The African Continental Free Trade Area Competition Protocol: a necessity or an overzealous endeavour?

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Introduction

The desire by Africans to have a united, integrated and prosperous Africa has long been recognised, especially in the post-colonial era. There was a realisation that Africa did not just need political independence, but also economic independence that would guarantee prosperity. Perhaps the most ambitious leader to coin this desire was Kwame Nkrumah, the first President of Ghana.[1] Nkrumah believed that a united Africa was a precursor to its development and prosperity. This is implicit in most of his seminal remarks. For example, he once remarked thus:

> 'It is clear that we must find an African solution to our problems and that this can only be found in African unity. Divided we are weak; united, Africa could become one of the greatest for the good in the world.'[2]

1 Ghana was the first country in Africa to gain independence from Great Britain in 1957.

2 Kwame Nkrumah, *I speak of Freedom: A Statement of African Ideology* (William Heinemann Ltd, 1961).

Nkrumah passionately advocated pan-Africanism as the solution to Africa's myriad economic, social and political problems and unequivocally reiterated his belief that no single African nation could progress without unifying politically and economically with other African countries.[3] However, at that time most other African leaders were sceptical and considered Nkrumah a dreamer. He did not receive support from his fellow African leaders, who were obsessed with the preservation of territorial sovereignty. It can also be argued that Nkrumah's dream could not be realised due to vested interests of forces like private enterprises that benefitted from African resources and whose interests were threatened by Nkrumah's vision of an integrated Africa. The foregoing notwithstanding, it is now clear that Nkrumah's vision was not obliterated but just delayed. Several decades later, the need for an integrated Africa is still being debated, making references to Kwame Nkrumah. The whole essence of the African Union (AU) is to unite Africa to exploit its potential and create wealth for its people, thereby enhancing the standard of living of its inhabitants. The AU is guided by its vision of 'An Integrated, Prosperous and Peaceful Africa, driven by its own citizens and representing a dynamic force in the global arena'.[4]

To achieve its vision, the AU came up with flagship projects for Agenda 2063: The Africa We Want. Agenda 2063 identifies 13 projects which are indispensable to Africa's integration and economic prosperity. Among the 13 flagship projects is the Africa Continental Free Trade Area (AfCFTA) which is a highly ambitious trade and integration agenda – and perhaps an accelerated approach to finally achieve the vision of Nkrumah as observed above.

AfCFTA

AfCFTA has been established by its own Agreement[5] that has the status of a treaty. It therefore means that the AfCFTA has a high degree of autonomy. The Agreement establishing AfCFTA was signed at an extraordinary summit of the AU Assembly on 21 March 2018 in Kigali, Rwanda. It is expected to bring together the 55 African countries, making it the largest free trade area in terms of member states since the World Trade Organisation was established in 1994, according to publicly available information. The aim of AfCFTA is to create a single, integrated African market and boost intra-African trade, a desire that has eluded Africa for many decades post-independence. The envisaged single market is also expected to be significant,

3 Biney, 'The Legacy of Kwame Nkrumah in Retrospect', 2008, 2(3) *The Journal of Pan African Studies*, 129–135.

4 'About the African Union' (African Union), see https://au.int/en/overview, accessed 29 September 2023.

5 Agreement Establishing the Africa Continental Free Trade Area.

with an impressive population of over 1.4 billion according to publicly available information. The GDP is equally impressive at US$3.1tn in 2023.[6] The AfCFTA is expected to boost intra-African trade by 52.3 per cent by 2025, increase Africa's income by up to $450bn by 2035, according to the International Monetary Fund, and lift 30 million Africans out of extreme poverty. However, intra-African trade currently accounts for only 15 per cent of the continent's total trade, compared to 58 per cent in Asia and 67 per cent in Europe.[7]

The objectives of the AfCFTA include:[8]

a) creating a single continental market for goods and services, with free movement of business persons and investments, paving the way for accelerating the establishment of a continental Customs Union;
b) expanding intra-African trade through better harmonisation and coordination of trade liberalisation and facilitation, across the regional economic communities and the continent in general; and
c) enhancing competitiveness at the enterprise and industry level, and supporting economic transformation through exploitation of economies of scale, continental market access and better reallocation of resources.

The colonial legacy of a Balkanised Africa still haunts it, and among the indications is the dwarfed intra-African trade. Several factors may explain this situation, among them being the public obstacles to trade such as tariff and non-tariff barriers to trade, and anti-competitive conduct by private enterprises. The paradox in intra-African trade is that the lowering of tariffs does not often translate into increased intra-regional trade. Tariff liberalisation often gives rise to non-tariff barriers, to which much of the stagnation in intra-African trade is attributed.[9]

The focus of this article therefore is on the remedy envisaged by the AfCFTA to address the problem of anti-competitive conduct of private enterprises that frustrate trade and the objective of a single African market.

The AfCFTA has, under Article 4(c), provided that 'for purposes of fulfilling and realising the objectives set out in Article 3 (of the Agreement), State Parties shall cooperate on investment, intellectual property rights and competition policy'.

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6 'Africa Population 1950–2023' (Statista), see www.macrotrends.net/countries/AFR/africa/population, accessed 29 September 2023.

7 Nardos Bekele-Thomas, 'AfCFTA: Seizing opportunities for a prosperous Africa' (*Africa Renewal*, 2023), see www.un.org/africarenewal/magazine/may-2023/afcfta-seizing-opportunities-prosperous-africa, accessed 29 September 2023.

8 *The African Continental Free Trade Area; A tralac guide*, (tralac, 2018), see www.tralac.org/documents/resources/booklets/2313-afcfta-a-tralac-guide-3rd-edition-august-2018/file.html.

9 Jodie Keane, Massimiliano Cali and Jane Kennan 'Impediments to Intra-Regional Trade in Sub-Saharan Africa' (Overseas Development Institute/Commonwealth Secretariat, 2010), see http://cdn-odi-production.s3.amazonaws.com/media/documents/7482.pdf accessed on 29 September 2023.

Pursuant to the foregoing, the AfCFTA Protocol on Competition Policy was adopted in February 2023 and is yet to become enforceable. The Competition Protocol (CP) shall enter into force 30 days after the deposit of the 22nd instrument of ratification.

The Competition Protocol

This section will explore whether or not the CP is necessary, or if it is simply an overzealous endeavour. The article begins by appreciating the rationale of including competition provisions in multi-state trade agreements (MTAs). It then proceeds to the review of some of the main and salient provisions of the CP. For the purposes of this article, the focus is on the objectives of the CP and its scope of application. The article will also explore other factors that pose challenges to the implementation of the CP.

Rationale of competition provisions in multi-state trade agreements

The inclusion of competition provisions in MTAs is neither a new thing nor unique to AfCFTA. Competition provisions have become a common feature in MTAs. The rationale is to ensure that the benefits that are expected to flow from trade liberalisation are not negated by the effects of anti-competitive conduct by undertakings operating in a free trade area or liberalised market. There is anecdotal evidence that the effects of *de jure* barriers to trade (tariff and non-tariff barriers erected by governments) may have more far-reaching consequences than the *de facto* barriers to trade erected by undertakings operating in the market. It is therefore not surprising that most MTAs have such provisions. For example, in the Common Market for Eastern and Southern Africa (COMESA), provisions on competition are embedded in Article 55 of the Treaty establishing the Regional Economic Community (REC). Article 55 of the Treaty establishing COMESA states that:

> 'The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.'

A treaty is a sacrosanct document: therefore, the inclusion of competition matters in Article 55 underscores the importance played by the regulation of competition to the realisation of the single market imperative. Article 55(3) further enables the enactment of the COMESA Competition Regulations, whose purpose is to promote and encourage competition by preventing restrictive business practices that deter the efficient operation of markets, thereby enhancing the welfare of

consumers in the Common Market, and to protect consumers against offensive conduct by market actors.

The Association of Southeast Asian Nations (ASEAN) is another REC that has included competition provisions in its constitutive documents. The main goal is to cooperate and coordinate with regard to matters of competition. Notably, there is no fully-fledged competition law and enforcement. However, the ASEAN Expert Group on Competition is responsible for overseeing matters related to competition. Its objectives are to, inter alia, promote a healthy competitive environment in the ASEAN region and to discuss and coordinate competition policies.

The European Union competition law regime is indisputably the most advanced and established multi-state competition enforcement system in the world. It is responsible for promoting the preservation of competitive markets within the European internal market by regulating anti-competitive conduct by undertakings. Competition law regulation has been a fundamental feature since the signing of the Treaty of Rome in 1957. According to Alison Jones, the activities of the Treaty of Rome included, among other things, not only the creation of an internal market but also 'a system ensuring that competition in the internal market is not distorted' (Article 3(f), later Article 3(1)(g), of the Treaty establishing the European Community). This provision embedded the principle of undistorted competition in the fundamental provisions of the Treaty and was considered to provide the foundation for the specific competition rules, including:

- an Article prohibiting restrictive agreements between independent firms (now Article 101 of the Treaty of the Functioning of the European Union (TFEU), formerly Article 81 EC); and
- an Article prohibiting abuse of a dominant position (now Article 102 TFEU, formerly Article 82 EC).[10]

From the foregoing, it is clear that the aims and objectives of including competition law provisions in MTAs are central to the realisation of a single market imperative and therefore similar aspirations in the context of the AfCFTA are not misplaced. The objectives of the CP are very impressive, and are contained in Article 2 of the CP as follows:

a) enhance competition within the AfCFTA for improved market efficiency, inclusive growth, and the transformation of the African economies;
b) ensure that gains from AfCFTA trade liberalisation are not negated or undermined by anti-competitive practices;
c) develop and strengthen the capacity of state parties to deal with anti-competitive business practices;

10 Alison Jones, 'Postgraduate Diploma/Masters in EU Competition Law, Module 1 – Unit 1' [2013/2014] P 5.

d) provide a continental platform for research, information exchange, capacity building, training, consultation, cooperating, and coordinating on competition policy and law in Africa;
e) promote economic integration and sustainable development in the AfCFTA Market; and
f) manage the inter-relationships of competition regimes and sectoral regulatory laws at the national, regional, and continental levels.

These objectives are consistent with the goals of including competition provisions in MTAs as stated above. The objectives of the CP are also consistent with what African leaders have aspired towards since the time of Nkrumah. There is no dispute that these objectives feed into the vision that seeks to have an Africa that is well integrated and greater levels of economic growth and development.

A review of some of the fundamental provisions of the CP

Now that the case for competition provisions in MTAs has been established, it is important to review some of the provisions of the CP in order to address the question of whether it is a necessity or an overzealous endeavour. In addition to the review of some provisions of the CP, this section will also review a number of other factors, including:

1. the geographic dispersion and size of Africa, and poor infrastructure;
2. the different levels of economic development among different countries;
3. the political situation in African countries;
4. the colonial legacy;
5. the availability of human and financial resources; and
6. the risk of suboptimal outcomes.

The starting point of this inquiry is the scope of application of the CP as set out in Article 3(1), that the CP shall apply to the following:

a) all economic activities by persons or undertakings within or having significant effect on competition in the market; and
b) conduct with continental dimension and having significant effect on competition in the market or a substantial part of it.

Further, Article 3(2) provides that the CP shall not apply to matters falling within the respective jurisdiction of the national competition authorities. Under Article 3(3), the CP states that, pursuant to Article 19 of the AfCFTA Agreement, where there is a conflict between the provisions of the CP and regional competition laws, the provisions of the CP shall prevail. A cursory reading of the provisions of the scope of application is impressive and very progressive. However, a detailed examination may reveal some issues.

That the CP appears to limit itself to conduct with a continental dimension is very progressive. The promulgation of laws should be done to address an identified problem. Therefore, it is evident that the CP has been promulgated to address the insufficiency of national and regional laws to address anti-competitive conduct whose effects are manifest in the entire continent. National and regional laws would have jurisdictional limitations to effectively curb anti-competitive effects beyond the boundaries of their countries or regions respectively. In an economic setting such as AfCFTA, such a situation may result in difficulties in realising an integrated market, as undertakings may find safe havens to implement their anti-competitive conduct by taking advantage of ineffective laws and implementation thereof and lack of competition laws in some countries and regions. The outcome of this would be a fragmented African market that AfCFTA seeks to overcome.

The CP is also mindful when it provides in Article 3(2) that it shall not apply to matters falling within the jurisdiction of national competition authorities. This provision is intended to embrace the principle of subsidiarity, where the best-placed competition authority is left to handle a competition matter. It is incontrovertible that national competition authorities would be best placed to handle matters that are national in nature as they would best understand those markets and would not be put in a position that may seemingly imply that the CP is usurping their jurisdiction. The objective of developing supra-national competition laws is not to usurp the jurisdiction of other authorities but to develop complementarities in order to effectively address anti-competitive conduct. The CP appears to have appreciated this matter very well.

It is also noteworthy that Africa has a number of RECs with overlapping membership. This situation makes it difficult to effectively implement programs, including supranational competition enforcement. For example, COMESA is the largest REC on the continent with 21 member states. However, some of those member states are also members of the East African Community (EAC) and the Southern African Development Community (SADC).[11] The situation is the same in the case of the Economic Commission for West African States (ECOWAS) and West Africa Economic and Monetary Union (WAEMU), where almost all the members of WAEMU are members of ECOWAS. Some of the RECs do not even have fully functional competition authorities. It does appear that COMESA is the only regional economic block that has a fully functional regional competition authority. The other regional competition authorities appear not to be fully operational yet due to a number of reasons,

11 It should be noted that while the EAC has a supranational enforcement institution on competition matters, SADC does not. SADC emphasises cooperation on competition matters among its member states.

among them being sovereignty matters, lack of political will, lack of financial and human resources, inherent lacunae in procedural and substantive law, and a poor competition culture.[12] The CP has therefore come in to fill this gap and eliminate the problem of overlapping membership, which may be a hindrance to effective supranational competition law enforcement. Among the fundamental objectives of the AfCFTA pursuant to which the CP has been enacted is the elimination of the problem of overlapping membership.

The CP also provides in its scope of application that it shall focus on matters of continental significance. This is very important so that it does not find itself bogged down on matters of little or no continental significance. It will be important that resources are channelled towards more important issues like detection and investigation of cartels of continental magnitude, building the capacity of national and regional competition authorities, raising sensitisation to various stakeholders on the negative effects of anti-competitive conduct by undertakings and the benefits arising from contestable markets, and research on competition matters that affect Africa, among other things. There are only a few cases that could be considered to be of continental significance, and these are the cases AfCFTA should focus on. Scholars like Eleanor Fox have argued that cases like the merger between Lafarge and Holcim in 2015 and Bayer and Monsanto in 2018[13] are among the cases that had continental significance, and that were not effectively addressed because of the absence of a continental competition regime in Africa.[14]

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12 Willard Mwemba, 'Do Supra-national Competition Authorities Resolve the Challenges of Cross-Border Merger Regulation in Developing and Emerging Economies? The Case of the Common Market for Eastern and Southern Africa' (Thesis Presented for the Award of the Degree of Doctor of Philosophy at the University of Cape Town, October, 2020) p 232.

13 It should be noted that it is difficult to conclude, in the absence of detailed research, that even these cases had a continental dimension. Due to disappointing levels of intra-African trade, it was not immediately clear at the time how to establish with absolute certainty how these two transactions would have raised significant competition concerns at continental level. Merger analysis is highly fact dependent and the definition of the relevant market that is central to the disposition of competition cases most likely resulted in a failure to establish continent-wide competition concerns. What was the case is that competition concerns were identified in specific regions and countries. This largely stemmed from the relevant market definition. For example, with regard to the *Lafarge/Holcim* transaction, the COMESA Competition Commission (CCC) identified concerns with respect to Mauritius and referred the matter to the Mauritian Competition Authority which approved the transaction subject to structural remedies. The fact that Africa is so diverse with different levels of economic development, language, culture and different legal systems means that in most cases, the relevant market may not be defined as continental.

14 Eleanor Fox, 'A Competition Law for Africa: Vision for AfCFTA' (CPI Columns Africa, 2022), p 3, see www.competitionpolicyinternational.com/wp-content/uploads/2022/10/Africa-Column-October-2022-Full.pdf accessed 29 September 2023.

While the enactment of the CP and its vision of contributing to the elimination of factors that are a hindrance to African integration is progressive and impressive, there are a number of factors that threaten the durability of this fabric. Once again, the beginning point is the CP. This article does not profess to review all the provisions of the CP but has liberally only looked at those it deems relevant for the purposes of the inquiry herein.

A look at Article 3 of the CP once again reveals some concerns. For example, Article 3(3) of the CP provides that pursuant to Article 19 of the AfCFTA Agreement, where there is a conflict between the provisions of the CP and regional competition laws, the provisions of the CP shall prevail. This is important because such conflicts cause uncertainty in the market, especially to the undertakings that are generally subject to the CP. Since the CP covers the entire continent, it is rational that where there is a conflict between the CP and the regional competition laws, the former should prevail. However, the concern here is that the scope of application of the CP appears not to recognise the jurisdiction of regional competition authorities.

While in Article 3(2), the CP is express in providing that the Protocol shall not apply to matters falling within the respective jurisdiction of the national competition authorities, there is no similar provision referring to regional competition authorities. It does appear that the CP does not expressly recognise the jurisdiction of the regional competition laws. It, however implicitly recognises this jurisdiction in Articles 15(g) and 20. Under Article 15(g), the CP provides that the functions of the competition authority established thereunder shall be among other things to cooperate with national and regional competition authorities. The implication of this is that the regional competition authorities shall remain, although their role is not immediately clear given the absence of any provision stating that the CP shall not apply to matters falling within the jurisdiction of regional competition authorities.

Further, Article 20(1) of the CP also suggests that the regional competition authorities shall play a role in this whole scheme of arrangements when it provides that the competition authorities of the regional economic communities shall maintain their jurisdiction as building blocks for an integrated competition provision. This is a very important provision which should have been put in the scope of application to reflect its significance. However, while Article 20(1) is significant, it is not immediately clear how the CP and the regional competition authorities will interact, given that the CP has conspicuously neglected to state that it shall not be applicable to matters falling within the jurisdiction of regional competition authorities. Solace may however be found in Article 20(2) of the CP, which provides an assurance that the Council of Ministers shall adopt future regulations and procedures to address the concurrent jurisdiction.

It will be important that regional competition authorities maintain their jurisdictions for an effective enforcement of the CP. The recognition of the RECs, both in the AfCFTA Agreement and the CP, is deliberate in underscoring their importance. The principle of preservation of the *acquis* is one of the cornerstones of AfCFTA as stated in Article 5 of the Agreement establishing AfCFTA. This means that AfCFTA and its programmes, among them the CP, shall be implemented on the basis of what the existing RECs have already agreed upon. While the problem of overlapping membership is evident, the immediate disregard of the regional competition authorities may lead to a gap whose effects may be larger than what the CP is attempting to address. A cautious and well-reasoned approach is vital. It is important to appreciate that countries within a certain REC are more integrated amongst themselves than with the rest of Africa. Therefore, it is expected that more competition concerns are expected to arise at REC level than at continental level. Using the principle of subsidiarity, the regional competition authorities and indeed the national competition authorities would be better placed to deal with these matters than the CP. The CP should therefore focus on developing the capacity of competition enforcement at national level and harmonising the approach at regional level as these are precursors to effective enforcement at continental level.

Article 3 is also silent on what would happen in the case of conflict between the provisions of the CP and those of the national competition legislation. This silence may raise problems with regard to which law should prevail in the case of conflict. The CP should have made it clear that in the case of conflict between the CP and national legislation, the CP shall take precedence.

Other factors that threaten the efficiency of the Continental Competition Protocol

While the article has so far focused on the CP and the challenges this may pose in its implementation, there are a number of other practical factors that are worth considering. The article does not attempt to exhaust all the factors but only points out those that it considers most important.

The geographic dispersion and size of Africa, and poor infrastructure

The immediate challenge to the implementation of the CP is the size of the African continent. Africa's total land area is approximately 30.37 million square kilometres.[15] This size presents a logistical nightmare for a centralised institution to effectively handle and address competition concerns arising in different parts

15 'Mapped: Visualising the True Size of Africa' (*Visual Capitalist*), see www.visualcapitalist.com/map-true-size-of-africa, accessed on 29 September 2023.

of the continent. It is also a well-known fact that the African continent's transport and communication infrastructure is gravely poor. Currently, there appear to be no meaningful investments in transboundary infrastructure. In fact, there hasn't been much enthusiasm since the attempted construction of a railway line from Cape to Cairo, that was initiated at the end of the 19th century.

Some anti-competitive conduct requires swift detection, investigation and prosecution to avoid the devastating and irreversible effects of their occurrence. This situation may also result in the delay of the disposition of cases thereby frustrating business and investments. With regard to those cases where statutory time limits will be imposed by the CP, suboptimal outcomes are expected as the focus would be to finalise the assessment of the competition concerns within time, not to effectively and comprehensively address the matter (which may be time-consuming given the tyranny of distance). A focus of AfCFTA therefore should also be to improve the transport and communication infrastructure. The other solution is to work closely with regional and national competition authorities in the quest to address the continental competition concerns timeously.

The volatile investment environment is also a challenge, given the immense capital needed to scale production in response to AfCFTA.[16] If AfCFTA and its attendant programs like the CP are to achieve their objectives, it will be important to invest in such infrastructure. Lack of infrastructure such as roads, railways and telecommunication contributes to the creation and entrenchment of dominant positions in given markets. It creates natural barriers to entry into given markets. Accordingly, the Continental Competition Authority's effectiveness in attaining its objective of promoting competition through encouraging entry or imports (which again is the objective of economic integration) would be greatly hampered.

The different levels of economic development among different countries

The countries in Africa are at different levels of economic development. This invariably results in these countries having different priorities. For those countries that are on the low end of economic development, competition law may not be a priority. This situation may be worrying in that effective supranational competition authorities are largely dependent on effective national competition authorities. AfCFTA should advocate for the development and strengthening of national competition enforcement, for it is central to the enforcement of competition law at continental level. Strong national competition authorities will also be helpful in resolving the challenges of a diverse and humungous continent identified above

16 Teniola T Tayo, 'The Road to Africa's Single Market: Progress so Far and Challenges for the Future' (Africa Policy Research Institute, March 2023), see https://afripoli.org/the-road-to-africas-single-market-progress-so-far-and-challenges-for-the-future accessed on 29 September 2023.

as they may feed their assessment into the continental competition assessment using their own resources.

Most African countries lack manufacturing bases, let alone value addition. They export raw materials that are processed in the global north. It is not expected that these raw materials would be traded among African countries that lack manufacturing capacity. Where trade is minimal, supranational competition enforcement is not effective and meaningful. The CP has been enacted to address competition matters that arise because of trade between member states. Therefore, enhanced trade between member states is a precursor to meaningful supranational competition enforcement. Of course, the argument that this may be a 'chicken and egg' scenario may be valid. It is sound to argue that the promulgation of the CP would contribute to enhanced trade on the continent. This article argues that the expansion of production and economic capacities should be undertaken simultaneously with the enforcement of the CP for optimal outcomes. Kasirim Nwuke has argued that the low level of intra-African trade reflects low levels of productive capacities in countries. Countries cannot trade without production.[17]

The political situation in African countries

The political instability in most African countries is cause for concern. There can be no dispute that such political turmoil has contributed to the lower-than-expected trade between African countries. It is difficult to trade with a country that is in a war zone and very few businesses are expected to establish themselves there. The enforcement of the CP, therefore, will be less effective where trade between member states is not meaningful, as argued above. AfCFTA, using other relevant organs under the AU, should work tirelessly to ensure that these conflicts are resolved as they have the potential to doom the effective implementation of the CP. It is also feared that, if these conflicts are not resolved in some parts of Africa, their ripple effects may be felt by frustrating continental competition enforcement even in regions that are stable, for it is the same tool that is intended to be applicable to the whole continent. It is for this reason that the article is advocating for the preservation of regional competition authorities that have already reached high levels of acceptance and may function well in their respective regions if the durability of the CP is threatened by instability in some parts of Africa.

17 Kasirim Nwuke, 'I Confess, I am an AfCFTA Sceptic' (*The Africa Report*, 15 February, 2022), www.theafricareport.com/176253/i-confess-i-am-an-afcfta-sceptic, accessed on 29 September 2023.

The colonial legacy

There is also a need to overcome the colonial legacy that has left the impression that trade can only be with the global north and not among the nations of the global south. This situation has also been exacerbated by the fact that most countries in the global south have little to offer with regard to trade, as their potential is only in raw materials and they lack the skills to engage in manufacturing and value addition (the foundations of contemporary trade). The desire by most African countries to compete with each other in forging trade agreements with the global north instead of among themselves has worsened the situation.

The risk of suboptimal outcomes

While the CP is expected to facilitate trade by getting rid of anti-competitive conduct, this could easily be frustrated if the systems of enforcement and cooperation among the three layers of enforcement (national, regional and continental) are not well coordinated. This implies the development of regulations that will address the identified gaps in the application of the Protocol. Failure to address the concerns could lead to suboptimal outcomes with the enforcement of competition law at continental level, and could also lead to the collapse of the existing systems of enforcement at national and regional level.

Conclusion

The CP is a tool that can be used to address the anti-competitive conduct of undertakings at continental level, resulting in competitive and innovative markets. However, efforts should be made to address the concerns identified in this article, otherwise the CP on its own cannot achieve the intended goals. Further, it is important that national and regional competition authorities are given more prominence in this scheme of arrangement, given the fact that they have over the years gained significant experience and achieved higher levels of integration in their respective regions.

The CP should be applied sparingly on matters that are continental in magnitude: anything short of this would not be a prudent use of resources and an effective way of addressing anti-competitive conduct on the continent. Its focus should be on enhancing the capacity of national and regional competition authorities, and raising awareness on the benefits of competition law enforcement on the continent.

The article therefore concludes that *there is a case for continental competition enforcement and that this is not just an overzealous endeavour*. However, it is notable that it is a very ambitious project that should consider carefully all the matters raised herein for it to achieve its objectives. It should also adopt an implementation

framework that is specific to Africa and avoid the temptation to 'copy and paste' from other jurisdictions. The challenges faced by the continent, among them those identified in this article, are not the same challenges identified in other jurisdictions. Therefore, careless copy-and-paste of competition law enforcement models from other jurisdictions may be fatal to the implementation of the CP.