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African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?

Executive summary

The goal of African regional integration and economic freedom is nearing fulfilment now more than ever in the period of more than 50 years since the time of Kwame Nkrumah. The Agreement establishing the African Continental Free Trade Area (AfCFTA), signed in Kigali on 30th March 2018, created a realistic opportunity for attaining a common market for Africa. This paper examines the role of the competition protocol in promoting a combined African competitive market under the AfCFTA. It further looks at existing Regional Economic Communities (RECs) and their fit within the AfCFTA, along with the opportunities and challenges they present to this process. Finally, it includes a brief on the effects of COVID-19 health crisis to competition enforcement, the role of UNCTAD and it ends with a conclusion and way forward.

Key words: regional integration, AfCFTA, competition protocol, market.



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1 The AfCFTA process and its operationalization: Headed for Regional Integration in Africa

As early as 1957, Kwame Nkrumah had already foreseen the importance of economic independence for African countries.¹ Realizing the benefits of economic and political independence in enhancing African people's welfare, African states' resilience and vision of continental integration has been on course for over 50 years. In 2013, the initiative to integrate the continent advanced through the Pan-African Vision of "*an integrated, prosperous and peaceful Africa*" enshrined into the African Union Agenda 2063.² Nevertheless, the dream of having an integrated Africa has not been easy. Yet, the African continent has held onto this expectation of economic freedom amidst numerous challenges it faces, in particular: limited energy and infrastructure development, insecurity and conflicts, multiple and overlapping membership of Regional Economic Communities (RECs), inadequate sequencing of the regional integration arrangements and limited financial resources.³

Indeed, despite the challenges facing regional integration in Africa, the effort of having a single integrated Africa has not dwindled. On 21 March 2018 in Kigali, Rwanda, member States of the African Union signed the Agreement establishing the African Continental Free Trade Area (AfCFTA) for African countries. This act by African governments marked a momentous milestone for regional integration in Africa.⁴ The signing of this agreement strongly indicated policymakers and African leaders' commitment to regional integration. This act pushes African nations to start looking inward and to examine the potential hidden in this huge market of 1.2 billion people and a GDP of over US\$2.5 trillion.⁵ The expected end result is to enhance intra-Africa trade.

The AfCFTA is a key effort of the African Union's Agenda 2063 development plan,⁶ whose core highlight is to facilitate trade within the region; and travel and connectivity that goes with it.⁷ The signatories seek to increase intra-Africa trade to speed up Africa's economic integration, in order to cushion its fragile economies and leverage its economic size.⁸ The AfCFTA therefore, establishes a free trade zone enabling Africa to move into an unprecedented development era that is expected to combat the low levels of intra-African trade.

¹ <https://www.dissentmagazine.org/article/kwame-nkrumah-and-the-quest-for-independence>

² <https://au.int/agenda2063/overview>

³ Mzukisi Qobo, 'The Challenges of Regional Integration in Africa: In the Context of Globalization and the Prospects for a United States of Africa' (Institute for Security Studies Paper No. 145 2007).

⁴ D Luke and J MacLeod, 'Introduction' in D Luke and MacLeod(eds), *Inclusive Trade in Africa; The African Continental Free Trade Area in Comparative Perspective* (Routledge Taylor and Group, 2019) 1-4.

⁵ <https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area>

⁶ <https://au.int/agenda2063/overview>

⁷ It includes as objectives; to create a liberalized and a competitive market which can face the world market together. Further, to lay the ground for the establishment of a Continental Customs Union" and "contribute to the movement of capital and natural persons."

⁸ https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf

trade currently stands at 16%, which is low globally and particularly when compared to Asia for example, which trades at 54 % intra-regionally.^{9,10} Additionally, the benefits of working together within the AfCFTA opens enormous opportunities for small, medium, and large businesses in manufacturing and other sectors as opposed to the operations of fragmented markets. With the expected lowering of tariffs and other non-tariff barriers, enhanced cross-border trade with easier access through customs and ports for SMEs, and improved efficiencies arising from possible partnerships between local and multinational companies, technological transfers, innovations and lower prices will accrue.¹¹ This will build a stage for smart competition among countries that will boost intra-regional trade to facilitate job creation, uplift skills development and promotion and exchange of best practices.¹² The move will create possibly the largest common market in the world, with accruing benefits.¹³

In order to actualize the benefits that AfCFTA promises, African countries have made remarkable progress since the signing on 21 March 2018. As of January 2020, 30 African countries had ratified and deposited ratification instruments with the African Union Commission.¹⁴ Negotiators have concluded all four of the Phase I protocols to the agreement and 10 of the 12 annexes (Trade in Goods annex 1 on Schedules of Commitments and annex 2 on Rules of Origin were to be concluded by July 2019). This marks commendable progress since the launch of negotiations in June 2015.

In addition, African States established the AfCFTA Secretariat in Accra, Ghana (July 2019). This movement demonstrated the consistent commitment of African States.¹⁵ During the 33rd Ordinary Session of the African Union Heads of States and Government Assembly, the African Union directed that the incoming AfCFTA Secretary General must be installed by 31st March 2020. The newly appointed Secretary General of the AfCFTA Secretariat, His Excellency Mr. Wamkele Mene, was sworn in at African Union Headquarters in Addis Ababa, Ethiopia on 29 March 2020.¹⁶ This step marks an important milestone in the process of initializing the AfCFTA and a big success in the history of the African Union Commission.

By July 1, 2020, the AfCFTA Secretariat was expected to begin the implementation of the instruments and protocols already concluded. This has been rescheduled to January 2021 due to disruptions caused by the COVID-19 pandemic, which will be discussed later in this paper. Furthermore, on 17th August 2020, the official handover and commissioning of the African Continental Free Trade Area Secretariat Building took place in Accra, Ghana.¹⁷

⁹ <https://www.afdb.org/fr/news-and-events/intra-african-trade-is-key-to-sustainable-development-african-economic-outlook-17022>

¹⁰ <https://www.unescap.org/resources/digital-and-sustainable-trade-facilitation-report-specs-2019>

¹¹ <https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcta-sme-business/>

¹² <https://www.weforum.org/agenda/2019/04/visualizing-africa-s-free-trade-ambitions/>

¹³ <https://www.weforum.org/agenda/2019/05/AfCFTA-africa-continental-free-trade-area-entrepreneur/>

¹⁴ https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf

¹⁵ https://au.int/sites/default/files/pressreleases/36910-pr-revised_pr_1_ex_con_1st_july_2019_.pdf; <https://africa-eu-partnership.org/en/afcta>

¹⁶ <https://www.ghanaweb.com/GhanaHomePage/business/First-Secretary-General-of-AfCFTA-Secretariat-sworn-in-898852>

¹⁷ <https://au.int/en/newsevents/20200817/official-hand-over-and-commissioning-afcta-secretariat-building>

AfCFTA implementation will put to the test the commitment of African countries to economic integration as the it aspires to deepen the integration of the African continent beyond merely a free trade area. African countries must take care that the AfCFTA does not simply add another element of preferential trade regime. Instead, it must provide coherence to the internal and external trade policy landscape in Africa. For a smooth implementation, countries must be prepared to handover some sovereignty and power to the continental body. In this regard, competition and trade policies could be among the policy areas that would require countries to cede some powers to enable effective implementation of the protocols of the AfCFTA.

2 Competition Policy and Law in Africa: The Competition Protocol Fit

2.1 Background

While the operationalization of the AfCFTA is expected to begin soon, the second phase of negotiations on competition, investment and intellectual property are making progress. At time of writing, the negotiations of the draft competition protocol had not yet started. It is timely to discuss the structure of the protocol and the substantive elements to be considered therein. Under this circumstance, it is important to note that in Africa, not all countries have competition laws, policies and institutions as explained later in this paper. The opportunity to develop a continent-wide competition policy requires careful consideration as it could be the solution for many countries in this regard.

Africa needs to create an environment where businesses will conduct themselves in a competitive manner in order to effectively compete globally. African markets must allow competitors to enter the market and while at the same time promote consumer welfare.¹⁸ Competition is considered as a pillar at the heart of making market economies function well through improving efficiency and healthy competition among businesses.¹⁹ Effective enforcement of competition and consumer protection laws enhances protection of consumer rights and promotes active participation of consumers in the market.

If competition is not regulated, when businesses are seeking to maximize profits, anti-competitive practices may emerge, including cartels, vertical restraints, and abuse of dominance. Firms could fall into anti-competitive engagements in the course of consummating mergers and acquisitions. Anti-competitive practices as well reduce consumer choice and increase prices. This denies consumers and excluded producers the benefits of trade liberalization. That is why,

¹⁸ Ibid, Chapter 10 by E. Gachuri on Approaching Competition Policy in AfCFTA

¹⁹ Lubeto, Jasper, A review of Eleanor Fox and Mor Barkkom; Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457057

anticompetitive practices have been described as cancer in the bone marrow of free and fair trade.²⁰

To make markets work fairly for both businesses and consumers, governments need to discipline businesses that engage in disruptive conduct while trading. That is when competition law application comes in. In the African context, certain anti-competitive conduct crosses the borders and affects multiple countries in the region. Those that lead to concentrations may create oligopolies and enterprises “too big to manage”.²¹ There is already evidence showing that cross-border cartels do exist in Africa.²² This makes cross-border regulation of market competition in Africa critical. Therefore, the AfCFTA Competition Protocol when it comes into force, will create an opportunity to deal with cross border cartels, which are rampant in the region.

2.2 Facts analysis

The AfCFTA Competition Protocol negotiations will start, at a time when competition law and policy in Africa is growing. Unlike the integration efforts in the 60s and 70s, when only a handful of countries had competition legislations, in 2020, African countries have made tremendous progress in terms of developing competition frameworks including laws, regulations and respective institutions to address anticompetitive conduct. This has happened in the three decades of the 80s, 90s and 2000s.²³ Countries like Egypt and Tunisia in the north, Gambia and Côte d’Ivoire in the West, Kenya and United Republic of Tanzania in the East, and Malawi, Zambia, South Africa and Namibia in the South have all enacted competition and/or consumer protection laws.

African countries have also made major amendments to their laws to reflect key developments in their markets and to keep pace with international best practices. In 2010, for example, Botswana passed a Competition Act, revised it in 2017 and Kenya repealed its 1988 Competition law and replaced it with one which established an independent competition authority. A recent and important progress made in this area is the enactment of the Federal Competition and Consumer Protection Commission Act of Nigeria in December 2019. The Act established a combined competition and consumer protection institution.²⁴ Nigeria is one of the largest economies in Africa both in terms of population and market size, a position that is well known. Therefore, the decision to enact the law to regulate competition and consumer protection is important especially at the time of heightened continental integration effort under the AfCFTA.

²⁰ See Assessing Regional Integration in Africa report (ARIA IX): “Next Steps for the African Continental Free Trade Area (AfCFTA)” Chapter 5 on Competition Protocol @ <https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix>

²¹ <https://www.inc.com/sam-bacharach/how-to-tell-if-your-company-is-too-big-too-manage.html>

²² Jonathan Klaaren, Simon Roberts and Imraan Valodia(eds), Competition Law and Economic Regulation: Addressing Market Power in Southern Africa (South Africa: Wits University Press 2017); Thula Kaira, ‘Cartel Enforcement in the Southern Africa Neighbourhood’ in Jonathan Klaaren, Simon Roberts and Imraan Valodia, Competition Law and Economic Regulation in Southern Africa: Addressing Market Power in Southern Africa (South Africa: Wits University Press 2017)71.

²³ Anu Bradford and Adam S Chilton AS, ‘Competition Law Around the World from 1889 to 2010: The Competition Law Index’ Journal of Competition Law and Economics, 2018,14(3):393-432.

²⁴ <https://lawnigeria.com/2019/03/federal-competition-and-consumer-protection-act-2018/>

In terms of development, African countries competition agencies are at different levels and this calls for a tailor-made approach to the competition protocol design and implementation. Furthermore, existing competition laws and those newly enacted exhibit differences that may impact the way the competition protocol would be crafted and applied.

In addition, the AfCFTA implementation machinery will face an added challenge of differences in common and civil law systems as African countries' laws are based on their colonial history. To implement the continental competition protocol governments will have to deal with how the AfCFTA frameworks will accommodate interpretation and harmonization of the two legal systems.

The competition laws in many African countries cover the core areas of competition regulation such as anticompetitive agreements, in particular cartels, mergers, and abuse of dominance. However, there are differences in application of public interest in merger analysis among countries. Abuse of dominance provisions also differ in terms of definition of abuse and thresholds for determination of dominant position in the market.²⁵ Moreover, lack of effective enforcement of competition laws is also a challenge.

The ongoing analysis is highly instructive for the AfCFTA as it presents the need to address competition issues across a range of countries at different levels of advancement in terms of legislation and institutional capacity. The AfCFTA competition framework will need to be designed in a way that embraces the span of diversity among countries to effectively deal with competition cases at continental level. These differences need to be identified and accommodated to ensure that all State Parties of the AfCFTA are included. It is important that their voices, needs, and challenges are reflected for ease of implementation of the protocol.

The map below shows the situation in Africa in terms of competition laws and institutions. So far, 24 economies have a competition law and a functioning competition authority,²⁶ 10 have a competition Law but no competition authority,²⁷ 3 are preparing a competition legislation and has reached an advanced stage²⁸ and 17 have no competition law or are still in the very early stages of preparation.²⁹

²⁵ Chapter 5 on Competition Protocol @ <https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix>

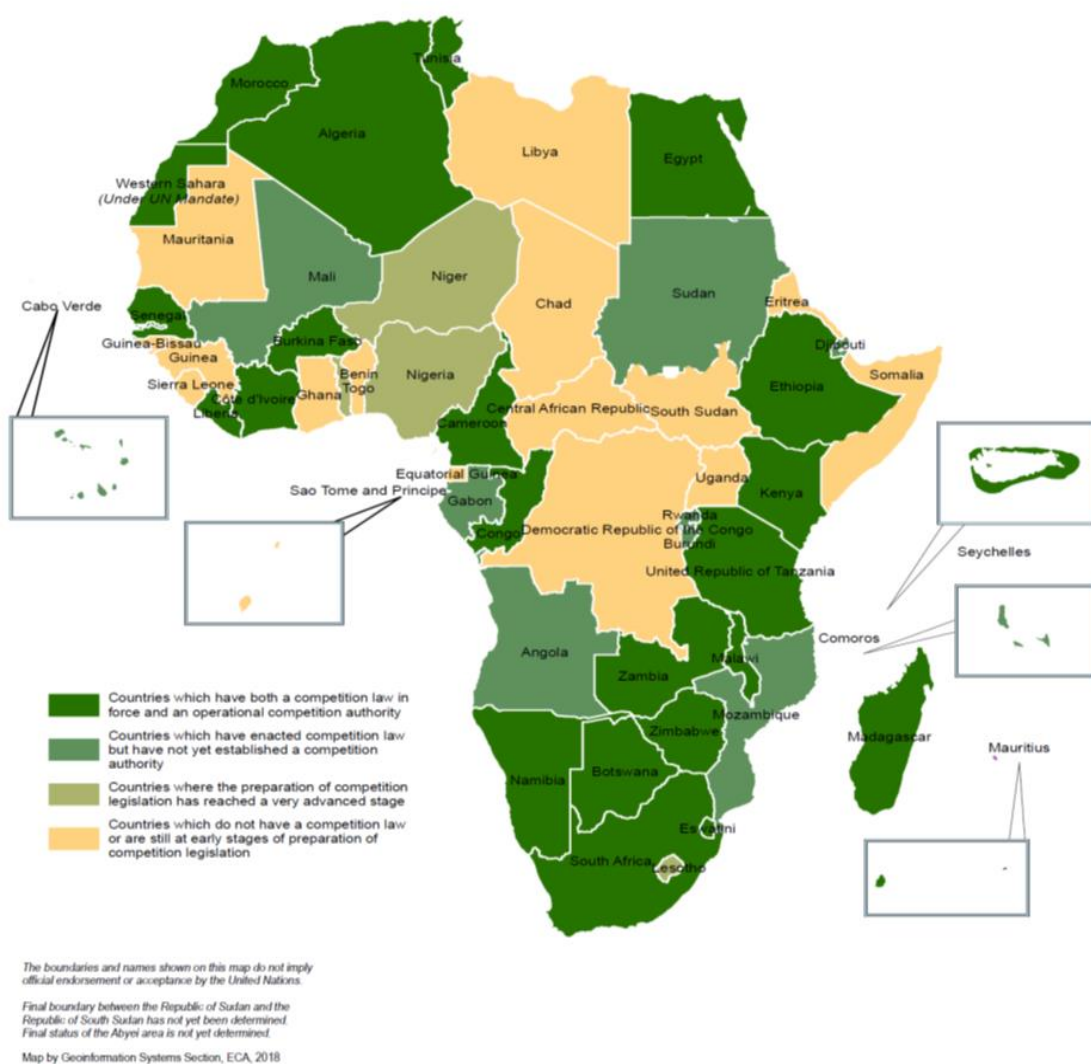
²⁶ Algeria, Botswana, Burkina Faso, Cameroon, Cote d'Ivoire, Democratic Republic of the Congo, Egypt, Eswatini, Ethiopia, The Gambia, Kenya, Liberia, Madagascar, Malawi, Mauritius, Morocco, Namibia, Nigeria, Senegal, Seychelles, South Africa, United Republic of Tanzania, Zambia, Zimbabwe

²⁷ Angola, Burundi, Comoros, Cabo Verde, Djibouti, Gabon, Mali, Mozambique, Rwanda, and Sudan

²⁸ Lesotho, Niger, and Togo

²⁹ Benin, Central African Republic, Chad, Congo, Equatorial Guinea, Eritrea, Ghana, Guinea, Guinea Bissau, Libya, Mauritania, Sao Tomé and Príncipe, Sierra Leone, Somalia, Uganda, and Western Sahara

Figure 1. Map of competition laws and regimes in Africa



As acknowledged in an earlier section, positive changes have taken place in the continent as many countries adopted competition laws during the last three decades. However, there is a lot of groundwork that needs to be done under the AfCFTA. Countries with no institutions will be expected to set up one. Those in the category of having draft laws and those which have not started the process, arrangements are needed to sensitize their Governments to enact laws and to establish enforcement institutions.

2.3 Looking closer at consumer protection

In addition to competition law and policy which is provided through the AfCFTA Competition Protocol, consumer protection cannot be ignored. Consumer protection is a complementary policy to competition policy. In the recent years, consumer protection matters have been gaining prominence in Africa, though at a pace which is slower than competition policy. Whereas many countries may not have specific consumer protection laws to deal with unfair business practices, the

COVID-19 experience has shown that such practices can have huge negative effects on consumers and markets. Practices such as hoarding and price gouging/overcharging of basic consumer products especially masks and sanitizers, misleading advertising related to miracle products, cancelation of public events, tourism services, and air transport tickets, financial frauds related to false donations and phishing techniques among others have been reported by member States.³⁰

The need to have consumer protection provisions within the AfCFTA protocol cannot be overemphasized. Consumer protection provides information and rights awareness to consumers, enforces rules against unfair and misleading commercial practices, promotes product safety and integrates consumers' interests across all economic sectors. It aims to balance the existing asymmetry between traders and consumers. In addition, consumers are more aware of their power and rights, through the work of consumer lobby groups who continue to raise consumer issues in many developing countries. Countries like South Africa, Egypt, Zambia, Ethiopia, Kenya, United Republic of Tanzania, Botswana among others have been enforcing consumer laws at various degrees for some time now. These countries are building on consumer violations redress efforts and in fact, consumer case law is being developed in the continent, based on their experiences shared through the African Consumer Protection Dialogue platform hosted by United States Federal Trade Commission for the last 10 years.³¹

One consumer protection area that the AfCFTA needs to examine, which is still a major challenge, is the practice of sustainable consumption. Environmental issues are on the green economy agenda, SDG 12 on sustainable consumption and production³², and the sustainable consumption in the United Nations Guidelines for Consumer Protection (Guideline 49-62), placing sustainability in an important position in consumer protection.³³ African policymakers need to create a link between consumer policies that promote sustainability and consumers' responsibility in promoting a clean environment.³⁴ For example, the problem of non-degradable plastic material is a considerable environmental issue in many African countries arising from imported materials from other parts of the world.

The AfCFTA could draw lessons from the revised United Nations Guidelines on Consumer Protection (UNGCP)³⁵ which addresses two major emerging issues in consumer protection: e-commerce and financial services. The UNGCP are a valuable set of principles for setting out the main characteristics of effective consumer protection legislation. African Union member States are formulating and enforcing domestic and regional laws, rules and regulations can adapt the UNGCP to suit their economic, social, and environmental circumstances. The guidelines also give direction for promoting international cross-border enforcement cooperation among agencies and encourages sharing of experiences.

³⁰ <https://unctad.org/news/covid-19-firmer-action-needed-better-protect-consumers>

³¹ <https://www.ftc.gov/news-events/events-calendar/eleventh-annual-african-consumer-protection-dialogue-conference>

³² <https://sdgs.un.org/goals/goal12>

³³ <https://unctad.org/SearchCenter/Pages/Results.aspx?k=UN> - Guidelines for Consumer Protection

³⁴ See study extract at: <http://theconversation.com/theres-still-a-gap-between-consumer-protection-and-sustainability-in-africa-81641>

³⁵ See UNGCP on: http://unctad.org/en/PublicationsLibrary/ditccplpmisc2016d1_en.pdf

In the era of digital technology, the AfCFTA will play a great role in enhancing competition in the digital markets and protecting consumers engaging in e-commerce. Many people embrace new digital based technology, online shopping, mobile payments and money transfers, and shared economy transactions. However, consumer dispute resolution and redress in such transactions is still very blurred. Especially in Africa, governments are not ready to deal with the issue comprehensively, even though it is difficult to stop consumers from using online services.

An UNCTAD online compilation of consumer protection legislation worldwide statement³⁶ states that, “*despite the importance of consumer confidence for business-to-consumer e-commerce, many developing, and transition economies still lack laws to protect consumers online*”. Out of the 125 countries for which data exist, 97 (of which 61 are developing or transition economies) have adopted consumer protection legislation that relates to e-commerce. In terms of regional patterns, the incidence of consumer protection laws is particularly low in Africa.”. Therefore, consumer protection is an area that the AfCFTA will have to critically examine when designing the required protocols for its implementation. In addition, as discussed in an earlier section, consumer protection and competition policies pursue similar objectives. Therefore, it is imperative to have consumer protection at the forefront as the discussions on competition protocol under the AfCFTA develops.

3 The Role of the AfCFTA Competition Policy in Addressing Cross-Border Anti-Competitive Practices

3.1 The Presence of Cross-Border and International Anti-Competitive practices in Africa

In addition to promoting competition and consumer protection at the national level, if well-formulated and implemented, the AfCFTA Protocol on Competition is an effective tool to deal with cross-border anti-competitive practices in Africa.³⁷ The continental approach to competition policy presents an avenue for African markets to grow and be competitive both inside and with foreign competitors. International mergers and acquisitions and the anti-competitive practices of foreign firms affect domestic markets in Africa. However, challenges sometimes hamper the ability to deal with such cases, such as human capacity and financial resources. Lack of domestic competition laws is also an issue. A combined effort on a continental scale, ensuring that no country is left behind, may alleviate these challenges.

³⁶ <https://unctad.org/page/online-consumer-protection-legislation-worldwide>

³⁷ See Kigwiru VK, 'The Cooperation on Competition Policy under the AfCFTA' (2020) 17(1) The Manchester Journal of International Economic Law 98-121.

For a long-time many developing countries are affected by international anti-competitive practices. For instance, data published back in 2004 by the American Bar Association indicated that the total value of the potentially “cartel affected” import to developing countries was US\$51.1 billion³⁸. Developing countries comprise a large proportion of the consumer products subject to international cartels. There is a corollary cost to developing country producers as well, including limiting access to technology, thus raising barriers to entry, and further distorting such markets. Today, this trend has continued, as discussed later in this paper.

Another example showing how long these practices had affected developing countries is the US\$200 million damage to vitamin consumers in six countries (India, Pakistan, Kenya, South Africa, United Republic of Tanzania and Zambia) as documented by the Consumer Unity and Trust Society (CUTS) in 2003. The challenges facing developing countries in dealing with anticompetitive cases mentioned above leads to relatively little activity on the part of the developing country governments or consumers to respond to these cartels, even after they have been revealed. Further, a study by the University of Johannesburg in 2012³⁹ found that in Kwa-Zulu Natal, a cartel mark-up on the price of building materials was estimated to be 51% - 57% benchmarked against the price war and post cartel periods in 2007.

Box 1. UNCTAD Research Platform study into 249 cartels across 20 developing countries, from 1996 to 2013

Under the auspices of UNCTAD Research Platform (RPP)⁴⁰ results of a study were presented based on data from selected developing countries where 249 major ‘hard-core’⁴¹ cartels were prosecuted in more than 20 developing countries from 1995 to 2013. An original and relatively simple methodology that can be employed to estimate cartel’s economic harm - in terms of price overcharges and consumers’ welfare losses - was developed.

The study provided some estimations of economic impact of cartels in sampled developing countries.⁴² The results show substantial effects in terms of sales related to GDP, though at various levels on average (0.01% to 3.74% and up to 6.38% for South Africa in 2002). Further the study shows that cartels’ excess revenue affected GDP levels by 1% for Republic of Korea and South Africa in 2002. Other harmful effects of cartel operations include 15% decrease on production levels in the sectors covered, inflationary pressure which affects consumers. According to the study, deterrence rate was established at 24%, meaning that the actual damage could be at least 4 times bigger.

Source: UNCTAD RPP report: Measuring the Economic Effects of Cartels in Developing Countries.

³⁸ See Inclusive Trade in Africa; The African Continental Free Trade Area in Comparative Perspective; Routledge Taylor and Group, 2019 Publication

³⁹ <https://ryan-hawthorne.squarespace.com>

⁴⁰ https://unctad.org/system/files/official-document/ditccp/misc2014d1_en.pdf

⁴¹ "cartels are agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors." Hardcore cartels usually refer to price fixing, market sharing, bid rigging or production or sales quotas
http://ec.europa.eu/competition/international/multilateral/te_mplate.pdf

⁴² Sample countries include Brazil, Chile, Colombia, Indonesia, South Africa, Mexico, Pakistan, Peru, Russia, Republic of Korea, Ukraine, and Zambia.

The effects of cross-border anti-competitive practices continue to harm African markets to this day. The challenge is that very few countries in Africa have successfully prosecuted cartel cases. However, South African Competition Commission has taken a lead in dealing with cartel cases as shown below.

Table 1: Cartels in South Africa with regional competition dimension, 2015-2017⁴³

Industry	No of companies in the case	Possible Countries affected	Raid/Referral/Settlement	Year
Fruits Processing	2	Botswana, Mozambique	Referral	2017
Bricks	6	Botswana, Eswatini Lesotho, Namibia, Zambia, Zimbabwe	Referral/Settlement	2017
Fire protection Services ⁴⁴	29	Sub-Saharan Africa	Referral/Settlement/Raid	2017
Chemicals	2	Botswana, Eswatini, Lesotho, Namibia Zimbabwe, Zambia, and others)	Settlement	2017
Meat	7	Botswana, Namibia, Eswatini, Lesotho, Namibia	Raid	2017
Edible oils 1 ⁴⁵	5	Botswana, Eswatini, Lesotho, Namibia	Raid	2016
Edible oils 2	2	Botswana, Eswatini	Referral/Settlement	2016/2017
Cargo Freight	6	Southern Africa	Raid	2016
Rail Maintenance	3	Southern Africa	Raid	2016
Gear Pumps	2	Southern Africa, Botswana, Zambia, Zimbabwe	Referral	2016
Security Services	2	South Africa	Settlement	2016
Packaging Paper	2	Sub-Saharan Africa	Raid	2016
Telecom Equipment	2	Angola	Referral	2016
Wooden Products	2	Zimbabwe, Zambia, Malawi, United Republic of Tanzania, Mozambique, Kenya, Uganda, Angola, Democratic Republic of Congo	Raid	2016
Glass Fitment & Repair services	2	Angola, Malawi, Democratic Republic of Congo, Botswana, Eswatini, Lesotho, Namibia	Raid	2016
LPG Gas & Cylinders	6	Angola, Botswana, Eswatini, Kenya Lesotho, Malawi, Mozambique, Namibia, Nigeria, Seychelles, United Republic of Tanzania, Uganda, Zambia, Zimbabwe	Raid	2015
Plastic Pipes	4	Sub-Saharan Africa	Referral	2015

⁴³ <https://www.competition.org.za/ccred-blog-competition-review/2017/8/29/recent-cartel-penalised-in-south-africa-possible-impacts-in-the-region>

⁴⁴ <https://www.gov.za/speeches/cartel-conduct-30-mar-2017-0000>

⁴⁵ <https://www.engineeringnews.co.za/print-version/commission-gets-go-ahead-to-review-evidence-in-margarine-manufacturers-cartel-case-2017-03-17>

Source: ARIA IX Publication based on Information adapted from CCRED Quarterly Review Analysis⁴⁶ (T. Bosu, 2017).

Notes: **Settlement:** Agreement to settle reached the Competition Commission South Africa; **Referral:** Case referred to the Competition Tribunal for adjudication; and **Raid:** Dawn raids conducted to obtain possible evidence on the existence of cartel conduct.

As shown above, African competition authorities are increasingly faced with cases which have a *regional dimension*, including cartels and abuse of dominance. A study by the African Competition Forum (ACF) found anti-competitive practices in the cement sector across Botswana, Kenya, Namibia, South Africa, United Republic of Tanzania, and Zambia. The same study discovered a similar situation in the 5 South African Customs Union (SACU), countries: Botswana, Lesotho, Namibia, Eswatini and South Africa. This shows that cement is one product where a whole region can be cartelized, providing a powerful case study of how collusion can operate at regional level.⁴⁷ The well-known bread cartel⁴⁸ which was dealt with in 2005 in South Africa was also affecting prices of bread in other SACU countries (Lesotho and Eswatini). Cartel activities are promoted by the existence of these companies across borders and therefore spreads the harmful effects and practices across regions.

The analysis above points to the importance of regional cooperation in dealing with cross-border anti-competitive practices. Due to the absence of safeguards to deal with such cases, businesses, and particularly dominant firms, both domestic and especially foreign ones (items such as rail maintenance equipment, gear pumps, telecommunications equipment are manufactured by foreign companies), can abuse their dominant position. The abuses may take the form of predatory behaviour, result in eliminating local competition, price fixing cartels or other market sharing agreements. These types of anti-competitive practices reduce choice, increase prices, and thus deny consumers and other excluded producers the benefits of trade liberalization.

Further, when African market opens up for AfCFTA implementation, the expected outcome is increased flow of goods and services, as well as creation of jobs and free movement of persons regionally and internationally. On the other hand, anticompetitive practices create barriers to market entry (cartels and abuse of dominance), drive out competitors from the market (predatory practices), contract the job market and dictate prices, and all this affects consumer welfare. Within the AfCFTA, the State Parties have widely divergent capacities in terms of territory and firms, and development levels. Dominance is likely to be an issue in the combined market.

Domestic cartels are likely to spread to other countries as borders are opened and free movement of people, goods and services becomes a reality under the

⁴⁶ Centre for Competition, Regulation and Economic Development (CCRED), based in Johannesburg, South Africa. Article by Tebogo Bosu in the Quarterly Review dated 20th December 2017; See link;

<https://www.competition.org.za/review/2017/12/20/cartels-investigated-in-south-africa-possible-impact-in-the-region>

⁴⁷ The African Competition Forum (ACF) is an informal network of 34 African national (30) and regional (4) competition authorities founded in 2011 with the principal objective to promote the adoption of competition principles in the implementation of national and regional economic policies of African countries. <http://www.compcom.co.za/african-competition-forum/>; <http://documents1.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf>

⁴⁸ <http://www.saflii.org/za/cases/ZACT/2010/9.html>

AfCFTA. A good example of a national cartel witnessed in Kenya is the setting of prices between trade associations and their members.⁴⁹ Competition Authority of Kenya (CAK) introduced a Special Compliance Program (SCP) in 2015 with powers to examine the conduct of members of certain trade associations in financial, agriculture and agro-processing sectors.⁵⁰ During a presentation of the SCP by CAK during the Intergovernmental Group of Experts on competition policy, the high cost of living in Kenya was partly associated to the business environment which enabled companies to engage in a collusive practice hurting consumers.

A continuing challenge is that national competition laws operate on a “territorial” basis. They can only address anticompetitive practices engaged by foreign actors on their domestic market. Authorities have no jurisdiction to address domestic actors engaged in anticompetitive business practices in other territories. Sectors prone to anticompetitive practices could be reviewed in the preparatory phase for competition protocol implementation, in particular agriculture (fertilisers), telecommunications (price fixing for telecoms services), air transport, energy, retail, road freight, etc.

The AfCFTA competition protocol is expected to address the following areas: cross border anticompetitive cases such as cartels, abuse of dominance and mergers analysis, aimed at creating a competitive environment conducive for existing competitors and new entrants.

3.2 Regional competition institutions and regional regulation of market competition in Africa: lessons for AfCFTA

3.2.1 Overview of existing Regional Economic Communities with regional Competition law and policy⁵¹

UNCTAD technical cooperation and capacity building program has assisted African RECs and member States to develop competition regimes over the years. The development of competition laws in the region has been momentous and UNCTAD has been there providing support all along.⁵² As a result of the presence of cross-border and international anticompetitive practices in Africa, some Regional Economic Communities (RECs) have sought to address this problem by putting in place regional level competition law and policies.⁵³ The AfCFTA may draw upon ongoing efforts by RECs with competition and/or some consumer protection mandate. So far, 4 recognized RECs and other regional institutions in Africa have competition law and policy provisions, adopting either a cooperative

⁴⁹ See article in the East African on; <http://www.theeastafrican.co.ke/business/2560-2704016-mb79lez/index.html>

⁵⁰ <https://cak.go.ke/sites/default/files/Special%20Compliance%20Process%20Report%202016-2017.pdf>

⁵¹ <https://www.uneca.org/oria/pages/regional-economic-communities>

⁵² UNCTAD work on competition law and policy with African RECs such as CEMAC, COMESA, EAC, ECOWAS, SACU, SADC, , WAEMU and Member States such as: Algeria, Benin, Botswana, Cameroon, Egypt, Ethiopia, Eswatini, Kenya, Lesotho, Malawi, Morocco, Namibia, Rwanda, Seychelles, Tunisia, Uganda, United Republic of Tanzania, Zambia, Zimbabwe, , among others.

⁵³ 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' (29 October 2019) <https://www.afromicslaw.org/2019/10/29/the-african-continental-free-trade-area-competition-policy-model-dispute-resolution-mechanism-institutional-framework-and-afcfta-relationship-with-existing-regional-competition-regimes/> accessed 8 March 2020.

framework or supranational institution. The Southern African Customs Union (SACU) and Southern African Development Community (SADC) provide a platform where Member States can cooperate on cross-border cases. The Common Market for Eastern and Southern African (COMESA), East African Community (EAC), Central African Economic and Monetary Community (CEMAC), Economic Community of West African States (ECOWAS) and Western African Economic and Monetary Union (WAEMU),⁵⁴ have established supranational regional competition institutions with binding regional level competition laws. These are discussed briefly.

Back in 2008, UNCTAD examined the issue of allocation of competence between regional and national competition authorities.⁵⁵ In the case of COMESA, the competition rules and regulations accord COMESA Competition Commission with the primary role to deal with cases affecting trade between member states, precedence over national authorities in case decisions and a widow for cooperation between the two in the implementation of competition rules. The COMESA court plays a key role in dispute resolution if the Secretary General consultations with concerned member States/council of Ministers failed to resolve a case amicably.

The COMESA Competition Commission, which has been in operation for 8 years, is the most established so far in terms of enforcement.⁵⁶ It has developed a case law on cross-border mergers. It covers sectors of agriculture, electronics, pharmaceuticals, energy, automotive, construction, mining, insurance, logistics, information technology, aviation, hospitality, telecommunications, packaging, payment systems, water treatment, retail, beverages, commodity trading and textile. Recently, it began investigations into anti-competitive conduct, noting that such cases take longer periods than merger applications that are time bound.⁵⁷

The EAC established the Community Competition Authority that started operation in January 2018, but competition issues have been discussed on *ad hoc* basis for the last five years.⁵⁸ EAC has not yet begun receiving merger applications within the region. However, it is conducting market inquiries and advocacy. An article published by African Law and Business Journal addressed the EAC Competition Authority stressing the need for Burundi, Rwanda, and Uganda to enact/and or implement competition laws.⁵⁹ It pointed out the future interplay between EAC and COMESA in terms of the overlapping memberships of some countries and lack of laws in others, plus how to deal with cross-border anticompetitive practices already taking place.⁶⁰

⁵⁴ Abuja Treaty 1997 recognizes, EAC, ECOWAS, COMESA, SADC as Regional Economic Communities and building blocks for African Integration. <https://www.un.org/en/africa/osaa/peace/recs.shtml>

⁵⁵ See UNCTAD document, TD/B/COM.2/CLP/69 @ https://unctad.org/en/Docs/c2clpd69_en.pdf

⁵⁶ Vincent N Angwenyi, *Competition Law and Regional Integration: The Common Market for Eastern and Southern Africa (COMESA)*, (Thesis, Intellectual Property Law Centre 2013)

⁵⁷ See Elizabeth Gachuri, 'Approaching Competition Policy in the AfCFTA', in David Luke and Jamie Macleod (eds.), *Inclusive Trade in Africa: The African Continental Free Trade Area in a Comparative Perspective* (Routledge 2019).

⁵⁸ Joyce Karanja Ng'ang'a, 'EAC Competition Law' in Emmanuel Ugirashebuja, John Eudes Ruhangisa, Tom Ottervanger and Armin Cuyvers(eds), *East Africa Community Law* (Brill 2017), pp. 433-453.

⁵⁹ <http://www.africanlawbusiness.com/news/6944-competition-law-developments-in-africa-i...>

⁶⁰ Döveling J, Majamba HI, Oppong RF and Wanitzek U (eds), *Harmonization of Laws in the East African Community: The State of Affairs with Comparative Insights from the European Union and other Regional Economic Communities* (TGCL Series 5, Law Africa 2018).

In terms of allocation of competences between East African Community Competition Authority (EACCA) and the national authorities, the EACCA has the exclusive original jurisdiction over any violation of the law. The decisions of the EACCA are deemed to be legally binding to Partner States authorities and their courts, while at the same time allowing the regional body to deal with a specific case when there are ongoing proceedings in a Partner State through this action ... “*stay such proceedings until the Authority has made a decision*”.⁶¹

In Southern Africa, both SADC and SACU have regional competition level policies that require member States to cooperate with each other. The SADC Treaty prescribes an enforcement cooperation network, which does not provide for a regional authority. The SADC Competition Committee, however, brings competition authorities to exchange enforcement experiences and capacity building programs. The SACU Agreement Article 40 on competition policy advocates for cooperation in respect to competition law enforcement by member States.⁶²

In West Africa, ECOWAS Regional Competition Authority was opened in Banjul, The Gambia, in April 2018.⁶³ Likewise, the WAEMU Competition Commission, which operates across a Francophone sub-set of ECOWAS countries, has been in operation for two decade with a supranational institution arrangement. In central Africa, the CEMAC Treaty which provides competition provisions and regional competition and consumer protections laws have been developed. A CEMAC regional consumer protection directive which was agreed by Member States’ is intended to improve consumer protection tools in the region and empower consumers for better informed choices.⁶⁴

The peculiarity of the WAEMU Commission is the exclusive competence of all anticompetitive practices in any member State within the union. Impact of such acts on the common market or between member States is not considered. The 2007 UNCTAD peer review for WAEMU points out the importance of rethinking this model that prevents national authorities to grow in their enforcement experiences.⁶⁵ Preparatory report for the ex post review of the competition policy of the West African Economic and Monetary Union has been prepared. This report will be discussed during the forthcoming Eighth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 19–23 October 2020.⁶⁶

The allocation of competences between WAEMU and ECOWAS Competition regimes requires a discussion between the executive bodies of the two

⁶¹ The East African Community Competition Act 2006, Section 44, @ <http://industrialization.go.ke/images/downloads/policies/eac-competition-act-2006.pdf>

⁶² <https://www.sacu.int/show.php?id=566>

⁶³ <https://www.ecowas.int/ecowas-launches-regional-competition-authority/#:~:text=The%20Commission%20of%20the%20Economic,the%20ECOWAS%20Authority%20in%202008%20 ;https://www.ecowas.int/signing-of-agreement-between-republic-of-the-gambia-and-ecowas-dakar-senegal-4th-june-2016/>

⁶⁴ The directive was prepared under the UNCTAD technical assistance program to strengthen competition and consumer protection in Central Africa funded by the European Union (2017-2019).

⁶⁵ UNCTAD, Voluntary peer review of competition policies of WAEMU, Benin and Senegal (UNCTAD/DITC/CLP/2007/1).

⁶⁶ https://unctad.org/meetings/en/SessionalDocuments/t drbpconf9d8_en.pdf

commissions. The ECOWAS Regional Competition Authority was established in Banjul in 2019 and a renewed effort of rethinking how the two frameworks can be harmonized is very timely.⁶⁷ Needless to say that the substantive rules adopted by ECOWAS are similar in many ways with those of WAEMU, whose eight member States are also ECOWAS members to avoid cases where either national or regional courts of Justice interprets the given rules in a different manner.⁶⁸

In terms of the AfCFTA and how to synergise with RECs, the COMESA Competition Commission experience is a good starting point. As pointed out earlier, COMESA has built a track record with dealing with cross-border merger cases. In addition, a deeper look at the legal instruments and the practical experiences at regional level need to be undertaken in preparation to the implementation of the competition protocol. It is very important for a dialogue between African Union member State and the RECs Secretariats on the best way forward. As pointed during the swearing in of the Secretary General of the AfCFTA “the CFTA negotiations are, after all, [*AU member States/RECs/Customs Territories driven with support of the African Union Commission and its structures*”].⁶⁹

3.2.2 Regional Competition Regimes and Lessons for AfCFTA

The agreement establishing the AfCFTA acknowledges that “*the Regional Economic Communities (RECs) Free Trade Areas as building blocks towards the establishment of the African Continental Free Trade Area (AfCFTA)*”.⁷⁰ Before delving into lessons that the above regional competition regimes provide for AfCFTA, it is important to note that these regimes are overlapped. The overlaps happen in two ways, between the RECs and between RECs and respective member States. As a result of the overlapping memberships within the RECs, it creates an environment for potential jurisdictional conflicts.

Further, the EAC may need to resolve merger applications guidelines to reduce potential jurisdictional conflicts with COMESA. This is because the majority of EAC member States are members of COMESA. In addition, only two members of EAC have functioning competition agencies. Arising from this scenario, the EAC Community Competition Authority will need to evaluate what mechanisms suits its Competition Act given that only Kenya and United Republic of Tanzania have operational national Competition Authorities. United Republic of Tanzania is also a member of SADC and that complicates matters further in terms of operations and enforcement coordination.

In West Africa, the same case of overlapping framework within ECOWAS and WAEMU exists and must be put into consideration while discussing the structures of the AfCFTA and its interaction with the RECs.⁷¹ WAEMU has been in operation for many years while the ECOWAS Competition Commission was established in

⁶⁷ <https://www.arcc-erca.org/ecowas-launches-regional-competition-authority/>

⁶⁸ https://unctad.org/meetings/en/SessionalDocuments/t drbpconf9d8_en.pdf

⁶⁹ <https://au.int/en/newsevents/20200319/swearing-secretary-general-african-continental-free-trade-area-afcfta>

⁷⁰ https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf

⁷¹ Eleanor M Fox and Mor Bakhoun, *Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa* (Oxford: Oxford University Press 2019)

Banjul in July 2018.⁷² Challenges are expected in this arrangement too. Two agencies within the same economic area presents a challenge for the enforcers, and jurisdiction issues are bound to crop up. WAEMU has taken an initiative to coordinate member States action in consumer protection to create synergies and maximize use of resources in the region.⁷³

Existing RECs have sought to put in place measures that would address overlapping membership and inter-REC jurisdiction conflicts. A notable effort is the Tripartite Agreement⁷⁴ which brings together EAC, COMESA and SADC. As contained on the EAC website *“the supreme objective of the Tripartite is to contribute to the broader objectives of the African Union that is accelerating economic integration of the continent and achieving sustainable economic development leading to poverty alleviation and improvement in quality of life for the people of the Eastern and Southern African region”*⁷⁵. The Tripartite Agreement contains competition provisions, which could form a basis for building the continental systems under the subsequent protocol. To address potential jurisdictional conflicts between ECOWAS and WAEMU, the two agreed to develop a cooperation framework which is still in a preliminary stage.

These measures undertaken by RECs are important for AfCFTA as it will seek to enhance the existing regional competition regimes as recognized under the principle of *acquis* under Article 19 of the AfCFTA Agreement. The AfCFTA has the mandate to consolidate efforts, harmonize operations of all RECs with competition provisions and draw lessons from enforcement experiences to craft continental systems that are workable and inclusive.

One benefit of having an institution like COMESA is that it closes the gap of lack of extraterritorial application of national competition laws by addressing concerns emanating from one jurisdiction to the other. Secondly, it reduces regulatory burden of merger notification for cases with a regional dimension, saving time and money. Thirdly, it promotes a sense of certainty and predictability by removing the possibility of varied outcomes and different timings. Cross border cases that went unchecked before COMESA regulation was in place have been addressed. A Memorandum of Understanding (MOU) between COMESA and Kenya is a good example of how to address possible jurisdictional conflicts on enforcement matters.⁷⁶ Consequently, COMESA’s experience could form a useful reference for the implementation of the AfCFTA at the continental level and a lesson for other RECs with competition institutions.

Finally, as pointed out earlier, the recently established AfCFTA Secretariat in Accra and the appointment of the Secretary General as a step to the right direction which will facilitate preparation for the start of implementation of the Phase I protocols. Phase II negotiations are also scheduled to start soon after COVID-19

⁷² G Deniz Both, ‘Models of Regional Cooperation in Competition Law and Policy from Around the World: Lessons for the ASEAN Region’ in in Burton Ong (ed), *The Regionalization of Competition Law and Policy within the ASEAN Economic Community* (Cambridge: Cambridge University Press 2018) 165-201.

⁷³ Presentation by Mr. Olivier Angaman, Director of Competition, WAEMU Commission, during the UNCTAD online webinar on “Key Competition and Consumer Protection Priorities for Regional Integration in Africa”, 17th June 2020.

⁷⁴ <https://www.eac.int/documents/category/comesa-eac-sadc-tripartite>

⁷⁵ <https://www.eac.int/tripartite>

⁷⁶ <https://www.comesacompetition.org/wp-content/uploads/2016/06/MoU-with-CAK.pdf>

pandemic is contained. The new Secretariat will have to reconcile prevailing operations of RECs and overlapping memberships and set up a system that is inclusive and builds on gains already accrued.

4 A snapshot of the AfCFTA Competition Framework and Institutional Architecture

As the negotiation on competition protocol under the AfCFTA kicks off, there is already a growing scholarly attention on the possible institutional framework to be adopted by African countries taking into consideration the African market peculiarities.⁷⁷ Recently the United Nations Commission for Africa (UNECA) in its publication, “*Competition policy is a key driver of growth of competitive markets in Africa*” (ARIA IX)⁷⁸ sought to examine this question. The background work done in this area is geared towards proposing a structure that would enable a continental approach to deal with cross border anticompetitive practices, which are prevalent in Africa.

To implement any competition related decision under the AfCFTA, it will be necessary to design an effective competition framework. Consideration of the existing competition legislations and institutional architecture at national and regional level will be crucial. Experiences and lessons at both levels could form a useful starting point for the continental bodies. The various institutional approaches in terms of enforcement mandate and dispute resolution (courts, rules of procedure, rules on jurisdiction, private litigation by businesses and consumers, etc.) are to inform which one would be the best in the AfCFTA context.

In terms of the institutional arrangement, the ARIA IX⁷⁹ publication proposes three options; (i) a supranational AfCFTA competition authority, which would deal with cross border competition violations by companies operating in more than one country/region as the case may be; (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 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 a directorate/authority within the AfCFTA Secretariat are finalized.

The third option seems to be most effective and inclusive institutional design to deal with cross border anticompetitive practices in Africa. A continent-wide competition directorate/division within the AfCFTA Secretariat would be a timely next step. At the same time, the directorate would create a platform to bring together national and regional competition authorities to network and discuss enforcement matters. It would allow the continental institutions to grow based on the enforcement and networking experiences already gained by the RECs and the ACF as discussed earlier in this paper. This will also accord the countries not

⁷⁷ See Kigwiru, Elizabeth, and UNECA.

⁷⁸ <https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix>; ARIA IX, Chapter 5 page XV

⁷⁹ https://www.uneca.org/sites/default/files/PublicationFiles/aria9_report_en_4sept_fin.pdf; Chapter 5 page 160

belonging to the RECs, such as the Maghreb Union (AMU),⁸⁰ the Community of Sahel-Saharan States (CEN-SAD)⁸¹ and the Intergovernmental Authority on Development (IGAD)⁸² with no enforceable competition provisions in their treaties opportunity to be part in the AfCFTA competition framework.

The sequencing of the operations of the AfCFTA institutions should be agreed by African Union member States based of resources available and other factors. However, the first step would be to have the general frame included in the text of the competition protocol. Cross referencing with the European Union Treaty provisions and the European Commission experience, especially the establishment of the European Competition Network would be useful, but the peculiarities of African countries should be considered and reflected accordingly.

The specific focus of competition protocol enforcement within the AfCFTA, which include poverty eradication, access to markets by SMEs and consumer protection, may differ from developed countries objectives.⁸³ However, the European Competition Network (ECN), which is a platform for exchanging case information and capacity building could provide the ACF with some lessons as it aspires to accede to continental level operations under the AfCFTA as proposed.⁸⁴

5 COVID-19 and the AfCFTA Implementation

5.1 Competition Policy Response to COVID-19

According to an article by Ibrahim A. Mayake, to cushion Africa from an economic fallout due to COVID-19, African Union members States and the continent's institutions should implement the AfCFTA swiftly.⁸⁵ The possibilities of the agreement of creating a tariff-free economic environment to spur the market to grow business, to boost intra-continental trade, to spark industrialization, and to create jobs is likely to be delayed.

According to estimates by the United Nations Commission for Africa (UNECA), losses in export earnings amounts to large figures, for example, at continental level, 7.4% of Africa's GDP is attributed to fuel exports (average between 2016 and 2018).⁸⁶ Due to COVID-19, UN-ECA estimates that revenues from oil exports from Africa could drop by as much as US\$ 101 billion in 2020, while Nigeria as a

⁸⁰ AMU Member States Algeria, Libya, Mauritania, Morocco, Tunisia, all these countries have national competition laws.

⁸¹ CEN-SAD Member States, see <https://au.int/en/organs/recs>

⁸² IGAD Member States, *ibid*

⁸³ Vellah Kedogo Kigwiru, 'The Cooperation on Competition Policy under the African Competition African Continental Free Trade Area : Manchester Journal of International Economic Law Volume 17 April 2020 Issue 1; <https://www.electronicpublications.org/stuff/777#gsc.tab=0>;

⁸⁴ Assessing Regional Integration in Africa report (ARIA IX): "Next Steps for the African Continental Free Trade Area (AfCFTA)" Chapter 5 on Competition Protocol @ <https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix>

⁸⁵ <https://www.project-syndicate.org/commentary/africa-trade-integration-hedge-against-covid19-by-ibrahim-assane-mayaki-2020-03>

⁸⁶ <https://www.un.org/africarenewal/news/coronavirus/eca-estimates-billions-worth-losses-africa-due-covid-19-impact>

major player, is estimated to reduce its total crude oil exports by between US\$14 billion and US\$19 billion by the end of 2020. Likewise, the Kenyan flower sector lost US\$75 million in one month which caused massive job losses and negative effects on people's livelihood.

The COVID-19 crisis is expected to manifest negative effects on businesses especially SMEs, now and post era, which may lead to firms exiting the market due to bankruptcies, while others may benefit from the crisis depending on the goods or services they provide. Those effects could lead to market concentrations and possible abuse of dominance. It is therefore crucial for African Governments to support SMEs towards economic recovery in an inclusive manner to maintain competition.

A recent study on the effects of COVID-19 on MSMEs in Ethiopia reports that the pandemic has negatively impacted the sector at devastating levels. Out of 4.5 million employed before the partial lockdown 2.2 million were laid off by April 2020 and out of 40.7 billion (birr) monthly earnings 28.5 billion was lost in the same period, amidst massive business closures in some regions (51% in Oromia region).⁸⁷

In general terms, to abate the foreseen effects of COVID-19, re-evaluation of set timelines to implement the AfCFTA would be necessary. Keeping in mind that there is a high dependence on trade exchange from outside of the continent and there is a demand to promote intra-African trade which now stands at 16%. For example, tariff and non-tariff barriers ought to be dismantled faster. Maybe probably consider shortening the 5-year timeline set for tariff barriers for non-LDCs on 90% of the products to facilitate regionalization process within the AfCFTA framework.⁸⁸

Africa can maximize the possible gains of the AfCFTA by aligning its actions during this pandemic period and the uncertainty of what may happen after the COVID-19 crisis as the global economy bears its effects of a depressed growth. It is possible for Africa to position itself into an attractive destination when the turn-around happens for the global economy.

The current economic projection is that the current health crisis is adversely affecting the global market and a large worldwide recession is very likely.⁸⁹ African nations need to be alert even though the pandemic is not yet as grave as the rest of the world at the time of writing this paper. Even though affected countries in Africa chose to pre-empt the crisis by restricting travel, both social and official gathering, closing all institutions of learning from kindergarten to university, lockdowns (partial or full) and curfews, it is difficult to predict the end gain of such measures as of July 2020.

⁸⁷ See Report on; Survey Report COVID-19 Impacts on MSMEs in Ethiopia by Entrepreneurship Development Center (EDC), Ethiopia, May 2020.

⁸⁸ https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf

⁸⁹ <https://www.uneca.org/publications/covid-19-africa-protecting-lives-and-economies>. Africa is highly dependent on imports of medicinal and pharmaceutical products, Pg.3

Given that Europe and possibly China, the main partners in trade are affected by the pandemic, economic impact will be felt due to open nature of the continent's economy, which depends on, to a great extent on global demand especially for raw materials and agricultural commodities. Around two thirds of African countries import a significant amount of their food and medicines, raising vulnerability to economic shocks emanating from outside.⁹⁰

Turning now to the digital economy and transformation in Africa going forward, one can see that mobile enabled technology is highly praised for having revolutionized access to electronic commerce in the continent.⁹¹ However, African countries need to build the basic infrastructure for a digital leap. This can happen when governments promote policies that contribute to key social policies that support the access to education, as well as other indicators which drive the digital agenda, such as investment in Information and Communication Technologies (ICTs) and technology related infrastructure.

The African population must own its digital transformation to move to the next step. Essential to this is the government's effort to create an enabling environment through upgrading telecommunication infrastructure including high speed internet and fiber optic installations. Consequently, human capital and capacity building development to enhance required skills will need to be undertaken.

To remain relevant post COVID-19, African companies must transit digitally to attract trade and investment partners.

5.2 UNCTAD perspective on enforcement response to COVID-19 health Crisis

The United Nations Secretary General, António Guterres recently, while addressing staff, stated that; *"We are facing a global health crisis unlike any in the 75-year history of the United Nations....one that is spreading human suffering, infecting the global economy and upending people's lives"*.⁹² The pandemic has placed on Governments the burden of looking for ways and means of mitigating the crisis effects on its population.⁹³

UNCTAD survey on member States response to COVID-19 shows that governments swiftly adopted emergency measures to protect consumers from misleading, unfair, and abusive practices and to alleviate the negative impact of the crisis on consumer's welfare.⁹⁴ Price gouging and hoarding of essential products was prevalent in many regions and competition authorities had to contend such practices especially for facemasks, hand sanitizers and basic household products.

⁹⁰ Africa is purported to be a net importer of food. The African Development Bank (AfDB) president Akinwumi Adesina says; "Africa currently spends a whopping \$35 billion annually on food imports, according to the African Development Bank (AfDB), which projects that if the current trend continues, food imports could rise to \$110 billion by 2050".

<https://diasporaconnex.com/agricultural-mechanisation-is-crucial-to-africas-food-security/>

⁹¹ <https://www.uneca.org/stories/digital-transformation-africa-hype-or-reality>

⁹² <https://www.un.org/en/un-coronavirus-communications-team/above-all-human-crisis-calls-solidarity>

⁹³ <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2383>

⁹⁴ <https://unctad.org/news/defending-competition-markets-during-covid-19>

Over twenty countries reported enforcement and regulation actions.⁹⁵ Some countries resulted to setting maximum reference prices for a basket of basic consumer products⁹⁶. Price caps for personal hygiene and cleaning items were also instituted as the crisis unfolded and governments had to act.⁹⁷

A surge of scams and false claims including those purporting miracle cure products sold online was witnessed pushing agencies to undertake quick enforcement actions for which the cooperation of online platforms played a major role.^{98,99}

At the height of COVID-19 crisis, the aviation sector was among the ones negatively affected, incurring heavy losses due to flight cancellations. Consumer agencies responded by strongly defending consumers' rights to refunds for flight cancellations.¹⁰⁰ In addition, UNCTAD issued a call for firmer action to better protect consumers and for airlines to respect consumers rights, both containing recommended actions for governments to continue to protect consumers during the COVID-19 crisis.^{101,102}

Some governments responded to the needs of vulnerable and disadvantaged people in their societies, especially those who suffered jobs losses by suspending the payment of utility bills. Some actions were taken, in particular stopping the disconnection of services such as electricity, water, gas, fixed and mobile phone lines provision.¹⁰³ Kenya's Stanbic Bank granted a three-month loan repayment holiday for consumers as an example of private sector response to protect consumers.

Other measures included temporarily exemption of competition law application to certain sectors, such as health sector in South Africa and the transport sector in Norway. In the European Union and United States, the joint R&D efforts in the pharmaceutical sector towards a vaccine against COVID-19 were exempted from the European competition rules.¹⁰⁴ UNCTAD issued a call for action, which contains recommendations for governments to defend competition in the markets during COVID-19 crisis.¹⁰⁵

Turning to an example on online platforms, the Jumia platform in Nigeria, delisted 390 products of 168 sellers of hand sanitizers and face masks from its platform.

⁹⁵ UNCTAD data: Bolivia, Brazil, China, Colombia, France, Greece, India, Italy, Kenya, Nigeria, Paraguay, Russian Federation, South Africa, Spain, Seychelles, Thailand, Turkey, United Kingdom, United States, Uruguay

⁹⁶ Argentina

⁹⁷ Argentina, France, Spain.

⁹⁸ Colombia, Republic of Korea, Italy

⁹⁹ Consumer protection authorities of all European Union member States issued a common position asking online platforms to better identify scams and unfair practices, take them down and prevent similar ones to reappear.

¹⁰⁰ China, the European Union, India, United States, see UNCTAD analysis:

<https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2383>

¹⁰¹ https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2326&Sitemap_x0020_Taxonomy=UNCTAD%20Home:#2311;#UNCTAD%20and%20the%20coronavirus;#1475;#Competition%20Law%20and%20Policy

¹⁰² <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2383>

¹⁰³ Argentina, Brazil, France, Portugal and Spain

¹⁰⁴ More information at <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2325>

¹⁰⁵ <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2325>

This happened after the Nigeria Federal Competition and Consumer Protection Authority issued a warning letter to the platform to refrain from excessive pricing.¹⁰⁶

Likewise, as the use of digital platforms heightens, as the COVID-19 crisis increases as well as the dependence on electronic commerce, competition authorities continue to closely monitor their operations. This is amplified by the inherent movement restrictions which limits the possibilities to buy products physically.¹⁰⁷

Competition authorities gave guidance to businesses on how competition laws would be enforced. However, the crisis led to some exceptions of competition law allowing collaboration between competitors in cases where such would promote the public good/interest, which would otherwise have been illegal under the competition law.

Finally, competition agencies will need international cooperation more now than ever, especially in cases and mergers involving global firms. UNCTAD's Guiding Policies and Procedures under the United Nations Set on Competition¹⁰⁸, the only internationally agreed instrument on competition law and policy, is expected to continue the dialogue among competition agencies and facilitate international cooperation.¹⁰⁹

The AfCFTA competition protocol discussions should put into consideration these market dynamics brought about by the COVID-19 crisis and ensure that the protocol provisions are sufficient to address such eventualities especially those affecting the continental market in various sectors. Given that increased market concentration is expected post COVID-19, competition authorities at national and regional level must find effective ways to tackle related cases.

International cooperation, exchanging information and sharing experiences among different jurisdictions within and outside the continent, will be the key to handle the new challenges in post COVID-19.

6 The role of UNCTAD in the implementation of AfCFTA protocols: The case for competition policy

¹⁰⁶ <https://www.fccpc.gov.ng/news-events/releases/2020/03/13/jumia-delists-390-products-on-accountof-fccpc-warning-over-hike-in-prices-of-productive-and-hygiene-products-assure-commission-of-cooperation/>

¹⁰⁷ https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=2325&Sitemap_x0020_Taxonomy=UNCTAD%20Home:#2311

¹⁰⁸ The Guiding Policies and Procedures under Section F of the United Nations Set on Competition was agreed and adopted at the 18th Session of the IGE on Competition Law and Policy and will be considered by the Eighth United Nations Conference to Review the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices; scheduled for 19-23 October 2020

¹⁰⁹ https://unctad.org/meetings/en/SessionalDocuments/ccpb_comp1_%20Guiding_Policies_Procedures.pdf

As a starting point, UNCTAD holds a unique and sole mandate of handling both competition (under the United Nations Set on Competition) in 1980 (resolution 35/63 of 5 December 1980). and consumer protection policy (under the United Nations Guideline for Consumer Protection (UNGCP) in 1985, in the United Nations system. Pursuant to its mandate under the United Nations Set on competition and UNGCP, UNCTAD engages through a blend of analytical work, capacity-building activities, and consensus-building within an intergovernmental framework open to all United Nations member States and stakeholders such as business representatives, civil society, and academia.

This would be a useful resource for the implementation of the AfCFTA where the secretariat could learn from the UNCTAD experience of bringing together heads of national and regional competition authorities and senior government officials from member States, to network and exchange best practices for effective enforcement for their various laws.

UNCTAD is well placed to be a strategic partner to collaborate with African Union and the AfCFTA Secretariat to deliver the implementation of the AfCFTA competition Protocol. UNCTAD is known, for its work with developing countries in Africa and other parts of the world, in assisting them in building capacities to adopt and implement competition and consumer protection laws and policies at national and regional level.

The other two areas of engagement with UNCTAD member States, are research and policy analysis and technical assistance. Research is undertaken on cluster issues mandated by Intergovernmental Group of experts in both on competition and consumer protection. In addition, UNCTAD created the Research Partnership Platform (RPP) in 2010, which meets annually and brings together research institutions, universities, competition authorities, business, and civil society.

The RPP enables researchers to undertake joint research with UNCTAD, and to disseminate the results, exchange ideas on the issues and challenges facing competition and consumer protection, particularly in developing countries and economies in transition. These forums would be a good starting point for the AfCFTA secretariat to both leverage and learn from lessons and experiences gained from such interactions, and possibly be enjoined in some research activities.

Regarding the AfCFTA, UNCTAD has contributed to Phase I on the development and negotiations of the protocol on trade in goods and services, and Phase II process on competition, investment, and e-commerce. Turning now to the competition protocol, in collaboration with UNECA, UNCTAD contributed as author in ARIA VIII and lead author of ARIA IX chapters on competition policy of the flagship publications in 2018 and 2019, respectively.

Finally, in collaboration with African Union Commission and UNECA, UNCTAD has participated in the development of the text of the draft competition protocol (to be negotiated by State Parties representatives after COVID-19 recedes).

7 Conclusion and issues for further consideration

7.1 General Aspects

In conclusion, State Parties and signatories of the AfCFTA Agreement have more work to do in preparation for the implementation of the protocols prescribed therein. This paper has identified many areas that could need one action or the other.

It is worthwhile pointing out that first, Africa could draw lessons from the economic integration of European Union and the creation of a single market. In the European case, though the countries are more developed than Africa, varying economies came together to form a highly comprehensive example of deep integration. The EU single market example shows that it is possible countries to uplift countries to a level commensurate with the community vision and competition law and policy is considered to have played a key role in this process.

Secondly, the success of Association of Southeast Asian Nations (ASEAN) countries integration is a useful lesson for Africa in terms of inclusiveness and regional linkages.¹¹⁰ The inward-looking ASEAN model provides flexibilities and support for less developed countries such as Cambodia, Lao People's Democratic Republic, Malaysia, and Viet Nam.¹¹¹ This has enabled improvement of competitiveness and connectedness to the outside world and progress has been achieved and development gains recorded in these countries.

Some actions for African Governments:

- (a) The remaining African countries should ratify the AfCFTA without delay and ensure that the continent moves together by greatly exceeding the minimum number of 22 ratifications what is required for enter into force. As of January 2020, 30 countries had ratified the AfCTFA.¹¹²
- (b) Critical technical components that need to be finalized before the AfCFTA can be operationalized must be urgently concluded. They include schedules of concessions for trade in goods, rules of origin and schedules of specific commitments for trade in services.
- (c) The phase II negotiations on investment, competition policy and intellectual property rights should commence as soon as COVID-19 crisis is contained.

¹¹⁰ <https://intpolicydigest.org/2016/01/06/asean-economic-integration-opportunities-and-challenges-that-lie-ahead/>

¹¹¹ See Inclusive Trade in Africa; The African Continental Free Trade Area in Comparative Perspective; Routledge Taylor and Group, 2019 Publication; Chapter 4 on ASEAN at 50 and Beyond by Mia Mikic and Weiran Shang

¹¹² https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf

- (d) AfCFTA State Parties need to identify other specific and immediate priorities to prepare the implementation of the competition protocol.
- (e) Ratification of the AfCFTA must be followed by effective implementation. This requires creating the AfCFTA institutions, establishing the mechanisms envisaged in its operative provisions and incorporating AfCFTA obligations into the laws and regulations of each State Party. Countries must strategically take advantage of the AfCFTA to achieve economic development and poverty alleviation.
- (f) The effectiveness of the AfCFTA committees will require many prompt decisions at African Union level. Certain decisions could be delegated to the AfCFTA Secretariat, other decision-making authorities could be delegated to RECs representatives in the absence of State representation or permanent representatives accredited to the Committee of Senior Trade Officials. The competition protocol could be a viable candidate for such delegations both at AfCFTA Secretariat and RECs level.

7.2 Competition Policy Specific points

- (a) The AfCFTA competition protocol should be comprehensive in coverage and enforceability.¹¹³
- (b) Prepare the State Parties, through information sharing and capacity building programs, to understand regional and domestic laws in order to facilitate their process of ratification of the competition protocol in conformity with the AfCFTA requirements.
- (c) The AfCFTA protocol on competition must cover the main substantive competition issues, anticompetitive agreements, cartels, mergers, and abuse of dominance.
- (d) The protocol should address the relations between national competition authorities, regional bodies and AfCFTA future directorate. The experience of RECs should carefully be considered and adapted where necessary and overlapping memberships addressed.
- (e) The AfCFTA State Parties should look at legal gaps, such as lack of rules governing private restraint on trade and strengthen competition law frameworks both at domestic and regional level.
- (f) Re-evaluate legal provisions required addressing competition issues in digital markets, including online platforms and examination of emerging business models.

¹¹³ <https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix>

- (g) The AfCFTA competition protocol text should establish a competition directorate/division and a competition network comprised of RECs and national competition authorities.
 - (h) The AfCFTA competition protocol negotiations should consider provisions to handle crisis situations as witnessed during COVID-19 health crisis.
 - (i) The AfCFTA competition protocol should embrace consumer protection either as a provision in the protocol or in an Annex.
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