *Bayer/Monsanto*, Bayer's Liberty Link technology and Liberty-branded agrochemicals business was divested at a global level, in addition to some localized conditions such as in South Africa where Bayer was required to divest its cotton business.

In these mergers, there would be instances where other jurisdictions such as COMESA where these two global mergers were approved with no conditions, as the domestic effects in that market were not significant.

When domestic effects are significant, such as in the Akzo Nobel's (manufacturer of Dulux paint) blocked acquisition of Kansai Paint (manufacturer of Plascon paint) in 2023, competition authorities in South Africa and COMESA identified significant

competition concerns in the decorative paint market, as the merger would have created a near monopoly position in most markets affected by the merger.

This outcome illustrates the importance of competition authorities in regulating markets, at national and regional levels, for markets to remain competitive.

With the AfCFTA competition policy protocol, there is scope to assess large mergers and their impact at a continental level, to complement the regulatory oversight at national and regional levels.

Cartels:

Now turning to cartels. Cartels are regarded as the most harmful of the anti-competitive practices, as they not only lead to higher prices but also raise barriers to entry into markets for those firms outside the cartel.

Although it is difficult to measure the full impact of cartels on trade, especially cross-border cartels, there is consensus that these are harmful.

In Africa, there has been limited success in detecting and prosecuting cartels, except in major jurisdictions such as Kenya, South Africa and Zambia.

There have been cartels uncovered in sectors such as cement, construction and steel, but yet only a handful of competition authorities on the continent have tackled these.

For example, in the cement sector, competition authorities in South Africa uncovered that the major producers of cement (Pretoria Portland Cement, AfriSam, Lafarge and Natal Portland Cement) in Southern African Customs Union (SACU), comprising South Africa, Botswana, Lesotho, Namibia and Eswatini (formerly Swaziland), colluded to fix prices and allocate territories since at least 1995 to 2009.

Prior to this period, the cement cartel was sanctioned by the government of South Africa since around 1940 and was formally ended in 1995 under the new democratic rule, but the firms continued with the practices after the permitted cartel ended.

Following an investigation, the competition authorities in South Africa found that in 1998 cement producers congregated in Port Shepstone, a coastal town in South Africa, to reestablish the cartel, which was momentarily disrupted in 1995, with the firms engaging in a price war for most of the periods in 1996 and 1997.

Despite the cement cartel having its reach in SACU, only South Africa prosecuted the cartel within SACU. In the end, AfriSam and Lafarge paid respective penalties of about R125 million in 2011 and R149 million in 2012.

The case against NPC was dismissed in 2020 by the courts for lack of evidence, whilst there was no action against Pretoria Portland Cement due to its cooperation with the competition authorities as a whistleblower.

What is evident is that the cement cartel in SACU had lasting harm on consumers.

To prove this harm, a study in 2016 found that the cartel overcharge during the cartel period was between 7.5% and 9.7%. This study found that the cartel for the period between 2010 and 2013 led to consumer savings of between R4.5 billion and R5.8 billion in South Africa, which benefits could have been higher had the competition authorities successfully busted the cartel at first attempt in 2000.

A World Bank Report in 2016 noted that prices of cement “in Africa were 183 percent higher, on average, than the world price of cement at the end of 2014.”

The cement cartel example highlights the harmful effects of cartels in markets.

Whereas cartel conduct can be caught in one region in Africa, it is likely that such a cartel could extend its reach in other markets, as the concerned firms are usually the same across regions.

It is therefore apt for the competition policy protocol to include provisions to regulate cartel conduct at a continental level, providing scope for the continent to better tackle such practices, and in a coordinated way.

With reported margins above the rest of the world in most markets (as shown by the World Bank 2016 report), detection of cartels in Africa is paramount, and ought to be uppermost priority for regulation.

Abuse of dominance:

Despite the challenge of abuse of dominance in markets, World Bank (2016) estimates that, on average, most competition authorities in Africa complete less than two abuse of dominance investigations per year.

There has not been much success within the African continent to tackle the market power of large dominant firms, as cases are either lost in courts or competition authorities are not sufficiently resourced to investigate these.

For competition regulation at a continental level, it is imperative to regulate significant cross-border concerns in mergers, abuse of dominance, cartels as well as other anti-competitive practices provided for in the AfCFTA competition policy protocol.

The adoption of a continental competition policy protocol provides a platform for Africa to regulate cross-border anti-competitive practices in the same way as other continents do.

Conclusion

In conclusion, the adoption of the competition policy protocol is a significant step towards regulatory cohesion on the continent.

It provides a platform for Africa to regulate cross-border anti-competitive practices, fostering fair competition, and preventing the undue dominance of markets by large firms.

As we move forward, enterprises engaged in AfCFTA must be fully aware of and compliant with these rules.

It is also an opportunity for universities to augment their curriculum to include this subject, which is a growing topic worldwide. This is at least the only platform I am aware where Universities are exclusively discussing AfCFTA and its implications on trade on the continent.

This protocol is not just a regulatory framework; it is a testament to a commitment to building a competitive Africa - to achieve the African Union Agenda 2063, the *Africa We Want*.

Thank you.