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Statement

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STATEMENT OF DEPUTY COMMISSIONER HARDIN RATSHISUSU, UNCTAD GENEVA, 7 JULY 2023

SESSION: COMPETITION LAW AND SUSTAINABILITY

The United Nations, in 2015, adopted UN Sustainable Development Goals (SDGs) ranging from ending poverty and hunger, providing adequate healthcare, access to clean water and sanitation and the need to contain climate change.

It is fitting that UNCTAD is at the forefront promoting a dialogue amongst Member States to exchange views and perspectives on sustainability and competition regulation.

Global developments particularly amongst competition authorities reflect that sustainability is gradually becoming a worldwide issue that requires a holistic response across all levels of society including Governments, policymakers, businesses and consumers.

In a number of countries including South Africa, sustainability is one of the public interest factors that may be considered in merger review, for example.

There is increasing points on whether sustainability considerations should be part of the competition regulation, and recent deliberations at forums such as the OECD, UNCTAD and the International Competition Network point to this direction.

For instance, the International Competition Network, an informal network of over 141 competition authorities and 129 jurisdictions worldwide, for its 2021 annual conference hosted by the Hungarian Competition Authority published a survey report on "Sustainable Development and Competition Law" which focused on environmental sustainability but equally noted the possibility to also consider "social sustainability" in the context of competition regulation.

South Africa's Competition Act considers issues of sustainability primarily in three areas, namely, merger control, exemptions and abuse of dominance, with the express emphasis on transformation, economic development and inclusion enhanced in the 2019 major legislative amendments.

Most competition authorities have in the recent past tackled cases addressing environmental concerns in competition regulation. Here we draw from Dave Anderson's Sustainability Map.

As early as 2010, the Competition Commission in South Africa initially prohibited a merger between Hi-Bred International (USA) and Pannar SA (SA company), on the grounds that it would raise competition concerns in the maize seed market, which decision was confirmed by the Competition Tribunal. The merger had environmental impacts in South Africa, and the African Centre for Biodiversity raised ecological concerns, including regarding the likely genetic modification of maize seeds, stating that seeds were "at the heart of a healthy food system" and that farmers had "nurtured thousands of varieties, adapting these to changing conditions with each growing season." The matter was appealed before the Competition Appeal Court and was subsequently approved with an array conditions.

Competition authorities in South Africa have also intervened on a case in 2019. The case involved the acquisition of Chevron (a petroleum refinery) by Glencore, it was approved with several conditions to promote investments and employment, including one requiring the merged entity to improve the merged entity's safety and environmental performance and to increase production of environmentally cleaner fuels in compliance with the D50 (low Sulphur fuel compared to regular fuel) product quality standard.

Besides environmental concerns for merger regulation, there is an emerging narrative that points to the need for competition regulation to include broader sustainability goals.

Most developing countries including South Africa have adopted competition laws with broader welfare goals, beyond the narrow focus on consumer welfare.

In South Africa, from a policy perspective, and to reinforce the more expansive approach to competition regulation, on 19 May 2021, the South African government published a statement on "Competition policy for jobs and industrial development", outlining competition policy priorities. Specific policy priorities include pursuing public interest in merger control with specific focus on five areas - employment, broad-based ownership, supplier development and localisation measures, investment, and downstream beneficiation.

Whilst climate change is most the most immediate and urgent global concern, sustainability considerations in competition regulation, based on South Africa's experience and perhaps other developing countries, should go beyond climate change concerns. If this path is pursued, competition regulation interventions in markets could yield outcomes that not only promote competition and efficiency, but equally ensure such outcomes shape a sustainable and inclusive growth path, thereby meaningfully contributing towards the attainment of the United Nations' 2030 Agenda for Sustainable Development.