

DECEMBER 2020

UNCTAD Research Paper No. 56
UNCTAD/SER.RP/2020/15

Elizabeth Gachuri
Economic Affairs
Officer
Division on
International Trade
and Commodities
UNCTAD
elizabeth.gachuri @un.org

African Continental Free Trade Area Phase II Negotiations: A Space for a Competition Protocol?

Executive summary

The goal of African regional integration and economic freedom is nearing fulfilment now more than ever in the period of more than 50 years since the time of Kwame Nkrumah. The Agreement establishing the African Continental Free Trade Area (AfCFTA), signed in Kigali on 30th March 2018, created a realistic opportunity for attaining a common market for Africa. This paper examines the role of the competition protocol in promoting a combined African competitive market under the AfCFTA. It further looks at existing Regional Economic Communities (RECs) and their fit within the AfCFTA, along with the opportunities and challenges they present to this process. Finally, it includes a brief on the effects of COVID-19 health crisis to competition enforcement, the role of UNCTAD and it ends with a conclusion and way forward.

Key words: regional integration, AfCFTA, competition protocol, market.



The findings, interpretations, and conclusions expressed herein are those of the author(s) and do not necessarily reflect the views of the United Nations or its official Member States. The designations employed and the presentation of material on any map in this work do not imply the expression of any opinion whatsoever on the part of the United Nations concerning the legal status of any country, territory, city, or area or of its authorities, or concerning the delimitation of its frontiers and boundaries.

This paper represents the personal views of the author(s) only, not the views of the UNCTAD secretariat or member States. The author(s) accept sole responsibility for any errors. Any citation should refer to the author(s) and not the publisher. This paper has not been formally edited.

Contents

Acknowledgements	2
1 The AfCFTA process and its operationalization: Headed for Regional Integration in Africa	3
2 Competition Policy and Law in Africa: The Competition Protocol Fit.....	5
2.1 Background	5
2.2 Facts analysis.....	6
2.3 Looking closer at consumer protection.....	8
3 The Role of the AfCFTA Competition Policy in Addressing Cross-Border Anti-Competitive Practices.....	10
3.1 The Presence of Cross-Border and International Anti-Competitive practices in Africa.....	10
3.2 Regional competition institutions and regional regulation of market competition in Africa: lessons for AfCFTA.....	14
3.2.1 Overview of existing Regional Economic Communities with regional Competition law and policy	14
3.2.2 Regional Competition Regimes and Lessons for AfCFTA	17
4 A snapshot of the AfCFTA Competition Framework and Institutional Architecture	19
5 COVID-19 and the AfCFTA Implementation	20
5.1 Competition Policy Response to COVID-19.....	20
5.2 UNCTAD perspective on enforcement response to COVID-19 health Crisis. ..	22
6 The role of UNCTAD in the implementation of AfCFTA protocols: The case for competition policy	24
7 Conclusion and issues for further consideration	26
7.1 General Aspects	26
7.2 Competition Policy Specific points	27

Acknowledgements

This paper was prepared by Elizabeth Gachuri. The author would like to thank Ms. Teresa Moreira for her encouragement, guidance, and feedback on the earlier draft versions of this paper. The author thanks Ms. Vellah Kedogo Kigwiru, Doctoral Research Fellow, Technical University of Munich School of Governance, Munich, Germany for substantive comments on earlier versions of this work. The author would like to thank Ms. Ying Yu (PhD) and acknowledge the comments received for this paper and Ms. Shizette Parker for formatting the table of contents and footnotes.

1 The AfCFTA process and its operationalization: Headed for Regional Integration in Africa

As early as 1957, Kwame Nkrumah had already foreseen the importance of economic independence for African countries.¹ Realizing the benefits of economic and political independence in enhancing African people's welfare, African states' resilience and vision of continental integration has been on course for over 50 years. In 2013, the initiative to integrate the continent advanced through the Pan-African Vision of "*an integrated, prosperous and peaceful Africa*" enshrined into the African Union Agenda 2063.² Nevertheless, the dream of having an integrated Africa has not been easy. Yet, the African continent has held onto this expectation of economic freedom amidst numerous challenges it faces, in particular: limited energy and infrastructure development, insecurity and conflicts, multiple and overlapping membership of Regional Economic Communities (RECs), inadequate sequencing of the regional integration arrangements and limited financial resources.³

Indeed, despite the challenges facing regional integration in Africa, the effort of having a single integrated Africa has not dwindled. On 21 March 2018 in Kigali, Rwanda, member States of the African Union signed the Agreement establishing the African Continental Free Trade Area (AfCFTA) for African countries. This act by African governments marked a momentous milestone for regional integration in Africa.⁴ The signing of this agreement strongly indicated policymakers and African leaders' commitment to regional integration. This act pushes African nations to start looking inward and to examine the potential hidden in this huge market of 1.2 billion people and a GDP of over US\$2.5 trillion.⁵ The expected end result is to enhance intra-Africa trade.

The AfCFTA is a key effort of the African Union's Agenda 2063 development plan,⁶ whose core highlight is to facilitate trade within the region; and travel and connectivity that goes with it.⁷ The signatories seek to increase intra-Africa trade to speed up Africa's economic integration, in order to cushion its fragile economies and leverage its economic size.⁸ The AfCFTA therefore, establishes a free trade zone enabling Africa to move into an unprecedented development era that is expected to combat the low levels of intra-African trade.

¹ <https://www.dissentmagazine.org/article/kwame-nkrumah-and-the-quest-for-independence>

² <https://au.int/agenda2063/overview>

³ Mzukisi Qobo, 'The Challenges of Regional Integration in Africa: In the Context of Globalization and the Prospects for a United States of Africa' (Institute for Security Studies Paper No. 145 2007).

⁴ D Luke and J MacLeod, 'Introduction' in D Luke and MacLeod(eds), *Inclusive Trade in Africa; The African Continental Free Trade Area in Comparative Perspective* (Routledge Taylor and Group, 2019) 1-4.

⁵ <https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area>

⁶ <https://au.int/agenda2063/overview>

⁷ It includes as objectives; to create a liberalized and a competitive market which can face the world market together. Further, to lay the ground for the establishment of a Continental Customs Union" and "contribute to the movement of capital and natural persons."

⁸ https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf

trade currently stands at 16%, which is low globally and particularly when compared to Asia for example, which trades at 54 % intra-regionally.^{9,10} Additionally, the benefits of working together within the AfCFTA opens enormous opportunities for small, medium, and large businesses in manufacturing and other sectors as opposed to the operations of fragmented markets. With the expected lowering of tariffs and other non-tariff barriers, enhanced cross-border trade with easier access through customs and ports for SMEs, and improved efficiencies arising from possible partnerships between local and multinational companies, technological transfers, innovations and lower prices will accrue.¹¹ This will build a stage for smart competition among countries that will boost intra-regional trade to facilitate job creation, uplift skills development and promotion and exchange of best practices.¹² The move will create possibly the largest common market in the world, with accruing benefits.¹³

In order to actualize the benefits that AfCFTA promises, African countries have made remarkable progress since the signing on 21 March 2018. As of January 2020, 30 African countries had ratified and deposited ratification instruments with the African Union Commission.¹⁴ Negotiators have concluded all four of the Phase I protocols to the agreement and 10 of the 12 annexes (Trade in Goods annex 1 on Schedules of Commitments and annex 2 on Rules of Origin were to be concluded by July 2019). This marks commendable progress since the launch of negotiations in June 2015.

In addition, African States established the AfCFTA Secretariat in Accra, Ghana (July 2019). This movement demonstrated the consistent commitment of African States.¹⁵ During the 33rd Ordinary Session of the African Union Heads of States and Government Assembly, the African Union directed that the incoming AfCFTA Secretary General must be installed by 31st March 2020. The newly appointed Secretary General of the AfCFTA Secretariat, His Excellency Mr. Wamkele Mene, was sworn in at African Union Headquarters in Addis Ababa, Ethiopia on 29 March 2020.¹⁶ This step marks an important milestone in the process of initializing the AfCFTA and a big success in the history of the African Union Commission.

By July 1, 2020, the AfCFTA Secretariat was expected to begin the implementation of the instruments and protocols already concluded. This has been rescheduled to January 2021 due to disruptions caused by the COVID-19 pandemic, which will be discussed later in this paper. Furthermore, on 17th August 2020, the official handover and commissioning of the African Continental Free Trade Area Secretariat Building took place in Accra, Ghana.¹⁷

⁹ <https://www.afdb.org/fr/news-and-events/intra-african-trade-is-key-to-sustainable-development-african-economic-outlook-17022>

¹⁰ <https://www.unescap.org/resources/digital-and-sustainable-trade-facilitation-report-specs-2019>

¹¹ <https://www.weforum.org/agenda/2018/10/africa-continental-free-trade-afcfta-sme-business/>

¹² <https://www.weforum.org/agenda/2019/04/visualizing-africa-s-free-trade-ambitions/>

¹³ <https://www.weforum.org/agenda/2019/05/AfCFTA-africa-continental-free-trade-area-entrepreneur/>

¹⁴ https://www.uneca.org/sites/default/files/uploaded-documents/ATPC/updated_q_a_21jan2020.pdf

¹⁵ https://au.int/sites/default/files/pressreleases/36910-pr-revised_pr_1_ex_con_1st_july_2019_.pdf; <https://africa-eu-partnership.org/en/afcfta>

¹⁶ <https://www.ghanaweb.com/GhanaHomePage/business/First-Secretary-General-of-AfCFTA-Secretariat-sworn-in-898852>

¹⁷ <https://au.int/en/newsevents/20200817/official-hand-over-and-commissioning-afcfta-secretariat-building>

AfCFTA implementation will put to the test the commitment of African countries to economic integration as the it aspires to deepen the integration of the African continent beyond merely a free trade area. African countries must take care that the AfCFTA does not simply add another element of preferential trade regime. Instead, it must provide coherence to the internal and external trade policy landscape in Africa. For a smooth implementation, countries must be prepared to handover some sovereignty and power to the continental body. In this regard, competition and trade policies could be among the policy areas that would require countries to cede some powers to enable effective implementation of the protocols of the AfCFTA.

2 Competition Policy and Law in Africa: The Competition Protocol Fit

2.1 Background

While the operationalization of the AfCFTA is expected to begin soon, the second phase of negotiations on competition, investment and intellectual property are making progress. At time of writing, the negotiations of the draft competition protocol had not yet started. It is timely to discuss the structure of the protocol and the substantive elements to be considered therein. Under this circumstance, it is important to note that in Africa, not all countries have competition laws, policies and institutions as explained later in this paper. The opportunity to develop a continent-wide competition policy requires careful consideration as it could be the solution for many countries in this regard.

Africa needs to create an environment where businesses will conduct themselves in a competitive manner in order to effectively compete globally. African markets must allow competitors to enter the market and while at the same time promote consumer welfare.¹⁸ Competition is considered as a pillar at the heart of making market economies function well through improving efficiency and healthy competition among businesses.¹⁹ Effective enforcement of competition and consumer protection laws enhances protection of consumer rights and promotes active participation of consumers in the market.

If competition is not regulated, when businesses are seeking to maximize profits, anti-competitive practices may emerge, including cartels, vertical restraints, and abuse of dominance. Firms could fall into anti-competitive engagements in the course of consummating mergers and acquisitions. Anti-competitive practices as well reduce consumer choice and increase prices. This denies consumers and excluded producers the benefits of trade liberalization. That is why,

¹⁸ Ibid, Chapter 10 by E. Gachuri on Approaching Competition Policy in AfCFTA

¹⁹ Lubeto, Jasper, A review of Eleanor Fox and Mor Barkkom; Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa Available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3457057

anticompetitive practices have been described as cancer in the bone marrow of free and fair trade.²⁰

To make markets work fairly for both businesses and consumers, governments need to discipline businesses that engage in disruptive conduct while trading. That is when competition law application comes in. In the African context, certain anti-competitive conduct crosses the borders and affects multiple countries in the region. Those that lead to concentrations may create oligopolies and enterprises “too big to manage”.²¹ There is already evidence showing that cross-border cartels do exist in Africa.²² This makes cross-border regulation of market competition in Africa critical. Therefore, the AfCFTA Competition Protocol when it comes into force, will create an opportunity to deal with cross border cartels, which are rampant in the region.

2.2 Facts analysis

The AfCFTA Competition Protocol negotiations will start, at a time when competition law and policy in Africa is growing. Unlike the integration efforts in the 60s and 70s, when only a handful of countries had competition legislations, in 2020, African countries have made tremendous progress in terms of developing competition frameworks including laws, regulations and respective institutions to address anticompetitive conduct. This has happened in the three decades of the 80s, 90s and 2000s.²³ Countries like Egypt and Tunisia in the north, Gambia and Côte d'Ivoire in the West, Kenya and United Republic of Tanzania in the East, and Malawi, Zambia, South Africa and Namibia in the South have all enacted competition and/or consumer protection laws.

African countries have also made major amendments to their laws to reflect key developments in their markets and to keep pace with international best practices. In 2010, for example, Botswana passed a Competition Act, revised it in 2017 and Kenya repealed its 1988 Competition law and replaced it with one which established an independent competition authority. A recent and important progress made in this area is the enactment of the Federal Competition and Consumer Protection Commission Act of Nigeria in December 2019. The Act established a combined competition and consumer protection institution.²⁴ Nigeria is one of the largest economies in Africa both in terms of population and market size, a position that is well known. Therefore, the decision to enact the law to regulate competition and consumer protection is important especially at the time of heightened continental integration effort under the AfCFTA.

²⁰ See Assessing Regional Integration in Africa report (ARIA IX): “Next Steps for the African Continental Free Trade Area (AfCFTA)” Chapter 5 on Competition Protocol @ <https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix>

²¹ <https://www.inc.com/sam-bacharach/how-to-tell-if-your-company-is-too-big-too-manage.html>

²² Jonathan Klaaren, Simon Roberts and Imraan Valodia(eds), Competition Law and Economic Regulation: Addressing Market Power in Southern Africa (South Africa: Wits University Press 2017); Thula Kaira, ‘Cartel Enforcement in the Southern Africa Neighbourhood’ in Jonathan Klaaren, Simon Roberts and Imraan Valodia, Competition Law and Economic Regulation in Southern Africa: Addressing Market Power in Southern Africa (South Africa: Wits University Press 2017)71.

²³ Anu Bradford and Adam S Chilton AS, ‘Competition Law Around the World from 1889 to 2010: The Competition Law Index’ Journal of Competition Law and Economics, 2018,14(3):393-432.

²⁴ <https://lawnigeria.com/2019/03/federal-competition-and-consumer-protection-act-2018/>

In terms of development, African countries competition agencies are at different levels and this calls for a tailor-made approach to the competition protocol design and implementation. Furthermore, existing competition laws and those newly enacted exhibit differences that may impact the way the competition protocol would be crafted and applied.

In addition, the AfCFTA implementation machinery will face an added challenge of differences in common and civil law systems as African countries' laws are based on their colonial history. To implement the continental competition protocol governments will have to deal with how the AfCFTA frameworks will accommodate interpretation and harmonization of the two legal systems.

The competition laws in many African countries cover the core areas of competition regulation such as anticompetitive agreements, in particular cartels, mergers, and abuse of dominance. However, there are differences in application of public interest in merger analysis among countries. Abuse of dominance provisions also differ in terms of definition of abuse and thresholds for determination of dominant position in the market.²⁵ Moreover, lack of effective enforcement of competition laws is also a challenge.

The ongoing analysis is highly instructive for the AfCFTA as it presents the need to address competition issues across a range of countries at different levels of advancement in terms of legislation and institutional capacity. The AfCFTA competition framework will need to be designed in a way that embraces the span of diversity among countries to effectively deal with competition cases at continental level. These differences need to be identified and accommodated to ensure that all State Parties of the AfCFTA are included. It is important that their voices, needs, and challenges are reflected for ease of implementation of the protocol.

The map below shows the situation in Africa in terms of competition laws and institutions. So far, 24 economies have a competition law and a functioning competition authority,²⁶ 10 have a competition Law but no competition authority,²⁷ 3 are preparing a competition legislation and has reached an advanced stage²⁸ and 17 have no competition law or are still in the very early stages of preparation.²⁹

²⁵ Chapter 5 on Competition Protocol @ <https://www.uneca.org/publications/assessing-regional-integration-africa-aria-ix>

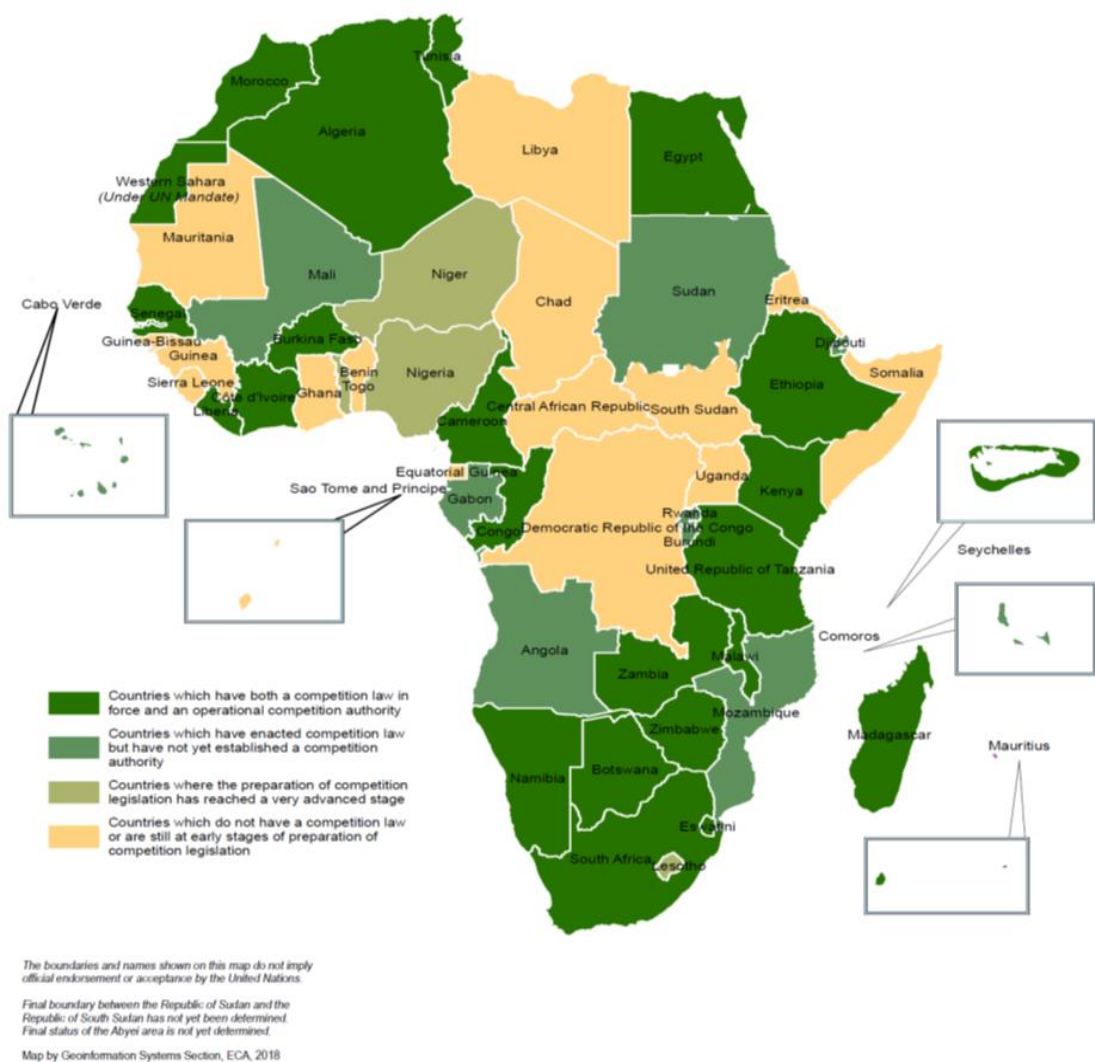
²⁶ Algeria, Botswana, Burkina Faso, Cameroon, Cote d'Ivoire, Democratic Republic of the Congo, Egypt, Eswatini, Ethiopia, The Gambia, Kenya, Liberia, Madagascar, Malawi, Mauritius, Morocco, Namibia, Nigeria, Senegal, Seychelles, South Africa, United Republic of Tanzania, Zambia, Zimbabwe

²⁷ Angola, Burundi, Comoros, Cabo Verde, Djibouti, Gabon, Mali, Mozambique, Rwanda, and Sudan

²⁸ Lesotho, Niger, and Togo

²⁹ Benin, Central African Republic, Chad, Congo, Equatorial Guinea, Eritrea, Ghana, Guinea, Guinea Bissau, Libya, Mauritania, Sao Tomé and Príncipe, Sierra Leone, Somalia, Uganda, and Western Sahara

Figure 1. Map of competition laws and regimes in Africa



As acknowledged in an earlier section, positive changes have taken place in the continent as many countries adopted competition laws during the last three decades. However, there is a lot of groundwork that needs to be done under the

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_8647

