The African Continental Free Trade Area Competition Policy: Model, Dispute Resolution Mechanism, Institutional Framework and AfCFTA Relationship with Existing Regional Competition Regimes

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Although the aspiration of the African Continental Free Trade Area (AfCFTA) is to reduce and progressively remove trade barriers, enhance intra-African trade at the continental level and increase Africa's global market share, anti-competitive conduct is likely to pose as a barrier hindering the realization of the main objectives of the AfCFTA. That is why, Articles 4, 6 and 7, in addition to other key provisions recognize that cooperation in competition policy is critical in meeting the objectives of the AfCFTA. As a result, negotiations on

competition policy are ongoing and it is expected to be undertaken under successive rounds and result in a Protocol on Competition Policy.

While the AfCFTA has been celebrated as the largest free trade area (FTA) to be established, it is not the first FTA to have a provision on competition policy. For instance, the North American Free Trade Agreement (NAFTA) has dedicated its chapter fifteen to competition policy, monopolies and state enterprises. Chapter sixteen of the Trans-Pacific Partnership(TPP) FTA has competition policy provisions covering: the establishment of competition law and authorities; anticompetitive business conduct; procedural fairness in competition law enforcement; privates rights of action; cooperation; technical cooperation; and consumer protection. These FTAs can act as a laboratory of experimentation for the AfCFTA on how competition policy within a free trade area would be like. Yet, Africa as a region is unique in itself and faces unique challenges such as the existence of multiple and overlapping trade regimes that require African crafted solutions.

Whereas there exists numerous issues and concerns on the future of the African continental competition policy, this article will focus on the model to be adopted, the dispute resolution mechanism, the institutional framework and how the continental competition policy will relate with existing regional competition regimes.

- **Model**

Research indicates that most of the FTAs with a competition policy provision have adopted a soft law approach. In a region where some countries have adopted competition laws and others are yet to, a soft law approach should be the most suitable at the moment under the AfCFTA. Further, many countries in Africa are members of already existing mandatory regional competition regimes such as COMESA which are facing jurisdictional conflicts and conflicts of laws. Adding a hard law approach to competition policy at the continental level without first addressing the challenges at the regional levels is an addition burden to the business community which will undermine the AfCFTA objectives. SADC competition regime that adopts a soft law approach can offer great lessons and insights. Unlike the hard law approach that has binding

commitments, a soft law approach to competition policy will seek to enhance cooperation, strengthen existing competition regimes and enhance competition culture. By requiring countries to cooperate on competition laws, it can be assumed that, the AfCFTA seeks to adopt a soft law approach in its competition policy. In doing so, the AfCFTA competition policy can create a continental lever seeking to push for reforms at both the national and regional levels that domestic and regional interest groups might resist. Once this is achieved, a hard law approach can be adopted in future.

- **Dispute resolution mechanism**

Unlike regional trade agreements, most FTAs do not provide for a binding dispute resolution mechanism on competition policy. Article 1501 of the NAFTA reads that, 'No Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.' Article 16.9 of the TPP exempts competition policy from dispute resolutions under the FTA. Under the Singapore-US FTA Article 12.7, questions on anticompetitive practice, cooperation and consultations are not governed under the FTA and calls upon parties to address conflicts on competition through consultations.

Sokol has attributed lack of binding dispute settlement mechanisms on competition policy under FTAs to the fact that it is hard to detect anticompetitive practices, lack of substantive convergence and the high transactions costs for dispute settlements. Until the negotiations on the Protocol of Competition Policy under the AfCFTA come to an end, we cannot anticipate at this period whether it will adopt a binding or non-binding dispute resolution mechanism. However, under the AfCFTA as discussed by Gathii and Eurallyah , the Protocol on Rules and Procedures on the Settlement of Disputes is based on a voluntary (non-binding) and mutual consent mechanism as underpinned under Article 8 of the AfCFTA. It is not exclusive either.

According to Gathii, although the dispute resolution mechanism under the AfCFTA is a replica of the WTO rules governing the dispute resolution mechanism, unlike the WTO, it is not an exclusive dispute resolution system. In addition to the non-exclusivity of the Protocol on Dispute Settlements, any other special or addition rules and procedures on dispute settlements under the AfCFTA agreement enjoy primacy in case of conflict. The AfCFTA, already

adopts a voluntary dispute resolution mechanism, and the likelihood is that, the same will be adopted under the competition policy. This will depend on what Member States will agree upon and if they decide on a mandatory dispute resolution mechanism, it will enjoy supremacy.

- **Institutional Framework**

If a soft law approach to competition policy is adopted, then the creation of an institutional framework under the AfCFTA Secretariat to oversee the cooperation in competition policy is the most suitable. SADC established the Competition and Consumer Policy and Law Committee to implement a system of cooperation. NAFTA has the Working Group on Trade and Competition whose role is to report and make recommendations to the NAFTA Commission on relevant issues concerning the relationship between competition policy and trade within the FTA. The AfCFTA can establish a committee on cooperation of competition policy at the AfCFTA secretariat that will oversee the implementation of the Protocol in Competition Policy.

- **Regional Competition Arrangements**

RECs remain the building blocks of the AfCFTA and this also applies to competition policy. So far, six competition regimes have been established at the regional level seeking to foster competition within their regional markets. They will continue to serve as a template for a continental competition policy and should play an active role in the negotiations and implementation of the Protocol on Competition Policy. The existing regional competition regimes not only vary in substantive laws, institution framework but also priority areas and how they will relate with AfCFTA competition policy will matter a lot. For instance, when COMESA was established it focused more on merger review and it was until recently that it begun investigating cartel conduct. The EAC, since 2018 when it was operationalized has focused more on market inquiries to determine anticompetitive conduct. The AfCFTA Secretariat should seek to collaborate with the existing regional competition regimes, to inform its functioning on competition policy.

In conclusion, a competition policy at the continental level is not only important to meet the objectives of the AfCFTA, but it will provide a forum to strengthen and develop existing competition regimes. The AfCFTA, creates a wide

continental market and a competition policy will provide African countries with the power to police international anti-competitive conduct by pulling resources that will enhance global trade. However, for a competition policy to be effective, the AfCFTA must continue to build on the efforts made at the national and regional levels. Member States should take this opportunity and negotiate on the future continental competition policy taking into consideration the African markets and its role in global markets.

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