

Competition: Why is it important for CFTA



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Outline

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CUTS work in Sub Saharan Africa

- Forwarding its agenda for better South-South cooperation: 3 offices in Africa – Lusaka (2000), Nairobi (2003), Accra (2013) & Resident Rep in Abuja (2013)
- Successfully applied ‘Triangular Cooperation’
- Greater space and opportunity for civil society’s engagement in trade, regulatory and development policy issues
- Contribute to reforming Competition & Consumer regimes across several S.S. African countries
- Capacity building of negotiators; improved information flow between capitals & Geneva (WTO issues)
- Sound working relations with national govts & regional authorities
- CSO network on Trade and Economic Policy issues
- Initiation of Africa Competition Forum

Trade and Competition

- Despite the failure by members of the WTO to negotiate a multilateral framework on competition policy, many regional trade agreements have binding international rules on competition law and policy
 - A 2005 OECD report identified competition policy-related provisions in 47 regional trade agreements.
- As African Union Trade Ministers finalise the formation of the African Continental Free Trade Area (CFTA) by 2017, it is critical for competition provisions to be fully embedded within the CFTA agreements
- Competition policy provisions provide clarity as well as serve as a safety-net against potential negative abuses of the CFTA by trans-national corporations
- Continental competition framework will enable African countries to control anticompetitive practices

Competition concerns from trade liberalisation (1/2)

- Opening up of borders has seen countries become susceptible to anti-competitive practices originating outside their national borders
- Increasing competition also gives incentives for anticompetitive tendencies as firms seek survival strategies
- Thus, trade liberalisation can be enjoyed only if state-constructed trade barriers are not substituted by other forms of private restrictive practices
- Cross-border competition concerns and vertical agreements that foreclose the market to create dominance become major concerns
- This calls for a Multilateral Competition Policy regime to adequately deal with such practices

Competition concerns from trade liberalisation (2/2)

- Trade liberalisation: national authorities are in a position to adequately control behaviour within their own markets
- However, regional issues go beyond the scope of national authorities
- Competition within the region can be managed if all member countries have expertise in competition law enforcement
- Cross border issues would require cooperation and complementary roles among the regulators in the different countries
- Opening up of borders need for an independent regional law and authority to deal with cross border concerns

Need: Continental competition policy framework

- A continental law ensures that there is only one basic law within which competition conduct affecting the region could be assessed.
- Country specific competition regimes may result in different approaches being undertaken for similar cases by national authorities even after the CFTA is in place
- Significant number of African countries do not have competition laws, which would make such countries prime targets for anticompetitive behaviour
- A continental law would also ensure similarity/harmonisation in approach across the countries
- Thus, the absence of a continental law has the potential to negate any gains from improved continental trade

Trade facilitation and role of MNCs

- Attraction of Multinational Corporations (MNCs) in developing countries is often a result of trade negotiations as well as incentives designed to attract FDI
- However, at times these arrangements often result in anticompetitive practices, especially if there is no competition policy oversight in the arrangements.
- Conduct of MNCs is often difficult to regulate as they are in some instances not physically present in countries where such practices are taking place
- In some cases, trade promotion initiatives in developing countries have ended up tolerating exclusive distribution arrangements, subjugating competition concerns to trade promotion interests in the process.
 - Lebanon which had to enact a legislation to protect such agreements.
 - Under the exclusive agency law, the government protected merchants and importers who are sole representatives of foreign-brand products, effectively granting them local monopolies.

MNCs conduct under the CTFA

- One area of concern is the type of distribution arrangements that the MNCs enter into with local distribution companies, which results in dominance.
- Domestic firms struggle to reproduce the infrastructure and means to compete effectively with the MNCs
- MNCs also find it difficult or more costly to set up shop in developing countries due to the poor ease of doing business and other structural bottlenecks
- MNCs prefer to use existing companies rather than setting up shop in order to exploit information and distribution networks.
- Thus, MNCs prefer to negotiate distribution agreements with the agents
 - Exclusive distribution agreements, just like other vertical agreements, are not *per se* anticompetitive
- However, there are cases when they are used by the parties to engage in abusive behaviour, with negative impacts on other competing firms as well as the consumers.

Examples- MNC Conduct in regional markets

- MNCs can acquire local manufacturing companies and then close them afterwards, supplying through agents in the same region
 - During a merger in the cement industry, the competition authorities of Zambia and Zimbabwe established that *Lafarge* had closed some of its cement plants acquired in other COMESA countries to control availability
- The distribution agents of MNCs may abuse sole distributorship.
 - In The Gambia, exclusive vertical distribution agreements existed between distribution agents and the firms they import from
 - They created distortions in the market; a wholesaler who is interested in buying sugar from the agent would be given a condition to buy rice from the importers
 - In Togo, RAMCO a leading appliances and electronics firm claimed an exclusive distribution agreement with LG in Togo and seized LG appliances from its competitors. The practice only stopped after the company failed to prove the existence of the exclusive contract in the courts and was ordered to pay damages.

The case of the East African Community

- The EAC can be used as an example to reflect two critical components within the CTFA context
 - Countries without competition laws are vulnerable to cross border competition issues
 - Only a multicountry competition law being effectively implemented can address the issues
- Currently, only two EAC countries, Kenya and Tanzania, have significant level of experience in handling competition issues
 - Burundi and Rwanda recently adopted competition laws and are yet to fully implement them. Uganda is yet to adopt a competition law
- The pace of competition reforms at regional level has been slower than the pace of regional integration
 - the EAC Competition Act was enacted in 2006 and its implementation has not been prioritised by member countries
- Newspaper reports have indicated some potential competition concerns in the EAC going unregulated due to lack of capacity
- Following examples highlight the conduct of MNCs in various sectors: breweries, cement, banking and mobile telecommunication

Breweries Sector

- Has a huge presence of MNCs in the EAC countries
- Global giants in the breweries sector such as SABMiller, Diageo and Heineken all have a presence in at least one of the EAC countries
 - Diageo controls East African Breweries Limited (EABL) with subsidiaries in Kenya (Kenya Breweries Ltd), Tanzania (Serengeti Breweries Ltd) and Uganda (Uganda Breweries Ltd).
 - Heineken owns Blarirwa in Rwanda, Brarudi in Burundi, Heineken Tanzania Limited, Heineken Uganda Limited and operates in Kenya through Heineken East Africa Import Company Limited.
- SABMiller owns Tanzania Breweries Ltd, Nile Breweries Ltd in Uganda, and Crown Beverages Ltd Kenya
- At least one of these has been found to be engaged in anticompetitive practices in South Africa, Tanzania, Kenya, EU while allegations have been levelled in Rwanda.

Cement Sector

- This Sector has subsidiary companies of MNCs with presence in more than one country in the EAC – like Lafarge, Holcim, Heidelberg and Dangote Cement.
- Holcim and Lafarge merged in April 2014 to create LafargeHolcim, whose impact is yet to be known
- In EAC, Lafarge operates through subsidiary companies in Kenya (Bamburi Cement), Uganda (Hima Cement) and Tanzania (Mbeya Tanzania Cement).
- In Tanzania, Heidelberg owns Tanzania Portland Cement and Holcim owns Tanga Cement Company.
 - The merger of Lafarge and Holcim is going to have a direct impact on the Tanzania market as they are two large producers merging as bigger entity
- Dangote Cement is a recent entrant, and reports indicate that it will set up two plants in Rwanda, three in Tanzania, one in Burundi and another in Uganda
- These players also have a rich history of competition law violation in other countries

Banking sector

- Regional integration has led to establishment of banks in all markets in EAC enjoying respectable profits from their cross-border holdings.
- Foreign-owned banks have a strong presence in the EAC banking sector, controlling a significant portion of the total assets of the banking sectors in Uganda (79%), Rwanda (54%), Tanzania (51%), Kenya (45%) and Burundi (41%).
- They have a natural advantage over local banks as they have access to lower cost financing from their parent companies
- High level of profits that banks enjoy are a result of wide gaps between the interest rates on deposits and loans
- Banks are alleged to be engaged in collusion due to similarities in bank charges, interest rates on loans and deposits
- In January 2014, the Competition Authority of Kenya was reported to have initiated a study into the Kenyan banking sector over such fears

Mobile telecoms market

- There are a number of service providers who have a presence in more than one EAC country – like Celtel, Safaricom and MTN
- The issue of roaming across the EAC countries has been an area of concern, with regional free-roaming zone arrangements being negotiated.
- Interactions among competitors are not always fair to competition without a regional competition authority to check.
- Example: In the mobile money transfer market, Airtel had reported to have lodged a complaint with the Competition Authority of Kenya complaining about Safaricom's conduct.
- The Competition Authority of Kenya was reported to be investigating the case as well as scrutinising the telecommunications market in general for possible abuses of dominance.

Examples Indicate

- *There is a need for common competition framework (policy and law) at the continental level, to harmonise the mandate for competition considerations on all member countries.*
- *This would lead to a robust mechanism of checks and balances to manage MNC conduct*

Conclusion

- The formation of the CFTA would be a milestone achievement in providing a framework for national and regional coordination in the trade arena
- The elimination of tariff and non-tariff barriers under the CFTA offers African countries an opportunity to improve industrial capacity
- However, the pace of the continental integration should not move faster than continental competition policy reforms
- There is need for competition provisions at the continent level to act as a major complement to the current efforts
- Failure to have such a safeguard can easily see the benefits from removal of state-constructed trade barriers being negated by anticompetitive practices from the private sector
- It is key that all critical stakeholders (government, private sector and civil society) ensure that the competition agenda is not overlooked during the CFTA discourse

Thank you!

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