Hopes for an Anti-Monopoly Agenda in the AfCFTA Competition Protocol

By:

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The African Continental Free Trade Area (AfCFTA) 's scope and potential are by now trite – it is set to be the world's largest free trade area, covering 1.2 billion consumers and an estimated $3 trillion in combined GDP[1]. The free trade area is projected to increase intra-African trade by 50%[2]. However, for the AfCFTA to result in economic development for the majority of Africans, these gains cannot be concentrated among economic and political elites, condemned to 'trickle down' to the rest.

In a recent webinar, the United Nations Conference on Trade and Development (UNCTAD)'s Director of the Division on Globalisation and Development Strategies, Richard Kozul-Wright, noted the importance of the AfCFTA agenda extending beyond trade liberalisation if there is to be any hope for the free trade area facilitating sustainable development[3]. The AfCFTA Competition Protocol is one tool that can serve as an important check on the market

opportunities that the free trade area will create. Phase II of the AFCFTA negotiations, intended to conclude by the end of 2022, will produce protocols on intellectual property, e-commerce, and competition. Although the AfCFTA is ultimately aimed at facilitating trade, its competition laws and enforcement bodies must be unafraid to intervene in markets in order to "protect consumers and small suppliers from the market power of large sellers and buyers, maintain the openness of markets, and disperse economic and political power"[4].

In Africa, inequality is closely linked to the dominance of monopolies. There is great inequality within African states, between African states, and between Africa and the global North. Lina Khan (the chairperson of the United States Federal Trade Commission) and Sandeep Vaheesan write that "monopoly pricing on goods and services [exacerbates inequality by] turn[ing] the disposable income of the many into capital gains, dividends, and executive compensation for the few[5]". This problem is even more egregious in Africa, where 36% of the continent's population lives in extreme poverty and has no disposable income. Ndidi Okonkwo Nwuneli writes that food expenditure in Africa is among the highest in the world and suggests that this is primarily due to the unchecked market power of agribusiness[6]. Monopoly pricing on food and other basic goods regressively redistributes the income of the poor to the rich and deepens inequality. Moreover, monopolies are able to exercise vast economic and political power – this is especially so in contexts where consumers rely on private firms for basic amenities, whether due to poor service delivery or privatisation or, often, both.

A central tenet of the Law and Political Economy Project[7] is that markets are legally constructed. Markets are "neither self-defining nor self-justifying" but are constructed through politics and law[8]. Competition law is often perceived as an artificial intervention in natural markets. The temptation in the AfCFTA context may be to see trade liberalisation as natural and any regulation thereof as artificial. However, if we see markets as legally and politically constructed, then the market restraints associated with competition regulation are not aberrations but just another politically and legally contingent way of structuring the market, no more or less natural than creating a free trade area. The flourishing of a particularly pernicious form of capitalism, in which food monopolies can exist, is partly due to the legal structuring of such markets,

including through thin market regulation.

Although competition law takes as its departure point an assumption that well-regulated markets are the most appropriate means of distributing wealth and income, competition law has the potential to be a "non-reformist reform" insofar as it is concerned with fundamentally altering and regulating unjust market arrangements. A "non-reformist reform" is one that has a normative agenda and involves the "implementation of fundamental political and economic changes[9]". These reforms change power relations and create "new centres of democratic power[10]". Competition law can function as a "non-reformist reform" when it is deployed as part of an antimonopoly agenda concerned with protecting and deepening democracy through "control[ling] private concentrations of economic power[11]". The kinds of transactions that land before a continental competition regulator are inevitably large, multi-country, multi-regional deals that have the potential to give firms enormous power. Effective competition law and enforcement that is able to identify and block transactions like these prevent the cession of power to private actors through the market. Put otherwise, effective competition regulation can protect democratic power.

As with all of the AfCFTA's protocols, rigorous enforcement through strong institutions is vital for the success of the Competition Protocol. At least 41 African states have competition legislation, but these rules are not enforced for the most part[12]. Thirteen African countries have no competition laws at the national level[13]. Although 32 of the 41 jurisdictions with national competition legislation have enforcement agencies, the degree to which agencies are operational varies widely[14]. Several Regional Economic Communities (RECs) have competition laws (some of which account for states without national laws), but only some of these laws are binding[15].

Enforcement by African agencies has largely been in respect of cartel conduct[16]. While investigating and prosecuting restricted practices is an important means of protecting consumer welfare, it is a retrospective remedy concerned with policing market conduct rather than regulating market structure. Robust merger control is necessary to snuff monopolies and oligopolies before they are formed. Guarding against the formation of monopolies and oligopolies not only protects consumer interests it also,

crucially, keeps a check on the economic power of firms and, therefore, on the political power firms might yield.

Enforcement (or lack thereof) can fundamentally change an antitrust regime's effectiveness without any required legislative change. Khan and Vaheesan detail how, under the Reagan administration, antitrust enforcement officials and the judiciary applied "elastic standards" that were favourable to business[17]. Among these elastic standards is the rule of reason review, which appears in the competition laws of most African states and RECs. The rule of reason involves balancing the anti-competitive effects of a transaction against possible pro-competitive gains presented by firms in justification of the proposed transaction. In the African context, many competition regimes include public interest provisions aimed at correcting, among others, ownership patterns that are vestiges of colonialism. It is welcome that competition authorities can regulate on public interest grounds, particularly where these are well-defined (which makes enforcement and the initiation of private litigation against firms easier). However, where public interest grounds may also serve as justifications for proposed merger transactions, lawmakers and enforcers must be wary not to introduce another nebulous ground through which firms can justify conduct that would otherwise be considered anti-competitive.

The AfCFTA Competition Protocol can function as a potential model law for African jurisdictions where there is no existing, or only a poorly developed and enforced, competition regime[18]. Some commentators have suggested that the initial approach of the AfCFTA should be to implement a 'soft law' regime, as other free trade areas like the North American Free Trade Area and the Trans-Pacific Partnership have done[19]. However, the AfCFTA is distinct as its member states have gaping enforcement holes[20]. While it is important to delineate which authorities have jurisdiction over transactions and firm conduct, particularly in instances where there are operational national and regional competition authorities with concurrent jurisdiction, the AfCFTA's competition laws must allow its enforcement agencies to exercise jurisdiction where there is no other competent regulator. This may initially mean that the AfCFTA competition rules will only apply where there is no other regulator at all or, as the AfCFTA authorities' enforcement capabilities mature, the rules will apply if the concurrent laws and enforcement are less rigorous than at the AfCFTA level. For example, in a merger that created the largest cement

producer in Africa and the world, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission issued its approval on the basis that the merger "does not have an appreciable effect on trade between the Member States", with no further analysis[21]. At the very least, the AfCFTA protocol must promote more rigorous legal and market analysis by regional and national regulators. An oft-repeated concern regarding the AfCFTA Competition Protocol is whether it will be able to harmonise with the competition regimes of its member states and the continent's various RECs. However, this is a technical issue with a technical solution. Of more significant concern is whether the AfCFTA Competition Protocol will be able to set strong, clear legal and enforcement standards that are fit to address and prevent monopoly and oligopoly power in Africa.

To echo Kozul-Wright, the AfCFTA must be more than a liberalisation project. To facilitate broad-based and sustainable development, the AfCFTA must ensure that the dramatic gains it is projected to generate are more equitably distributed. The Competition Protocol is one tool at the continental level through which to constrain monopolies and their concomitant economic and political power.

References

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[1] Francisco G. Carneiro and Ferdinand Owoundi ‘The African Continental Free Trade Area and exchange rate misalignments’ Brookings Institution, available at https://www.brookings.edu/blog/future-development/2021/04/27/the-african-continental-free-trade-area-and-exchange-rate-misalignments/.

[2] Ibid.

[3] A recording of the webinar entitled “How can Transformative Industrialisation and Implementation of the AfCFTA stimulate Africa’s sustainable development post COVID-19?” is available at this link https://www.facebook.com/136552896545158/videos/997091424442863.

[4] Lina Khan and Sandeep Vaheesan ‘Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents’ 11 Harvard Law and Policy Review 235 at 237.

[5] Ibid at 236.

[6] Ndidi Okonkwo Nwuneli ‘The High Cost of Food Monopolies in Africa’ https://www.project-syndicate.org/commentary/africa-monopoly-food-prices-by-ndidi-okonkwo-nwuneli-2018-08?barrier=accesspaylog.

[7] See the Law and Political Economy Project’s website, here https://lpeproject.org/.

[8] Jedediah Britton-Purdy et al. ‘Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis’ 129 Yale Law Journal 1784 at 1833.

[9] Andre Gorz quoted in Amna A. Akbar ‘Demands for a Democratic Political Economy’ 134 Harvard Law Review Forum 90 at 101.

[10] Ibid.

[11] Lina Khan ‘The New Brandeis Movement: America’s Antimonopoly Debate’ 9 Journal of European Competition Law and Practice 131.

[12] Tim Buthe and Vella Kedogo Kigwiru ‘The Spread of Competition Law and Policy in Africa: A Research Agenda’ 1 African Journal of International Economic Law 44 at 46.

[13] Ibid at 48.

[14] Ibid at 47.

[15] Ibid at 53 - 61.

[16] Buthe and Kigwiru supra at 47.

[17] Khan and Vaheesan supra at 236 – 237.

[18] See Prof. Jonathan Klaaren’s discussion of the West African Monetary Union’s ‘preemption’ of its member states’ competition laws in his review of Eleanor Fox and Mor Bakhoum’s book Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa, here https://www.afronomicslaw.org/2019/09/17/book-review-of-fox-and-bakhoum-

making-markets-work-for-africa-oup-2019.

[19] 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’ AfronomicsLaw Blog, available at https://www.afronomicslaw.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.

[20] Buthe and Kigwiru supra.

[21] Klaaren, drawing from Fox and Bakhoum, supra.

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