



BUILDING THE AFRICAN CONTINENTAL COMPETITION AND ANTITRUST POLICY

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Background

Africa has a large domestic market that possesses opportunities alongside the challenges. With a total population of about 1.2 billion and a combined regional income of \$2.1 Trillion Dollars, Africa's estimated regional GDP was projected to grow by 3.4 percent in 2021². Africa occupies a significant place in the world economy with a potential for even greater impact. Nevertheless, the market growth has been inhibited by various factors including language barriers, customs restrictions, isolated markets, etc. which the African Continental Free Trade Agreement (AfCFTA) was established to resolve by creating a single market for goods and services in order to deepen the economic integration of Africa.

With the AfCFTA in place, it is expected that the continental market will grow to compete with other regional free trade agreements such as the European Union and the North American Free Trade Agreement³ (NAFTA). According to the World Bank⁴, the AfCFTA holds the potential to boost intra-African trade by 52.3% through eliminating import duties and reduction of non-tariff barriers but achieving its full potential depends on significant policy reforms and trade facilitation measures across African signatory nations.

The associated challenges that trade liberalization and free movement of people, goods and enterprise poses also must be taken into consideration. Given the growth inequalities between African economies, one must be mindful of the fact that various African countries are at different level of development. Competition is a major concern that trails the implementation of the world largest free trade area. The continental antitrust policies forms part of Phase II of the AfCFTA negotiations which will cover investment, intellectual property rights and competition policy. However, this article will focus on the various factors that relates to competition and propose mitigants to resolve these issues in line with international best practices.

Competition or Anti-trust Law

Competition, otherwise called Anti-trust Law are rules that check questionable business practices that affect consumers, and the supply chain thereby creating a balance between big, intermediate and the small market players. The goal of competition and antitrust is to create free and open markets; to eliminate monopolies and cartels practice; promote aggressive competition among sellers in an open and liberalized marketplace, higher quality products and services, greater innovation; market allocation and to prevent other questionable business activities.



¹United Nations Conference on Trade and Development (UNCTAD): Key statistics and trends in regional trade in Africa. (Geneva, 2019).

² Africa Development Bank 2021 "African Economic Outlook 2021 From Debt Resolution to Growth: The Road Ahead for Africa"

³ <https://www.alp.company/sites/default/files/AfCFTA%20%20Strengthening%20Africa%E2%80%99s%20Trade%20Capacity.pdf>

⁴World Bank. The African Continental Free Trade Area: Economic and Distributional Effects. Washington, DC: World Bank. doi:10.1596/978-1-4648-1559-1. License: Creative Commons Attribution CC BY 3.0 IG

Monopoly and Market Restriction

A monopoly is a dominant position of an industry or a sector by one company, to the point of excluding all other viable competitors and it could be manifest in many forms which includes franchise monopolies, territorial allocations, and restrictions. The existence of monopoly and absence of a competitive market affects the price and quality of products.

Many municipal competition laws in Nigeria for instance, discourage and prohibit monopolies⁵ and this extends to territorial division and restriction. Also, the Municipal laws in many African Countries prohibit market division or allocation schemes. For instance, in Nigeria, arrangements or agreements that have the likely effect of preventing or restricting competition are prohibited⁶.

Whilst the initiative behind the AfCFTA is undeniably a good one, if left unchecked in certain areas, the AfCFTA has a potential to create monopolies in the free zone. With the removal of tariff-based barriers and non-tariff-based barriers to trade, the resultant effect will be ease in movement of people, goods and enterprises. It is undeniable that big companies will seek leverage by creating alliances and mergers across national borders. The effect of this will be economies of scale, a situation where companies with great economic power will alter the market forces against small companies.

These monopolistic tendencies can be curbed through efficient competition mechanisms. One of the measures which may be adopted by the AfCFTA Protocol on Trade to this effect is the introduction of an objective cap on combined financial threshold for transnational mergers, joint ventures or amalgamation of enterprise. While there could be arguments against placing an objective financial threshold on mergers because it could prevent business collaboration in certain situations or in markets where there is no apparent threat to competition, the alternative measure is to set subjective standards or protocols to be complied with before transnational mergers can be approved. These includes putting into consideration the degree of countervailing power in the local market where the merger is primarily sought. With such measures⁷ in place, companies with large market strength would be prevented from forming market alliances.

Dumping

Dumping refers to the practice of selling products abroad at below costs or significantly below prices in the home market⁸. This practice is defined in the Anti-Dumping Agreement⁹ as the introduction of a product into the commerce of another country at less than its normal value. By doing so, the importing country local enterprises are put out of business because the demands for their goods and services are eliminated. Dumping is also a concern in the AfCFTA which the protocol on competition should solve.

⁵ Section 76 of the Federal Competitions and Consumer Protection Act, 2018. (Federal Republic of Nigeria Official Gazette, No. 18, 2019)

⁶ Section 59(1)(3), *ibid.*

⁷ These measures are provided for in the Nigerian Law on Competition. See Section 94, *ibid.*

⁸ Investopedia, 'Dumping' (Investopedia <https://bit.ly/Investopedia-DumpingDefinition>) <accessed 28th April 2022>

⁹ World Trade Organization (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (GATT), 1994 (Anti-Dumping Agreement)



The several measures put in place by the Anti-Dumping Agreement such as (a) fair price comparison in the products ; (b) Establishment of a functional authority in regulating and ensuring anti-dumping measures are enforced ; (c) Determination of Injury caused by the importing country should be expanded and built on to develop a holistic regional approach for preventing dumping practices.

Price Fixing and Resale Price Maintenance

Price maintenance occur when a supplier prevents a customer from selling a product below a minimum price. It may also occur when a supplier refuses to supply a customer, or otherwise discriminates against them, because of their low pricing policy. Maintaining resale prices is an anti-competition practice and is prohibited by most Anti-trust and Competition laws globally. Prohibition on price maintenance gives dealers and retailers of goods and services the liberty to sell goods purchased from the manufacturers or suppliers at a price they deem fit. The rationale for prohibition of this practice in competition law is that market forces should determine the price of a product or service. In furtherance to this theory, an entity shall not agree, promise or by any other means attempt to influence the price of goods and services upward or discourage the reduction of prices.

¹⁰Article 2 of the Anti-Dumping Agreement

¹¹Article 5 (initiation and subsequent investigation), 6 (evidence) and 7 (Provisional Measures) of the Anti-Dumping Agreement

¹²Article 3 of Anti-Dumping Agreement

Bid Rigging

Bid Rigging also known as cartel practice is a practice between two or more parties who collude to choose who will win a contract. It is essentially an arrangement between two or more businesses with economic strength to influence the outcome of bids and contracts and as a result putting lesser bidders at a disadvantage by taking diverse forms which includes bid suppression, bid rotation or subcontracting arrangements. The cartel agrees in advance who will submit the winning bid and competitors who agree not to bid or to submit a losing bid frequently receive subcontracts or supply contracts in exchange from the successful low bidder.



Bid rigging is an anti-competition act and a concern on the implementation of the AfCFTA by ensuring bidding is won free and fair amongst the bidders and ensure regulators are established to ensure legal actions and sanctions are taken against unfair bidders.

Regional Economic Communities Competition Policies and Laws

Over the years, several regions have established competition authorities to promote and protect fair competition such as the Economic Community of West African States (ECOWAS) which is a regional grouping of fifteen Member States founded in 1975 via the Treaty of Lagos to promote economic integration; Common Market for Eastern and Southern Africa (COMESA) which was signed in 1994 with nineteen members ; East Africa Community (EAC) was enacted in 2006 and so many others.

¹³ Member countries making up ECOWAS are Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

¹⁴ Economic Community of West African States (ECOWAS) Revised Treaty (1993).

¹⁵ Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, and Zimbabwe

¹⁶ Dawar, Kamala and Lipimile, George (2020) Africa: harmonising competition policy under the AfCFTA. *Concurrences Review*, 2020 (2). a93472 242-250. ISSN 1773-9578

Conclusion

In Building the Continental Competition Policy, the African integration process needs a strong guiding role in ensuring that competition policy and trade liberalization complement each other in promoting efficiency, consumer welfare, growth, and development. A regional integration policy needs to take account of the probability that the removal of border barriers may stifle local small and mid-scale businesses through anti-competitive business practices.

In building the African Continental Competition Policy, transparency between member states must be at the heart of negotiations and implementation. Regional Economic Competition laws and policies and existing structures should be used as the building blocks that will lead to the establishment of a continental competition laws. There is also a need to appreciate the inequalities among member states and accommodate these unequal factors in the continental competition policy and regulation. These will protect the least developed African markets from collusion and dumping practices.

Therefore, it is important to ensure that complementary mechanisms are in place to facilitate adjustments by establishing some basic safety nets to ensure fair trade and competitiveness. The AfCFTA can be used as a vehicle to address cross-border competition issues and can also help countries with no competition laws to enact some in conformity to an agreed approach as envisaged in a continental competition framework.

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