Why AfCFTA may not be a credible forerunner of single African market

By:

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For over 55 years, since the establishment of the Organisation of African Union (OAU) in 1963, African leaders have had the vision of integrating the continent's economies. In 1980, the OAU adopted the Lagos Plan of Action for the creation of an African common market. Eleven years later, in 1991, African Heads of States signed the Abuja Treaty, establishing the African Economic Community (AEC). The treaty, which entered into force in 1994, set out an ambitious six-stage roadmap to achieve full economic integration within 34 years, including a customs union by 2019, a single market by 2023 and an economic and monetary union by 2028. However, hardly any progress was made towards achieving any of these milestones. The decision of African Heads of States at the AU Summit in Addis Ababa in January 2012 to establish a Continental Free Trade Area by the end of 2017 was therefore very significant, even though a free trade area is a considerable slimming down of the ambitious goals of the Abuja Treaty, under which there should be a customs union this year, followed by a single market in about five years' time. Yet, the launch of the African Continental Free Trade Area (AfCFTA) in the Rwandan capital, Kigali,

on 21 March 2018 was an epochal moment in Africa's economic history. It marked a critical and potentially consequential first step in the creation of a single market for Africa. Indeed, the agreement establishing the AfCFTA, now signed by 49 African countries and ratified, so far, by 18 (22 ratifications are needed for the agreement to enter into force), states in Art 3 that the objectives of AfCFTA are, *inter alia*, to "create a single market" and to "lay the foundations for the establishment of a Continental Customs Union". But to what extent is AfCFTA a credible forerunner of a single market for Africa; in other words, can AfCFTA lead to the creation of a single African market, the goal of the continent's economic integration agenda?

This piece examines the AfCFTA agreement to identify elements that potentially support, or undermine, the emergence of a single market for Africa. ***Scope of the AfCFTA agreement*** The AfCFTA consolidated legal text is 253-page long. It consists of: the agreement establishing the AfCFTA; three protocols, each on trade in goods, trade in services and the rules and procedures on the settlement of disputes; eight annexes, each on rules of origin, customs cooperation, trade facilitation, non-tariff barriers (NTBs), technical barriers to trade (TBT), sanitary and phytosanitary measures (SPS), transit, and trade remedies; and several appendixes. Yet, despite its seeming comprehensiveness, the AfCFTA is work in progress. For instance, the schedules of tariff concessions and specific commitments are not yet concluded, and there are outstanding Phase 1 negotiations, particularly on rules of origin and the regulation of services. Furthermore, Phase 2 negotiations on competition, investment and intellectual property rights have yet fully to start, with the draft legal texts not expected until January 2020. However, Article 8 of the AfCFTA Agreement states that all the current and future protocols, annexes and appendixes will be part of the "single undertaking", that is, form an integral part of the agreement as a single treaty instrument. This will ensure consistency and coherence across the AfCFTA Agreement and its components.

Elements supporting emergence of a single market

But can AfCFTA potentially lead to a single market? The answer is both yes and no. This is because some aspects of the instruments point in the direction of a single market, while others don't. Let's start with the elements that potentially support the emergence of a single market, which, by definition,

means the absence of tariff and non-tariff barriers, and free movement of goods, services, capital and people. The comprehensiveness of the annexes on trade in goods, particularly those relating to rules of origin, trade facilitation and non-tariff barriers, would, if fully implemented, support the integration of Africa's markets. For example, the annex on rules of origin recognises cumulation of origin within the continent, treating Africa as "a single territory". Furthermore, the harmonisation, as envisaged, of customs tariff nomenclatures, valuation laws and practices, and customs procedures across Africa would boost the continent's economic integration. Indeed, the elaborate provisions on the mechanism for identifying, reporting, monitoring and elimination of non-tariff barriers, set out in the annex on NTBs, indicate a serious attempt to tackle NTBs across Africa, which is a critical step towards creating a single market. So, there are very important provisions in the AfCFTA legal texts, which, if fully implemented, could lay the foundations for the emergence of a single market for Africa. However, there are some aspects of the AfCFTA instruments that appear to undermine the goal of a future single market.

Elements likely to prevent emergence of a single market

The first seeming obstacle to the emergence of a single African market is the contradictions between the stated aims of AfCFTA and some of the principles set out in the AfCFTA Agreement. As noted earlier, AfCFTA's objectives include creating "a single market" and laying "the foundations for the establishment of a Continental Customs Union". Yet, one of the principles under Article 5 is "variable geometry", that is, differentiated integration. Of course, variable geometry was designed to recognise the heterogeneity and diversity in Africa's economies. However, a single market is not consistent with an *a la carte* approach, where members integrate at different speeds. Ideally, every member should be subject to the same levels of obligation while special and differential treatment, including flexibility and technical assistance in relation to the implementation of obligations, is used to address the issue of diversity in an integrated market. Furthermore, variable geometry, which suggests a multi-speed integration, is not consistent with consensus in decision-making, another principle of the AfCFTA, as some states could hold back those willing to make faster progress. Consensus in decision-making has been a major obstacle to negotiating progress at the World Trade Organisation. Another potential barrier to the emergence of a single African market is the legal relationship between

the Regional Economic Communities (RECs) and the AfCFTA. The agreement describes the RECs, such as ECOWAS in West Africa and COMESA in East Africa, as “building blocks for the AfCFTA”. But Article 20 states that “In the event of any inconsistency between this Agreement and any regional agreement; this Agreement shall prevail to the extent of the specific inconsistency”. This suggests that AfCFTA rules take precedence over the rules of the RECs, although that seems to contradict the principle, under Article 5, of “preservation of the acquis”, presumably REC acquis. Given the poor harmonisation between the RECs, it is difficult to see how they could effectively be brought within the AfCFTA discipline. Indeed, as an UNCTAD report notes, the RECs are a major obstacle to intra-Africa economic integration. The third disincentive to the emergence of one African market is the level of derogations in the AfCFTA agreement. For a free trade deal that is intended to evolve into a single market, the AfCFTA treaty contains too many carve-outs for sensitive products, exclusion lists, priority sectors, MFN exemption list, market access conditions and limitations etc. All of these would be difficult to dismantle once established, thus creating obstacles to, rather than laying foundations for, establishing a single market or a Continental Customs Union. What’s more, free movement is a prerequisite for a single market. Yet only 30 African countries signed the Protocol on Free Movement in Kigali. Finally, the AfCFTA agreement is based almost entirely on the WTO system. In fact, the AfCFTA can be described as a continental version of the WTO. The texts of the protocols and annexes, including the rules and procedures on dispute settlement, virtually replicate the corresponding WTO instruments. The WTO is not the right model for a future single market. Regional trade blocs are often created to achieve deeper and more comprehensive integration than is ever possible under the WTO. And for a region, that is Africa, that aims to become a Single Market, like the EU, its level of ambition should be greater. But AfCFTA shows a continent approaching economic integration too cautiously or hesitantly. The African Union’s strapline for AfCFTA is “Creating One African Market”. But while AfCFTA is a good FTA, it can’t usher in a single market in its present form. That’s not even mentioning concerns about implementation!

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