

The development of a competition framework for the success of the AfCFTA: previous attempts within regional blocs and lessons to be learnt from Europe and Asia

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Introduction

Regional integration is by no means a new concept even to the African continent, and was recognized as a vital part of a Pan-African agenda as early as the nineteenth century by scholars like Martin Delany and Alexander Crummel.² The formation of regional economic communities aimed at realizing an integrative ideal in order to foster economic success by African states started emerging as early as 1910 when the South African Customs Union (**SACU**) was formed, with the East African Community (**EAC**) following shortly in 1919.³ On a continental level, the need for integration was first formally recognized by the predecessor to the African Union (**AU**), the Organization of African Unity (**OAU**), in its Charter signed by member states in 1963.⁴ Despite the failure of the OAU, continental economic integration remained on the agenda of the AU and is an objective member states hope to achieve in terms of the Constitutive Act of the African Union signed on 11 July 2000. It is notable that it also features as a key goal of the African Union's Agenda 2063.⁵ After more than 2 decades of strategic planning and lengthy negotiations, on 1 January 2021, the African Continental Free Trade Area (**AfCFTA**) was officially launched.

The objectives of the AfCFTA include the creation of a single continental market for goods and services, with free movement of business persons and investments, to pave the way for the establishment of a

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² Pan-Africanism or Continentalism, Staff Report 2, published on 12th May 2005, accessed online on: <https://neweralive.na/posts/pan-africanism-or-continentalism>

³ Alemayehu Geda and Haile Kibret, *Regional Economic Integration in Africa: A Review of Problems and Prospects with a Case Study of COMESA*, p.2, accessed online on: <https://www.soas.ac.uk/economics/research/workingpapers/file28853.pdf>

⁴ Article II of the OAU Charter

⁵ Article 3 of the Constitutive Act of the African Union

Continental Customs Union.⁶ Intra-regional trade in Africa currently stands at 16% whilst in other regions like Asia intra-regional trade stands at 54%.⁷ An increase in intra-regional trade has many benefits for the African continent, including improved efficiencies arising from possible partnerships between local and multinational companies, technological transfers between member states and improved infrastructure on the continent as a whole. The African people seek to benefit as this will also create jobs, facilitate skills transfer and lower the prices of goods and services.

In order to achieve this broader objective of continental integration, the AfCFTA aims to enhance competitiveness at the industry and enterprise level through exploiting opportunities for scale production, continental market access and better reallocation of resources.⁸ This necessitates the establishment of a comprehensive competition framework for all member states to implement, which is part of the second phase of negotiations being undertaken by AU member states. Whilst the development of a competition framework is currently underway, the status of this development remains unknown as no information is available publicly.⁹ Existing regional blocs, such as the Common Market for Eastern and Southern Africa (COMESA) and Economic Community of West African States (ECOWAS) already have subsisting policies and agreements addressing competition issues in place. The success of these policies has been turbulent due to various issues such as overlapping jurisdiction of local and regional authorities and lack of enforcement ability. This paper examines COMESA and ECOWAS's policies to determine what lessons can be drawn for the AfCFTA, as well as highlights the hindrances to the success of their policies, to assess whether these apply at a continental level and whether it is possible to mitigate them. Successful attempts at economic integration have been achieved in Europe and Asia, both regions having developed competition policies, which has fostered a more secure trading environment. This paper also examines the competition policies adopted by the European Union (EU) and the Association of SouthEast Asian Nations (ASEAN), from which international best practice can be deciphered and discusses whether a similar approach can succeed in Africa.

⁶ <https://au.int/en/ti/cfta/about>

⁷ Elizabeth Gachuri, *African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?*, UNCTAD Research Paper No. 56, UNCTAD/SER.RP/2020/15, p.4, accessed online on: https://unctad.org/system/files/official-document/ser-rp-2020d15_en.pdf

⁸ *Ibid.*

⁹ *Supra* n.7, p.5

The need for a competition framework for the success of the AfCFTA

The development of a competition framework is not usually included in free trade agreements. However, African states have recognized that this is vital to the success of the AfCFTA.¹⁰ There are many reasons for this inclusion in the negotiations of the AfCFTA, the most compelling being that Africa comprising largely developing countries is more prone to being affected by anti-competitive practices. Competition laws and policies basically restrict practices that manipulate or restrict free trade within a defined territory and ensure that businesses conduct themselves in a manner that protects the interests of consumers, thus maintaining the sanctity of the marketplace. As consumers form a vital element of the economy, the importance of their interests can hardly be overstated, thus the need for a robust competition framework to ensure the success of the AfCFTA.

As of 27 April 2022, 54 African countries signed the Agreement establishing the AfCFTA.¹¹ These 54 signatory states all have in place different legal systems and diverse laws. Whilst the promulgation of competition laws is considered a vital part of any robust economy, many African states have not enacted competition laws, and of those that have implementation and enforcement of such laws has proven to be problematic.¹² Of the African countries that have competition laws and policies in place, their competition agencies are at different levels, which diversifies them further.¹³ Studies reveal that anti-competitive practices remain prevalent in Africa, even in countries that have enacted competition laws.¹⁴ In the event that these practices prevail continentally, they threaten the success of the AfCFTA by denying market participants from reaping the benefits of the integrative agenda. Due to the fact that individual member states are facing these impediments to trade within their borders, the AfCFTA has sought to rectify this by including in its agenda the development of a common competition framework that will be applicable to all its members.

¹⁰ *Ibid.*

¹¹ https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT_ESTABLISHING_THE_AFRICAN_CONTINENTAL_FREE_TRADE_AREA_1.pdf

¹² Chapter 10, Phase 2 Negotiations-Competition, Intellectual Property Rights and E-Commerce, p.145, accessed online on: https://www.uneca.org/sites/default/files/chapterimages/Chapter10_en.pdf

¹³ *Supra* n.7, p.7

¹⁴ *Ibid.*

There are many reasons in addition to the aforesaid as to why the development of a competition framework was considered a requisite in the African context. Even in the event that every African country had a competition framework in place, the territorial application of their laws and jurisdictional limits applying to their agencies tasked with the enforcement of such laws would continue to be a hindrance to curbing anti-competitive practices on the continent.¹⁵ Moreover the application of laws by these agencies and their definition of thresholds differ greatly, which if left as is creates room for ambiguity and the setting of conflicting precedents.¹⁶

There are other areas incidental to competition that need to be addressed by the AfCFTA's competition framework in order to foster trade within the region and enable African countries to compete on a global level. Consumer protection laws regulating areas such as unfair and misleading advertising, e-commerce and financial services are necessary to ensure fair trade in the region, and should constitute part of the competition framework as even some countries that have promulgated competition laws in Africa are still lacking in these areas. Another key area that needs to be addressed is sustainable consumption and production, which is enshrined in Sustainable Development Goal 12¹⁷ as sustainability remains a problematic area for Africa.¹⁸

Existing regional blocs and their approach to competition issues

One of the objectives of the African Union is to “*coordinate and harmonize the policies between the existing and future Regional Economic Communities for the gradual attainment of the objectives of the Union*”¹⁹. Whilst Africa has 8 Regional Economic Communities recognized by the AU, many of these regional bodies do not have competition frameworks in place, and of those that do, it would be too lengthy to include a discussion of them all in this paper. For this reason, only 2 regional bodies and their approach to competition issues are discussed herein.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ <https://www.undp.org/sustainable-development-goals#responsible-consumption-and-production>

¹⁸ *Supra* n.7, p.9

¹⁹ Article 3 (l) of the Constitutive Act of the African Union

COMESA

COMESA was formed in December 1994, replacing the previous Preferential Trade Area (PTA) that was in existence from 1981.²⁰ COMESA currently has 21 members²¹ and links 583 million people within these states. COMESA aims to provide amongst other benefits a wider, harmonised and more competitive market and increased productivity and competitiveness within member states.²² COMESA member states appoint a Council of Ministers that is responsible for strategically furthering the objectives of the community. The Secretariat of COMESA is its executive organ, whose function it is to make strategic recommendations to the Council of Ministers appointed by member states and to ensure that the regulations and directives adopted by the Council of Ministers are properly implemented.²³ COMESA has since its inception established various needs-based institutions to facilitate the meeting of its objectives which include a COMESA Court of Justice, COMESA Business Council, Trade and Development Bank and COMESA Competitions Commission. Each of these institutions has been formed to provide expertise in specific areas, develop skills and conduct extensive market research that links evidence to their recommendations that they present to the Council of Ministers.

The COMESA Competitions Commission was established in terms of Article 6 of the COMESA Competition Regulations of 2004, albeit the Commission only commenced operating on 14 January 2013. COMESA has a comprehensive legal framework governing competition related issues, including the Regulations of 2004 and various sets of Rules pertaining to mergers and acquisitions²⁴ and the establishment of the Commission's Appeals Board²⁵, which was formed as an appellate body to which decisions of the Commission can be appealed. COMESA has also developed various guidelines on ancillary matters such as restrictive business practices and abuse of dominance. COMESA's Competition Commission has been recognized as the most established regional competition authority in Africa so far, however despite its

²⁰ <https://www.comesa.int/what-is-comesa/>

²¹ Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe

²² <https://www.comesa.int/what-is-comesa/>

²³ <https://www.comesa.int/secretariat/>

²⁴ Rules on the Determination of Merger Thresholds and Method of Calculation

²⁵ COMESA Competition Commission (Appeals Board Procedure) Rules

ambitious existence, its enforcement of legal instruments, which is its primary mandate has been fraught with difficulties.²⁶

One of the challenges facing the COMESA Competition Commission is that it only has jurisdiction in respect of transactions or conduct that is cross border and affects more than 2 member states.²⁷ As a supranational authority, it also relies on national competition agencies within member states, that are often hesitant to cede autonomy to the COMESA Competition Commission and do not cooperate and coordinate with it, thus posing a hurdle to the Commission's operations.²⁸ The reasons for this hesitance are many and include a loss of merger fees for national competition agencies as well as the lack of knowledge in particularly young national institutions.²⁹ The lack of a competition framework and national institution to implement this in some member states³⁰ further exacerbates the inability of the COMESA Competition Commission to fulfill its mandate.³¹ To date, national competition authorities continue to invoke parallel jurisdiction as the COMESA Competition Commission, many of them arguing that failing domestication of the COMESA Competition Regulations, they are not bound to cooperate with or cede autonomy to the Commission.³²

As of 2020, intra-regional trade between COMESA member states stood at a staggering 7%.³³ The low volumes in trade have been attributed to numerous factors including a lack of competitiveness in various sectors such as the financial sector, telecommunications, tourism and transportation.³⁴ Whilst a robust competition framework in the region cannot mitigate all the impediments to trade within the region, the strides taken by COMESA as a regional economic community are definitely noteworthy and a move in the right direction. The COMESA Competition Commission continues to take measures aimed at facilitating the fulfillment of its mandate including embarking on awareness campaigns, entering into memorandums of

²⁶ Vellah Kedogo Kigwiru and Willard Mwemba, *The COMESA Competition Commission (CCC), Earlier Experiences and Lessons for Regional Competition Regimes in the Global South*, published on 30th August 2021, accessed online on: <https://www.afronomiclaw.org/category/analysis/comesa-competition-commission-ccc-earlier-experiences-and-lessons-regional>

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Currently countries that have not enacted competition laws include Democratic Republic of Congo, Eritrea, Libya, Somalia and Uganda

³¹ *Supra* n.7, p.8

³² *Ibid.* Competition Authority of Kenya in particular has invoked this argument

³³ Online article by Mwangi Gakunga published on 29th October 2020 on <https://www.comesa.int/opportunities-abound-to-turn-around-the-low-intra-regional-trade/>

³⁴ *Ibid.*

understanding with national competition authorities and sharing merger fees to encourage cooperation with the Commission in respect of competition issues.

ECOWAS

ECOWAS is an older regional economic community having been formed in 1975. Its membership comprises 15 countries in West Africa³⁵ and connects over 300 million people within this region. One of the main objectives of ECOWAS is to foster collective self-sufficiency for its members and whilst economic integration is high on the list of its objectives, collective defence and security are also at the forefront of this regional body's objectives.³⁶ In terms of achieving economic integration, ECOWAS has been harmonizing macro-economic policies in member states, implementing a roadmap for the ECOWAS single currency programme, monitoring the performance of member states and has established a ECOWAS Macroeconomic Database & Multilateral Surveillance System (ECOMAC).³⁷ At the epicenter of decision making within ECOWAS is the Authority of Heads of States and Government with its main executive organ being the Commission, formerly the Secretariat.³⁸ ECOWAS has also established various institutions such as the Community Court of Justice, Community Parliament and the ECOWAS Bank for Investment and Development.

In 2007, ECOWAS adopted a Regional Competition Policy Framework proposed by its Technical Committee of Trade and Competition Experts articulating the purpose and basic principles of competition law and its many benefits to the regional integration process.³⁹ The Framework comprises 2 pieces of key legislation that were adopted by ECOWAS members in 2008, namely, the Community Competition Rules and the modalities for their application and the ERCA Act that establishes the ECOWAS Regional Competition Authority. However, the Authority only commenced operations in May 2019.

As the operations of the ECOWAS Regional Competition Authority commenced fairly recently, there is very little data on its successes thus far. Cases and decisions are not available online and very little literature has

³⁵ Benin, Burkina Faso, Cape Verde, Cote d' Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Sierra Leone, Senegal and Togo

³⁶ https://ecowas.int/?page_id=40

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ Supplementary Act A/SA.1/12/08 and Supplementary Act A/SA.2/12/08

been written. In terms of the legislation, the Framework is comprehensive and progressive, which is noteworthy. There has been recognition that if anything one challenge to the success of the Framework will likely be enforcement and only robust implementation will promote and facilitate conditions necessary for economic growth and integration in West Africa.⁴⁰ Another impediment to the success of the ECOWAS Competition Framework is the fact that several member states have not enacted competition laws, and even of those that have, the level of their laws and national competition authorities differ.⁴¹ Thus, it is likely that ECOWAS will face similar challenges to its success in the realm of competition as COMESA has been facing, and many remedial actions will be required to mitigate these impediments.

A competition framework for Africa

Key features of a competition framework

Whilst many countries in Africa have promulgated sophisticated competition laws and policies that accord with international standards, a competition framework at a continental level needs to accord with successful efforts undertaken at a regional level. In Africa, various regional blocs have formed competition policies, as discussed above. Whilst other continental approaches to a framework may appear more attractive, current attempts within Africa would be most insightful considering that extensive research has been done by experts in the field continent wide to create a framework that fits the African context. Without going into too much depth, key features of a competition framework can be devised drawing lessons from the 2 regional economic communities discussed in this paper, namely, COMESA and ECOWAS. At the very epicenter of any legal instrument is its definitions section. This section defines terms used within such legislative document and ensures amongst other things that its application is as uniform as possible. Whilst terms related to competition laws may vary within various jurisdictions, a competition framework would need to define these terms as they apply to all member states of the AfCFTA. The COMESA Competition Regulations were promulgated in 2004. Article 1 commences with key definitions that bring certainty to the interpretation of the Regulations. The ECOWAS Community Competition Rules and the Modalities of their Application within ECOWAS, promulgated in 2008 in similar fashion commence with key

⁴⁰ Prince Ifeanyi Nwankwo, *Mergers and Acquisitions under ECOWAS Competition Law*, published online on 12th November 2019, accessed online on: <https://api.hkspublications.org/mergers-and-acquisitions-under-ecowas-competition-law/>

⁴¹ These countries include Ghana, Guinea, Guinea-Bissau and Sierra-Leone.

definitions, albeit varying slightly in content from the COMESA definitions. What is notable from both sets of rules is that the definitions are not as nuanced as they would be at a national level but rather broad to facilitate their application within member states with varying local laws on the same subject matter. A continental instrument will need to have tailor made definitions considering the varying levels of development of competition laws across Africa. Like other regional instruments, these definitions need to be certain enough to ensure uniform application and interpretation of the substantive provisions therein.

Much as definitions of terms is a necessary element of a robust competition framework, defining the concepts which underpin competition issues is equally important if not more so. For countries with no competition laws in place, the need for defining concepts is to enable them to understand the context and purpose of the competition framework, whilst for countries with varying laws, the purpose is to harmonise interpretation and application of the continental framework. At the crux of this is defining the confines of anti-competitive practices, such as the creation of a monopoly, cartels, price fixing, abuse of dominance or any other practices that decrease competitiveness on the continent. Whilst these may appear universally accepted terms, the manner of determining when these practices distort a free market differ widely and it is necessary to codify this manner of determination, whilst leaving room for the use of discretion by a regional authority responsible for making such determination.

A key area that forms a part of competition legislation worldwide, at both national and regional levels is that of mergers and acquisitions. This area covers all instances where businesses merge either as a result of a joint-venture, acquisition or business arrangement that involves two or more entities from operating as a single entity or being controlled by a specific group of people. In many instances this behavior can threaten free trade as a single entity or a set of people can occupy a large market share, thus monopolizing an industry or sector. Competition legislation seeks to regulate this behavior by requiring prior authorization for transactions that meet certain requirements in order to ensure that such behavior will not reduce competition in the market or threaten free trade. A continental competition framework will need to have detailed provisions on mergers and acquisitions, including forms applicants will need to fill out to apply for authorization, the nature of information that will need to be submitted for a determination to be made, fees and sanctions for non-compliance.

In terms of defining concepts underpinning competition laws, COMESA's Competition Regulations are far more detailed than ECOWAS Competition Rules. COMESA has also promulgated additional Rules under the

Regulations, as well as Guidelines on key issues, namely, merger assessment, market definition, restrictive business practices and abuse of dominance. A notable area that is also covered by COMESA's Competition Regulations is consumer protection.⁴² Whilst competition laws generally operate to create a fair market, there is also a need to balance the interests of relations subsisting between traders and consumers.⁴³ Consumer protection laws cover amongst other things information and rights awareness for consumers, unfair and misleading practices and product safety.⁴⁴ Whilst some countries have moved towards the adoption of consumer protection policies, the pace at which this movement is gaining momentum has been slow.⁴⁵ A competition framework for the AfCFTA will need to be progressive and accord with international best practice, which dictates that consumer protection issues also be addressed. The COMESA provisions in this respect could be incorporated and built on.

Since the development of the COMESA Competition Regulations, there has been global progress in respect of various other matters that have found their way on to the competition agenda. One of these areas is sustainable business practices.⁴⁶ Environmental issues have taken the centerstage worldwide in the midst of global warming and the damage it has caused to the economies of countries and to this end Sustainable Development Goal 12 makes mention of sustainable consumption and production.⁴⁷ There is a need for a continental competition framework to create a link between consumer policies that promote sustainability and consumers role in promoting a clean environment.⁴⁸ Two other key areas that have been identified as being vital to address in the realm of consumer protection include e-commerce and financial services.⁴⁹ In an era of digital technology, the AfCFTA cannot turn a blind eye to these areas as consumers continue to engage in online purchasing using various means of payment.⁵⁰

⁴² Part 5 of the COMESA Competition Regulations, December 2004

⁴³ *Supra* n.7, p.7

⁴⁴ *Supra* n.7, p.9

⁴⁵ *Supra* n.7, p.8

⁴⁶ *Supra* n.7, p.9

⁴⁷ <https://sdgs.un.org/goals/goal12>

⁴⁸ *Supra* n.7, p.9

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

Implementation and Enforcement

Since time immemorial, the world has seen international organisations fall for being unable to enforce compliance of member states. An institution must be created tasked with implementing and enforcing the mandate of any competition framework in the AfCFTA. By the very fact that African countries ratified the Agreement establishing the AfCFTA is an acknowledgment of some form of commitment to the free trade movement along with competition related issues, which forms part of the negotiations member states have committed to discussing. As part of regional economic communities that have various implementation and enforcement structures in place, there is no doubt that African countries are no strangers to the idea of a regulating authority.

In the context of competition policy, COMESA and ECOWAS both have Competition Authorities with fairly similar mandates, being that primarily of ensuring compliance with and enforcement of the various competition rules and regulations promulgated. Likewise, the primary mandate of a continental competition authority for the AfCFTA would be to implement and enforce the competition rules and regulations, once promulgated. There would need to various structures within the authority tasked with various functions, such as a secretarial arm to deal with all administrative issues. Both COMESA and ECOWAS Competition Authorities have Directors and support staff tasked with the day to day running of the Authority, along with Commissioners who are responsible for reviewing applications, recommendations for further policy development and decision making in respect of any enforcement measures that need to be taken. All these functions would need to form part and parcel of any continental competition authority, once established.

An additional dimension faced by the AfCFTA is the fact that there are already regional economic communities existing within Africa with which its mandate overlaps. The jurisdiction of a continental authority would need to be clearly defined to avoid duplicating that of any regional economic community. Furthermore, a continental authority in order to succeed would also need to play a central coordinating role linking all the various competition authorities within the region and ensuring cooperation in terms of exchange of information. It would also be necessary to determine which regional authority has jurisdiction where there are issues of overlapping jurisdiction. The AfCFTA competition authority will need to assist countries in capacity building to develop competition laws at a national level and conduct advocacy exercises to raise awareness on competition issues. In this respect it would need to liaise with other regional

economic communities as well as the African Competition Forum, whose objectives include assisting African countries to adopt competition laws.⁵¹ Finally, the AfCFTA competition authority would do well to conduct research into the latest trends and gather statistics in respect of all competition related issues to further develop competition policies on the continent and keep up with global developments.

Impediments to a successful competition regime in Africa

Whilst the development of a competition regime applicable continent wide is a crucial part of the free trade agenda, there are numerous hurdles that would need to be crossed in order to succeed in creating a competition regime that is accepted by all member states. A major impediment to a common competition framework for Africa is the fact that all member states of the AfCFTA have national competition laws and institutions at differing levels.⁵² It is anticipated that this would make it exceptionally difficult for members to reach agreement on the substantive provisions of any competition policy as well as the extent of its implementation and enforcement.⁵³ Countries with more sophisticated competition laws would advocate for more stringent regulation of competition issues comparable to their own local laws, whilst countries with little or no regulation of competition issues are likely to oppose the idea of a common framework altogether and may frustrate the negotiation process. An added complex to this dynamic is the fact that African states are made up of a mix of common law and civil law jurisdictions, which necessitate a set of rules that ensures that the interpretation of its provisions will be uniform regardless of which system of law prevails in each member state.⁵⁴

Another impediment particularly in the realm of enforcement is the existence of numerous authorities with overlapping jurisdiction at various levels. Member states have established national competition authorities that regulate competition issues within their borders. Regional communities like COMESA have also established competition authorities that operate at a regional level to address competition issues affecting more than one-member state within such region. At these two levels, it has been observed that where there is overlapping jurisdiction, national competition authorities are reluctant to cede authority to regional

⁵¹ <https://www.compcor.co.za/african-competition-forum/>

⁵² *Supra* n.7, p.7

⁵³ Eleanor M. Fox, *Integrating Africa by Competition and Market Policy*, Review of Industrial Organization (2022) vol. 60, 305, p.307

⁵⁴ *Supra* n.7, p.7

authorities, for various reasons, including loss of merger fees.⁵⁵ It has been increasingly difficult to coerce member states into taking enforcement measures against the national authorities in their countries. One of the arguments propounded by national authorities for not ceding jurisdiction to a regional authority is that since the regional competition rules have not been domesticated, the national authority was not bound to comply with those rules.⁵⁶ Where agreement can hardly be reached on a regional level, it is unlikely that where an added continental authority is added to the blend, agreement will easily be reached.

Regional economic communities have an instrumental role to play in the success of the AfCFTA as it is far easier to coordinate the interests of a few blocs rather than 54 members individually. However, many countries are members of more than one regional bloc, which makes it difficult to determine which blocs approach they would prefer. In terms of competition issues, some African countries have more than one set of rules applicable to them at a regional level and they fall within the jurisdiction of more than one regional authority responsible for regulating competition issues. For example, in the case of the East African Community (EAC), the EAC's Community Competition Authority despite starting operations in January 2018 has been facing difficulties in receiving notifications, one of the reasons being the overlapping membership of some countries that are members of both COMESA and EAC.⁵⁷ This makes it difficult to determine which authority has jurisdiction over a matter, and may result in certain anti-competitive behavior being ignored altogether. This issue will need to be addressed for a successful competition framework to be enforced within the AfCFTA.

Recommendations

Several integration attempts have been carried out on other continents, and many of them have culminated in increased intra-regional trade. The most successful integration attempt to date has been that established by European countries, known as the European Union (EU). The EU is not merely a free trade area or customs union, but has evolved into a monetary and fiscal union. The EU dates back to 1945, where European countries formed the European Coal and Steel Community and established the European parliament subsequent to World War II.⁵⁸ Subsequent decades saw member countries increase

⁵⁵ *Supra* n.26

⁵⁶ *Ibid.*

⁵⁷ *Supra* n.7, p.15

⁵⁸ https://european-union.europa.eu/principles-countries-history/history-eu_en

cooperation, eventually integrating economically and developing regional policies.⁵⁹ In the 90's and after the fall of communism, member states then formed the EU as it is today, launching a single market, border-free travel and the use of the euro as a common currency.⁶⁰ In 2020, regional trade within the European continent was 68%.⁶¹

The EU has a common legal framework that applies individually in all member states, which includes strict competition laws that have been part of the EU legal framework since the 1950's.⁶² This law has been interpreted, applied and enforced through various national and regional institutions, including the courts of member states, the EU Court of Justice and decisions of the European Commission.⁶³ EU Competition law covers three main areas, namely, anticompetitive agreements⁶⁴, unilateral conduct and abuse of dominance⁶⁵ and concentrations. The period of time over which competition laws have been in force in Europe as well as the capacity of its institutions has resulted in the EU being seen as a leader from which lessons can be drawn. However, European history, although fraught with 2 devastating World Wars is vastly different from Africa's history, which speaks of poverty, colonialism and issues of poor governance. Africa's history has resulted in its members adopting a protectionist approach to trade, which has hindered regional efforts to integrate as collective success remains at the very bottom of the agenda for most countries. In addition to this survival of the fittest attitude, the differing legal systems African countries have inherited from their colonisers makes it immensely difficult to harmonise their laws and compel them to follow a single set of rules, with blanket application to them all. Whilst the European competition model is inspirational as its success speaks volumes in terms of the amount of intra-regional trade it has fostered, it cannot be mimicked in Africa in the near future as harmonisation of laws in all member states would need to be done before such approach can be adopted. In addition, Africa faces severe resourcing challenges that would be necessary to build the kind of institutions Europe has established for the implementation and enforcement of its competition laws.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ <https://hbs.unctad.org/trade-structure-by-partner/>

⁶² Konstantinos Stylianou and Marios Iacovides, *The Goals of EU Competition Laws: A Comprehensive Empirical Investigation*, The Society of Legal Scholars, Legal Studies (2022), p.3

⁶³ *Supra* n.62, p.4

⁶⁴ Article 101 Treaty on the Functioning of the European Union

⁶⁵ Article 102 Treaty on the Functioning of the European Union

Another community that has succeeded in reaping tangible benefits from economic integration is the Association of Southeast Asian Nations (**ASEAN**). This regional institution was established in 1967 and currently has a membership comprising 10-member states.⁶⁶ The objectives of ASEAN speak more to cooperation than integration, and acknowledges the diversity of its member states, seeking to grow as a region together, whilst maintaining each member states individuality.⁶⁷ As of 2017, all member states of ASEAN had promulgated national competition laws, albeit at different levels.⁶⁸ In August 2010, ASEAN member states approved Regional Guidelines on Competition Policy. Unlike in the EU, the ASEAN Guidelines are not intended to be binding legislation, but a general framework for member states to introduce, implement and develop competition laws in their individual countries considering their varying economic conditions.⁶⁹ The Regional Guidelines amongst other things, outline the objectives and benefits of competition laws, the scope of competition laws and policies, guidance on the establishment of a competition regulatory institution, the provision of technical assistance and capacity building to member states and advocacy programs to create awareness in respect of competition related issues.

ASEAN member states have similar histories to African countries in that they have varying legal systems in place, are at differing levels of development and were historically colonized. They also face similar capacity constraints that African countries have at national and regional levels. Whilst there is no data on ASEAN specific inter regional trade percentages, it is noteworthy how the Asian continent as a whole has managed to increase its inter regional trade, far surpassing the progress made by regions within Africa. The lesson that can be learnt from ASEAN in the context of a competition framework is that the AfCFTA might succeed if it starts with a soft approach to the problem by focusing on coordination, advocacy and capacity building within member states before developing a set of rules that applies at a continental level.

The United Nations Commission for Africa (**UNECA**) recently sought to address the possibility of an institutional framework addressing competition issues, considering the particularities of the African continent.⁷⁰ Three options were proposed; (i) a supranational AfCFTA competition authority, which would

⁶⁶ Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam

⁶⁷ Article 1 of the ASEAN Charter

⁶⁸ https://eng.kppu.go.id/wp-content/uploads/ANNEX-II_Comparative-Table-on-Competition-Law-Frameworks-in-ASEAN-1.pdf

⁶⁹ Article 1.2.1 of the ASEAN Regional Guidelines on Competition Policy

⁷⁰ *Supra* n.7, p.19 and Assessing Regional Integration in Africa Report, UNECA, ARIA IX, Chapter 5, available online on: https://archive.uneca.org/sites/default/files/PublicationFiles/aria9_report_en_4sept_fin.pdf, p.155

deal with cross border competition violations by companies operating in more than one member state; (ii) a cooperation framework, which would be an informal network and a platform to bring together competition authorities for exchange of information, best practices and to share challenges; or (iii) both frameworks with a sequential approach, where the process will start with creation of a network as preparations for the establishment of an authority within the AfCFTA structure are finalised.⁷¹ Scholars such as Gachuiru⁷² support the third option mainly because she argues that a hard approach where African states at their varying levels of policy development in this realm are forced to comply with a compulsory framework is not feasible, until regional economic communities and member states harmonise their approaches to competition issues through the collective efforts of the AfCFTA. She argues further that the timing of this sequencing should not be rushed and should allow regional economic communities such as Maghreb Union (AMU), the Community of Sahel-Saharan States (CEN-SAD) and the Intergovernmental Authority on Development (IGAD) an opportunity to come to speed by developing their own competition policies.⁷³

Whilst there are strong reasons for the development of competition laws to proceed on a national level with capacity building, advocacy and coordination on a continental level, scholars like Fox argue that the anti-competitive practices of African firms transcending state borders necessitates the establishment of a competition voice at the center to champion continent-wide competition issues.⁷⁴ She argues that whilst the current architecture of African states does not allow for deep policies to be developed, few but critical functions must be developed at the center and enforcement should not wait.⁷⁵ Regionalism must still proceed, however continental enforcement is key. Whilst a system of voluntary coordination is not hard to set up, she argues that the potential of nation-to-nation cooperation is limited and thus a platform at the “top” must be established to enforce compliance.⁷⁶ Fox makes a case for lessons to be drawn from the EU model, albeit not at the level of policy formulation, but institutional establishment.⁷⁷ The most compelling reason Fox gives for her proposed model is that a more elaborate and complete law is unlikely to be

⁷¹ *Supra* n.7, p.19 and *Supra* n.70, p.160 of ARIA IX

⁷² *Supra* n.7, p.19

⁷³ *Supra* n.7, p.20

⁷⁴ *Supra* n.53, p.306

⁷⁵ *Ibid.*

⁷⁶ *Supra* n.53, p.307

⁷⁷ *Ibid.*

embraced unless it is voluntary and unenforceable. Instead, a slim law is more likely to be accepted by African states and if enforced has reasonable prospects of succeeding.⁷⁸

All the above recommendations point toward the possibility of a hybrid system. Whilst adopting comprehensive competition laws at a continental level as has been done in the EU is largely unsuitable for Africa, the establishment of a central authority to enforce things at the top as proposed by Fox may succeed. However, as Gachuri proposes, this may need to be sequential, commencing with the creation of a cooperation framework. Kigwiru also argues for the same reasons that a “soft” law approach is most suitable at this point in time.⁷⁹ In terms of the framework itself, it could mimic the ASEAN Regional Guidelines on Competition Policy, tailored to the African context and involving the various Regional economic communities that have been established to date. Once this has been done, the next step would be to develop and create a “slim” policy, being a set of rules governing the most crucial areas of competition regulation, as Fox proposes and establish a central authority to ensure enforcement of this policy. A key feature of this slim policy should be the harmonisation of competition laws across the continent. Eventually, Africa will be ready to develop comprehensive competition rules applicable continent wide, with an authority that has the mandate to ensure its compliance.

Conclusion

If the AfCFTA succeeds in achieving its objectives, it would result in Africa increasing its cumulative gross domestic product to an estimated US\$3.4 trillion.⁸⁰ However, the attainment of this ideal is largely dependent on African countries implementing significant policy reforms and trade facilitation measures.⁸¹ Whilst competition policy alone is insufficient to ensure that the mandate of the AfCFTA is met, it is definitely a piece of the puzzle intended to make a whole image and in recognition of this, member states included it as part of phase II negotiations currently being discussed.

⁷⁸ Supra n.53, p.310

⁷⁹ Vellah Kedogo Kigwiru, *The African Continental Free Trade Area Competition Policy: Model, Dispute Resolution Mechanism, Institutional Framework and AfCFTA Relationship with Existing Regional Competition Regimes*, Afronomics Law, published on 29 October 2019, p.2

⁸⁰ <https://african.business/2022/02/trade-investment/what-you-need-to-know-about-the-african-continental-free-trade-area/>

⁸¹ *Ibid.*

Notable strides have been taken to develop competition policies at a regional level by the likes of COMESA and ECOWAS, which are a starting point to creating a continental framework. A robust competition policy must address various key areas such as defining significant concepts, specifying what constitutes anti-competitive behavior and regulating mergers and acquisitions. Additional areas that ought to be regulated are consumer protection, e-commerce and financial services to ensure that Africa is keeping up with global trends. An authority also needs to be established to implement and enforce competition policy once developed, as laws without enforcement will encourage non-compliance by member states.

There are various impediments to the success of a competition framework for the AfCFTA including the fact that national competition laws in member states vary greatly with some countries not even having promulgated competition laws, the overlapping membership of African countries within regional economic communities meant to be the building blocs of the AfCFTA and the likely hesitance of member states to ceding authority to a single continental agency tasked with the enforcement of a competition policy. In light of these impediments, many proposals have been put forth for the eventual development of a competition framework for Africa. A sequential approach to competition policy has the highest chances of succeeding starting with a “soft” approach entailing the development of a cooperation network between member states, followed by the establishment of a competition authority for enforcement purposes and finally the promulgation of a set of rules applicable within the continent once harmonisation at national and regional levels has taken place. The establishment of a competition authority should also be synonymous with the regulation of few but critical areas through the creation of a “slim” policy as proposed by Fox, which is more likely to be accepted by member states. By adopting this hybrid approach, there is a good possibility that the policing of anti-competitive behavior may succeed and in turn encourage inter-continental trade within Africa.

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