Regional Integration and the role of National Competition Agencies in Competition law enforcement: Lessons from the Covid-19 Pandemic

By:

Elizabeth Gachuiri

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Dynamics of Regional Trade Agreements.

This blog post illustrates the role of national competition agencies (NCAs) in enforcing regional-level competition laws in Africa. Generally, the journey to regional integration starts with action at the national level. Then, as countries enter discussions and negotiations, treaties or agreements are signed containing articles that spell out common interests between States.

The proliferation of RTAs post-90s has been witnessed in all parts of the world, intra, and inter-continental. Yet, there is a great disparity between the objective

of establishing these Treaty Agreements and their actual implementation. In 2005 Lucian Cernat, posed the question "*eager to ink, but ready to act*"? This question lingers on today. The signing and implementing of the articles of such agreements have taken considerable time in many cases.

Notably, competition provisions in RTAs usually take even much longer to implement. For instance, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission was established in 2013, almost ten years after the COMESA Competition Rules and Regulations were enacted in 2004. Moreover, the West African Monetary Union (WAEMU) Treaty was signed in 1994. As a result, the WAEMU Competition Commission was established in 1995. Yet the operation of the WAEMU Competition Regulations begun in 2002, a total of 8 years delay.

Similarly, the Economic Community for the West African States (ECOWAS) enacted its Competition Regulations in 2008. However, eleven years later, in 2019, the ECOWAS Regional Competition Authority was launched. The East African Community (EAC) Competition Authority begun its operation on an ad hoc basis in 2018. Yet, the EAC Competition Act was enacted in 2006. For a brief overview of the regional competition regimes (RCRs) in Africa, see Büthe and Kigwiru's article on 'The Spread of Competition Law in Africa: A Research Agenda', pages 53-67.

Different factors influence the implementation of regional competition laws in Africa. They include sharing competencies between the NCAs and RCRs and the reluctance of National Governments to cede power to regional institutions. Moreover, these RCRs operate on a constrained budget. Therefore, this paper seeks to analyze the role of the NCAs in implementing RCRs.

Competition-related Provisions in Africa RTAs.

Africa has not been left behind in the surge of RTAs. There are many regional and sub-regional agreements across the continent. For example, at the continental level, the African Continental Free Trade Agreement (AfCFTA) establishing a free trade area among the 54 African States of the African Union was signed in March 2018 in Kigali with high hopes of unleashing Africa's huge potential to spur development in the region and its people. The AfCFTA provides a competition protocol to deal with cross-border anti-competitive

practices as part of Phase II negotiations. In addition, a draft protocol has been prepared for negotiations by African Union member States, including competition articles, and proposes a consumer protection addition. For literature on competition policy under the AfCFTA, see Kigwiru, The Cooperation on Competition Policy under the African Continental Free Trade Area; Gachuiri, Approaching competition policy in the AfCFTA, and the UNCTAD Research Paper; African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol.

At the regional level, RTAs in Africa with competition provisions range from EAC, ECOWAS, COMESA, SADC, CEMAC, to WAEMU. These institutions are at different levels of operations depending on various factors as described above. They are differentiated by the institutional structures prescribed by their treaties.

So far, COMESA has taken the lead in enforcing competition rules and regulations in the last eight years. Case law on cross-border mergers is well documented. It is expected to be a springboard on continental competition matters as the AfCFTA implementation takes shape. Key sectors have been covered in this enforcement work[1]. In addition, COMESA Competition Commission has expanded its enforcement to anti-competitive practices and consumer protection.

However, for such regional institutions to effectively enforce regional laws, national competition laws should be enacted and implemented in respective member States. Competition awareness at the national level should strengthen RCR because national-level institutions appreciate competition regulation. Once valued, this would facilitate the allocation of competencies between the regional and national bodies. Ultimately, through cooperation and coordination, jurisdictional conflicts are resolved.

Therefore, what happens at the national level in terms of competition law enforcement determines regional enforcement of competition provisions. For instance, COMESA’s success can be attributed to effective management and expertise at the COMESA Competition Commission. However, most of the COMESA countries have a national competition regime. The COMESA Competition Commission has increasingly worked on facilitating cooperation

between it and national competition agencies. For instance, the Commission has entered a Memorandum of Understanding (MOUs) with NCAs, fostering collaboration and coordination in enforcing competition Regulations. A good example to report is Kenya's competition authority (CAK) which signed a Memorandum of Understanding to address jurisdictional conflicts with COMESA in 2016. An additional and more recent action by CAK is its November 2019 Competition Rules which explicitly recognize the jurisdiction of COMESA in relation to merger control. In 2016, the COMESA Competition Commission provided technical support to countries without competition law and agencies to close the gap of countries missing out on competition enforcement.

In the next section, I briefly discuss how African NCAs have regulated competition law during the Covid-19 pandemic.

African NCAs s during the Pandemic; Technology-related Enforcement Matters

An OECD study points out that the Covid-19 pandemic has created an opportunity and a push to accelerate the fourth industrial revolution in East Asia. Firms are becoming more responsive to the current market call as industry 4.0 technologies tighten the grip on their operations. Africa still lags in technology matters, but remarkable progress in internet penetration has been observed in many countries, especially among the youth. Indeed, the Covid-19 pandemic has created a shift that has pushed market operations to a *reset* mode globally.

Competition enforcement has likewise been affected by the effects of the pandemic, which implores a rethinking of how to deal with competition regulation matters. This calls for National Competition Agencies (NCAs) to respond differently during and post-Covid-19. See Kigwiru's article on 'Enforcing Competition Law and Consumer Protection During the COVID-19 Pandemic in Africa: The Competition Authority of Kenya.

Nonetheless, one of the areas that have emerged as important during the pandemic is technology in competition enforcement and information sharing. The response to the crisis by NCAs in Africa was varied based on internet tools available to them. Countries like Kenya, South Africa, Zambia, etc were able to adjust to online tools for enforcement purposes. In contrast, other countries

halted their operations during lockdown periods, for example, Botswana and Swaziland. While many NCAs in Africa were able to post information guidance on Covid-19 on their websites, lockdown measures paralyzed the ability to carry out investigations and lodge case applications with NCAs. The lesson here is that technology access was instrumental to continued receipt and processing of cases by NCAs, pre, during, and post the Covid-19 pandemic.

Mobile-enabled technology is highly praised for having revolutionized access to electronic commerce in the African continent. Still, the need to build necessary digital infrastructure and configure this technology to competition enforcement is now more urgent than ever. Namibia issued a press release containing information on how consumers could file complaints related to Covid-19 by email and WhatsApp. To remain relevant post-Covid-19, African NCAs must transit digitally to continue improving enforcement of competition laws effectively.

In general terms, NCAs in Africa have taken concrete steps, as shown in the examples below. The Competition Authority of Kenya (CAK) pre-Covid-19 did accept complaints both physically and online. However, because of the pandemic, CAK went fully online, through which consumers can lodge complaints more easily. Merger notification was also made fully online, and no hard copies were being accepted. CAK is currently digitizing all the records, which will ensure that all cases are available within the click of a button. Additionally, it is developing a mobile application app to enable easier submission of complaints.

In Zambia, the Competition and Consumer Protection Commission (CCPC) has developed a case management system currently being tested before the CCPC launches it for the public to use it. This will allow for e-filing for an application and lodging a complaint, be it competition or consumer protection. The filing system is also digitalized with the first ten years of the CCPC’s files already scanned and saved electronically. The process is still ongoing. The CCPC has an e-signature system it is using, and this has been in place since the pandemic started.

As for COMESA Competition Commission (CCC), before the pandemic, applicants were to present three hard copies of the notification of a merger in

addition to the email submission of the notification. The parties needed to submit the three hard copies seven days after the submission of an email notification. The Commission has, via its notice on the website, relaxed this by stating that the Parties shall submit the hard copy notification within a reasonable period after submitting email notification. Further, the Commission has embarked on digitalizing its systems, including electronic merger filings, electronic submission of complaints, etc., expected to roll out by the end of 2021 fully.

Conclusions

The Covid-19 pandemic has shown that African NCAs, leverage and translate into the digital space and are prepared for operations online. They need a rapid shift to online systems and, where possible, use mobile technology to enable inclusiveness for all levels of society, including consumers. Further, it is imperative to examine the legal provisions required to deal with digital markets such as online platforms and embrace emerging business models. The response to the pandemic has shown that preparedness and moving with the times is the very key to enforcement success as everyone goes online.

In addition, for NCAs in Africa to match with best practices from other regions, there is a need for collaborative action between development partners to assist these countries in embracing technology. UNCTAD, specifically in its focus on development dimension and building upon its work in developing competition and consumer policies in Africa, is well suited to mainstream and include issues of technology use in its capacity building program.

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[1] Sectors that COMESA cases cover; 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.

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