

REPORT OF THE AFRICA TRADE WEEK SIDE EVENT BY 'CUTS' HELD ON THE 30TH DECEMBER 2016

Introduction

African leaders launched negotiations to create a Continental Free Trade Area (CFTA) after key stakeholders recognised the role of competition policy in guiding the market activities. The CFTA could potentially be marred with anti-competitive practices which pose a threat to market efficiency, unless Africa begins discussions for incorporation of competition policy deliberately.

CUTS International organised a side event during the Africa Trade Week in Addis Ababa to enable exchange of views on how African countries can use competition policy as a tool to foster economic integration and secondly to provide a platform for African stakeholders to define the contribution of competition policy to the CFTA as well as reflect on how to mobilize support for competition policy to be integrated in the CFTA process.

The session was moderated by Dr Joy Kategekwa, Head, UNCTAD Regional Office for Africa. Panellists included Mr. Pradeep Mehta, Secretary General of CUTS International. Prof. Gerhard Erasmus, Founder and Associate, TRALAC and Mr. Rashid Kibowa, Director of Trade, East African Community (EAC)

The Session

Mr. Pradeep Mehta

- CUTS International has many years of experience through its competition work in Africa and has seen the evolution of competition from traditional anti-competitive practices across borders like cartels and abuse of dominance to emerging competition related issues like abuse of Government discretion.
- Many FTAs have incorporated competition related provisions thus recognizing competition policy as an integral part for regional trade, liberalisation, cooperation and integration. The CFTA negotiations including on competition principles will need to conclude in Phase 2.
- There is the need for the Continent to adopt a competition regime that will ensure one basic law is followed to avoid the risk of adopting different approaches for similar cases across the countries.
- The CFTA objectives align very well with the role of a harmonised competition policy in promoting efficient utilisation of resources and checking non-tariff measures which act as barriers to free trade. This will further ensure optimum distribution and utilisation of resources to help foster Intra-African trade as well as checking cross border anticompetitive practices
- Among the specific recommendations include:
 - a. Inclusion of model competition chapter for CFTA that recognizes the different levels of individual country competition regimes. This is to ensure provisions are acceptable to all and easily implementable
 - b. Provision for Competition Impact Assessment that will evaluate previous and upcoming policies regularly from a competition lens thus assess distortions caused by regulatory and policy measures and also ensure consistency amongst policies vis-à-vis competition principles

- c. Inclusion of a model chapter that will have provisions to check common anti-competitive practices such as abuse of dominance, cartelisation and anti-competitive agreements
- d. Provision for competition advocacy towards development of a culture of competition across the region that will ensure collective and active participation of state and non-state actors to further effective implementation of competition policy

Prof. Gerhard Erasmus

- The CFTA remains an ambitious undertaking by African states; at the centre is the question of how the chapter of competition will be approached. The new proposal to deal with competition and IP policy after completing negotiations on trade in goods and services, and investment is not right. There's need for an integrated approach even as we phase the negotiations owing to linkages within the different chapters of the CFTA.
- It is important to learn how experts have handled it in other RECs, such as COMESA.
- RECs have adopted different approaches like co-operation among individual countries; this has not been very successful owing to extra-territorial and jurisdictional complications. The problem is made worse by the problem of overlapping membership issues across RECs. Part of the solution towards a harmonised policy is correction of this scenario. There are currently no modalities on the scope and thus design issues will remain a key challenge in discussing this chapter.
- COMESA is having challenges of domesticating a supra-national law. There is reference on the need of a model law and harmonisation as a possible option, challenge is whether countries with functional competition laws be willing to go back to the model law? There is therefore the need to exploring new insights on the subject beyond what we know. The good news is that competition has been identified by the CFTA process unlike in the TFTA negotiations.
- Capacity of government representatives on the subject remain a challenge hampering its prioritisation hence the need for advocacy as among the building blocks towards phase-2 negotiations.
- The challenge of flexibility in the negotiations pose yet another challenge. Unfair trade practice like dumping is technically not a negative situation in a customs union like SACU.

Rashid Kibowa

- The EAC has a regional Competition Act 2006. At the operational level, five commissioners from the five partner states have since been appointed and took oath in November 2016. It was quite delayed. The commission is independent of other organs of the EAC but draws funding from the secretariat. The council of ministers have directed to have national competition laws for all countries.

- Among the lessons to be drawn include differential levels of competition regimes, from a consensus principle in negotiation it means that the partners have to move at the level of the slowest member. A second lesson is the level of awareness among policy makers, politicians and experts, this challenge will impact on the pace and depth of negotiation at the CFTA level. There is a wanting political will and a general lack of technical capacity are the other lessons from EAC. There will be need to train experts on the subject before phase-2. Funding will also remain a key challenge in pushing the agenda forward.
- Some key sectors in the EAC that are subject to cross border trade that will need to be looked at deeply include cement, power, air transport, steel, railways, telecoms and banking.
- There is need for complementarity of phase 1 and phase 2. Allowing goods and services to move is primary; however there is need to relook on why the negotiation seems to be picking almost all aspects of negotiations. As we negotiate there will be need to prioritise and properly phase certain aspects of the CFTA negotiations to avoid slowdown.

Plenary and Conclusion

- There's a need to critically look at how the national, regional and continental competition regimes will relate will each other on the discussions around co-operation.
- The history of RECs and their failures inform that there's need to put certain fundamentals in place. On competition an assessment of the potential benefits to countries adopting the policy will be necessary.
- Vested interest remains an impediment in adopting competition policy across many developing countries.
- There is need to define who the "we" is if the bar is to be raised in competition advocacy. Lots of success will be realised from sobriety and incremental gains through engagement of key stakeholders including think tanks and civil society groups i.e. thus going beyond while complementing the technocrats.
- Realisation of competition benefits will only be assured if other manifestations like good governance are sustained.
- The question of design remains controversial and an area of potential conflict which include jurisdictional issues of administration like merger fees and also the interplay of egos among the leaderships of these national and regional institutions.
- Funding is likely to be big challenge at the continental level just as it was and has remained at the regional level. Options for funding regional integration activities and operations on competition need to be explored.
- Competition remains critical in bringing fairness and economic democracy in the CFTA. It will help promote consumer protection in our markets. The question of readiness is paramount, the reality is that there will need to be incremental steps; building onto what we already know from other blocs like COMESA, WAEMU, ECOWAS and EAC. Learning from the challenges, this will help in addressing the question of design of not only the options of law to take but also institutional options.

- The process remains linear and not parallel. This fits very well within the conversations around the preparedness of stakeholders on what would be the best framework to adopt moving forward.