COMPETITION POLICY OPTIONS FOR THE AFRICAN CONTINENTAL FREE TRADE AREA.

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Abstract

Regional Trade Agreements (RTA) such as the recently formed African Continental Free Trade Area (AfCFTA) can resolve some of Africa's key enforcement issues in the area of competition law and policy. The Competition Protocol, which will result from the Phase II negotiations, is critical in ensuring that anti-competitive practices do not undermine the AfCFTA's liberalisation benefits. This article discusses the following key considerations when developing an AfCFTA competition policy: the theoretical framework of competition regulation; the intersection of trade and competition policy; and the models for regional competition regulatory frameworks. The article asserts that the optimum competition regulation in the AfCFTA should have a balance between intervention and free-market principles. Further, it suggests a semi-supranational competition framework that establishes basic standards for competition policy that all members must adhere to.

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1. Introduction

Fair business competition is a cornerstone of free trade and essential to Africa's economic development.[2] However, anti-competitive trade practices can hinder the free flow of goods and services between and among nations. Regional Trade Agreements(RTA) such as the recently formed African Continental Free Trade Area (AfCFTA) can resolve some of Africa's key enforcement issues in the area of competition law and policy.[3] The negotiations of AfCFTA negotiations are in phases; with phase I addressing the issues of trade in goods and services, while Phase II addresses the issues of intellectual property rights, investment, and competition policy.[4] The issues discussed and agreed upon will be codified in legal agreements known as Protocols, which will form an integral part of the AfCFTA Agreement if adopted.[5] The Competition Protocol which will result from the Phase II negotiations is crucial in ensuring that anti-competitive practices do not undermine the AfCFTA's liberalisation and integration benefits. This article discusses the following key considerations when developing the AfCFTA competition policy framework: concepts of competition law and policy, the theoretical framework of competition regulation, the intersection of trade and competition policy, and the models for regional competition regulatory framework

2. Competition Law and Competition Policy

Competition is a common term that refers to an event or contest where individuals compete to establish dominance or supremacy in a specific field.[6] In business, competition is a rivalry between organisations seeking superiority in the marketplace. The organisations contest by providing the best combination of price, quality, and service to gain more customers, sales, profit, or market share.[7] In the context of trade, competition policy is a set of measures that promote competitive market structures and behaviour, such as enacting competition laws that

[2] SADC, (2020). *Competition Policy.* [online] Available at *http://www.sadc.int/themes/economic-development/trade/competition-policy/* accessed on (20 January 2022).
[3] Dawar, K., & Lipimile, G. (2020). Africa: harmonising competition policy under the AfCFTA. *Concurrences Review*. 2020 (2). a93472 242-250.
[4] Phase II negotiations are expected to be concluded by September 2022. *See* AfCFTA. *Results of the meeting of the council of ministers responsible for trade*. [online] Available at https://amchamghana.org/wp-content/uploads/2018/03/AfCFTA-8th-Council-of-Ministers-Press-Statement-Official.pdf> [Accessed on 24 February 2022].
[5] Art. 8 of the AfCFTA Agreement
[6] Lexico. (2022). *Competition*. [online]. Available at https://www.lexico.com/definition/competition. [Accessed on 20 February 2022].
[7] Clark, J. (1925). What is competition? *Jstor*, 217-240.

target anti-competitive business activities.[8] Competition law is one of the policy options available to governments to prevent, reduce or eliminate anti-competitive practices by private entities. Competition law regimes vary but commonly include prohibitions on anti-competitive cartel activities such as price-fixing, mergers and acquisitions, and anti-competitive conduct by dominant firms that substantially reduce competition.[9] Competition is beneficial because it motivates suppliers to develop more innovative products and sell them at lower prices to attract customers.[10] As a result of competition, the market has a wide variety of products, better product quality, and reduced prices.[11] Given the benefits of competition, competition law and policy ensure that market competition is not distorted in a way that is harmful to society.

While 'competition law' and 'competition policy' appear to be used interchangeably, the two are not synonymous. Competition policy can be broadly defined as government initiatives to protect or foster competition among market participants as well as to advance other initiatives and procedures that support the growth of a competitive environment.[12] Competition policy includes not only competition laws but also policies that advocate for less anti-competitive ways of implementing laws that impact competition, such as international trade laws and consumer protection laws.[13] Thus, the usage of the terms 'competition policy' in the AfCFTA Agreement suggests that members are prepared to discuss a wide range of competition issues, including the application of competition law. However, this could also mean that members can agree to have other sub-sets of competition policy without necessarily codifying competition laws. At the outset, members need to agree on whether it will be required for all members to have national competition laws. Presently, some members as shown in table 1 below do not have national competition laws. Further, the eight Regional Economic Communities (RECs) recognised by the AfCTA[14] have varying regional competition policies with some having codified competition laws and others having a broader competition policy without the regional

[8]WTO Working Group on the Interaction between Trade and Competition Policy. (1999). *The Fundamental Principles* of *Competition Policy*, WT/*WGTCP*/W/127, para 2.

[9] Sweeney B. (2004). Globalisation of competition law and policy: Some aspects of the interface between trade and competition. *MelbJIL.* 375.

[10] UNECA et al, (2019). *Assessing Regional Integration in Africa IX*. Available online at https://repository.uneca.org/bitstream/handle/10855/42218/b11963189.pdf?sequence=1&isAllowed=y > [Accessed on 8 August 2022].

[11] Ibid

[12] UNCTAD, (2009). *The relationship between competition and industrial policies in promoting economic development.* Available online at https://unctad.org/system/files/official-document/ciclpd3_en.pdf [Accessed on 8 August 2022].

[13]Ibid.

[14] The AU recognises eight RECs, the: Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel–Saharan States (CEN–SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD) and Southern African Development Community (SADC).

competition law. For example, the Southern African Development Community (SADC) has a regional competition level policy that requires the Member States to cooperate but has no regional authority. Similarly, the Economic and Monetary Community of Central Africa (ECCAS) has adopted a regional competition regime but has not yet established a regional competition authority. The Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), and the Economic Community of West African States (ECOWAS) have established supranational regional competition institutions with binding regional level competition laws. RECs, such as the Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD), and the Intergovernmental Authority on Development (IGAD), have no enforceable competition provisions in their treaties.

Table 1: AfCFTA Countries without National Competition laws

Number of Countries	Country	National Competition Legislation	National Competition Authority	Membership in African Regional Economic Community
1.	Benin	No	No	ECOWAS,
2.	Central African Republic	No	No	ECCAS
3.	Chad	No	No	ECCAS
4.	Congo (Brazzaville)	No	No	ECCAS
5.	Equatorial Guinea	No	No	ECCAS
6.	Eritrea	No	No	COMESA
7.	Gabon	No	No	ECCAS
8.	Ghana	No	No	ECOWAS
9.	Lesotho	Draft	No	SADC
10.	Niger	Draft	No	ECOWAS
11.	Togo	Draft	No	ECOWAS
12.	Uganda	Draft	No	EAC
13.	Guinea	No	No	ECOWAS
14.	Guinea Bissau	No	No	ECOWAS
15.	Libya	No	No	COMESA
16.	Mauritania	No	No	-
17.	Réunion	No	No	-
18.	São Tomé and Principe	No	No	ECCAS
19.	Sierra Leone	No	No	ECOWAS
20.	Somalia	No	No	-
21.	South Sudan	No	No	EAC
22.	Western Sahara	No	No	-

Source: Dawar, K., & Lipimile, G. (2020). Africa: harmonising competition policy under the AfCFTA. *Concurrences Review*. 2020 (2). a93472 242-250.

According to table 1 above, about half of the AfCFTA countries did not have national competition laws as of 2020. The disparities in competition law enactment show how important it is to discuss the issue of competition law in the AfCFTA's competition policy formulation. Members may agree to require all member countries to establish national-level competition laws that would effectively handle anti-competitive trade practices in the AfCFTA. For example, the Comprehensive and Progressive Pact for Trans-Pacific Partnership (CPTPP), a free trade agreement between Canada and ten other Asia-Pacific countries, requires all parties to have national competition laws to decrease trade obstacles and enhance commerce between Canada and member countries.[15] Although the inclusion of competition law in competition policies enables better enforcement mechanisms, members should be mindful of the various schools of thought behind competition regulation. It might well be that not having a competition law is a competition policy option for some countries.

3. Theories of Competition Regulation

Various economic theories contribute to the ongoing debate on whether governments should regulate competition in the marketplace. The Classical theory advanced by Adam Smith in the Wealth of Nations as far back as the 17th century argued against competition regulation.[16] According to the Classical theory, individuals, by pursuing their self-interest, will increase production and lower prices, thereby benefiting the whole community.[17] According to Adam Smith, the market should be driven by the 'invisible hand' because free-market economies produce more advantageous outcomes than market intervention.[18] Similarly, Neo-classical theorists assert that government should not intervene in the market by restraining the choices of suppliers and consumers; to them, the market is driven by demand and supply.[19]

In contrast, those that argue in favour of competition regulation believe that restraint is necessary before freedom can be achieved.[20] For example, the Harvard school of thought argued that competition law is essential to control concentrated markets and high entry

[15] Chapter 16 of Comprehensive and Progressive Agreement of Trans-Pacific Partnership.
[16] Smith, A. (1990). The wealth of nations In J M Dent & Sons in Nicholas E. (ed). (1975). *Adam smith's legacy: His thought in our time.* ASI (Research) Limited: London.
[17] Ibid.
[18] Ibid.
[19] Inoua, S. M., & Smith, V. L. (2020). *Neoclassical Supply and Demand, Experiments, and the Classical Theory of Price Formation.* [online] Available at https://digitalcommons.chapman.edu/cgi/viewcontent.cgi?article=1314&context=esi_working_papers [Accessed on 25 February 2022].
[20] Wyman, B. (1907). The justification of fair competition. 19 *Green Bag* 277.

barriers.[21] In contrast, the Chicago School of thought agreed with the neo-classical theory that markets could take care of themselves, but to them, intervention is necessary to protect consumer welfare.[22] More recently, the post-Chicago school of thought criticised the Chicago theory for the presumption that monopolists cannot engage in competitive behaviour.[23] According to the Post-Chicago theory, the conduct and performance of the market are essential in evaluating the competitiveness of the market, and the government should identify and remedy anti-competitive practices.[24]

Economists from the aforementioned schools of thought have had a significant influence on the structure of competition and trade policy. Despite some considerable variations, all four theories agree on the importance of competition in an economy. Even proponents of competition regulation do not seek to eliminate competition. The distinction between a strictly free-market economy and those advocating for competition regulation is the perspective of the interests they are attempting to protect. For instance, protecting the interests of the consumers on one hand or the suppliers affected by anti-competitive conduct. Given the importance of competition, but also keeping in mind that markets are not perfect, policymakers concerned with anti-competitive behaviour should develop a competition policy that considers the interests of the market players. Therefore, an ideal competition regulation would have the right mix of intervention and free-market principles, ensuring that everyone in society benefits from the best opportunities for both selling and buying.

As per the Post-Chicago theory, the AfCFTA should identify and remedy anti-competitive practices. Intervention is necessary for the African market to promote competition. Having a competitive market pushes suppliers to be more innovative and to produce better products and services that can compete effectively on a global scale. Without regulating competition, cross-border anti-competitive practices in the form of cartels, restraint of trade and abuse of dominance can undermine Africa's trade liberalisation. The regulation of competition in the

[21] Papadopoulos, A.S. (2010). *The International Dimension of EU Competition Law and Policy*. Cambridge University Press: Cambridge p. 271.

[22] Hovenkamp. (1985). Antitrust policy after Chicago. 84 *Michigan LR* (1985) 213 at 215.

[23] Holland, H. (2014). *Transaction Cost Economics: Applications to Competition Policy in South Africa*. [online]. Available at <*http://www.compcom.co.za/wp-content/uploads/2014/09/TCE-Conference-Paper-Final.pdf* > [Accessed on 25 February, 2022].

[24] Ibid.

AfCFTA is necessary to encourage healthy competition among African businesses. Enforcing competition laws can enhance the protection of consumer rights and at the same time increase productivity, therefore benefiting both the buyer and seller. The AfCFTA can reduce cross-border anti-competitive practices by requiring all members to abide by a certain minimum level of competition law, either at a national level or as part of a larger grouping within the regional level.

4. Trade and Competition Policy

Regional competition regimes arose as a result of more open borders brought about by free trade, globalisation, and technology.[25] Competition law has traditionally been a national issue that originated in developed economies and was believed superfluous to adopt in developing nations. For example, one scholar, Paul Godek, advised against transferring competition laws to developing countries, claiming that they would be ineffective. According to Paul Godek, "Exporting antitrust …is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs. And if the tie is knotted too tightly, he won't be able to eat what little there is available to him."[26] However, in an increasingly globalised world of free trade, open markets, and technology, competition is no more only a national concern, and more states have implemented competition law frameworks.

Competition policies can impact trade policies, and vice versa, due to the intersection between competition and trade.[27] Scholars have used intriguing words to characterise this relationship between trade and competition law. For example, the relationship between trade and

[25] Campbell N. and Masse M.G.(2012). The interplay between competition law and Free Trade Agreements - The Canadian experience. 8 *Competition L. Int'l* 64.
[26] Godek P. (1992). One US export eastern Europe does not need. 15 *Regulation* 20.
[27] Klaaren, J. et al. (2021). *Trade and Competition (Laws): Interrelations from a Southern African Perspective.* In International Economic Law from a Southern African Perspective, edited by Kholofelo Kugler and Franziska Sucker, 565–601. Juta & Co. Available at https://www.researchgate.net/publication/353826928_Trade_and_competition_laws_Interrelations_from_a_southern_African_perspective. [Accessed on 8 August 2022].

competition law has been described as complicated,[28] not stable,[29] difficult,[30] frenemies[31] and uneasy.[32] These interesting descriptions have come about because competition law has the potential to impede trade, and trade policies have the potential to restrict competition. This is because, despite their shared purpose of preventing restrictive trade practices, they differ in the perspective of the interests they strive to defend. For example, international trade liberalisation is focused on raising productivity on a global scale, whilst competition law is concerned with improving consumer welfare in domestic markets. Furthermore, national trade policy is concerned with enacting trade remedy laws, such as safeguards, anti-dumping, and countervailing duty, which may benefit local producers in terms of price competition but prevents the consumer from enjoying competitive price or from buying goods of their choice.

Safeguards, anti-dumping and countervailing measures are some of the exceptions to market access restrictions under the WTO. Promoting market access by reducing tariffs and eliminating non-tariff barriers to trade, such as quantitative restrictions, is one of the core objectives of the WTO. Non-tariff barriers include quantitative restrictions such as quotas, technical barriers to trade, and sanitary and phytosanitary measures. The elimination of market access restrictions promotes both trade and competition. However, the trade remedies which are exceptions to market access restrictions such as safeguards and countervailing duties distort competition. Safeguard measures restrict imports of a particular product where there is a surge of imports to protect a domestic industry from serious injury. An example of a safeguard measure is where country X temporarily imposes a ban on all imports of chickens to protect local chicken farmers. Such a ban as a trade remedy is against the ideals of competition. From the perspective of competition, the surge of imports would lead to high supply and low prices for the consumer. Thus, for the local farmers to remain competitive, the market requires them to be innovative, improve product quality, and offer better prices. In contrast, from the

[28] Hank S.(1997). The interaction between trade and competition policy: the perspective of the Australian Competition and Consumer Commission. [online] Available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKEwjFg7_ZvZj2AhWdQkEAHczLCkYQFnoECAYQAQ&url=https%3A%2F%2Fwww.accc.gov.au%2Fsystem%2Ffiles%2FThe%2520Interaction%2520between%2520Trade%2520and%2520Competition%2520Policy.doc&usg=AOvVaw0pVNSSbgPHwb1uvLm9C8C7> Accessed on 24 February 2022.

[29] Weiss F. (1999). From world trade law to world competition law. 23 *Fordham International Law Journal* 250.

[30] Ibid.

[31] Marumo N. and Van Wyk M. (2014). *Competition and trade policy – Frenemies.* [online] *Available at http://www.compcom.co.za/wp-content/uploads/2014/09/Competition-and-Trade-Policy-Frenemies.pdf* [accessed on 26 February 2022].

[32] Kelly, D.A. (2007). Should the WTO have a role to play in the internationalisation of competition law? 7 *Hibernian LJ* 17.

perspective of trade, the surge of imports would harm the local farmers and the temporary ban is a necessary trade remedy. This example shows the clear conflict between trade and competition law.

Trade remedies appear to distort competition, although they were put in place to protect domestic producers. Safeguards also particularly protect developing countries whose infant industries may not survive the heavy competition. This trade remedy enables developing countries that have entered a regional or international market to grow their small industries that are at risk of not surviving the wider market. However, the measure is temporary and only applicable where there is a surge of imports that would likely cause serious injury to particular domestic production. Further, WTO agreements require members to have reasonable justifications for imposing trade remedies against a fellow WTO member.

An example of quantitative restriction can be seen in Malawi's ban of Mozambican Frozy. In Malawi, months after the Malawi Bureau of Standards banned the distribution and sale of Mozambican frozy drinks in the country, the Malawi Bureau of Standards (MBS) lifted the ban.[33] MBS restricted the importation of frozen drinks in November 2016 because the product was not properly labelled and the drink had high levels of citric acid and benzoates. Months later, MBS reported that they conducted independent tests which showed that Frozy now complies with the specifications of carbonated soft drinks.[34] The short-lived import ban of Frozy in Malawi shows that even with technical trade barriers, WTO members are careful not to impose a permanent or long-term ban on a fellow member's product.

Another example of trade and competition conflict is the imposition of anti-dumping duties on Brazilian chickens in South Africa. In January 2012, the International Trade Administration Commission of South Africa (ITAC) imposed provisional anti-dumping duties on Brazilian chicken imports.[35] The decision resulted from an investigation that found that three Brazilian exporters sold their chickens in the Southern African Customs Union (SACU) market at lower prices than in the Brazilian market.[36] The tariff hike on frozen poultry raised a critical policy

[33] The Times, (2017). *Malawi Bureau of Standards lifts ban on Frozy.* Available online at https://times.mw/malawi-bureau-of-standards-lifts-ban-on-frozy/ [Accessed on 8 August 2022].
[34] Ibid
[35] Ndlovu, P. (2013). *South African trade: Too chicken to definitively challenge Brazilian poultry imports?* Available online at https://www.polity.org.za/print-version/south-african-trade-too-chicken-to-definitively-challenge-brazilian-poultry-imports-2013-09-17 [Accessed on 8 August 2022].
[36] Ibid.

debate between trade and competition policymakers.[37] The chicken tariff debate has prolonged in South Africa with the Competition Commission on the side of consumers standing on the view that imports might force domestic producers to compete, resulting in lower prices for consumers and more product choices. On the other side, the ITAC protecting the interest of the local farmers, the South African Poultry Association (SAPA) have been imposing provisional anti-dumping duties on imported chicken sold cheaply on the South African market. Earlier in 2022, the national trade policy prevailed, which protected domestic producers from import competition but sacrificed consumer interests. However, to safeguard customers' pockets amidst high food prices, South Africa recently stated in August 2022 that it would defer the enforcement of anti-dumping taxes on chicken imports from Brazil and four other European Union nations for at least a year.[38]

As a result of the significant differences above, trade officials and lawmakers are forced to choose between protecting producers within an industry threatened by import competition at the expense of consumer welfare. This tense relationship between competition and trade may have played a role in the failure of WTO negotiations to include competition policy in international trade on a multilateral framework. Therefore, members of the AfCFTA should be aware of these differing perspectives or concerns that other members may have about the inclusion of competition policy in their regional trade agreement.

Moreover, AfCFTA consists of countries with differing levels of economy. Least developed countries like Malawi may want the freedom to use trade remedies against import surges from more developed economies like South Africa. In contrast, the more advanced economies may wish to advance competition policies in the AfCFTA that would prevent or reduce the imposition of trade remedies that supposedly distort competition. Members should keep in mind that, in the absence of a multilateral framework under the WTO, the AfCFTA's competition regulatory framework can protect members against private restrictive trade practices that might stifle Africa's free trade. However, members should create room for trade remedies to protect the infant industries of the least developed countries, especially being mindful of the different levels of the economy.

[37] Ibid

[38] Mofokeng, P. (2022). *SA suspends anti-dumping duties on poultry imports.* Available online at https://www.moneyweb.co.za/news/south-africa/sa-suspends-anti-dumping-duties-on-poultry-imports/ [Accessed on 8 August 2022].

5. Models of Regional Competition Regulatory Framework

There are various models of regional competition frameworks that the AfCFTA might employ to foster cooperation on competition among its members. Examples of such models include the supranational model, the cooperation model, and the harmonisation of laws.[39] According to Art. 5(f) of the Agreement establishing the AfCFTA; one of the AfCFTA principles is that members undertake to preserve the *acquis*, which means that they pledge to build on what has already been accomplished at the Regional Economic Community (REC).[40] The current RECs in the AfCFTA such as the COMESA, EAC, SADC, ECOWAS, and AMU have different competition policy frameworks.[41] This section discusses three models and suggests the best model for the AfCFTA.

5.1 Harmonisation of National Competition Laws

Harmonisation of laws entails creating a competition policy that advocates for common standards across the AfCFTA. Harmonising national competition laws is a bottom-up convergence of laws instead of the supranational model that takes a top-down approach to harmonisation of laws.[42] This model also takes a bilateral approach to harmonisation, where two or more countries agree to converge their laws based on shared principles.[43] The harmonisation model has the benefit of being a piecemeal approach to integration that countries with common competition principles can easily implement. However, it does not make use of existing RECs that have advanced from a bilateral to a more regional framework, such as COMESA, which has a unified competition law framework, and SADC with a regional competition policy.

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[39] See Chapeyama, S. (2015). *Developing a regional competition regulatory framework in the Southern African Development Community (SADC*). [online] Available at <http://hdl.handle.net/11394/4765> [Accessed on 8 March, 2022].

[40] Chidede, T. (2021). AfCFTA phase II and III negotiations – update. *Tralac*. [online]. Available at < https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html> [Accessed on 8 March 2022].

[41] Common Market for East and Southern Africa (COMESA), East African Community (EAC), Southern African Development Community (SADC), Economic Community of West African States (ECOWAS), and Arab Maghreb Union (AMU).

[42] Dawar, K., & Lipimile, G. (2020). Africa: harmonising competition policy under the AfCFTA. *Concurrences Review*. 2020 (2). a93472 242-250.

[43] *Ibid.*

Harmonisation of national competition laws assumes that all countries have some level of competition legislation and work towards harmonising those laws. The member countries can achieve harmonisation by having competition laws bear similar provisions, particularly on the core principles of competition. The core principles could be those laws that would encourage healthy competition and prevent restraint of trade commensurate with the objectives of the AfCFTA. On a deeper level of harmonisation, all the competition laws within the AfCFTA would be the same. However, having national laws that completely mirror each other in all 55 countries might take longer to achieve and may not serve the unique problems of each country. The best mode of harmonisation would be if each member agreed to include specific or agreed-upon standards on competition law in their national laws.

The challenge of the harmonisation model is that other members do not yet have national laws to join in the harmonisation process. However, the absence of competition laws in some countries may also be an advantage. This is so because the AfCFTA members would agree on minimum standards to be applied by all members. Those without national laws would include the minimum standards in their new laws, and those with competition laws would review and make necessary amendments to their existing statutes. The harmonisation model would work best if all countries agreed to harmonise their national laws and not take a piecemeal bilateral approach. Some RECs, such as COMESA, have already achieved a regional-level competition law; therefore, the bilateral approach would be regressive and contrary to the vision of preserving the acquis as provided in Art. 5 (f) of the Agreement establishing the AfCFTA. Members can implement the harmonisation model by first agreeing on the national competition laws requirement as part of the competition policy. Secondly, members would agree on the minimum standards of competition law that should be present in all the competition laws within the AfCFTA.

5.2 Cooperation Model of Regional Competition Policy

The cooperation model entails collaboration between competition authorities for mutual assistance and reciprocity in enforcing their competition laws.[44] Cooperation is possible even for those without competition laws, for example, by offering them technical assistance to

[44] UNCTAD. (2014). *Informal cooperation among competition agencies in specific cases.* TD/B/C.I/CLP/29. [online] Available at <*http://unctad.org/meetings/en/SessionalDocuments/ciclpd29_en.pdf* > [Accessed on (18 March 2015).

develop their competition laws.[45] The cooperation model distinct from the supranational model discussed below entails informal cooperation that is more unofficial, friendly, voluntary, and non-binding, such as the SADC competition policy framework. In contrast, formal cooperation, usually under a supranational model, is based on a legally binding instrument such as the COMESA competition policy framework.

The cooperation model has the benefit of being an easier approach to implement at a regional level since nations do not have to amend their competition laws. Members are not subject to formal rules and therefore may consider this approach as retaining their sovereignty. With the cooperation model, agreements may be achieved quickly during the AfCFTA negotiations. Furthermore, the cooperation model preserves the *acquis* since it draws on the existing formal and informal cooperation in the current RECs. Moreover, Article 4 (c) of the Agreement Establishing the AfCFTA specifies that the Member States must "cooperate on competition," which may be a hint to the members' intention to build a regional cooperative competition framework.

The drawback of the cooperation approach is that members may experience the same enforcement issues that the current RECs with the cooperation model have had. For example, SADC has encountered enforcement issues in its competition regime due to the absence of competition legislation in certain countries, varying degrees of economic development, and a lack of expertise and resources in others.[46] In the absence of a supranational body to handle competition issues within the AfCFTA, those countries without competition laws and those with weak competition authorities are particularly vulnerable to international anti-competitive practices. Further, some African countries have smaller economies and may lack the capacity and resources to handle cross-border anti-competitive cases within the AfCFTA. For example, South Africa and Namibia benefited from cooperation and coordination in the Walmart-Massmart merger case whereas other countries with less capacity approved the transaction unconditionally.[47] Perhaps with more cooperation among big or small economies, other African countries could also have imposed and benefited from similar conditions as South

[45] *Ibid.*
[46] Chapeyama, S. (2015). *Developing a regional competition regulatory framework in the Southern African Development Community (SADC*). [online] Available at <http://hdl.handle.net/11394/4765> [Accessed on 8 March, 2022].
[47] Klaaren, J. and Sibanda F. (2019). *Competition policy for the Tripartite Free Trade Area*. In Competition and Regulation for Inclusive Growth in Southern Africa, edited by Jonathan Klaaren, Simon Roberts, and Imraan Valodia, 1st ed., 487–528. Jacana, 2019. http://oapen.org/search?identifier=1007876.

Africa and Namibia.[48] However, even if members agreed to all have national competition laws to make cooperation possible, the various competition authorities would have different priorities. The newly established competition authorities would focus on institutional capacity and technical assistance, whereas the more experienced competition authorities would work on reducing cross-border anti-competitive practices that harm their country.

In addition, due to the informal nature of the cooperative model, some countries may not be willing to cooperate with other competition authorities.[49] The cooperation model and its voluntary approach may also mean that national laws will prevail over the regional framework. Therefore, where there would be a conflict between the AfCFTA's competition cooperation policy and domestic law, the members' domestic laws would prevail. Further, without any obligatory legal duties, members would be at liberty to choose alliances. Thus, one member would opt to cooperate with some countries over others and this would undermine the objective of the AfCFTA to reduce cross-border anti-competitive practices at a regional level.

5.3 Supranational Model

Perhaps the strongest option is full integration or having one single codified competition law applicable to all AfCFTA member countries. This model entails the creation of a comprehensive continental competition policy or code, as well as a supranational enforcement body to deal with cross-border anti-competitive conduct. For example, this model has been adopted by ECOWAS, COMESA, and EAC. Supranational regional competition regulatory framework has great potential in resolving some of the most serious issues that hinder competition law enforcement in African developing countries. This model can secure and strengthen market integration and small jurisdictions can benefit from joint enforcement as well as pooled resources and capabilities. Furthermore, because the supranational model has unified laws, it increases transparency, certainty, predictability, and compatibility.[50] Unlike the

[48] Ibid.
[49] See Burke, et al (2019). *Conclusion: Building Institutions for Competition Enforcement and Regional Integration in Southern Africa*. In Competition and Regulation for Inclusive Growth in Southern Africa, edited by Jonathan Klaaren, Simon Roberts, and Imraan Valodia, 1st ed., 487–528. Jacana, 2019. http://oapen.org/search?identifier=1007876. Discussing challenges of enforcement in weaker competition regimes.
[50] *Ibid.*

cooperation model, it creates a formal cooperation system, thereby strengthening enforcement of the agreed competition laws and principles.

The supranational model can also address the issue of overlapping regional integration if members agree to abandon the existing regional competition frameworks in favour of the AfCFTA. What Jagdish Bhagwati refers to as a "spaghetti bowl"[51] is well illustrated by the various and concurrent memberships of many Regional Economic Communities (REC) across Africa. Tanzania, for instance, participates in both the SADC and the EAC (EAC), and the two RECs have different regional competition frameworks. Further, some SADC countries such as Seychelles, DRC, Namibia, Swaziland, Zambia, Angola, Mauritius, Zimbabwe, and Malawi are also members of COMESA. This overlap across the competition authorities and concurrent memberships may result in forum shopping, conflict of laws, or duplication of laws. The AfCFTA members have pledged to uphold the acquis by building on what already exists. The agreement to preserve the acquis may have been made to persuade members that the AfCFTA would not reverse the gains that each member had already accomplished in their own RECs but would further expand trade opportunities in Africa. However, the spaghetti bowl effect would get further complicated if the AfCFTa has a new competition law that operates independently of and concurrently with the existing RECs.

The main challenge of the supranational model is that many African nations are already members of mandated regional competition regimes like COMESA and EAC that experience jurisdictional problems and conflicts of laws. The Tripartite Free Trade Agreement (TFTA) agreement between the SADC, COMESA, and EAC may be a step forward for African countries in addressing the issue of overlapping RECs. Perhaps the AfCFTA may build on the progress towards the establishment of the TFTA to reduce the burden of overlapped memberships. Without first overcoming the current challenges at the regional level, a supranational approach to competition policy at the continental level would be challenging and burdensome on the members. It would be counterproductive to the goals of the AfCFTA to

[51]Bhagwati J.N. (1995). *US Trade Policy: The Infatuation with FTAs* [online] Available at *http://hdl.handle.net/10022/AC:P:15619* [Accessed on 16 June 2022].

build a competition framework that is more onerous than helpful to its members. Possibly, one of the challenges facing the supranational approach at a regional level is the differing levels of the economy of African countries. UNECA et al (2019) have suggested that given that each African country has unique economic and political needs, a one-size-fits-all competition policy would be ineffective. As for preserving the acquis, one argument may be that the AfCFTA should not disrupt the existing competition regimes by bringing in a competition regime that undermines the existing frameworks. However, from a different perspective, the supranational competition authority at a continental level may be seen as building on the progress of the current RECs in pursuance of Article 5 of the AfCFTA.

5.4 Mixed Approach Model of Regional Competition Policy

The optimum competition policy for the AfCFTA may be a point of contention among the members. The harmonisation of laws model might work best for those with already existing national competition regimes, those without might come lagging. The cooperative model may be seen as lacking the institutional channels for resolving competition issues and implementing competition laws. As for the Supranational model, it can be argued that a hard law approach to competition policy at the continental level without first resolving the issues at the regional level, may be seen as unhelpful.

All three models; harmonisation of laws, the cooperation model and supranational models have strong arguments in their favour. The AfCFTA can employ a mixed model that incorporates a part of each model to reap the benefits of all. The mixed approach model would take the form of a unified competition protocol (supranational model) that provides the basic standards for competition policy to be implemented by RECs and their respective members (Harmonisation of laws). As directed by the AfCFTA agreement, one of the minimum requirements would be to cooperate on competition policy (cooperation model).[52] The codification would ensure widespread acceptance of regional competition terms, norms, and practices, as well as uniform interpretation, implementation, and enforcement of competition principles.[53] Moreover, members should take advantage of the progress made in establishing an institutional framework

[52] Article 4(c) of the AfCFTA.
[53] Dawar, K., & Lipimile, G. (2020). Africa: harmonising competition policy under the AfCFTA. *Concurrences Review*. 2020 (2). a93472 242-250.

such as the AfCFTA's Dispute Settlement Body and the Appellate Body.[54] Further, the mixed approach model preserves the *acquis* as required by the AfCFTA because it takes into consideration the progress so far made in the current RECs, for both the informal and formal cooperation regimes.

One could argue that because the mixed model incorporates all three models, the AfCFTA is likely to experience the drawbacks of all three models, such as overlapping memberships, reluctance to cooperate, and divergent priorities of competition authorities. However, the mixed model does not fully implement each model. While the supranational model calls for RECs and their members to adhere to a set of minimum standards for competition law, members will be free to add more competition laws and policies. Their additional laws can be tailored to meet the particular challenges of the respective countries or RECs. The harmonisation of laws will only go as far as the basic requirements are concerned. The easiest way to achieve harmonisation is to compel all members to have national competition laws as one of the minimum requirements. As for cooperation, Article 4 (c) provides that state parties "shall" cooperate on competition policy. The reading of Article 4 suggests that members have already decided on formal cooperation rather than a non-binding commitment to cooperate. Furthermore, in addition to reaping the benefits of all three models, the mixed model will serve as a piecemeal approach toward full integration.

6. Conclusion

This article discussed the following factors to consider when creating the AfCFTA competition policy framework: concepts of competition law and policy, the theoretical framework of competition regulation, the interaction between trade and competition policy, and models for regional competition regulatory framework. The paper discussed that members of the AfCFTA must first agree on whether it will be necessary for every member to establish national competition law. Some members currently have no competition laws whilst others have. In addition, the eight Regional Economic Communities (RECs) that the AfCTA has recognized have different regional competition policies. Some RECs have codified competition laws whilst others have no codified competition laws. Although competition laws have better

[54] AfCFTA. *Results of the meeting of the council of ministers responsible for trade*. [online] Available at https://amchamghana.org/wp-content/uploads/2018/03/AfCFTA-8th-Council-of-Ministers-Press-Statement-Official.pdf> [Accessed on 24 February 2022].

enforcement measures, members should be aware of the many schools of thought underpinning competition regulation.

The idea of regulating competition steers economic theories debate on whether or not governments should control market competition. This paper argued that enforcing competition regulations can improve consumer rights and boost production, which is advantageous to buyers and sellers. The AfCFTA can lessen cross-border anti-competitive practices by compelling all members to adhere to a specific minimum standard of competition legislation, either at the national level or as part of a wider grouping within the regional level.

Another significant factor to consider in deciding the competition policy option is the interaction between trade and competition policy. Despite having the same goal of eliminating restrictive trade practices, trade and competition policies seek to protect varying interests. For instance, while competition law is concerned with enhancing consumer welfare in home markets, international trade liberalization is concentrated on increasing productivity and protecting domestic producers. The AfCFTA includes countries with various economies that may have different interests. For example, the Least developed countries may want the freedom to use trade remedies against import surges, while the more developed countries may want to limit trade remedies to enhance competition. The paper suggests that members should consider the various economic levels and leave opportunities for trade remedies to safeguard the infant industries of the least developed countries.

Finally, the maintenance of the *acquis* is an essential concept established by the member countries in the AfCFTA who have agreed to build on what exists in the current RECs. In terms of competition policy, this entails building on the competition regimes of the various RECs under the African Union, such as the COMESA, EAC, ECOWAS, and SADC. The level of competition policy commitments varies throughout these RECs, ranging from cooperation among national competition agencies to regional laws and regional competition authorities. The AfCFTA is expected to build on these varying regional competition regulatory frameworks. In the absence of an effective competition regime in AfCFTA, the advantages of liberalised trade may be negated by private barriers that discourage or limit access to foreign goods and services. The AfCFTA can establish a semi-supranational approach where the competition protocol provides rules for RECs to enforce minimum requirements of competition principles and RECs to have harmonised laws for these minimum requirements. Based on the

existing state of RECs in the AfCFTA, the mixed approach that combines harmonisation of laws, cooperation, and the supranational model is perhaps the optimum regional competition regulatory framework for the AfCFTA.

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