[PANEL 2: Competition, regional integration: mergers and cartels]

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[CCC: Lessons from CCC for the AfCFTA]

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BACKGROUND

Regional Economic Communities and Regional integration

- Regional competition law is an essential ingredient for regional integration. This is because, regional integration is combined with trade and investment liberalization and as such competition law becomes crucial, as benefits of trade and investment liberalization should not be compromised by cross-border anti-competitive practices and be appropriated by private undertakings by means of their unlawful conducts.

- Anti-competitive conduct by private players may have devastating effects against the integration agenda far greater than the *de jure* obstacles to trade if regional integration does not address this conduct.

- The RECs have put in place measures geared towards reduction in tariff and non-tariff barriers imposed by governments and this has the overall goal of facilitating regional integration and increase in the free flow of goods, services, and factors of production across borders.

❑ Lessons from COMESA

- The COMESA Competition Commission is a regional competition authority established pursuant to Article 6 of the COMESA Competition Regulations (the Regulations). The Regulations were gazetted in 2004 but the Commission started operating in 2013.
- The Regulations are developed under Article 55(3) of the Treaty establishing the Common Market for Eastern and Southern Africa (the Treaty).
- Article 55 (1) is the magna carta of competition law enforcement in the Common Market and by extension merger regulation in the Common Market. Article 55(1) of the Treaty provides that:

  "The Member States agree that any practice which negates the objective of free and liberalized trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its object or effect the prevention, restriction or distortion of competition within the Common Market".

- The Commission has jurisdiction on conduct affecting or likely to affect two or more Member States or those with cross border effect. The jurisdictional limitation is that such conduct should affect two or more Member States and should be appreciable in scale. What is appreciable has been explained in the Rules, Guidelines and Practice Notes.

❑ Lessons from COMESA

- The effectiveness of a regional merger enforcement regime depends on the design of the law, the institutional set up and autonomy of the authority, practices and proactivity of the authority and indeed the level of development of National Competition Authorities (NCAs). In addition, business and political acceptance are key ingredients to this scheme of arrangement.
- There are also a number of issues that should be addressed before implementing a regional merger control system. These may include the following:

➢ What kind of competition related issues do developing countries face in the framework of Regional Trade Agreements (RTAs)?

➢ Should a regional competition policy be more centralized or decentralized?

➢ What effects does the intensity of intra-community trade have on the policy choice between centralization and decentralization ?

➢ Should NCAs be given decision-making power in the enforcement of community law?

➢ Should the Member States' different experiences be taken into account in the delimitation of jurisdiction and competences between the regional level and the national level?

❑ Lessons from COMESA

- ➢ Is a regional competition law even desirable in certain regional economic communities?
- ➢ How should the relative size of the participating countries influence the design of regional competition laws?
- ➢ Does the trend of regionalizing competition policies especially in developing countries make the adoption of an international competition policy more likely or less likely?
- ➢ These questions may be answered differently according to unique features of each regional economic community.
- ➢ However, issues such as enforcement, lack of efficient institutional settings and lack of resources among other constraints pose similar challenges in developing countries.
- ➢ In drawing lessons from COMESA, the presentation has been divided into:

- Design and architect of the law
- Institutional Setup and Autonomy of the authority
- Advocacy, Awareness and Technical Assistance
- MOUs with other Competition Authorities
- Capacity building

❑ Design and Architect of the Law

- The law should be binding on all the State Parties. State Parties should also be urged to avoid taking measures that may jeopardize the enforcement of the regional competition law. Articles 5 and 10 of the Treaty, Article 5 of the Regulations and Rule 5 of the COMESA Competition Rules are instructive on this.
- The scope of application should be defined clearly without any ambiguity. This is important to ensure that the regional law only deals with matters of regional significance. Examples include **Hashi Energy Limited/Lake Oil Limited and Norfund/Green Resources mergers.**
- What amounts to a merger on which the regional law is applicable should also be clearly defined. This may avoid a great deal of litigation on account of different understanding of what amounts to a merger.
- Thresholds based on a transparent criteria should be clearly defined. Thresholds are very important for the delimitation of jurisdiction between NCAs and regional competition authorities. Thresholds are also important is detecting mergers that may have regional consequences from those that may not have. (See Rule 4 of the COMESA Rules on the Determination of Merger Notification Thresholds and Method of Calculation).

❑ Design and Architect of the Law

- Safeguards through the referral mechanisms to Member States on mergers even when they meet the merger notification thresholds, evidently are devoid of regional significance. (See Article 24(8) of the Regulations).
- Residual jurisdiction on mergers that may not meet merger notification thresholds but may nevertheless raise concerns of regional significance. The **Uber/Careem** case of 2019 is a good example. (See Article 23(6) of the Regulations).
- Involvement of all the stakeholders especially NCAs. (See Article 26(6) of the Regulations).
- Penalties for undertakings that violate the merger provisions of the Regulations to deter would be offenders and recidivism. The ATC/Eaton Towers (fined **USD 67,629.98)** and the Helios towers/Madagascar Towers and Malawi Towers mergers (fined **USD 102,101.765)** are good examples. (See Articles 8 and 24 of the Regulations).
- **Caution**: In the early days, begin with soft enforcement until the implementation of the law is well grounded. As remarked by Franklin D. Roosevelt:

  "Beware of that profound enemy of the free enterprise system who pays lip service to free competition but also labels every anti-trust enforcement prosecution as persecution".

- Provision in the law for the development of secondary legislation and instruments for effective implementation of the Regulations. Merger Assessment Guidelines were promulgated pursuant to these provisions. (See Articles 8(7) and 39 of the Regulations).

❑ Institutional Setup and Autonomy of the Authority

- The set up of the institution is very important in the effective implementation of any law, more so regional and international laws which are posed with various challenges of implementation.
- The authority should have an optimum number of staff to undertake effective merger reviews and assessment. A division of mergers should be in place.
- Monitoring and compliance functions should be embedded in the institution.
- There should be competent economists and lawyers to ensure sound assessment and disposition of merger cases. When the Commission commenced operations, it had a very lean staff. This has since improved. More should be done and the Commission is in the process of reviewing our organizational structure.
- Within the institution, there should be safeguards that allow for due process. Those who investigate should not be the same officials to make determinations or decisions. In the case of the COMESA Competition Commission, the investigative wing is separate from the Committee of Initial Determinations (the CID) which makes decisions. The decisions of the CID are appealable to the Board. An appeal against the decision of the Board lies with the COMESA Court of Justice.
- It is also important that the institution is to a large extent shielded from external interference on matters before it. The institution should be autonomous. Article 6 of the Regulations and Rule 6 of the COMESA Competition Rules are instructive. Such autonomy enhances the credibility and integrity of the institution and its decisions are respected more by stakeholders. The COMESA Secretariat has granted this autonomy to commendable levels.

❑ MOUs with other Competition Authorities

- In order to ensure effective regional merger control, the Commission enters into MOUs with various stakeholders.
- The Commission has since signed 11 MOUs with NCAs of Member States. The Commission is expected to sign MOUs with Uganda and Burundi by the end of 2022. The Commission also entered into an MOU with the Eurasia Economic Commission which also has a mandate on regional competition enforcement.
- The Commission is in discussions to conclude MOUs with the CARICOM Competition Authority and the East African Community (EAC) Competition Authority. Discussions with the EAC Competition Authority are at an advanced stage and the MOU is expected to be signed by the end of the year.
- Good working relationships with the US Federal Trade Commission, US Department of Justice, the European Commission and the Competition Commission of South Africa (CCSA).
- MOUs are important for a number of reasons:

- Detecting competition matters that would otherwise not have been detected. e.g Uber/Careem Merger, CAF and Toyota cases from Egypt and Zimbabwe.
- Working together in assessing mergers and designing remedies
- Capacity building
- Developing and establishing competition laws and national competition laws.

❑ Capacity Building

- Capacity building for different stakeholders is important in order to ensure effectiveness in the enforcement of a regional merger control system.
- It is important to undertake capacity building for members of staff in order to develop their skills in merger assessment for the effective enforcement of the law.
- The Commission undertakes capacity building for its staff as well as staff from the Member States' NCAs to equip them with the necessary skills required to handle merger review.
- The Commission also raises the capacity of various stakeholders such as judges, lawyers and other stakeholders involved in the implementation of competition laws in the Common Market.
- Such capacity is important in enhancing understanding of a regional competition law and ultimately its enforcement. The enforcement of the regional law does not only involve the Commission but various stakeholders including NCAs, judges, lawyers, etc.

❑ Advocacy, Awareness and Technical Assistance

- Second to investigations, a bigger part of the Commission's budget is spent on advocacy and awareness activities.
- Stakeholder engagement is key in order to raise awareness of the law and the obligations of the businesses in complying with the law. Advocacy and awareness also raises prospects of the law being accepted by various stakeholders like governments of Member States, NCAs and the Business Community. Business and political acceptance are key ingredients to this scheme of arrangement.
- Stakeholder feedback through such engagements is also key in shaping the regulatory framework.
- The Commission has been undertaking advocacy activities for different stakeholders including;
  - Businesses
  - NCAs
  - Relevant government Institutions in the Member States
  - Journalists
  - Lawyers
  - Judges

❑ Advocacy, Awareness and Technical Assistance (Continued)

- Operational and effective NCAs are important for regional merger review.
- There is need for NCAs to have laws and institutions in place.
- The Commission is obliged under Article 26(6) of the Regulations to notify Members States of regional mergers and Member States are required to submit their views on the competition or public interest matters relating to the regional mergers.
- In order to facilitate this, the Commission provides technical assistance to Member States to ensure the following:
  - Development of Laws
  - Setting up of Institutions
  - Harmonising the national laws with the Regulations
  - Domestication of the Regulations
  - Training of members of staff at national level in merger review

COMPETITION LAW FRAMEWORK UNDER AFCFTA

❑ Agreements at the African Continental Level

✓ **Constitutive Act of the African Union (AU):** signed by 55 Member States

✓ **Treaty Establishing the African Economic Community ("Abuja Treaty")**

✓ **African Free Trade Area Agreement (AfCFTA):** signed by 54 Member States.

- **Constitutive Act of the African Union (AU)**

✓ Article 3(I) of this Agreement stipulates that the **AU is vested with the responsibility to coordinate and harmonize the policies between the existing and future RECs** for the gradual attainment of the objectives of the Union.

- **Abuja Treaty**

✓ Articles 4(d), 5(a), 5(d), 88(1)-88(4) of the Abuja Treaty stipulate that the Africa Economic Community is to be established through coordination, harmonization and progressive integration of the activities of the Regional Economic Communities (RECs). This is in line with Article 3(I) of the AU Constitutive Act

- **The African Continental Free Trade Area Agreement (AfCFTA)**

✓ This Agreement is premised on the principles outlined in the Abuja Treaty and the Constitutive Act of the African Union.

✓ The AfCFTA Agreement recognizes all the 8 RECs which have also been recognized by the AU.

- Need to enhance the competitiveness of the economies of State Parties within the continent and the global market and for State Parties to cooperate on competition policy.
- Seeks to resolve the challenges of multiple and overlapping memberships
- Recognizes the RECs as building blocs for the AfCFTA.
- That the Agreement is to be guided by the best practices in the RECs.
- That State Parties that are members of other RECs, which have attained among themselves higher levels of regional integration than under the Agreement are to maintain such higher levels among themselves.

LESSONS FOR THE AfCFTA FROM COMESA

❑ Scope of Application of the AfCFTA Competition Protocol

- **Draft Provision:**

✓ The Protocol applies to conduct that may affect competition between two or more State Parties and has an appreciable effect on the Market or a substantial part of it.

✓ The Protocol is clear that it shall not apply to matters falling within the respective jurisdiction of national competition authorities.

- **Issues arising**

✓ This model appears to imply that there will be national competition authorities and then at the next level, the continental competition authority. Thus, the scope of application leaves out the role of the regional competition authorities in the enforcement of the Protocol.

✓ The African continent is very diverse and broad, with diverse economic and political frameworks. It will be a challenge for an authority at a continental level to effectively enforce competition law if the national and regional competition authorities' roles are not well provided for under the draft Protocol.

- ✓ Business will be burdened and effectiveness of assessment and enforcement of competition law in Africa will be eroded in light of the broad scope of the Continental Competition Authority.

- **Proposed recommendations**

- ✓ The scope of the Continental Competition Authority provided for under the draft Competition Protocol is too broad as it should be limited to dealing with matters of continental significance.

- ✓ Regional competition authorities are very key in the enforcement of competition law in Africa.

- ✓ Maintaining the enforcement of competition law at the level of State Parties and regional competition authorities is in line with the principle of subsidiarity.

- The AfCFTA Continental Authority should work in close collaboration with regional and NCAs.

- It would be important that most of the work is done by regional and national competition institutions with the continental body playing a coordination role. In the absence of this an enforcement gap maybe created with a number of anti-competitive conduct escaping the anti-trust law net.

- Africa's levels of economic and political integration are very low. Thus, need for political integration as it would result to the respect of such laws at continental level. This makes it important to maintain the scope and jurisdiction of regional competition authorities as there are reasonable levels of economic and political similarities akin to integration in the regional economic communities.

❑ Institutional Structure

- **Draft Provision:** Article 4(c) of the AfCFTA Agreement provides for State Parties to cooperate on competition policy.

- **Issues arising**

✓ The State Parties are at different levels of adopting competition laws and competition institutions. Some have robust laws and institutions, others are at nascent stage while others inexistent.

✓ The RECs are at different levels of enforcement and adoption of competition laws and structures.

- **Recommendation**

It would be important that the continental competition framework begins by way of cooperation. This will allow State Parties and the RECs to put in place measures that would impact on the implementation of the Protocol and provided for in the transition arrangement.

❑ Conclusions

- Effective competition law enforcement at national, regional and continental level is central to ensuring enhanced trade, investments, economic growth and ultimately poverty reduction.
- The AfCFTA can learn from COMESA's successes and mistakes in order to build a robust and effective continental competition regime.
- It is also important for the State Parties, negotiators and other stakeholders to have a clear understanding of the problems that need to be addressed. Such an approach is important to remain focused when formulating law and policy in addressing the identified problem.
- Therefore, it is important that a proper study be conducted in order to identify matters of continental significance that need to be addressed by a continental protocol. Anything lower than this standard may be suboptimal.
- Research bodies like CCRED and indeed competition authorities like the Commission and NCAs with many years of enforcement experience may assist in drafting a protocol that would stand the test of time.

Thank You

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