

A DISCUSSION ON THE AFRICAN CONTINENTAL FREE TRADE AREA AND COMPETITION.

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ABBREVIATIONS

AfCFTA	- African Continental Free Trade Area
AGOA	- African Growth and Opportunity Act
AU	- African Union
CCRED	- Centre for Competition, Regulation and Economic Development
CFTA	- Continental Free Trade Area
COMESA	- Common Market for Eastern and Southern Africa
EU	- European Union
ICN	- International Competition Network
IMF	- International Monetary Fund
OECD	- Organisation for Economic Co-operation and Development
TTIP	- Transatlantic Trade and Investment Partnership
UNECA	- United Nations Economic Commission for Africa
UNCTAD	- United Nations Conference on Trade and Development
UK	- United Kingdom
US	- United States of America
WTO	- World Trade Organisation

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1. CHAPTER ONE: Introduction

1.1 INTRODUCTION.

This chapter forms the back-bone of the research as it explores; the background of the study giving rise to this dissertation, states the problem the dissertation focuses on and highlights the objectives and significance of the study. It goes further to list the research questions, limitations to be encountered in the course of the study and the assumptions, as outlined below. It concludes by highlighting the structure of the dissertation.

1.2 BACKGROUND OF THE STUDY

According to Olasupo Owoeye, as the world is becoming increasingly globalized, it is difficult for some regions, for example, the African continent, to become competitive in the global market because of their overly protectionist measures¹. Former WTO Director, Pascal Lamy, also noted that Africa should no longer rely on external demand for its goods and services to support its growth but must take steps to accelerate regional integration, as it remains the least developed continent with the highest number of least developed countries in the world². This explains the formation of the African Continental Free Trade Area by the African Union members; whose main objective is to boost intra African trade and create a single continental market for goods and services. The African Continental Free Trade Area is expected to enhance competitiveness at both the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better allocation of resources.³

The AfCFTA is also expected to facilitate a better integration of the African economy into the global market, thus contributing to sustainable economic growth, poverty reduction, enhanced foreign direct investment and employment creation in Africa. It is also considered to be a stepping stone towards two of the deeper integration stages envisaged in the Abuja Treaty of

¹ Owoeye, Olasupo. *'Regionalism and WTO Multilateralism: The Case for an African Continental Free Trade Area'*. Journal of World Trade 50, no. 6 (2016), page 1098.

² WTO News, Lamy: *'Use Multilateral Trade Negotiations and the WTO System as Impetus for Greater Regional Integration'* (29 Jan. 2012), Available at, https://www.wto.org/english/news_e/sppl_e/sppl214_e.htm, Accessed on 18 May 2018

³ Available at <https://www.tralac.org/documents/resources/faqs/2019-african-continental-free-trade-area-faqs-june-2018-1/file.html>, Accessed on 22 May 2018

1991, namely the creation of a continental customs union by 2019 and an African Economic Community (AEC) by 2028⁴.

The AfCFTA can however pose some challenges to the signatory countries as through trade liberalization, domestic markets will become open to foreign competition and susceptible to anti-competitive practices originating outside their national borders. These include cross-border competition concerns, international cartels, mergers and acquisitions that risk monopolizing or creating abuse of dominance in the internal market⁵. Some firms may gain market power and abuse their dominance through taking advantage of the economies of scale. Hence the need for the member countries, not only to dismantle trade barriers but also to adopt complementary competition policy to ensure a smooth transition and to benefit from gaining access to new markets.

As was stated by Ernst-Ulrich Petersmann, competition laws are important to the preservation of economic freedom and the free trade system as is with the Bill of Rights to the protection of fundamental freedoms⁶. The competition and trade policies are both based on the conviction that free trade is a means of maximizing the economic welfare of trading nations through the efficient allocation of resources. The two policies therefore complement each other as without competition, the African Continental Free Trade Area lacks legitimacy because private restraints to trade will undermine its achievement. Hence the negotiations on competition which are supposed to take place beginning of 2019 by the African Union countries who have signed the African Continental Free Trade Area.

The research will therefore discuss the formation of the African Continental Free Trade Area, discuss the relationship between trade and competition and will also scrutinize the likely positive and negative impacts of the African Continental Free Trade Area *vis a vis* competition. Reference will also be made to other regional agreements on competition linked with

⁴ Laura Páez. 'A Continental Free Trade Area: Imperatives for Realizing a Pan-African Market'. *Journal of World Trade* 50, no. 3 (2016), page 534

⁵ P. Brusick, A.M Alvarez, L.Cernat, 2005, *Competition Provisions in Regional Trade Agreements : How to assure Development Gains*, page viii, available at http://unctad.org/en/docs/ditcclp20051_en.pdf, accessed on 22 May 2018

⁶ Ernst-Ulrich Petersmann, *Legal, Economic and Political Objectives of National and International Competition Policies: Constitutional Functions of WTO Linking Principles for Trade and Competition*, 34 *New Eng. L. Rev.* 145 (1999), Available at, <https://heinonline.org/HOL/PDFsearchable?handle=hein.journals/newlr34&collection=journals§ion=22&id=&print=section§ioncount=1&ext=.pdf&nocover=>, Accessed on 22 May 2018

regional efforts to set up free trade zones, particularly, the European Union where regional integration has been used to enhance economic growth and the useful lessons that can be learnt from those.

1.3 STATEMENT OF THE PROBLEM

As the world is becoming increasingly globalized so are regional agreements setting up free trade zones or common markets. The markets are therefore no longer confined within the national territories of the member countries. As a result, competition law and policy which regulates the conduct of business and promote competition in the market, has gradually been concerned with the activities beyond the borders of national markets when they affect domestic competition⁷. Regional agreements among developing countries is a case of concern as their success has been slow and unequal due to lack of a properly functioning system of competition enforcement. The question has therefore been raised, whether domestic laws of member countries are suited to dealing with activities beyond national borders or whether regional competition policy should be adopted, and a competition authority set up, given that some members of the African Union who have signed the agreement, for example the Democratic Republic of Congo do not have domestic competition laws. Even those African Union member countries who have domestic competition laws, the wording and the enforcement thereof is different, with some having extraterritorial application and some only applying within their national borders. Some member countries also lack the necessary resources to enforce the competition laws.

Other differences among competition laws and policies of member countries, which shall be discussed below, include; the priority attached to competition policy vis-à-vis other policies, the importance attached to objectives other than consumer welfare or efficiency under many competition laws, legal approaches to the control of anti-competitive practices, substantive rules applicable in particular to vertical restraints, abuses of dominant positions, mergers and the extent to which different countries participate in international cooperation in this area, and regulatory restrictions upon market entry.⁸ In regards to the competition law objectives, the

⁷ Fiona Marshall, *Competition Regulation and policy at the World Trade Organisation*, Cameron May London: 2010 page 2.

⁸ UNCTAD (2010), *"The role of competition policy in promoting economic development. The appropriate design and effectiveness of competition law and policy,"* Note by the UNCTAD Secretariat, Available at, https://unctad.org/en/Docs/trdbpconf7d3_en.pdf, Accessed on 30 November 2018

South African Competition Act, for example considers the apartheid era as reflected in the preamble;

‘The people of South Africa recognize: That apartheid and other discriminatory laws and practices of the past resulted in excessive concentrations of ownership and control within the national economy, inadequate restraints against anticompetitive trade practices, and unjust restrictions on full and free participation in the economy by all South Africans...That the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focused on development, will benefit all South Africans. IN ORDER TO – provide all South Africans equal opportunity to participate fairly in the national economy; achieve a more effective and efficient economy in South Africa; provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire; create greater capability and an environment for South Africans to compete effectively in international markets; restrain particular trade practices which undermine a competitive economy; regulate the transfer of economic ownership in keeping with the public interest; establish independent institutions to monitor economic competition; and give effect to the international law obligations of the Republic’

From the preamble the Competition Act in South Africa does not seek to protect competition for its own sake but does so to promote the development of the economy, more equitable participation and wide ownership especially by historically disadvantaged persons.⁹ Whereas for some countries for example, Zimbabwe, the Competition Act seeks to mainly protect competition as stated in the preamble;

“AN ACT to promote and maintain competition in the economy of Zimbabwe; to establish an Industry and Trade Competition Commission and to provide for its functions; to provide for the prevention and control of restrictive practices, the regulation of mergers, the prevention and

⁹ CCRED Review Paper 2, *The links between competition policy, regulatory policy and trade and industrial policies*, available at https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/589055529f7456cd34c92bfc/1485854038755/Review%2Bpaper%2B2%2Bdraft_28042015.pdf, Accessed on 25 July 2008.

control of monopoly situations and the prohibition of unfair trade practices; and to provide for matters connected with or incidental to the foregoing.”

In Algeria, the objectives of its competition law have been stated as: to organize and promote free and fair markets; to promote economic efficiency, to maximize consumer welfare; and to encourage transparency in trade practices.¹⁰ In Kenya, the objectives are: to encourage competition; prohibit restrictive trade practices; control or regulate the activities of monopolies; control the concentration of economic power; control prices of some commodities believed to be essential to the economic development and the welfare of low income consumers.¹¹

Some member countries are already part of other regional agreements on competition in Africa for example, COMESA. This overlap in membership is likely to cause jurisdictional hurdles in the enforcement of competition law. This study will therefore also explore how the issue of overlap in membership can be addressed and whether there is need for the creation of a regional competition law regime, which can be utilized by all member countries, even those without domestic competition laws and how this will help to realize the prospective gains of the African Continental Free Trade Area.

1.4 OBJECTIVES OF THE STUDY

The study seeks to explore the relationship between trade and competition in the African Continental Free Trade Area.

1.5 RESEARCH QUESTIONS

It is imperative for one to read the study along with research questions since they provide a guide to the study and are significant to ensuring that the objectives have been met. The questions have been structured in the following manner;

- a. What is the current position with regards to the African Continental Free Trade Area and Competition?
- b. What are the reasons behind the increased awareness of competition in developing countries?

¹⁰ Supra note 8

¹¹ ibid

- c. What is the linkage between trade and competition policies with regards to market access?
- d. What would be the most suitable form of competition law and policy for the AfCFTA to deal with anti-competitive practices?
- e. Would Cooperation be ideal?
- f. Does it make sense or is it necessary to follow the EU model given that its economy is more advanced than that of Africa?
- g. What is the most comprehensive competition legal regime that the African Continental Free Trade Area can adopt to fulfill its aims and purposes? Should the courts have a role to play in the enforcement? National vs Regional.
- h. What resources should be made available for enforcement?

1.6 SIGNIFICANCE OF THE STUDY

To the student, this study is carried out in partial fulfilment of the requirements for the degree of Master of Law in Commercial Law at the University of Cape Town. It will also help the student to gain practical skills for future research and the student's knowledge on the trade policy and competition policy will be widened.

Phase 2 of the negotiations by the AU Heads of State and Government, to further deepen trade in Africa, is expected to begin in 2019 and will focus on competition among other things. Practically, it is therefore hoped that this study will ultimately identify the issues that the member countries must agree on for the African Continental Free Trade Area's system of competition enforcement to function properly. It is also hoped that this study will also act as a catalyst to a new face, approach and attitude towards the elimination of anti-competitive practices in a bid to promote the ideals of the African Continental Free Trade area of promoting free trade.

Theoretically, it is hoped that the study will serve as a reference for ideas for future researchers who wish to pursue research in the same subject area.

1.7 RESEARCH METHODOLOGY

In this work resort will be had to extensive library research. Emphasis will be placed on textbooks material, journals articles and relevant sites on the internet. The study will also involve interviews with selected officials from the South African Department of Trade and Industry,

Swaziland Competition Commission, Centre for Competition Regulation and Economic Development, Trade Law Centre for Southern Africa and competition law consultants.

1.8 LIMITATIONS TO THE STUDY

Although the African Continental Free Trade Area was first proposed in 2010 and reaffirmed at the 18th African Union Summit held at Addis Ababa in 2012, it is still a new agreement and only phase one of the negotiations has been conducted. Phase 2 of the negotiations is yet to be conducted to deal with competition. There is therefore not much written material on the subject and no competition institutional structure yet to use as a starting reference point. However, reference will be made to existing regional agreements, particularly the European Union and COMESA and the useful lessons that can be learnt from those.

Time Constraints – Research will be done under a limited time frame with regard to its submission and hence making it difficult to obtain all information.

1.9 ASSUMPTION

The research will be made on the following assumptions:

- Limited time will still allow a reasonable, comprehensible and representative study to be carried out
- The information that will be used for the research is reliable, accurate and unbiased and will be obtained from relevant publications and authors.
- All responses to be provided by the interviewees will be true facts
- The period of the study and status of the African Continental Free Trade Area will remain constant.

1.10 ORGANISATION OF THE STUDY

Chapter one sets out the focus and content of the study.

Chapter two navigates through the background of the establishment of the African Continental Free Trade Area and the increased awareness of competition in developing countries.

Chapter three will analyze the interaction of trade and competition policy. It will address both the trade law and competition law aspects of the problems caused by anti-competitive practices. It will establish that the two policies essentially complement each other, leading to the suggestion that if the African Continental Free Trade Area fails to address the issues of competition law it will not be able to operate in its full capacity in seeking free and fair trade for the member countries.

Chapter four will expose both the positive and negative impacts of the African Continental Free Trade Area *vis a vis* competition law.

Chapter five will discuss the other regional agreements and their effectiveness in combating anti-competitive practices and will give an overview of the institutional arrangements in the EU and how these facilitate effective competition enforcement.

Chapter 6 will offer recommendations to the exposed problems as identified by the study on how the African Continental Free Trade Area could start adopting some of the useful models learnt from other regional agreement on how to combat anti-competitive practices.

2.CHAPTER TWO: The African Continental Free Trade Area (AfCFTA) and Competition

2.1 INTRODUCTION

This chapter explores the background of the formation of the AfCFTA and why the African Continent needs a free trade area as well as the current position of the AfCFTA *vis-à-vis* competition. It also spells out the aims and objectives of the AfCFTA and reasons behind the awareness of the role of competition by developing country.

2.2BACKGROUND OF THE FORMATION OF THE AfCFTA

The formation of the AfCFTA dates back to July 1991 when the then OAU member countries adopted the Abuja Treaty that set the creation of Free Trade Areas in each region as the first step towards the creation of an African Economic Community by 2028, followed by customs unions, common markets and monetary unions. In January 2012, the Economic Commission for Africa in its paper¹² argued for enhanced efforts to boost intra-African trade as only about 10 to 12 percent of Africa's trade took place with other African countries and a decision was adopted by the African Union Heads of State and Government to establish a Continental Free Trade Area. On the 15th of June 2015, in Johannesburg, South Africa, the African Union Heads of States launched the negotiations towards a Continental Free Trade Area with the goal of having the free trade area in place by the end of 2017, and the negotiations began in earnest in early 2016 at the level of technical working groups, senior officials and Ministers.

On 21 March 2018, the African Heads of States and Government held an Extraordinary meeting in Kigali, Rwanda during which the Agreement establishing the AfCFTA was presented for signature, along the Kigali Declaration and Protocol to the Treaty Establishing the African Economic Community relating to the Free Movement of Persons. About 44 out of the 55 African Union member countries signed the consolidated text of the AfCFTA Agreement. On 1 July during the 31st Ordinary Session of the African Union Assembly on Mauritania, 5 more countries signed the AfCFTA, bringing the total number of signatories to 49. It has been said that in terms

¹² African Union/Economic Commission for Africa, 2012. 'Boosting, Intra-Africa Trade. Issues affecting Intra-Africa Trade, Proposed Action Plan for boosting Intra-Africa Trade and Framework for Fast Tracking of a Continental Free Trade Area' (Addis Ababa, Ethiopia: January 23-30, 2012) Available at http://www.uneca.org/sites/default/files/uploadeddocuments/ATPC/issues_affecting_intra-african_trade_proposed_action_plan_for_biat_and_framework_for_the_fast_tracking_en.pdf accessed on 19 June 2018

of participating countries, the AfCFTA will be the world's largest free trade area since the formation of the WTO.¹³ The AfCFTA will come into force after being ratified by 22 of the signatory countries.

2.3 WHY AFRICA NEEDS THE CONTINENTAL FREE TRADE AREA.

The member states of the African Union, by creating a Continental Free Trade Area hope to boost Intra-African trade which is around 18% and is significantly lower than the level of intra-regional trade of other developing regions. According to David Luke, coordinator of the African Trade Policy Centre at UNECA, 'colonialism created a situation where neighbours stopped trading with each other. The main trading route was between African Countries and European countries and the US.'¹⁴ It is thus hoped that the free trade area will boost intra-African trade and make Africa more competitive outwardly as it has been argued by some, for example M. Marongwe¹⁵, that African countries have not participated in any meaningful way in the WTO Dispute Settlement process because Africa is not yet a very active participant in the world trading system, among other reasons. According the United Nations Economic Commission for Africa estimates, the AfCFTA has the potential to boost intra-African trade by 52.3% by eliminating import duties.

The Economic Commission for Africa states the following reasons as to why Africa needs the CFTA:¹⁶

- Two thirds of African countries are either more protectionist than Africa in general or face more limiting market access conditions. This makes it hard for Africa to be competitive in the global market. The CFTA, even one that progressively eliminates barriers, can offer substantial economic and social gains in Africa.
- Intra African trade in Agriculture faces a higher rate of protection than non-agricultural sector. Almost all African countries/Sub-regions impose higher tariffs on Agriculture imports from

¹³ Supra note 3

¹⁴ Loes Witschge (20 March 2018), "*African Continental Free Trade Area: What you need to know*." Available at www.aljazeera.com/news/2018/03/african-continental-free-trade-area-afcfta-180317191954318.html, Accessed on 3 June 2018

¹⁵ Marongwe Mavis, *African Countries and the WTO Dispute Settlement System* (2004) Page 3.

¹⁶ Supra note 10, page 46

other African Countries. The CFTA provides the opportunity for Africa to maintain food security and boosting trade in Agricultural products;

- For some African countries, trade within the region constitutes a significant share of their exports.

Most African countries rely on external trade and the preferences granted by the European Union and the US. The implications of the AGOA Extension and Enhancement Act of 2015, and the impact of the US led mega-bilateral (TTIP) is that the 10-year extension of AGOA benefits to African countries may not be assured over this period and the radical transformation of the traditional trade and aid relationship between the EU and Africa from one of unilateral preferences towards one of reciprocity is a major challenge for African countries¹⁷. There is therefore need for African countries to open markets to their neighbours in Africa and accelerate regional integration than relying on preferences and external demand for their goods and services to support their economic growth.

It is also hoped that establishing the African Continental Free Trade Area for all African Union member countries would serve as an effective route to resolve the issue of multiple and overlap of membership by African countries to Regional Economic Communities which continue to pose a challenge to integration and internal trade in Africa.¹⁸

2.4 AIMS AND OBJECTIVES OF THE AfCFTA

The Agreement Establishing the AfCFTA states both the general and specific objectives of the AfCFTA, with the later applying to the State Parties. Below are the general objectives¹⁹:

- To create a single market for goods, services, facilitated by movement of persons to deepen the economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063;
- To create a liberalized market for goods and services through successive rounds of negotiations;

¹⁷ Faizel Ismail, 2017, *The Changing Global Architecture: Implications for Sub-Saharan Africa's Development*, Journal of the World Trade, 51, no.2

¹⁸ *ibid*

¹⁹ Article 3 of the Agreement Establishing the African Continental Free Trade Area

- To contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and Regional Economic Communities;
- To lay the foundation for the establishment of a Continental Customs Union at a later stage;
- To promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties;
- To enhance the competitiveness of the economies of State Parties within the continent and the global market;
- To promote industrial development through diversification and regional value chain development, agricultural development and food security; and
- To resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.

2.5 THE CURRENT POSITION OF THE AfCFTA VIS-À-VIS COMPETITION.

So far, 49 out of 55 African Union member countries have signed the consolidated AfCFTA document including the Agreement Establishing the AfCFTA, the Protocol of Trade in Goods, the Protocol on Trade in Services and the Protocol on Rules and Procedures on the Settlement of Disputes. Phase 2 of the negotiations by the AU Heads of State and Government, to further deepen trade in Africa, is expected to start beginning of 2019 and will cover competition among other things. The AfCFTA will come into force after being ratified by 22 member countries and so far only 12 countries have ratified it, including Chad, Rwanda, Niger, Kenya, Ghana.

2.6 THE REASONS BEHIND THE INCREASED AWARENESS OF COMPETITION IN DEVELOPING COUNTRIES.

It has been stated that up to the beginning of the 1980s there was little research on anti-competitive practices in developing countries and little awareness of their existence.²⁰ Developing countries were even resistant to the inclusion of competition in the WTO multilateral system arguing that competition laws were not relevant and necessary to them as they had small economies. This has however changed, many developing countries have come to adopt some

²⁰ Alberto Heimler and Frederic Jenny, *Regional Agreements*, Building New Competition law regimes : selected essays/edited by David Lewis page 184

form of competition law domestically, for example Zimbabwe introduced specific competition law in 1996 and the following are the factors that seem to have contributed to the awareness:

2.6.1 The change in the economic structure of the world.

We have moved from the world characterized by the prominence of two large economic blocs, that is the US and EU, competing with one another and have witnessed the emergence of the developing countries, particularly the BRICS countries.²¹ The economic rise of the BRICS countries (Brazil, Russia, India, China and South Africa) has revealed the enormous potential of developing countries to promote economic growth in the world and has created a renewed interest for the issue of competition and economic development.²²

2.6.2 Research by economist.

The evolution of internet has made it easier for the researchers to gain more knowledge on the market conditions of the developing countries which were an important source of concern for those countries calling for immediate attention.²³ Moreover, with the increased number of people with competition law expertise and specializing in the field, economists have put a great deal of confidence in the ability of competitive markets to promote efficiency and hence leading to considerable attention being given by an increased number of developing countries to the value of competition and the need to develop competition law and policy domestically.²⁴

2.6.3 Globalization and its effects.

As the world is becoming increasingly globalized so are trade liberalization agreements and the rise of multinational companies which have led to the realization among developing countries that markets are no longer confined to national borders. Anti-competitive practices of enterprises are increasingly international in scope. This has increased the awareness of the importance of competition law and policy to address market failures due to anti-competitive practices among developing countries and to establish a climate that is conducive to investment and economic growth.

²¹ ibid

²² ibid

²³ ibid

²⁴ ibid

2.6.4 International Organizations and influence by the developed countries.

After viewing the experience of developed countries with competition law and policy, many developing countries have come to associate having a competition law and policy with economic growth and progress. Consequently, they have adopted competition laws with modern elements borrowed in the vast majority of cases from competition regimes in the developed world and the competition rules and standards developed by international organizations, for example UNCTAD, World Bank and IMF.²⁵ As noted by Frederic Jenny, “in some countries the adoption of a domestic competition law reflected a genuine change in the economic philosophy of officials but in some other countries it was mostly due to external pressures (World Bank or IMF conditionality or European Union pressure) on potential candidates through the European Agreements.”²⁶

2.7 CONCLUSION.

This chapter has discussed the formation of the African Continental Free Trade Area, its aims and objectives, the current position with regards to competition and why Africa needs a continental free trade agreement. Given the increased awareness of the importance of competition in developing countries, adopting competition laws is considered crucial for a free market economy and thus Phase 2 of the negotiations on competition will start beginning of 2019. The next chapter will therefore discuss the link between trade and competition policy.

²⁵ Ibid page 290

²⁶ Fredic Jenny, “*Globalisation, Competition and Trade Policy:convergence, Divergence and cooperation*, C.A Jones, M. Matsushida (eds), *Competition Policy in the Global Trading System* (2002) Kluwer Law International, page 302

3. CHAPTER THREE: Trade and Competition Policy

3.1 INTRODUCTION

This Chapter will discuss the interaction between the trade and competition policy. It will define both trade and competition policy and will explore whether it is possible to achieve the trade policy goals without a process of competition in the market place.

3.2 WHAT IS COMPETITION POLICY?

There is no precise definition of what competition policy is as in most cases it does not exist on its own but is interwoven with the general political, economic, social and cultural patterns of the relevant country. Countries therefore design various competition laws and policies which are largely influenced by their varying political, economic, social and cultural needs and interests. Be that as it may, according to Fiona Marshall ‘competition policy encompasses both governmental measures that directly affect the behavior of private firms (competition law) and the economic policies that a government adopts in order to ensure local and national competitiveness.’²⁷ According to Fishwick, competition policy is ‘a term used broadly to describe intervention by public authorities to ensure competition in the markets for goods and services. It is fundamentally concerned with identifying situations where market power can be exercised to the detriment of consumers and covers prevention or control of agreements between firms which limit competition, for example explicit cartels or tacit collusions, control over monopoly powers and its abuse and the process of business concentration through mergers and acquisitions.’²⁸ Competition policy is therefore broader than competition law which has been defined as the ‘body of legal rules and standards which aim at protecting the process of competition: dealing with market imperfections and restoring desirable competitive conditions in the market,’²⁹ as it compasses within it a system of competition law and its enforcement. Competition policy therefore has two major instruments, the first being a competition law and the second major instrument, particularly important in the interface with other economic policies, is competition advocacy.

²⁷ Supra note 7 Page 10

²⁸ Fishwick, *Making sense of Competition Policy* (1993), page 11

²⁹ Professor M Dabbah Maher (2010), *International and comparative competition law*, Cambridge University Press, page 12

3.3 GOALS AND OBJECTIVES OF COMPETITION LAW AND POLICY

While the objectives and goals of competition law and policies may vary from country to country as competition law does not stand on its own but includes economically, socially, politically and cultural elements of a given country, the laws largely relate to prevention of anticompetitive practices. It has been stated that the chief among the competition law objectives is ‘the desire to promote efficiency in markets, by ensuring that resources are distributed so as to maximize the benefit attained by the use of them, by ensuring that prices are as close as possible to marginal cost, enabling firms to produce at the lowest possible cost and consumers to buy at the lowest possible price , and by further providing firms with the incentive to undertake research and development to improve and expand upon existing market products and methods.’³⁰ This objective clearly encompasses both the consumer and producer welfare. Other economic goals include enhancing the development of a market economy, promotion of trade and facilitating economic liberalization.³¹ By advancing these objectives competition policy can also contribute to the overall process of economic development.

Efficiency is not the only goal of the competition policy. Several other goals are embodied in national competition laws and policies which also fall under social and political goals. The following are for example the objectives of the South African Competition Act;³²

(a) to promote the efficiency, adaptability and development of the economy;

(b) to provide consumers with competitive prices and product choices;

(c) to promote employment and advance the social and economic welfare of South Africans;

(d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons

³⁰ Supra note 7 page 15

³¹ Supra note 22 page 41

³² Section 2 of the South African Competition Act.

The above South African objectives clearly go beyond the traditional competition objective of efficiency and protecting the competition process. Competition policy is seen as important in increasing competitive market pressures, leading to firms becoming more efficient and internationally competitive and in also improving the participation of black-owned companies in the economy.³³ Competition law and policy may therefore, socially, aim at enhancing consumer protection through safeguarding the opportunities and interests of small and medium-size firms, the dispersion of socio-economic power of large firms, safeguarding the consumer from undue exercise of market power by ensuring that anti-competitive practices on the part of producers do not raise prices or lower the quality of goods and ensuring market fairness and equity mainly through wealth distribution in society³⁴.

Politically, it may aim at, among other things, maintaining effective competition within free trade areas and other forms of economic integration by ensuring that anti-competitive practices such as abuse of dominance, do not undermine the objectives of the said free trade areas and other forms of economic integration. It may also aim at controlling the over concentration of economic power in the hands of few given the example of the objectives of the South African Competition Law Act which seek to promote participation of the previously disadvantaged people in the economy.

3.4 TRADE POLICY AND ITS OBJECTIVES

Trade policy is largely concerned with the regulation of trading practices between countries and seek to level the playing field by ensuring that trade between nations is fair and firms compete freely on liberalized markets.³⁵ It encompasses the policy of free trade which is basically a free market policy where there are no trade barriers in the form of tariffs, quotas and taxes on products and other governmental restrictions on imports and exports between countries and hence enabling them to trade freely.³⁶ The policy of free trade is often justified by the comparative advantage theory by David Ricardo which holds that countries should specialize in those goods that they are good at as this will allow them to maximize their comparative

³³ Supra note 22

³⁴ Ibid page 42

³⁵ Supra note 7 page 23

³⁶ Choi, E Kwan 'Handbook of International Trade Volume II- Economic and Legal Analyses of Trade Policy and Institutions' (2004), page s 6-7.

advantage and increase economic efficiency³⁷. The key objective of free trade has been said to be efficiency: “*the efficient allocation of resources so as to attain maximum output in as low a cost as possible, providing consumers with the goods and services that they require at a price they are willing to pay, while lowering and removing barriers to entry in other markets, thus providing for international competition, which in turn will maintain the competitive process by allowing innovation on technology and products.*”³⁸

Governments, however, also pursue trade policies for a variety of reasons, for example, as a means to raise revenue, to shift the terms of trade, to attain certain foreign policy or security goals, or as protection measures for example to impose import restrictions to foreign products or simply to restrict the consumption or trade of specific goods.³⁹ The trade protection measures are in contrast to the free trade policy and often justified by the theory of Infant Industry Protection by Alexander Hamilton which advocates for the protection of new industries from import competition by imposing measures like import restrictions to foreign products in the form of taxes, dumping duties, subsidies, *et cetera*, so as to enable local industries to develop.⁴⁰ These have been said to be major barriers to free and fair trade as their imposition is often based on unfair, arbitrary and anti-competitive concepts⁴¹ and dampen the intensity of competition.

The WTO agreement also contain several key principles which facilitate competition in markets, for example, the National Treatment Principle and the Most-Favoured Nation Treatment Principle. The objective of the National Treatment Principle is to ensure that WTO Member countries do not apply internal taxes and regulations in a manner which affects the competitive relationship, in the market place, between domestic and imported products involved, so as to afford protection to domestic production and hence obliges the members of the WTO to provide

³⁷ Joseph E. Stiglitz & Andrew Charlton *Fair Trade for All: How Trade Can Promote Development* (2006) 25.

³⁸ Supra note 7 page 25

³⁹ B. Hoekman and P.C Mavroids, ‘Linking Competition and Trade Policies in Central and East European Countries’, Policy Research Working Paper 1346 (World Bank,1994), page 2, Available at, https://s3.amazonaws.com/academia.edu.documents/41475379/Linking_Competition_and_Trade_Policies_i2016012324601sc28vi.pdf?AWSAccessKeyId=AKIAIWOWYYGZ2Y53UL3A&Expires=1532541315&Signature=bn4OHCionKPDWtD4o4CSz2vN4wk%3D&responsecontentdisposition=attachment%3B%20filename%3DLinking_Competition_and_Trade_Policies_i.pdf, Accessed on 30 July 2018

⁴⁰ Peter Van den Bossche and Werner Zdouc ‘*The Law and Policy of the World Trade Organisation: text, cases and materials*’ 4 ed (2017) pages 26- 27

⁴¹ Supra note 7 page 26

equality of competitive conditions for imported products in relation to domestic products.⁴² The Most Favoured Nation Treatment Principle requires that “any advantage, favour, privilege or immunity granted by any Member to any product originating in or destined for any other country be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other Members.”⁴³

3.5 INTERACTION OF THE COMPETITION AND TRADE POLICY

Whereas the free trade policy calls for the reduction or elimination of tariff and non-tariff barriers and the competition policy for the elimination of anti-competitive practices, both policies complement each other with regards to the desire of promoting market efficiency. As stated by the United States,⁴⁴ “...the trade policy objectives of trade liberalization, non-discrimination and transparency can generally go a long way towards facilitating robust competition in markets, whereas the establishment and vigorous enforcement of sound antitrust laws and competition policies can generally go a long way towards assuring the conditions which are conducive to expanding and sustaining free and open trade among nations.” According to Fredic Jener, the goals of competition policy are consistent with the ultimate goals of the trade policy as the trade policy allow for the possibility of increased competition and the competition policy ensures that private strategies do not distort competition.⁴⁵

Both policies are based on the conviction that free trade is a means of maximizing economic welfare of trading nations through the efficient allocation of resources. The trade policy contributes to efficiency by eliminating barriers that close access to new markets to foreign firms and competition policy contributes to efficiency by preventing firms from harming competition.⁴⁶ Competition laws therefore represent an existing legal arsenal, equipped with the weapons needed to strike down the collusive private behavior that produces private trade barriers that hinder market access. The imposition of trade protectionist measures, often based on anti-

⁴² Article III of the GATT 1994. See also European Communities –Measures affecting Asbestos and Asbestos – Containing Products.

⁴³ Article I:I of the GATT 1994 and it also covers *de facto* discrimination as per the case of Canada – Certain Measures Affecting the Automotive Industry (2000)

⁴⁴ Communication from the United States, W/66 Section 1, supra note 7 page 34 -35

⁴⁵ Fredic Jenny, “Globalisation, Competition and Trade Policy: convergence, Divergence and cooperation, C.A Jones, M. Matsushida (eds), Competition Policy in the Global Trading System (2002) Kluwer Law International, page 301

⁴⁶ Supra note 22 page 595

competitive concept, can be addressed by competition law and policies and thus leading to a free and fair-trading system.

A large number of WTO members have made the point that the competition policy and trade liberalization play complementary roles in promoting efficiency, consumer welfare, growth and development.⁴⁷ Neither instrument is likely to be fully successful in the absence of the other, as the trade policy fosters those goals primarily through the reduction of government imposed barriers to international commerce, while competitive policy addresses principally anti-competitive practices of enterprises that impede access to, or the efficient function of markets.⁴⁸ Competition policy is essential to the function of the WTO to promote the equality of competitive opportunities for Members in the world trading system and hence the interdependence and complementary nature of trade and competition policy.⁴⁹

3.6 CONCLUSION

Competition law has often not been treated with equal importance as trade law⁵⁰ and yet the more the barriers to trade are lowered and eliminated, the greater the incentive for private enterprises to create their own private barriers to trade and hence undermining the effectiveness of the trading system. This Chapter has discussed the objectives of both the competition policy and trade policy and their linkage with regards to market access. Creating an African Continental Free Trade Area is definitely ideal but more often, the removal of governmental barriers to trade are replaced by private barriers to trade that need to be regulated by competition policies. It is therefore clearly desirable for the African Union member countries who have signed the the African Continental free trade area to agree on the competition policy they are going to adopt to combat the anti-competitive practices that may affect their trade and hinder market access among the nations.

⁴⁷ WTO (1998) , *Synthesis paper on the relationship of trade and competition policy to development and economic growth*, Available at https://www.wto.org/english/tratop_e/comp_e/wgtcp_docs_e.htm, Accessed on 2 December 2018

⁴⁸ *ibid*

⁴⁹ *ibid*

⁵⁰ *Supra* note 7 page 35

Discussion in the following chapter heightens the importance of competition law by discussing both the likely positive and negative impacts of the AfCFTA to the African Union member countries *vis a vis* competition.

4.CHAPTER FOUR: The Impact of AfCFTA on Competition

4.1 INTRODUCTION

While the AfCFTA is a good developmental move for African countries, it is also likely to brew serious cross border competition law issues which may be in the form of international cartels, monopoly and abuse of dominance. These may harm trade, competition and consumers and undermine economic growth. If the AfCFTA is a vehicle to growth and development, then removing the anti-competitive practices which are barriers to trade is crucial to ensure its full operation as benefits from the reduction and elimination of tariff and non-tariff barriers are most likely not to be realized in the absence of competition rules to remove the unnecessary distortions to competition. This chapter will discuss both the negative and positive effects that are likely to arise because of the AfCFTA *vis a vis* competition.

4.2 NEGATIVE EFFECTS

Hindrances caused by anti-competitive practices such as collusion in horizontal and vertical situations, abuses of dominant power and also the process of business concentration through mergers and acquisitions mergers, discussed below, all work to the detriment of consumers by lessening competitiveness and thereby inhibiting economic growth contrary to the aims of trade liberalization.

4.2.1 COLLUSION IN HORIZONTAL AND VERTICAL SITUATION

They may be collusion by firms aiming at price fixing, market sharing, output limitation, big rigging, commonly referred to as cartels, and considered among the most serious breaches of competition law.⁵¹ Horizontal agreements and vertical agreements may be entered into between firms operating at the same level of market and those at different levels of the economy, respectively. Both these agreements feature certain anticompetitive restraints and may lead to harmful outcomes for African economies by hindering access to domestic markets by foreign firms for example firms A, B and C in Zimbabwe may enter into a horizontal agreement and agree to refrain from purchasing and distributing products from South Africa, the consequence of this agreement may prevent domestic firms in South Africa handling that product from penetrating the domestic market of Zimbabwe. An import cartel for example in the Democratic

⁵¹ Supra note 22 page 33

Republic Congo may be established to fix prices so that the imported goods for example from Zimbabwe cannot be sold more cheaply than the domestic like products. According to the CCRED Quarterly Competition Review,⁵² a cartel in South Africa is mostly likely is to have a regional impact as most of the African countries import products from South Africa, for example, Zambia and Zimbabwe. Cartels therefore limit trade more than the former high tariffs and non-tariff barriers and ultimately injures consumers by making goods and services unavailable to them and unnecessarily expensive.

4.2.2 ABUSE OF DOMINANCE OR MONOPOLISATION

Refers to situations in which a firm or firms that enjoy a position of economic power or strength harm competition individually or collectively through acting unilaterally.⁵³ While mere possession of such power does not constitute violation of competition, the behavior is only illegal and call for intervention from competition authorities, if its abusive in nature, done by a dominant firm and aims to defeat competition by excluding rivals. These firms or firm remain large because they use their power to perpetuate their dominance and won't allow other firms to get into the market. For example, a Zimbabwean firm or firms which enjoys a position of economic power or strength may refuse to supply or to deal with firms from South Africa. Abuse of dominance may also be in the form of predatory pricing, excessive pricing, margin squeeze, loyalty rebates, tying and bundling and selective price-cutting.

4.2.3 MERGERS

A merger may occur in a variety of ways, through: amalgamation (the pure merger situation) where two or more firms merge to become a single entity; acquisition of control, whether sole or joint control of a firm; and the creation of a full-function joint venture, an autonomous, independent entity by two or more firms which is intended to operate on a lasting basis.⁵⁴ Mergers may be created to improve the efficiency of firms for African countries whereas some may reduce competition in the market and artificially create a dominant position which is not based on superior economic performance achieved through lawful means and hence have anti-

⁵² CCRED Quaterly Competition Review, December 2017, page 8 Available at <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5a3c9b390d92975090c2a666/1513921346975/CCRED+Quarterly+Competition+Review+December+2017.pdf> Accessed 25 September 2018

⁵³ Supra note 22, page 34

⁵⁴ Ibid page 35

competitive effects beyond the borders of the country or countries where the merger is taking place.⁵⁵ The latter are a major concern to the competition authorities as they, if not properly accessed, pose great harm to consumers.

4.3 POSITIVE EFFECTS

Having discussed the above anticompetitive situations which are barriers to competition and harm innovation, productivity and growth, there is therefore need for the African Union member countries to acquire a wider understanding at policy levels in governments and in the business sectors of the beneficial impact of effective competition and competition policy which prohibits collusion in horizontal and vertical situations, abuse of dominance or monopolization, provides for merger control and ensures that African firms do not harm or prevent fair competition markets for economic growth. Where competition law and policy exist, the above-mentioned anticompetitive practices may be challenged but where it does not, the benefits discussed below would be lost.

4.3.1 CHEAPER PRICES

Through trade liberalization, countries that specialize in goods and services where they have comparative advantage tend to produce more and they can grow their economies and develop their infant industries by trading with other countries.⁵⁶ This leads to free exchange of exotic products at a cheaper price which gives consumers more variety and diversity of goods.⁵⁷ Thus trade liberalization brings with it increased competition and enables citizens to improve their welfare by obtaining goods based on a comparative advantage among competing markets.⁵⁸ The AfCFTA may therefore allow consumers in different African countries to acquire goods at cheaper prices as both domestic and foreign firms will be forced to compete with each other and will be under pressure to devise more efficient methods of production, better marketing techniques and quality improvements in their product. This results in lower prices and better

⁵⁵ Ibid

⁵⁶ Econmentor 'Evaluate arguments for and against free trade' available at [http://www.econmentor.com/international-economics/ssein2/evaluate-arguments-for-and-against-free-trade/text/1701.html#Evaluate arguments for and against free trade](http://www.econmentor.com/international-economics/ssein2/evaluate-arguments-for-and-against-free-trade/text/1701.html#Evaluate%20arguments%20for%20and%20against%20free%20trade), accessed on 2 March 2018.

⁵⁷ Peter Van den Bossche and Werner Zdouc., *The Law and Policy of the World Trade Organisation*, 4th edn

⁵⁸ Asmita Parshotam, *Can the AfCFTA offer a new beginning for Africa*, Available at, <https://saiia.org.za/research/can-the-african-continental-free-trade-area-offer-a-new-beginning-for-trade-in-africa/>, Accessed on 22 September 2018

quality of goods for both the domestic and foreign consumers and thus substantially contributing to the growth of African economies. UNCTAD projects suggest that Africa will benefit from the AfCFTA which should bring about \$16.1 billion in welfare gains.⁵⁹

Competition may go a long way in reducing poverty which is central to the operation of markets and fosters innovation, productivity and growth, all of which create wealth and reduce poverty which is a serious problem for most of the African countries.⁶⁰ The money saved by the consumers by purchasing foreign goods at a cheaper price may be spent or invested elsewhere, creating employment in other industries and reducing poverty. Total employment is expected to increase by 1.2%.⁶¹ The loss in tariff revenue will be considered in the gains arising from increased employment and access to a variety of cheaper products.⁶² According to Klaus Tilmes,⁶³ robust and competitive markets are crucial for creating jobs as competition helps drive labour towards more productive employment by imposing firm-level productivity and by driving the allocation of labour to more productive firms within an industry.

A paper⁶⁴, found that trade liberalization in the form of reduction of tariffs in Indonesia led to an increase in income among poor households, which allowed them to pull their children out of the labour force, ultimately leading to substantial reductions in child labour. This may be the case for African countries who have signed the AfCFTA agreement. Moreover, effective competition regulation can lead to lower inflation due to lower prices.⁶⁵

4.3.2 GOOD QUALITY

As stated above, the possibility of intense competition from foreign firms, may motivate domestic producers to produce more efficiently and effectively. Such competitive spirit also

⁵⁹ UNCTAD (2017), *African Continental Free Trade Area : Challenges and Opportunities of Tariff Reduction*, Research paper no. 15 Available at, https://unctad.org/en/PublicationsLibrary/ser-rp-2017d15_en.pdf, Accessed on 22 September 2018.

⁶⁰ Nick Godfrey, *Why is competition important for growth and poverty reduction*, (March 2008) Available at <https://www.oecd.org/investment/globalforum/4031539.pdf>, Accessed on 18 September 2018

⁶¹ Supra note 52

⁶² ibid

⁶³ Klaus Tilmes (2015), *'Does Competition create or kill jobs'* Available at <http://blogs.worldbank.org/psd/does-competition-create-or-kill-jobs>, Accessed on 13 December 2018

⁶⁴ Krisztina Kis-Katos and Robert Sparrow, *Child Labour and Trade Liberalisation in Indonesia*, (August 2009) available at <https://beingclassicallyliberal.liberty.me/5-good-reasons-to-support-freetrade/> accessed on 14 March 2018.

⁶⁵ Vincent J G Power, *Competition Law and Practice*, page 146

encourages innovation and the production of better quality products, therefore promoting better outcomes for all involved, as was argued by Adam Smith.⁶⁶ Moreover, the existence of a functioning competition policy may increase an economy's ability to attract foreign investment as: '...a well-functioning competition policy could help to remove obstacles to inward foreign direct investment (FDI) resulting from the behavior of incumbents and contribute towards providing an attractive legal framework for foreign investors.'

Foreign firms are therefore expected to be attracted to a competitive environment in which competition rules exist and are consistent with or similar, both in letter and application, to those prevailing in major jurisdictions, most notably the EC.⁶⁷ A report⁶⁸ of the Commission for Africa arrived at the same conclusion that investors need effective competition laws which are vital to improving productivity and promoting innovation.

4.3.3 WIDER CHOICES

Further, it is argued that through the AfCFTA, wider markets will be open to competition, producers will therefore have more of an incentive to produce what the consumers want, leaving the later with a wider choice to choose between different products. Those products and raw materials that are unavailable locally can be easily procured through the free movement of goods at lower costs because of the high demand for such products, and every country benefits due to the mutually advantageous nature of free trade,⁶⁹ which increases consumer choice. This is not the case with monopolies wherein there is no competition and the wishes of consumers are ignored.

4.4 POTENTIAL BENEFITS

The following are benefits of the AfCFTA which have been stated in a paper by the African Union:⁷⁰

'The establishment of a continental FTA will lead to a significant growth of Intra-Africa trade and assist Africa to use trade more effectively as an engine of growth and sustainable

⁶⁶ Peter Van den Bossche & Werner Zdouc, *The Law and Policy of the World Trade Organization* 4th ed. (2017)

⁶⁷ Supra note 22 page 300

⁶⁸ Commission for Africa (2005), *"Our Common Interest" Report of Commission for Africa*, Available at [news.bbc.co.uk/2/shared/bsp/hi/pdfs/11_03_05africa.pdf](https://www.bbc.co.uk/2/shared/bsp/hi/pdfs/11_03_05africa.pdf), Accessed on 4 February 2019

⁶⁹ Joseph E. Stiglitz & Andrew Charlton *Fair Trade for All: How Trade Can Promote Development* (2006) 25.

⁷⁰ Supra note 10 page 46-47

development.....In a possible scenario of two FTA groups COMESA-EAC-SADC and IGAD, or (SE) FTA group and ECOWAS, CENSAD, ECCAS/UMA or N-W-C FTA group, the global average protection rate is nearly as high as the average of 7.7% with the S-E FTA group and 8.2% for the N-W-C FTA group, and 8.7% for the entire continent. Currently there is a high level of protection inhibiting trade. An FTA of the two groups/regions would simultaneously reduce Africa's global protection by 68.7%, consequently reducing Intra-African average trade protection from 8.7% to 2.7%. In view of the foregoing, a CFTA will have even greater benefits.....Among other specific benefits that will accrue to African countries from the establishment of the continental FTA are:

- Increased food security through reduction of the rate of protection on trade in agricultural produce among African countries;*
- Increased competitiveness of Africa's industrial products through harnessing the economies of scale of a large continental market of about one billion people;*
- Increased rate of diversification and transformation of Africa's economy and the continent's ability to supply its import needs from its own resources;*
- Better allocation of resources, improved competition and reduced price differentials among African countries;*
- Growth of Intra-Industry trade and the development of geographically based specialisation in Africa;*
- Reduced vulnerability of Africa to external trade shocks;*
- Enhanced participation of Africa in global trade and reduced dependence of the continent on aid and external borrowing.'*

4.5 THE IMPACT OF LACK OF COMPETITION: CASE STUDY OF RAIL AND MAINTAINANCE, CARGO SHIPMENT, FIRE PROTECTION INDUSTRY AND CHEMICAL CARTELS IN SOUTH AFRICA

Most countries in Southern Africa are net importers of products from South Africa and are therefore likely to be subject to South African cartels.⁷¹ Imports from South Africa cut across sectors including food, capital equipment, construction materials, energy, plastics and chemical products.⁷² Moreover, regional markets are closely linked through the presence of South African companies in the rest of the region. For example, Botswana, Zimbabwe, Zambia, Namibia and others are all net importers of rail maintenance equipment and related services, mainly from South Africa.⁷³ The companies involved in supplying these products and services were the subject of the rail and maintenance cartel case in South Africa, which was referred to the South African Tribunal in 2016. The firms allegedly colluded in bidding for tenders to supply Transnet, including allocating various tenders amongst each other. Over 90% of Botswana's imports of rail maintenance equipment and related services in 2016 were from South Africa, while the figures are just over 51%, 31% and 25% for Namibia, Zimbabwe and Zambia, respectively.⁷⁴

The cargo freight cartel which is alleged to have fixed the rates of general cargo shipment from Asia to South Africa involved companies that also have offices in South Africa.⁷⁵ The potential impact on countries in the region is different in this instance as it may not involve collusion of firms operating in or exporting to the neighbouring countries.⁷⁶ In this case, as prices may have been higher for cargo to South Africa, this would have also increased the costs for cargo passing through South Africa to other countries such as Botswana for instance.⁷⁷

In the chemicals cartel, two companies (Investchem (Pty) Ltd) and Akulu Marchon (Pty) Ltd) involved in the manufacturing and supply of key chemical input materials used to make detergents, cosmetics and toiletries recently agreed to pay penalties.⁷⁸ The penalties amounted to R23.4million in the case of Investchem and R13.9million on the part of Akulu Marchon after

⁷¹Teboko Bosiu (2017), *Cartels investigated in South Africa: Possible impact in the region?*, Available at <https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5a3c9b390d92975090c2a666/1513921346975/CCRED+Quarterly+Competition+Review+December+2017.pdf>, Accessed on 1 February 2019

⁷² ibid

⁷³ ibid

⁷⁴ ibid

⁷⁵ ibid

⁷⁶ ibid

⁷⁷ ibid

⁷⁸ Teboko Bosiu (2017), *Recent Cartels Penalised in South Africa: Possible Impacts to the region?* Available at, https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/59a54472d482e9b5a6c6ce40/1504003196334/CCRED+Quarterly+Competition+Review_August+2017.pdf, Accessed on 1 February 2019

admitting to price fixing and dividing markets between 2003 and 2013.⁷⁹ Although not disclosed, it is highly likely that the conduct of these companies has impacted other African countries since their products are also exported to various countries in the continent. Investchem specifically has customers in countries such as Botswana and Zimbabwe, although it does not have branches or subsidiaries there.⁸⁰ Akulu Marchon (a subsidiary of Chemical Services Ltd) also has a footprint in other African countries through exports, however these operations have apparently been taken over by Chemical Initiatives (Pty) Ltd, another subsidiary of Chemical Services Ltd.⁸¹ It seems unlikely that having agreed not to compete in South Africa that these arrangements did not extend to export sales into neighbouring countries.⁸²

The fire protection industry cartel involved several companies that also conduct business in various countries in the rest of the continent.⁸³ These include Fireco Gauteng (Pty) Ltd, Afrion Property Services CC, Belfa Fire (Pty) Ltd, Cross Fire Management (Pty) Ltd, Fire Protection Systems (Pty) Ltd, Fireco (Pty) Ltd and Tshwane Fire Sprinklers CC.⁸⁴ These companies specialize in supplying, installing and maintaining fire control and protection systems in South Africa and the continent. Two of the companies (Fireco Gauteng and Afrion) admitted to fixing prices, dividing markets and tendering collusively when bidding for tenders to install fire control and protection systems in new and existing buildings.⁸⁵ They agreed to pay penalties and assist the Commission in the prosecution of the other companies. These two companies also have operations across other countries in southern Africa.⁸⁶ Fireco Gauteng (which changed its name to KRS Fire) does business in various sub-Saharan African markets. For example, one of its clients is Debswana Diamond Company in Botswana.⁸⁷ The company also has a branch in Mozambique. Afrion does business in countries including Botswana, Namibia, Zimbabwe and Swaziland. The other companies identified in this case also do business in the region, except for Tshwane Fire Sprinklers which does business only in Gauteng. Fireco (not Fireco Gauteng) has offices in Namibia as well as a sister company in Angola. Belfa does business in the whole of the

⁷⁹ *ibid*

⁸⁰ *ibid*

⁸¹ *ibid*

⁸² *ibid*

⁸³ *ibid*

⁸⁴ *ibid*

⁸⁵ *ibid*

⁸⁶ *ibid*

⁸⁷ *ibid*

southern Africa region. Cross Fire covers the rest of the continent and has branches in Ghana and Mozambique.⁸⁸

From the above cases, it is clear that a cartel in South Africa is mostly like to have a regional impact and countries that have competition laws as well as operational competition enforcement agencies are better placed as those countries can prosecute. However, those that do not have competition laws are more vulnerable to cross border anticompetitive practices as they have no means of fighting those anticompetitive practices. Those countries must therefore be encouraged to enact competition laws.

4.6 CONCLUSION

This chapter has discussed both the likely benefits and negative effects of the AfCFTA with regards to competition. It is obvious that the above possible benefits will not be realized if anticompetitive situations are prevalent on national markets that will ultimately reduce the global welfare of all nation. The next chapter will therefore discuss how competition law and policy has been introduced and enforced in the EU and COMESA.

⁸⁸ *ibid*

5. CHAPTER FIVE: Comparing the application of Competition Law in COMESA and the EU

5.1 INTRODUCTION

Having established the complementary nature of the trade policy and competition policy, the need to address cross border anticompetitive situations which may arise as a result of the AfCFTA and the benefits of having competition law and policies in the previous chapter, it seems pertinent that the competition law and policy be introduced into the AfCFTA system but how to do it remains a question to be answered. This chapter will discuss the regional agreements on competition particularly the Common Market for Eastern and Southern Africa (COMESA) in Africa and the European Union which is an example of a territory with a single market where there is free movement of goods and services, their institutional features, how effective they have been in combating anti-competitive practices and how the AfCFTA could start applying some of the successful models. Knowledge of institutional designs in other regional agreements on competition can be useful in creating a new institution for the AfCFTA. It is imperative to note that there are quite several regional agreements on cooperation in Africa including the Southern African Customs Union (SACU), East Africa Community (EAC), West African Economic and Monetary Union (WAEMU) and the Southern African Development Community (SADC) but because of time constraints, the writer will only discuss the COMESA.

5.2 COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA (COMESA)

The Treaty establishing the Common Market for Eastern and Southern Africa (COMESA) was signed in Kampala, Uganda and was ratified in Lilongwe Malawi on 8 December 1994. Countries which are members of COMESA include Angola, Burundi, Comoros, Democratic Republic of Congo, Eritrea, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Tanzania, Uganda, Zambia and Zimbabwe. Some of the member countries do not have competition laws and those that do have, they consider them to be inadequate to deal with complex cross-border competition issues and hence the regional competition framework.

COMESA is considered by some as “an umbrella community” and the largest REC in Africa, given that it covers other regional organisations, including the East Africa Community (EAC) and overlaps with the Southern African Development Community (SADC).⁸⁹

Regional competition law was adopted in the form of the COMESA Regulations in terms of Article 55 (3) of the COMESA Treaty in late 2004, after the approval of the Council of Ministers. The COMESA Regulations provides a regulatory framework for the implementation of competition law. The regulations deal with competition issues which have a cross border effect and aim at safeguarding competition as means to enhancing intra-regional trade, protecting consumer welfare and ensuring efficient allocation of resources. Domestic issues are dealt with on national levels. In case of a conflict because of the supremacy of the Regulation over national laws, the former prevails over the latter.

By being a member of COMESA, the member countries are deemed to have agreed that they shall take steps to secure the enactment of and the continuation of such legislation to give effect to the COMESA Treaty and to confer upon the Regulations of the Council the force of law and the necessary legal effect within its territory. The Treaty imposes penalties on all member countries who fail to comply with the Treaty in its entirety.

Article 6 of the COMESA Regulations provides for the COMESA Competition Commission which is composed of the Commissioners from COMESA member states and is an institutional framework for the implementation of competition law. It was created in 2004 as a supra national Competition Authority and has been operating since 2013. The Commission promotes and encourages competition in the common market by preventing anti-competitive practices. In terms of Article 7 of the COMESA Regulations, the Commission has the power to monitor and investigate anticompetitive practices within the common market, mediate disputes between member countries concerning anti-competitive conduct, among other things. The Commission includes Board of Commissioners which reviews the initial determinations by the Commission and hears appeals.

The decisions adopted by the Board of Commissioners can be appealed at the COMESA Court of Justice, which is the main dispute resolution mechanism. It consists of two chambers, that is,

⁸⁹ Supra note 22 page 382

the Court of First Instance and the Appellate Division and can conduct a judicial review of the acts of the COMESA institutions.⁹⁰ Its main function is to ensure adherence to law in the interpretation and application of the Treaty. Its jurisdiction is to adjudicate upon all matters referred to it under the COMESA Treaty which can be by the member states, the Secretary General, legal and natural persons. The COMESA Competition Commission can also refer a matter to the COMESA Court of Justice for either guidance or interpretation of the law.

It has been argued by some that the structure of the COMESA Competition Commission, particularly the existence of a COMESA court of justice has led to an efficient system of competition enforcement.⁹¹

5.3 CHALLENGES FACED BY COMESA

The greatest challenge for COMESA is that the COMESA Treaty is not domesticated by all member states unlike the EU Treaty which will be discussed below. This is mainly due to lack of awareness of the law binding Member States and the lack of understanding of the regional regime by member countries who wrongly consider the Competition Commission as a stumbling block to their competition efforts and the domestication of the Treaty as the road to loss of sovereignty. The different legal systems of member countries have also slowed down the domestication of the COMESA Treaty.

According to Willard Mwemba in his presentation,⁹² the competition skills at national levels remain very low hence coherence between the COMESA Competition Commission and the national competition authorities in enforcement has remained a challenge. The business environment has continued to exhibit a very low level culture of compliance with the competition rules both at national and at regional level. This has led to a challenge in the implementation of the COMESA Treaty and hence the recommendations by Eunice Hamavhwa in her presentation⁹³ that there is need for the COMESA Competition Commission and the

⁹⁰ Supra note 22 page 385

⁹¹ Supra note 17 page 193

⁹² Presentation by Willard Mwemba, *Competition Regulation in the Common Market*, Available at <https://www.competition.org.za/acer-presentations/?rq=willard%20mwemba%20>, Accessed on 12 October 2018.

⁹³ Presentation by Eunice Hamavhwa, *The role of Industrial and Competition Policies in Regional Intergration – case of COMESA*, 2nd Annual Competition and Economic Regulation (ACER) week, Southern Africa Conference Programme at Livingstone, Zambia, Available at <https://www.competition.org.za/acer-presentations/?rq=eunice%20hama> Accessed on 12 October 2018

national competition authorities to engage in serious advocacy with stakeholder in order to educate them on the benefits of competition and for the member states without competition laws to adopt competition law and policies in order to enjoy the benefits of competition.

COMESA is also facing jurisdictional issues as several regional groupings in Africa have been created with overlapping boundaries. Moreover, adequate funds are an essential feature of many organisations as without funds even the best-designed institutions cannot survive and yet COMESA lacks funding for both the operation of the board and for recruiting staff.⁹⁴

5.4 JURISDICTION AND PROCEDURAL ISSUES ON COMPETITION CONCERNS: CASE OF THE CONFEDERATION OF AFRICAN FOOTBALL

Article 23 of the COMESA competition regulations empower the COMESA Competition Commission (CCC) to investigate mergers that involve companies operating in two or more COMESA member states.⁹⁵ Part 3 of the COMESA competition regulations outline restrictive business practices that can be investigated by the regional authority. Specifically, article 16 states that, ‘the rules on restrictive business practices apply only if the agreement, decision or concerted practice is, or is intended to be, implemented within the Common Market. Furthermore, it considers conduct that may affect trade between Member States; and restrictive business practices which have as their object or effect the prevention, restriction or distortion of competition within the Common Market.’⁹⁶ Article 22 (1) states that ‘*where the Commission has reason to believe that business conduct by an undertaking restrains competition in the Common Market, the Commission will so notify the undertaking involved and will launch an investigation*’ which empowers the Commission to institute an investigation.

In the first quarter of 2017 the COMESA Competition Commission (CCC) empowered in terms of article 16 and 22 investigated its first restrictive business practice case by the Confederation of African Football (CAF). The case relates to the exclusive award of marketing and media rights

⁹⁴ Supra note 17 page 193

⁹⁵ Tatenda Zengeni, (2017), *What can we learn from the first comesa restrive business practice case?* Available at <https://www.competition.org.za/review/2017/8/29/what-can-we-learn-from-the-first-comesa-restrictive-business-practice-case?rq=COMESA>, Accessed on 2 February 2018

⁹⁶ *ibid*

for the main regional football competitions on the African continent.⁹⁷ The allegation is that on 12 June 2015 the CFA entered into an agreement with Lagardère Sports S.A.S., a sport marketing firm based in Paris, France that awarded the media and marketing rights for the Africa Cup of Nations, African Nations Championship and African Champions League to Lagardère exclusively for the period 2017 to 2028.⁹⁸ It is further alleged that CAF entered into a similar agreement with Lagardère Sports S.A.S. from 2009 to 2016 in relation to the media rights of the same tournaments over this period.⁹⁹

The launch of the investigation by the COMESA Competition Commission came at a time when the competition authority in Egypt, a member of COMESA, concluded its investigation into a similar allegation. The Egypt Competition Authority (ECA) found CAF to have violated its Act and requested the Prosecutor's Office to press criminal charges against the former CAF President and Secretary General.¹⁰⁰

The conclusion of a case with regional dimensions by the ECA raises questions about jurisdiction and procedural issues on competition concerns that transcend borders in COMESA.¹⁰¹ The regulations for restrictive business practices are not as explicit as those for mergers and seem to create some uncertainty about the circumstances under which the COMESA Competition Commission can investigate such cases.¹⁰² The current wording suggests that CCC has the power to investigate any case even at national level if the country is a member state and if that matter will have an impact on the common market, even though the Egyptian authority may have investigated aspects affecting its own territory.¹⁰³

The lack of an explicit definition that distinguishes cases with regional effects might have led to the ECA conducting a unilateral investigation on a case that actually has a regional dimension.¹⁰⁴ The jurisdictional uncertainty is further compounded by a lack of COMESA guidelines for investigating such cases, which may explain why the Egypt Competition Authority only informed the COMESA Competition Commission of its investigation after it had been

⁹⁷ *ibid*

⁹⁸ *ibid*

⁹⁹ *ibid*

¹⁰⁰ *ibid*

¹⁰¹ *ibid*

¹⁰² *ibid*

¹⁰³ *ibid*

¹⁰⁴ *ibid*

concluded. The lacuna in the law can potentially create a conflict between national authorities and the regional authority on jurisdiction and can also lead to over-enforcement.¹⁰⁵ For instance, while the ECA has referred the case to the Prosecutor General for prosecution, CCC regulations stipulate that if found guilty the undertakings involved will be liable to pay a penalty of up to 10% of annual turnover of each undertaking for participating in the infringement.¹⁰⁶ It is important to note that investigations by both the ECA and the CCC of the same conduct partly defeats the purpose of establishing a regional competition authority.¹⁰⁷ Regional competition authorities provide a platform for member states to pool financial resources when undertaking investigations and avoid duplication of resources.¹⁰⁸

5.5 WHAT IS THE PRACTICE IN THE EU REGIONAL AUTHORITY?

A significant difference between the European law, which shall be discussed in greater detail below and the CCC Competition Regulations is that the former decentralised the application of its Act in 2004, empowering member states to enforce the European Competition Law in parallel with their domestic laws.¹⁰⁹ The process came with many challenges especially around inconsistency when applying the law. To counter these challenges, the EU created a robust system of cooperation among competition authorities through the establishment of the European Competition Network.¹¹⁰

Mechanisms were developed to facilitate effective cooperation. First a signalling mechanism is in place, in which any authority is required to alert others when it commences investigation or any other action to avoid overlapping activities that have the potential to lead to divergent results.¹¹¹ Second, authorities agreed on a division of work mechanism to enable each authority to utilise its relative advantages in investigations.¹¹² As a general principle, the authority that initiates the investigation remains competent to act until the end of the investigation. Third, a system of information exchange and coordination was developed to

¹⁰⁵ *ibid*

¹⁰⁶ *ibid*

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*

¹⁰⁹ *ibid*

¹¹⁰ *ibid*

¹¹¹ *ibid*

¹¹² *ibid*

invigorate cooperation between authorities in their investigations.¹¹³ A dispute resolution mechanism to solve and prevent potential conflicts was also agreed upon.

Important to note from the EU is that the mechanisms have been created to avoid multiple investigations of the same matter.¹¹⁴ This is a very important step towards harmonizing competition laws and facilitating regional integration at large.¹¹⁵ It is therefore important that the AU member countries that have signed the AfCFTA address this jurisdiction and procedural issue for the AfCFTA to operate in its full capacity.

5.6 EU COMPETITION LAW REGIME

The EU Competition law Regime has been regarded as the most successful in dealing with anti-competitive practices and has certainly used its competition law to help achieve the internal market. The EU competition law has had considerable influence on the adoption of competition law of member states for example Italy's competition law regime is based on the then EC and now EU system.¹¹⁶ The UK, Belgian and Irish competition law regimes also mirrors the EU system to avoid duplication of work for those undertakings subject to the EU Competition law. At the time of the signing of the EU Treaty most of the EU member countries had no domestic competition laws except for Germany whose domestic competition laws were implemented the same year as the European Union Treaty¹¹⁷ and hence it was easy for the member states to simply adopt the EU Competition law regime. It has been argued that the existence of a supranational competition law at the regional level for the EU has contributed to the dissemination of a competition culture in member states and to the harmonization of national laws.¹¹⁸

The European Union is established by two Treaties, the Treaty of the European Union and the Treaty of the Functioning of the European Union. The competition rules of the EU are contained

¹¹³ *ibid*

¹¹⁴ *ibid*

¹¹⁵ *ibid*

¹¹⁶ Siragusa and Scassellati, *Italian and EC Competition Law: A new relationship – Reciprocal Exclusivity and common principles* (1992) 29 CML Rev 93.

¹¹⁷ *Supra* note 17 page 197

¹¹⁸ *Supra* note 5

in Chapter 1 of the Title VII of the Treaty on the Functioning of the European Union, which is comprised of Articles 101 to 109 and in summary;¹¹⁹

- Article 101 (1) prohibits agreements, decisions by association of undertakings and concerted practices that have as their objective or effect the restriction of competition. These provisions can however be declared inapplicable where the conditions of Article 101 (3) are satisfied.
- Article 102 prohibits the abuse by an undertaking or undertakings of dominant position.
- Article 106 (1) imposes obligations on Member States in relation to the Treaty generally and the competition rules specifically, while Article 106 (2) concerns the application of the competition rules to public undertakings and private undertakings to which a Member State entrusts particular responsibilities.
- Article 107 to 109 prohibit state aid to undertakings by Member states that may distort competition in the internal market.

The institutional structure of the EU is comprised of the European Commission and the European Court of Justice, the Court of First Instance, also referred to as the General Court, domestic courts and domestic authorities, among other organs. The EU Commission has been said to be the most important in practical terms of all the European institutions and has played a big role in the formulation and enforcement of EU competition law.¹²⁰ It is the guardian of all EU Treaties, has day to day responsibility for the application of competition law and has considerable regulatory, investigation, enforcement and punishment powers in that area and is independent of the Member States in the exercise of its functions.¹²¹

The European Court of Justice is the EU judicial institution and has a mandate in terms of Article 220 of the EU Treaty to ensure that in the interpretation and application of the EU Treaty, the law is observed. It also monitors the conduct of other institutions and is the supreme authority on all matters of the EU law.

¹¹⁹ Richard Wish and David Bailey, *Competition law*, Eighth Edition, Oxford University Press, page 53

¹²⁰ Supra note 58 page 25

¹²¹ *ibid*

The EU Court of First Instance was established in 1989 and plays an important role in offering the necessary judicial review of the European Commission decisions on competition matters.¹²² The fact that the European Commission decision is subject to the judicial control of the European Courts has been said to be an important feature of the EU institutional structure. The position is the same with COMESA although the role of the regional courts there is minimal as compared to the EU.

Domestic courts of member states and their national competition authorities also play an important role in applying and enforcing the EU Competition law. The cornerstone of the EU system and of its success is the principle of “supremacy of community law”. The national courts are obliged to comply with the EU law and give it priority over the domestic laws.

Domestic authorities are given the power to apply community law in the EU and concept of “effect utile” which was developed by the European Court of Justice to address endless jurisdiction issues, has led to a fully coordinated body of law, with no substantive distinction between domestic and community provisions.¹²³ Case allocation is governed on the basis of the principle of opportunity, that is, according to which institution is better placed with respect to the investigations.¹²⁴ The national competition authorities and the Commission together form the network called the ‘European Competition Network’, discussed above, which is a forum for discussion and cooperation for the application and enforcement of EC Competition policy.

The EU also addresses directly the issue of funding which is a great concern for COMESA as stated above. The member states are represented by means of Council of Ministers and the EU institutions are to be funded according to their needs as established by the Council of Ministers through tax revenues of member states.¹²⁵

5.7 CONCLUSION

This chapter has discussed and compared the institutional designs of both COMESA and the EU. From the foregoing, the question remains as to whether African leaders will be able to successfully implement the free trade area, especially given the issues and challenges faced by

¹²² Supra note 22 page 167

¹²³ Supra note 17 page 198

¹²⁴ Ibid page 199

¹²⁵ Ibid

COMESA and that a lack of political will, technical expertise amongst relevant stakeholders and financial constraints have plagued most continental and regional efforts towards deeper intra-African trade thus far.¹²⁶

The next chapter will identify the issues to be addressed by the African Union Heads of state that have signed the AfCFTA and the possible recommendations that can be adopted.

¹²⁶ Asmita Parshotam, *Can the AfCTA offer a new beginning for Africa*, Available at, <https://saiia.org.za/research/can-the-african-continental-free-trade-area-offer-a-new-beginning-for-trade-in-africa/>, Accessed on 22 September 2018

6. CHAPTER SIX: The AfCFTA and Competition – Policy Implications

6.1 INTRODUCTION.

This chapter concludes by not prejudging issues for negotiations but by identifying non-exhaustive policy issues to be addressed by the Heads of States and discussing the possible approaches that can be adopted by member countries to deal with anticompetitive practices. The writer believes that the formal negotiations on competition should at least cover the following issues; an elaborate study of the interaction of the trade and competition policy, how competition will contribute to the AfCFTA goals, how to deal with the fact that some member countries have signed the agreement establishing the AfCFTA have no competition laws and whether there is need for a regional competition authority for the African Continental Free Trade Area or whether Cooperation would be ideal to effectively halt and deter anticompetitive practices mentioned in Chapter 4.

Reference will be made to the problems facing COMESA *vis a vis* competition being an African regional agreement and how those problems have been addressed in the EU given that the latter is said to be the most successful regional competition agreement with the most comprehensive institutional structure.

6.2 POSSIBLE APPROACHES

Competition issues can be addressed in two possible ways;

- a) Through the application of domestic laws with extraterritorial application to cross border harm affecting markets and,
- b) At the regional level, through cooperation or member countries can agree on strong and clear regional law provisions and regional authorities set up. The EU discussed in chapter five offers an outstanding example of a regional competition regime.

6.3 CHALLENGES WITH THE TWO APPROACHES

Domestic competition laws have been said to be ill suited to dealing with cross border anti-competitive activities because of globalization, among other things, which calls into play more than one competition law. This has an effect of creating over-regulation as businesses attempt to conform to several competition laws with different objectives. Authorities may also encounter

difficulties in gaining access to important evidentiary materials located in foreign states that have enacted provisions blocking the provision of materials and hence enforcement of a penalty on a foreign firm may virtually be impossible if that firm has no seat in the domestic nation.¹²⁷ This may result in less competition both on the domestic and international level. Moreover, it's been stated that states care more about national welfare than global welfare and the extra territorial application of domestic competition laws is potentially possible but however practically difficulty. Competition authorities are usually limited to practices which affect competition in their own country. This dilemma in enforcement has been fully acknowledged by most African Union member countries who have signed the AfCFTA for example Zimbabwe and Kenya¹²⁸

Regional competition law regime on the other hand entails either regional cooperation or the introduction of regional competition law provisions and authority as a regional platform for conflict resolution in all cross-border matters involving anti-competitive behavior. This then leads to easing the costs of doing business as, for example, if there is a regional authority, the notification of cross-border transactions need not to be notified in each of the member states, were the transaction is taking place. Moreover, according to Tatenda Zengeni, regional competition authorities reduce resource constraints faced by national competition authorities, by pooling together resources that enable the regional body to reach economies of scale in the enforcement of competition law.¹²⁹ Further, they provide a platform where member states can pool together financial resources that can be used for investigations and undertaking competition advocacy programmes which can be difficult if conducted by individual countries.¹³⁰ In the same vein a regional competition body becomes very important for those member states that do not have competition laws in place.¹³¹ Regional authorities can also assist in the detection and prosecution of anti-competitive conduct that transcends borders.¹³²

¹²⁷ Supra note 7 page 2

¹²⁸ P. Brusick, A.M Alvarez, L.Cernat, 2005, *Competition Provisions in Regional Trade Agreements : How to assure Development Gains*, George K Lipimile, Elizabeth Gachuiru Allocation of competences between national and regional competition authorities: the case of COMESA, Available at http://unctad.org/en/docs/ditccclp20051_en.pdf, accessed on 22 May 2018

¹²⁹Tatenda Zengeni (2014), *Update on the COMESA competition commission*, Available at https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/536776f4e4b01141ffedee61/1399289588076/CCRED+Quarterly+Review_April+2014.pdf, Accessed on 3 February 2019

¹³⁰ ibid

¹³¹ ibid

¹³² ibid

Regional cooperation can be in three types. The first is where the cooperation will be used as a forum, for consultation, experience sharing which would facilitate the building of effective domestic competition law regimes and support for the regimes through technical assistance and capacity building channels.¹³³ The second type involves building a mechanism for effective enforcement which could be handled by several authorities, including those which may operate at regional level for example the European Competition Network, which brings together the European Commission and national competition authorities of the member state countries.¹³⁴ The third type may revolve around achieving convergence and harmonization among the domestic competition law regimes of the countries concerned.¹³⁵ Cooperation, is however a voluntary process and each country decides with whom it wants to cooperate and with whom it chooses not to cooperate with. Countries with no domestic competition law may not be in a position to cooperate with other countries due to the lack of a competition authority. At the same time, it is important to note that building a viable cooperation framework is not easy and requires sufficient competition law expertise and according to Professor Maher M. Dabbah, “*the journey from formulating the idea of regional cooperation to bringing the relevant initiative to fruition is long and features extremely tough terrain.*”¹³⁶ Does this therefore mean that the existence of an effective competition regional authority would be ideal and anticompetitive behaviors can be caught and regulated on a regional level as member countries would have made a commitment to address the issues of competition?

6.4 FORSEEN CHALLENGES OF THE AfCFTA VIS-A-VIS COMPETITION

Given that effective competition policy requires effective and efficient application of competition laws,¹³⁷ countries with no competition laws are more vulnerable to cross boarder anticompetitive practices as they have no means of fighting anticompetitive practices. Competition authority acts as a medium through which information is exchanged and thus, countries within a Regional Free Trade Area that do not have domestic competition laws and competition authorities have no opportunity for cooperation with other countries on competition

¹³³ Supra note 22

¹³⁴ *ibid*

¹³⁵ *ibid*

¹³⁶ Supra note 22 page 369

¹³⁷ Available on www.oecd.org/daf/competition/enforcement/, Accessed on 1 September 2018

cases.¹³⁸ Further, anticompetitive practices tend to thrive more where there are no national competition laws and hence the growing trend of competition related provisions of trade liberalization agreements requiring that all the member states have domestic competition laws and the necessary institutional infrastructure to enforce the law, while others impose regional competition laws and require the member states to adopt those into their national legal systems. In the absence of a domestic law on competition chances are slim that a country may take legal action against anti-competitive practices within its borders and even in another member country.

With that being said, member countries who have signed the AfCFTA who do not have domestic competition laws stand to benefit more from enacting domestic competition laws as they will have an advantage of having the competition authority that will train the staff, build a domestic competition culture, be the contact point for fellow member states and the medium through which information is exchanged with other member states. They should therefore be encouraged to enact domestic laws.

Cross border cartels may pose a challenge to enforcement actions by national authorities, for example, Zimbabwe, which has previously openly stated that its domestic competition laws and authorities are ill-suited with dealing with anticompetitive practices with a cross border dimension.¹³⁹ This may be due to the fact that most African countries with national competition laws face a number of resource and skill constraints in enforcing those laws as stated in the previous chapter.

Member countries also have different competition law objectives for example the South African and Zimbabwean Competition Act discussed above, with the former not only seeking to protect competition but also promoting wide ownership especially by historically disadvantaged persons. Some jurisdictions have national competition laws that may limit information sharing which is a crucial strategy for effective law enforcement especial with regards to cartel investigations.

Given the above issues, salient questions therefore become apparent on how the Heads of State will deal with the issue that some member countries have no domestic laws and those that do have the wording and enforcement thereof is different, whether cooperation between national authorities is ideal and if so which form of cooperation or whether regional competition laws

¹³⁸ Supra note 5

¹³⁹ Supra note 120

must be enacted that can be adopted by the member states without competition laws and a regional competition authority set up, as with the case of the EU.

6.5 WAY FORWARD

Fully fledged cooperation can promote convergence in competition laws in the African Continent and may help ensure effective and efficient enforcement against cross border anticompetitive practices through cooperation among the competition authorities but does not address the issue of lack of competition laws in some countries. According to Professor Maher M. Dabbah it is questionable whether regional cooperation would work as it can be undermined by the fact that competition law is lacking in some countries, and moreover, the future looks very uncertain with respect to how much attention is likely to be given to the field of competition law in Africa.¹⁴⁰

Would national governments favour a strong competition law framework and enforcement at a regional level given that its likely to limit their sovereignty in favour of regional authorities? Common rules within regional blocks can effectively regulate problems of those countries as they may have similar legal cultures and similar levels of development. While some anticompetitive practises may not be detected by individual country authorities, it is less likely that such conduct will remain undetected in an open market with a regional competition authority. Decisions adopted by member countries may have cross-border effects and if enforcement is centralized, there may be economies of scale and transaction cost savings due to uniform application of common competition rules by supranational authorities acting as one-stop shops in dealing with anticompetitive cases.¹⁴¹

With the case of the EU, when the EU Treaty was enacted only Germany had domestic laws and therefore it was easy for other member states to mirror its competition law regime. The situation is not the same with Africa, wherein some of the African Union member countries who have signed the AfCFTA already have domestic competition laws and some do not have competition laws at all. This has also been the greatest challenge for COMESA as well. It is therefore questionable whether a strong competition law framework and enforcement at a regional level would secure complementariness between domestic and regional competition laws as with the

¹⁴⁰ Supra note 22 page 409

¹⁴¹ UNCTAD (2013), *Prioritization and resource allocation as a tool for agency effectiveness*, Available at https://unctad.org/meetings/en/SessionalDocuments/ciclpd20_en.pdf, Accessed on 23 September 2018

case of the EU. Some member countries may object to adopting competition law regime on a regional level as competition law and policy must meet the special needs and circumstances of each country, politically, economically and socially. The writer is therefore of the view that it is too early to embrace a full-fledged regional competition law framework for the AfCFTA.

Be that as it may, the strong desirability of competition in the market place by the EU is an important lesson. However due care must be taken to the objectives of competition law so that the AfCFTA does not follow blindly the competition law and policy of the EU as according to Professor Maher M. Dabbah, “*determining what form and scope of the local competition law should have requires an understanding of the culture prevailing in the country concerned, as well as an understanding of the particular economic, social and political circumstances of that country.*”¹⁴² The mere fact that the EU competition law regime has been said to be the most successful does not mean that adopting the same model or institutional structure would work for the AfCFTA. The trend for most countries, especially developing countries has been to copy and paste the competition law regime of the European Union without considering the differences between their economies and the difference in the political, economic and socially goals. Developing countries have small economies compared to the EU. Such copy and pasting has had the worst consequences for the developing countries as in most times they tend to have problems enforcing the adopted competition rules which do not meet their special needs and circumstances and not viable and effective in addressing anticompetitive practices in their economies. It would therefore be absurd and unfair to subject the AfCFTA to the same competition policy disciplines as the EU.

The point has been made that it is important to address anticompetitive practises at an early stage given that anticompetitive tendencies tend to become well- entrenched if inadequate instruments exist to address them. Cooperation can therefore serve as a forum to foster capacity building and an instrument to implement enforcement cooperation activities between countries where cross border anti - competitive practices occur. A cooperation agreement would allow authorities to exchange fruits of investigations. It is therefore the writer’s view that at this stage cooperation in the sense of mutual assistance on individual investigation or cases is the option for member countries. Cooperation can be used as a forum, for consultation and experience sharing which

¹⁴² Supra note 22 page 4

would facilitate the building of effective domestic competition law regimes especially for those without competition laws and support these regimes through technical assistance and capacity building channels. Later, when the issue of lack of competition laws and weak enforcement has been addressed, member countries can then move to a fully-fledged competition law regime with community competition rules and a regional competition authority.

There are concerns about the capacity to implement community competition rules.¹⁴³ Despite political will at the regional level, institutional weaknesses, small size and the scarcity of human resources in some member States can affect implementation capacity.¹⁴⁴ Appropriate design of competition policy and law and institutional framework at the regional level must therefore include among other things;

6.5.1) Independence of the competition authority

For the regional competition authorities for enforcement to deter anticompetitive behaviours, it must be independent. According to the OECD studies, most African countries lack political independence in the implementation of their policies and this has far reaching consequences and hence why the African Heads of state need to consider the issue of adequate resources which shall be discussed below to insure independence in the enforcement of competition laws.

6.5.2) Judicial review of competition cases

It is widely held that independent judicial review of the decisions of competition authorities, whether through the regular courts or through administrative tribunals, is desirable for the sake of the fairness and integrity of the decision-making process.¹⁴⁵ It has thus been customary for the legislature to resort to judicial review to police the enforcement action of the competition authority as with the case of the EU and COMESA.

Judicial review positively shapes the principle of legal certainty which is a fundamental principle recognised by many jurisdictions in the world. There must therefore be a possibility of recourse to judicial review of competition cases for the AfCFTA. The decision-making process should be

¹⁴³ Supra note 141

¹⁴⁴ *ibid*

¹⁴⁵ *ibid*

neutral and transparent and the work of courts and agencies regarding the enforcement of competition rules must be expressly clear.

6.5.3) Adequate staffing and financial resources of the competition authority.

The issue of adequate resources has been said to be the greatest challenge for COMESA. According to the OECD Guidelines,¹⁴⁶ to challenge anticompetitive conducts by firms, Competition authorities must have the adequate resources, political support and independence to implement effectively the competition laws. Political support should encompass supply of sufficient resources for effective enforcement and to ensure adequate lawyers, economist and support staff as investigation of anticompetitive practices often require a significant effort of gathering data, market conditions information, sophisticated econometric analysis and the need to hire legal and economic experts.

Member countries with no domestic competition laws will need assistance on developing competition laws and policies and building a competition culture tailored to their countries circumstances. There is therefore need for a wider understanding at policy levels in Government, regulatory officials, in the business sector, trade unions, judges, the legal community and by consumers of the beneficial impact of effective competition and of the broad-based support for a strong competition policy on an economy in all countries that have signed the AfCFTA.¹⁴⁷ Seminars and workshops can be used as vehicles for sharing information and experiences on competition by the participants as competition law enforcement requires a complex legal and economic skill set and constant professional development.

6.6 OVERLAP OF MEMBERSHIP.

There can be overlapping activities between COMESA, EAC, SADC, TFTA and other regional agreements on competition which need to be harmonized. The overlap of membership can have implications on funding. African countries with small economies and poverty issues face a big problem of prioritization of the resources, which is a process of deciding what type of activities, enforcement action, advocacy initiatives, or in general competition policy measures a

¹⁴⁶ Thomsen, *Competition Policy Guidelines*, page 8 Available at <https://www.oecd.org/investment/toolkit/policyareas/competition/Competition%20Policy%20Guidance,%20Thomsen.pdf> Accessed on 12 October 2018

¹⁴⁷ Supra note 141

competition agency might pursue in a given period of time.¹⁴⁸ Allocating resources for competition law may not be deemed as a necessity or priority and some countries tend to prioritize one community, resulting in others lacking the necessary resources. Hence, there is need to clarify the relationship of the organizations in the same region as this may undermine the success of the AfCFTA as with COMESA.

6.7 CONCLUSION

This study has discussed the background on the formation of the AfCFTA and its aims and objectives. It has identified some of the benefits that should flow from a successfully implemented AfCFTA *vis a vis* competition and some of the difficulties that may hinder its implementation. It has also identified some of the future challenges that can threaten to slow down implementation, as well as the positive impacts and benefits for the member countries who have signed the agreement. It concluded by discussing some of the potential blind spots and issues that governments need to address, and their impact on the African continent.

From the foregoing it is important to recognize the anti-competitive behaviors are a subject of concern when one considers the interface between trade and competition policy. Every member must have some form of competition law and policy to eliminate the anti-competitive behaviors which reduce the benefits of trade. Greater effort must therefore be taken to educate the national authorities and the public at large on the benefits of competition and importance of the implementation of a transparent and effective competition policy. Those include, the protection of the welfare of consumers and enhancing the attractiveness of an economy to foreign investment.

To ensure that competition law enforcement is consistent with the AfCFTA, there would have to be a mechanism ensuring that anti-competitive practices having a market access are in fact eliminated. This can be done either through applying domestic competition laws or at the regional level, through cooperation or member countries can agree on strong and clear regional law provisions and regional authorities set up. The writer is of the view that that cooperation in the form of technical assistance would be ideal for the AfCFTA given the limited human and financial resources in most member countries. To those member countries without competition

¹⁴⁸ *ibid*

laws, technical assistance programmes can enable countries to have access to the expertise and assistance needed to craft and introduce laws that are suitable to their level of development. Later, when the above raised issues have been addressed, member countries can move to a fully-fledged competition law regime with community competition rules and a regional competition authority.

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Interview with Das Nair Reena, Senior Lecturer, School of Economics, College of Business and Economics, Senior Researcher, Centre for Competition, Regulation and Economic Development, South Africa on 6 July 2018.

Interview with Professor Gehard Erasmus, Associate Trade Law Centre (TRALAC) on 30 July 2018

Interview with Modesai Donga, competition law consultant, former chief investigation and litigation officer of the Swaziland Competition Commissioner on 20 August 2018