COMPETITION LAW AND THE AFRICAN CONTINENTAL FREE TRADE AREA- WHY A HARMONISED COMPETITION REGIME IS ESSENTIAL TO AFRICA'S FREE TRADE AGENDA.

by

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ABSTRACT

This thesis tackles competition law in light of the African continent and the African Continental Free Trade Area (AfCFTA). Inspired by the AfCFTA, which aims to create a single market for goods and services across Africa, this thesis explores how Africa can utilise competition law to build a more competitive, robust and resilient market. It looks at the development of competition law from a national and regional perspective and proposes that Africa develop a harmonised competition regime under the AfCFTA regime. It explores how Africa can do so by examining the AfCFTA agreement and the AfCFTA draft Competition Protocol. It does a comparative analysis with the European Union, which has been able to achieve a harmonised competition regime founded on Articles 101 and 102 of the Treaty for the Functioning of the European Union. It argues that if Africa aims to protect and develop AfCFTA, it must embrace competition law at the heart of it, to protect its market against anti-competitive conduct, abuse of dominant positions, and collusions or combinations that will undermine its goal of developing a truly competitive market. It finishes by giving its conclusions of the current competition regime under AfCFTA and offers recommendations on how AfCFTA ought to proceed moving forward.

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ABBREVIATIONS

AfCFTA	African Continental Free Trade Area
ACJ	African Court of Justice
ACHPR	African Court on Human and People's Rights
ACJHR	African Court of Justice and Human Rights
AEC	African Economic Community
ACN	African Competition Network
COMESA	Common Market for Eastern and Southern Africa
CCC	COMESA Competition Commission
CJEU	Court of Justice of the European Union
CUE	Council of the European Union
CEMAC	Central African Economic and Monetary Union
DG COMP	Director General of Competition
EAC	East African Community
EACCA	East African Community Competition Authority
EAEC	European Atomic Energy Community
ECOWAS	Economic Community of West African States
ECN	European Competition Network
ERCA	ECOWAS Regional Competition Authority
EEC	European Economic Community
EEC (treaty)	Treaty Establishing the European Economic Community
ECSC	European Coal and Steel Community

ECOWAS	Economic Community of West African States
EU	European Union
EUC	European Commission
EUMR	European Union Merger Regulation
Euratom	European Atomic Energy Community
FTA	Free Trade Area
IGAD	Intergovernmental Authority on Development
NCA	National Competition Authority
OECD	Organization for Economic Cooperation and Development
RCA	Regional Competition Authority
REC	Regional Economic Community
RCR	Regional Competition Regime
RPM	Resale Price Maintenance
SACU	Southern African Customs Union
SADC	Southern African Development Community
TEC	Treaty Establishing the European Community
TFEU	Treaty for the functioning of the European Union
WAEMU	West African Economic and Monetary Union
UEP	European Union Parliament
UMA	Arab Maghreb Union
VBER	Vertical Block Exemption Regulation

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CHAPTER ONE: An Introduction to AfCFTA and the Regional Economic Communities.

1.0 Introduction

This thesis examines Africa's goal of developing an African Competition Regime under the African Continental Free Trade Area. It explores the diverse competition regimes in Africa under the various Regional Economic Communities (RECs) and whether Africa can develop one comprehensive regime to govern the continent. It further examines why Africa would require such a consolidated competition regime, its relationship with the competition regimes developed under the RECs and at the national level, and the aim of such a competition regime. It also addresses the question of African nations being members of more than one Regional Economic Community, the challenges and confusion this brings about, and whether having a harmonised competition regime would be able to tackle this challenge.

Finally, it also looks at the draft AfCFTA competition Protocol, how it has approached the issues raised above and whether or not it has effectively addressed them.

1.1 What is AfCFTA?

On 3rd January 2021, Africa began to trade under the African Continental Free Trade Area Agreement (AfCFTA). This agreement, adopted in March 2018 and enacted in 2019, aims to improve the African region's free trade, labour, resources, and capital flow. Intra-African trade currently accounts for only 15% of African trade[1], but in other areas, such as Europe, more than half is intra-regional trade. In addition, intra-African trade is primarily localised, as most countries only trade with those geographically close to them.[2] Most trade is also concentrated among the

[1] Intra-Africa trade: Facts and figures 2022 - tralac trade law centre, https://www.tralac.org/resources/infographic/16253-intra-africa-trade-facts-and-figures-2022.html (last visited May 6, 2024).
[2] AfCFTA a tralac guide 8th edition March 2022, https://www.tralac.org/images/E-books/afcfta-guide-8th-ed/AfCFTA-a-tralac-guide-8th-edition-March-2022.html#page=1 (last visited Dec 5, 2022).

Southern African Development Community (SADC) and the South African Customs Union (SACU) members.[3] Therefore, there is a long way to go and tremendous potential for growth.

The AfCFTA agreement has several benefits for the African continent. It aims to build a single market for goods and services and to promote the free movement of persons across Africa.[4] In terms of population, AfCFTA is the largest free trade area globally, with a population of about 1.4 billion people and a combined GDP of $3.4 trillion.[5] It opens the continent to African businesses, allowing them to find trade opportunities across Africa. It is expected to increase trade in new and existing products and add significant economic benefits for African countries, such as higher income from increased efficiency and productivity due to better resource allocation, higher cross-border investment flows, and technology transfers.

It also aims to eliminate tariffs on 90 per cent of goods and reduce barriers to trade in services, which could raise income by 7 per cent, or $450 billion, by 2035.[6] According to the World Bank, this will reduce the number of people living in extreme poverty by 30 million and those living in moderate poverty by 68 million.[7]

AfCFTA is also expected to significantly boost African trade, especially intraregional trade in manufacturing. By 2035, the volume of total exports is expected to grow by about 29 per cent, and intracontinental exports will increase by more than 81 per cent, while exports to non-African countries are expected to grow by 19 per cent. This would generate new opportunities for African manufacturers and workers.[8] Additionally, its realisation would provide more employment opportunities and better wages for unskilled workers and help to close the gender wage gap. There would also be an increase in the number of workers in the energy and agricultural industries.

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[3] *Id.*
[4] Treaty Establishing the African Economic Community, https://au.int/sites/default/files/treaties/37636-treaty-TREATY_ESTABLISHING_THE_AEC-compressed.pdf (last visited Sep 8, 2023).
[5] Section 4 Agreement Establishing the African Continental Free Trade Area | African Union, https://au.int/en/treaties/agreement-establishing-african-continental-free-trade-area (last visited Jan 9, 2021).
[6] Making the most of the African Continental Free Trade Area, WORLD BANK, https://www.worldbank.org/en/topic/trade/publication/free-trade-deal-boosts-africa-economic-development (last visited Nov 14, 2022).
[7] *Id.*
[8] MARYLA MALISZEWSKA, & MICHELE RUTA, *World Bank. The African Continental Free Trade Area: Economic and Distributional Effects.*, 138 (2020), https://openknowledge.worldbank.org/bitstream/handle/10986/34139/9781464815591.pdf.

The agreement has three phases. The first phase, which was completed, involved negotiations on trade in goods and trade in services. The second phase, which is still underway, entails negotiations on intellectual property rights, competition policy, and investment, while phase three tackles e-commerce and women and youth in trade.[9] The third phase, which was set to begin after the commencement of the second phase, is underway and is geared towards the negotiation of a Protocol on Women and Youth in Trade. The protocol is expected to focus on the role of women and youth as entrepreneurs, exporters, importers, and informal cross-border traders, and it would pave the way for national measures and policies to be aligned across state parties.[10]

This is an exciting prospect, but cross-border trade also creates the opportunity for cross-border anti-competitive behaviour. It could endanger the trade liberalisation process through the abuse of dominant position, formation of cartels, predatory behaviour to eliminate local competition and other anti-competitive practices. Therefore, competition rules are the heart of this liberalisation process because they will protect this free trade agreement and ensure it thrives.

Therefore, the negotiations on competition policy are of the essence in this research. Competition law is mentioned several times in the AfCFTA agreement as one of its significant factors, including Article 4, which states that state parties shall cooperate on investment, property rights, and competition policy and Article 6, which states that the agreement will cover trade in goods, services, investment, intellectual property rights and competition policy.[11]

This is significant given that competition has several benefits, such as a positive impact on economic growth, as it pushes businesses and industries to be more productive, creating room for them to grow and to be more competitive both locally and internationally. Furthermore, it promotes consumer welfare by generating more choices for consumers and pushing businesses to offer the best deals to them, thus protecting them from paying premiums for essential goods.[12] Despite these benefits, several African countries' markets are hampered by anti-competitive business practices

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[9] *Id.*

[10] Symposium Introduction: Protocol on Women and Youth in Trade - Unpacking "Inclusivity," AFRONOMICSLAW.ORG, https://www.afronomicslaw.org/category/analysis/symposium-introduction-protocol-women-and-youth-trade-unpacking-inclusivity (last visited Dec 20, 2023).

[11] African Continental Free Trade Area Agreement (AfCFTA) 2018.

[12] THE WORLD BANK GROUP. 2016. BREAKING DOWN BARRIERS: UNLOCKING AFRICA'S POTENTIAL THROUGH VIGOROUS COMPETITION POLICY., 142 (2016), https://documents.worldbank.org/en/publication/documents-reports/documentdetail/243171467232051787/breaking-down-barriers-unlocking-africas-potential-through-vigorous-competition-policy (last visited Nov 23, 2022).

and government actions that undermine healthy competition through policies, regulations, and procedures that bolster dominance.[13]

Given the scale of AfCFTA, it is clear that more than national and regional competition regimes will be needed to monitor anti-competitive practices across the continent. Thus, this thesis argues that Africa will require a harmonised competition regime to prevent anti-competitive practices across the AfCFTA and an authority to implement and enforce these laws. This thesis will, therefore, discuss the role competition law plays in the African continent, the potential benefits it can deliver in the context of AfCFTA, and why AfCFTA should implement a harmonised competition law in the second phase of their negotiations.

1.2 Why Harmonisation

In making a case for African Economic Integration, Reginald Green and Ann Seidman argued that no African state was sufficiently large economically to build a modern economy on its own.[14] Although Africa had the resources for industrialisation, it was divided into more than forty African territories, which hindered its growth. As a single united entity, Africa could provide markets large enough to support large-scale, efficient industrial complexes, but in its fragmented state, no African country could do so effectively. There was, therefore, a substantial reason for African economic Integration if Africa was going to achieve its goal of Economic Stability.[15]

On 29th April 1980, African Leaders met in Lagos, Nigeria, for the Lagos Summit. At this summit, the Lagos Plan of Action for the Economic Development of Africa, 1980-2000, was unanimously adopted.[16] The Lagos Plan of Action was the African Union's Economic blueprint for Africa's development strategy until 2000. The design was centred on the achievement of an economically integrated Africa. As part of this strategy for Africa's development, African Heads of State committed to setting up regional structures and strengthening existing ones to achieve an African

[13] *Id.*
[14] Kofi Ankomah, *Unity or Poverty? The Economics of Pan-Africanism by Reginale H.Green and Ann Seidman London, Penguin Books, 1968. Pp. 364. 7s. 6d.*, 7 J. MOD. AFR. STUD. 159 (1969).
[15] Kofi Ankomah, *Review of Unity or Poverty? The Economics of Pan-Africanism*, 7 J. MOD. AFR. STUD. 159 (1969).
[16] The Monrovia strategy and the Lagos plan of action for African development- Five years after, (1984), https://repository.uneca.org/handle/10855/21080 (last visited May 22, 2024).

Common Market.[17] Therefore, the Regional African Economic Communities (RECs) were seen as the building blocks for achieving the African Common Market. They were to serve as the blueprint for a larger African Economic Community, as it is here that the process of Economic Integration was to begin. In turn, the Common Market was the first step towards achieving an African Economic Community. The African Economic Community (AEC) envisioned six stages: the first was strengthening Regional Economic Communities and establishing new ones in regions where none existed. This would be followed by the stabilisation of Tariff and Non-Tariff barriers, customs duties, and other internal taxes at the regional level and the establishment of a Common Market through the adoption of a standard policy in sectors such as agriculture, industry, and research in science, the harmonization of financial and fiscal policies. It would then culminate in the sixth stage, which involves the strengthening and unification of the African Common Market's framework via the unrestricted flow of goods, people, and services; the Integration of the political, cultural, economic, and social sectors; the establishment of an economic and monetary union and the harmonisation and coordination of the activities of the RECs.[18]

Given that the larger goal pursued by Africa is not merely that of a Free Trade Area but an economically integrated Continent, it only makes sense that Africa should have one competition regime that would govern the activities of the AfCFTA. We already have Regional Competition Authorities such as the WAEMU Competition Commission, the COMESA Competition Commission, and the ECOWAS Regional Competition Authority. All of these commissions have different approaches to regional Integration, but the COMESA Competition Commission specifically aims to help harmonise competition policy within its member states so that there is uniformity of application and interpretation of competition law within the Common Market.[19]

Harmonisation would, therefore, involve making a competition policy that all African States would accede to. There would also be a central Competition Authority that would oversee competition policy on the continent and ensure uniform application. This, however, does not mean that the National Competition Authorities (NCAs) and Regional Competition Authorities (RCAs) would

[17] Lagos Plan of Action for the Economic Development of Africa, 99, https://www.resakss.org/sites/default/files/OAU%201980%20Lagos%20Plan%20of%20Action%20for%20the%20Economic%20Development%20of%20Africa.pdf (last visited Jan 18, 2022).
[18] Treaty Establishing the African Economic Community, *supra* note 4.
[19] Regulations, COMESA COMPETITION COMMISSION (2014), https://www.comesacompetition.org/regulations/ (last visited Feb 2, 2022) Article 6(c).

be rendered irrelevant. They would still function, and states would implement and enforce competition policies within their territories. This is based on the principle of subsidiarity.[20]

The AfCFTA Competition Authority would ensure harmonisation and uniform application of competition law across the Free Trade Area (FTA). Thus, harmonisation will prevent differences in rules and implementation of competition law across Africa. It would provide certainty and lead to a coordinated approach towards competition violations. It would help promote investment within the African region as foreign companies looking to enter the market would have confidence in applying competition laws in Africa. Local market players would also benefit from this certainty.

At the same time, there would be respect for the national and regional authorities, which would still have their place. Not all competition law matters will be handled at the continental level. National and regional laws would still precede issues better addressed at their level. However, regional authorities might have to be limited to only a few recognised ones to avoid the challenge of multiple overlapping memberships.

Although this will come at the cost of African countries giving up part of their sovereignty, if Africa wants to achieve and take advantage of its economic Integration, it must harmonise its competition regulations. There are several regional competition models from which AfCFTA can borrow; however, the details of how will be discussed later in this thesis.

1.3 The Development of Competition in Africa

Competition law in Africa has long been slowly but steadily developing. Most African countries did not enact competition laws and policies within the first few years of their independence. Before the 1990s, only three African countries had enacted competition laws: Kenya, South Africa, and Gabon. The 1990s and 2000s, however, saw a rapid rise in the number of countries that enacted competition regimes; by 2020, 41 countries had adopted competition laws. Presently, the adoption of competition laws has transcended national regimes. Five regional competition regimes (RCRs)

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[20] The Principle of Subsidiarity is based on Article 5(3) of the Treaty on European Union (TEU) and Protocol (No 2) on the application of the principles of subsidiarity and proportionality. It is aimed to ensure that decisions are taken at the closest possible level to the citizen and that constant checks are made to ensure that an action at the EU level is justified in comparison to the solutions available at the local, national and regional levels. It means that provided an area does not fall within the exclusive jurisdiction of the EU, the EU will not take an action unless it is more effective than an action taken at the local, national or regional level.

with transnational competition rules have been developed by African nations, and two RCRs whose member states have followed a confederate model by establishing competition laws within their respective jurisdictions and committing to cooperation in enforcing competition law.[21] Lesotho, São Tomé and Príncipe, and Western Sahara (a disputed territory) are the only African countries with neither national nor regional competition regimes.[22] Africa has thus come quite a long way since the 1990s. Today, African countries can be divided into four categories:

- Those with a national competition authority as well as a national competition legislation.[23]
- Those with national competition legislation but no competition authority.[24]
- Those which do not have a national competition law but are subject to a regional competition regime.[25]
- And those which lack a national competition law and are also not part of any regional competition law.[26]

Presently, about 41 out of 54 countries have national competition laws in Africa, and out of these 41 countries, only nine do not have a functional competition authority.[27] However, 32 countries with active competition authorities greatly vary in their ability to effect and enforce their respective competition laws because most of them have been recently established, and they have yet to become very influential in implementing and enforcing competition laws.[28] In Ghana, a more robust competition framework must be enacted as it lacks a Competition Authority and is governed by an ineffective competition law in the Protection Against Unfair Competition Act 2001. The result is that big firms tend to dominate their market and abuse their dominant position. However,

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[21] The Spread of Competition Law and Policy in Africa | Afronomicslaw, 44, https://www.afronomicslaw.org/journal-file/spread-competition-law-and-policy-africa (last visited Jul 28, 2022).
[22] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21.
[23] These countries include Algeria, Angola, Botswana, Burkina Faso, Cameroon, Cape Verde, Egypt, Eswatini, Gabon, Ivory Coast, Kenya, Liberia, Malawi, Mauritius, Morocco, Mozambique, Namibia, Nigeria, Seychelles, Senegal, South Africa, Sudan, Tanzania, The Gambia, Tunisia, Togo, Zambia and Zimbabwe.
[24] These countries include Chad (a member of CEMAC) and Burundi (also subject to the regional competition regimes under the EAC, COMESA, and CEMAC).
[25] These include Benin, Djibouti, Eritrea, Equatorial Guinea, Guinea-Bissau, Libya, Sierra Leone, Somalia, South Sudan, Togo, The Republic of Congo, Uganda and Ghana.
[26] These countries include Lesotho, Western Sahara and São Tomé and Príncipe.
[27] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21 at 47.
[28] *Id.*

Ghana has a draft competition law called the Competition and Fair Trade Practices Bill, which has yet to be enacted in parliament.[29]

In Uganda, there is a competition bill, but Uganda has failed to enact it for over 18 years, and attempts by regulators such as the Uganda Competition Commission to regulate the telecommunications sector have proven to be futile.[30] Although Uganda is part of the EAC and is subject to the East African Community Competition Authority (EACCA) jurisdiction, the East African Community Competition Act only covers activities and sectors with a cross-border effect. Therefore, although a country may be under a regional competition regime, it must have its national laws and authority to implement and enforce competition at the national level.

1.4 Competition Law in Africa from a Regional Perspective

There are several Regional Economic Communities in Africa, most of which have a competition regime at the supranational level to promote competition within their respective markets. Currently, there are about five RECs that have adopted competition laws. These include the Central African Economic and Monetary Union (CEMAC), Economic Community for the West African States (ECOWAS), West African Economic and Monetary Union (WAEMU), Common Market for Eastern and Southern Africa (COMESA), and the East African Community (EAC).[31] Each of these regimes has adopted and implemented their regional competition laws uniquely, and they can serve as a model from which AfCFTA can borrow. The Organization for Economic Cooperation and Development (OECD) divides these Regional Competition Regimes (RERs) into four models:[32]

1. The "Regional referee" model in which the RCA has exclusive original jurisdiction over regional cases and handles investigations undertaken at the national level. It has the following characteristics:

[29] General | Ghana | Africa Competition Guide | Baker McKenzie Resource Hub, https://resourcehub.bakermckenzie.com/en/resources/africa-competition-guide/africa/ghana/topics/general (last visited Jan 10, 2023).
[30] Competition law body_0.pdf, https://www.ulrc.go.ug/sites/default/files/ulrc_resources/Competition%20law%20body_0.pdf (last visited Jan 10, 2023).
[31] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21.
[32] Cristina Volpin & Chris Pike, *Competition Concerns in Labour Markets*, (2019), https://papers.ssrn.com/abstract=3487666 (last visited May 22, 2024).

a. The competent NCAs conduct investigations into possible competition infringement, which have a regional dimension, but the RCA makes the final decision.
b. NCAs have exclusive original jurisdiction on national cases and
c. NCAs cannot enforce regional provisions.

There is yet to be an African Regional Competition Regime that fits this model.

2. The "Two-tier" model has two separate operating levels: for regional cases, the RCA has exclusive original jurisdiction, conducts the investigation, and decides on the case. In contrast, the NCA has exclusive original jurisdiction for national cases; it conducts the investigation and decides on the matter. It has the following characteristics:
a. The RCA investigates competition infringement from a regional dimension and decides at the regional level.
b. The competent NCAs decide National cases at the national level and
c. NCAs cannot enforce regional provisions.
3. The "Joint enforcement" model is where regional competition laws are applied in each case by national and regional authorities. This model has the following characteristics:
a. Investigations into competition infringements having a regional dimension can be conducted at the national level by the NCAs and at the regional level by the RCA. Mechanisms may be in place to allocate competence at the most appropriate level.
b. NCAs decide National competition cases at the national level;
c. NCAs and RCAs can (or must) enforce regional provisions.
4. The "One-tier" model", where the RCA investigates and decides national and regional competition cases, with the NCAs merely supporting. They have the following features:
a. The RCA conducts investigations into possible competition infringement with a regional dimension at the regional level.
b. The RCA decides national competition cases.
c. NCAs cannot enforce regional provisions.

I will analyse and discuss the various RECs present in Africa, their respective models, and how they can impact the direction AfCFTA will take.

In addition to these four models, we have the confederate model. The confederate model, also known as the voluntary, cooperative or soft law model, avoids creating a common competition law for the region. What occurs instead is that the members will commit to enforcing a competition regime at the national level and cooperate to implement these competition laws. In this case, the regional body merely provides the platform for cooperation and coordination.

1.4.1 The Confederate Model

1.4.1.1 SACU and SADC

In Southern Africa, we have the Southern Africa Customs Union (SACU) and the South Africa Development Community (SADC), which have followed a confederate model.[33] They do not fall into any of the categories listed by the OECD above. Article 2 of the SACU Agreement lists promoting fair competition in the common customs area as one of SACU's objectives.[34] Article 40 of the agreement requires each member state to adopt a competition policy and cooperate in enforcing competition laws and regulations.[35] Article 25 of the SADC 1996 Protocol on Trade adopts a similar wording by requiring its member states to implement measures within the community that prohibit unfair business practices and promote competition.[36] Although they lack a regional competition law, most SACU and SADC members adhered to the respective agreements by developing competition laws, except Lesotho, which has yet to enact any competition law.

1.4.2 The 'Two-tier" Model

1.4.2.1 The EAC

Within the East African region, we have the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA). However, COMESA does not fall under this model. The EAC comprises seven partner states: Kenya, Uganda, Tanzania, Burundi, Rwanda, South Sudan and the Democratic Republic of Congo (DRC). The EAC was initially established in 2000 as a Customs Union but later became a Common Market in 2010. In 2006, the EAC enacted the Competition Act, which pertains to all societal sectors and economic endeavours, so long as they have an impact across international borders.[37] It also established the East African Community

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[33] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21.
[34] Southern African Customs Union Agreement BETWEEN THE GOVERNMENTS OF THE REPUBLIC OF BOTSWANA, THE KINGDOM OF LESOTHO, THE REPUBLIC OF NAMIBIA, THE REPUBLIC OF SOUTH AFRICA AND THE KINGDOM OF SWAZILAND, (2002), https://wits.worldbank.org/GPTAD/PDF/archive/SACU.pdf (last visited Jan 30, 2023).
[35] *Id.* at 40.
[36] 1996 SADC Protocol on Trade, 25, https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Trade1996.pdf (last visited Jan 4, 2023).
[37] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21.

Competition Authority (EACCA), whose role *inter alia* is to investigate violations of the Competition Act, make decisions that are enforceable by law and apply penalties and remedies. The authority initially operated ad hoc during its first five years but took on a more permanent role later.[38] The Act is broad as it covers mergers and acquisitions, restrictive trade practices, abuse of market dominance, public procurement, and consumer welfare.

Under Article 44 of the EAC Competition Act, the EACCA has an exclusive original. Jurisdiction to determine competition law infringements under the Act and has also been given dominance in community-level competition disputes by imposing its legal decisions on member state NCAs and lower courts.[39] The partner states and their respective competition authorities are also obliged to enforce the decisions of the EACCA.[40] However, Within their borders, NCAs have exclusive jurisdiction over disputes involving competition. They are not obligated to apply the EAC competition law at the national level. Nonetheless, they must forward to the EACCA any matter or disagreement falling under the purview of the EAC Competition Act.[41] In the event of a dispute between the EACCA and an NCA or a National Court, the dispute is to be determined by the East African Court of Justice.[42] The EAC, therefore, has a "two-tier" model of application.

The EAC has faced circumstances similar to those faced by AfCFTA. It has an extremely diverse set of member states, some of which have fully functioning national competition regimes and authorities such as Kenya and Tanzania. On the other hand, Burundi and Rwanda have competition regimes but don't have operational competition authorities. The Ministry of Trade in Rwanda is in charge of enforcing the competition law in the interim. Although their parliaments are still considering drafts of competition laws, South Sudan and Uganda have not yet passed any. To add to this diversity, The memberships of Burundi, Kenya, Rwanda, Uganda, and South Sudan overlap with COMESA.[43] The challenges AfCFTA will face are thus not new or unfamiliar.

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[38] eac-competition-act-2006.pdf, 37, http://www.industrialization.go.ke/images/downloads/policies/eac-competition-act-2006.pdf (last visited Jan 4, 2023).
[39] *Id.* at 44.
[40] *Id.*
[41] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21.
[42] eac-competition-act-2006.pdf, *supra* note 38 at 44 (6).
[43] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21.

1.4.2.2 The Central African Economic and Monetary Union (CEMAC)

Six nations make up CEMAC, which was founded in 1994 and is composed of the following: Gabon, Equatorial Guinea, the Republic of the Congo, Cameroon, and the Central African Republic. CEMAC was founded on a treaty that excluded competition laws. However, the 1999 CEMAC Regulations on Anti-competitive Business Practices (modified in 2005) and the 1999 Regulations on Trade Practices Affecting Trade Between Member States established CEMAC's competition regime.[44]

The CEMAC regulations have a decentralised enforcement model and tackle anti-competitive agreements, abuse of dominance, mergers, and state aid. CEMAC falls under the "two-tier" paradigm, in cases involving regional competition, the RCA has exclusive regional jurisdiction, while in cases involving national competition, the NCAs have exclusive original jurisdiction. The NCAs cannot use provisions pertaining to regional competition in national matters.[45] Initially, CEMAC did not have a competition commission, and the Regional Council of Competition was responsible for implementing the 1999 Regulations. However, the 2005 Amendments gave the CEMAC Competition Commission this responsibility, but the Council kept some of its investigative and consultative roles, resulting in conflicts of jurisdiction within.[46] In 2019, the 2005 amendments were repealed by Regulation No. B/19-UEAC-639-CM-33 of 7 April 2019. The new Regulations provided clarity on the relationship between CEMAC and the NCAs.[47] According to the new regulations, any merger or acquisition involving two or more CEMAC member states shall be notified to the CEMAC authority. The regulations also amended the thresholds for notification of mergers to the CEMAC authority.[48]

1.4.2.3 The Economic Community of West African States (ECOWAS)

ECOWAS was established in 1975 and is made up of fifteen West African States: Cape Verde, Nigeria, Burkina Faso, Ghana, Côte d'Ivoire, Togo, Sierra Leone, Senegal, Niger, Mali, Liberia, Guinea, Guinea Bissau, Benin and The Gambia. The ECOWAS competition regime is based on

[44] *Id.* at 59.
[45] pdf.pdf, https://one.oecd.org/document/DAF/COMP/GF(2018)5/en/pdf (last visited Jan 11, 2023).
[46] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21 at 59.
[47] Africa-Competition_31.08.2021.pdf, https://bowmanslaw.com/wp-content/uploads/2021/09/Africa-Competition_31.08.2021.pdf (last visited Jan 11, 2023).
[48] competitioninafricareport16apr21_003_12211.pdf, https://www.bakermckenzie.com/-/media/files/insight/publications/2021/05/competitioninafricareport16apr21_003_12211.pdf (last visited Jan 11, 2023).

the 2008 ECOWAS Regional Competition Rules. The Competition Rules aimed at “promoting, encouraging and maintaining competition and enhancing economic efficiency in production, trade and commerce at the regional level.”[49] They were the result of the adoption in 2007 of the ECOWAS Regional Competition Policy Framework. The ECOWAS Competition Rules outlaw any anti-competitive business practices that hinder, restrict, or stifle regional competition. This includes state assistance that stifles or threatens to stifle competition in favor of particular businesses or the production of particular goods.[50] The ECOWAS Regional Competition Authority (ERCA) is the body assigned to implement and enforce the Community Competition Rules. It is responsible for investigating regional cases while the NCAs investigate national cases.[51] It can, however, request the support of NCAs where it sees fit. The ERCA's decisions are binding, and each government's national authorities are responsible for implementing these decisions.[52] It, therefore, falls under the "two-tier" model.

1.4.3 The "Joint-enforcement Model

1.4.3.1The Common Market for East and Southern Africa (COMESA)

COMESA has twenty-one member states: Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tunisia, Uganda, Zambia and Zimbabwe.[53] Article 55 of the COMESA treaty establishes the COMESA Competition Regime, which declares that it is forbidden to engage in any activity that interferes with the open and liberalized conduct of trade.[54] In 2004, the COMESA Council enacted the COMESA Competition Regulations to effect the provisions of Article 55 and bolster the well-being of consumers in the Common Market by

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[49] ECOWAS Regional Competition Policy Framework – ECOWAS Trade Information System(ECOTIS), https://ecotis.projects.ecowas.int/policy-development/ecowas-trade-competition-policy/ (last visited Jan 12, 2023).
[50] SUPPLEMENTARY ACT A/SA.1/12/08 ADOPTING COMMUNITY COMPETITION RULES AND THE MODALITIES OF THEIR APPLICATION WITHIN ECOWAS, https://ecotis.projects.ecowas.int/wp-content/uploads/2020/03/ASA.11208-SUPPL-ACT-adopting-COMMUNITY-COMPETITION-RULES.pdf (last visited May 23, 2024).
[51] European Commission, *REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES.*, 5 (2018), https://one.oecd.org/document/DAF/COMP/GF/WD(2018)8/en/pdf (last visited Jan 11, 2023).
[52] UNCTAD, *Economic Development in Africa: Reaping the Potential Benefits of the African Continental Free Trade Area for Inclusive Growth* (United Nations 2021).
[53] COMESA Members States – Common Market for Eastern and Southern Africa (COMESA), https://www.comesa.int/comesa-members-states/ (last visited Jan 11, 2023).
[54] To this end, the Member States agreed 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.

opposing trade practices and other barriers that hinder the smooth operation of markets and shield consumers from unfair behaviour by market participants.[55]

The Regulations defined the member nations' responsibilities, established the regional competition system with all of its institutions and rules, and made a distinction between the NCAs and the COMESA Competition Commission (CCC). The Regulations forbid any agreements among undertakings, decisions made by undertaking associations, and coordinated actions that could impact trade among Member States or which are targeted toward the prevention, restriction, or distortion of competition inside the Common Market.[56] Regarding merger control, the regulations establish a supranational regime for transactions where a party acquires a controlling stake in another party, and either one or both are members of the COMESA.[57] Regarding the relationship between the CCC and the NCAs, the CCC conducts investigations of cross-border anti-competitive cases but can cooperate with the NCAs where necessary.[58] Under rule 43 of the COMESA competition rules, the CCC can request the NCAs of member states to undertake investigations where it deems necessary.

Similarly, if the NCA requests, the officials of the CCC may assist those of the NCA in conducting such investigations.[59] Rule 40 of the COMESA Competition Rules outlines the cooperation process between the Commission and the Member States' competent authorities in establishing application and notification infringements and reaching decisions.[60] It additionally states that the competition authorities of the Member States should have the right to voice their opinions regarding the course of action adopted by the Commission.[61] As such, COMESA falls under the joint-enforcement model.

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[55] COMESA-Competition-Regulations-December-2004.pdf, 2, https://comesacourt.org/wp-content/uploads/2020/01/COMESA-Competition-Regulations-December-2004.pdf (last visited Jan 11, 2023).
[56] *Id.* at 16.
[57] COMESA Members States – Common Market for Eastern and Southern Africa (COMESA), *supra* note 53.
[58] Competition issues in labour markets - OECD, https://www.oecd.org/daf/competition/competition-concerns-in-labour-markets.htm (last visited May 22, 2024).
[59] Frank Montag, *The Case for a Reform of Regulation 17/62: Problems and Possible Solutions from a Practitioner's Point of View*, 36, 43 b.
[60] COMESA_Competition_Rules.pdf, 40, https://www.comesacompetition.org/wp-content/uploads/2014/04/COMESA_Competition_Rules.pdf (last visited Jan 12, 2023).
[61] *Id.*

1.4.4 One-Tier Regional State Model

1.4.4.1 The West African Economic and Monetary Union (WAEMU)

The West African Economic and Monetary Union (WAEMU) was established on 10th January 1994 through Dakar Treaty signed by seven West African franco-phone countries: Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal and Togo. Guinea-Bissau joined them on 2nd May 1997, bringing the total membership to eight.[62] WAEMU embedded competition provisions in Articles 88, 89 and 90 of its founding Treaty.[63] In 2002, WAEMU adopted its regional competition rules to implement the treaty's provisions, and these rules became operative in 2003.[64] The Department of the Regional Market Trade, Competition and Cooperation houses the Directorate of Competition, which was established by the WAEMU Commission in 2007 to act as the commission for WAEMU competitions.[65] The competition regulations of WAEMU forbid agreements, coalitions, or coordinated actions having the intention or result of limiting competition inside the Union.[66] The abuse of a dominant position on the common market or a sizable portion of it is likewise prohibited.[67] When it comes to mergers, the notification of mergers to the WAEMU Commission is not compulsory; nevertheless, in the event that a proposed merger raises concerns about the potential for abuse of a dominant position, the WAEMU Commission may order the merging parties to: (i) modify the transaction; (ii) take any necessary steps to ensure or re-establish sufficient competition; or (iii) not implement the transaction (if it has not yet been executed or closed).[68]

Article 90 of the WAEMU treaty tasks the WAEMU commission (under the supervision of the Court of Justice) to enforce competition law within the region.[69] Further, in Opinion No. 003/2000, the Court of Justice stated that Member States did not have the competence to regulate and monitor

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[62] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT VOLUNTARY PEER REVIEW OF COMPETITION POLICY: WEST AFRICAN ECONOMIC AND MONETARY UNION, BENIN AND SENEGAL OVERVIEW, 2, https://unctad.org/system/files/official-document/ditcclp20071overview_en.pdf (last visited Jan 12, 2023).
[63] WAEMU Treaty (1994) - Electronic Database of Investment Treaties (EDIT), https://edit.wti.org/app.php/document/show/57ce5bd9-ef38-4a1d-abd5-ed07f1f155bf (last visited Jan 12, 2023).
[64] The Spread of Competition Law and Policy in Africa | Afronomicslaw, *supra* note 21.
[65] *Id.*
[66] WAEMU Treaty (1994) - Electronic Database of Investment Treaties (EDIT), *supra* note 63 at 88 a.
[67] EDIT (n 51) art 88 b.
[68] Competition_10.5.2022.pdf, https://bowmanslaw.com/wp-content/uploads/2022/05/Competition_10.5.2022.pdf (last visited Jan 13, 2023).
[69] WAEMU Treaty (1994) - Electronic Database of Investment Treaties (EDIT), *supra* note 63 at 90.

competition. As such, only the commission can exercise any competence in competition.[70] The WAEMU Commission, however, must cooperate with the various NCAs per Directive n° 02/2002/cm/UEMOA. [71]Thus, WAEMU falls under the "one-tier" model.

AfCFTA thus has a bevvy of models from which it can develop its competition regime. The RECs appear to have achieved their objective of forming the foundational structure of a Continental Free Trade Area. The different relationships and challenges the RCAs have with the NCAs will be critical in the direction the AfCFTA will choose. In further chapters, I will continue my analysis to examine how other entities outside the continent have navigated this challenging path.

[70] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT VOLUNTARY PEER REVIEW OF COMPETITION POLICY: WEST AFRICAN ECONOMIC AND MONETARY UNION, BENIN AND SENEGAL OVERVIEW, *supra* note 62 at 11.

[71] Directive No. 02/2002/CM/UEMOA, (2002), https://www.dge.gouv.ci/sites/default/files/tableau/TEXTES%20COMMUNAUTAIRES%20CLASSSIFIES/UEMOA/DIRECTIVE/Directive%20n%C2%B002-2002%20relative%20Coop%C3%A9ration%20entre...pdf (last visited May 5, 2023).

CHAPTER 2: A Comparative Analysis with the European Union.

2.1 Introduction

In the first chapter, we discussed the AfCFTA, its goal of developing a competition regime, the reasons for creating a harmonised competition regime, and the challenges it faces in the harmonisation process. Finally, we discussed the different regional economic communities present in Africa and the various paths they had each taken to enforce competition law in their respective jurisdictions.

This chapter will broaden our outlook and examine how the European Union implements and enforces Competition Law. This is critical due to the European Union's success in implementing and enforcing competition laws. We shall conduct this comparative analysis to understand better the route AfCFTA should adopt in its competition enforcement.

2.2 The European Coal and Steel Community

To understand the history of competition law in Europe, we must look at the Robert Schuman Declaration of May 1950. The Schuman Declaration was a proposal by the French Foreign Minister Robert Schuman to create a European coal and steel community (ECSC)[72] in which the founding members of the ECSC (France, West Germany, Italy, the Netherlands, Belgium and Luxembourg) aimed to pool coal and steel production.[73] This was done to prevent the occurrence of future wars because European governments believed that pooling coal and steel production would avert war between the European nations, especially between Germany and France.[74] Therefore, the French and German steel production was to be assigned to one high authority inside a European Union wide organization.[75] The merging of economic interests was also meant to set up a common foundation for European development and serve as the first step in forming the European Federation and creating a more united and prosperous Europe.[76] Therefore, the ECSC served economic and political interests, with political interests being its core. It was the prototype

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[72] Schuman declaration May 1950 | European Union, https://european-union.europa.eu/principles-countries-history/history-eu/1945-59/schuman-declaration-may-1950_en (last visited May 4, 2023).
[73] *Id.*
[74] *Id.*
[75] *Id.*
[76] *Id.*

for European integration as it provided a platform to develop and test the cooperation between Western European countries.[77]

2.3 The Motivation Behind the ECSC

As I have discussed, at first glance, the Schuman plan appeared to be a purely political event driven by the political interest of European Unification; however, it was also driven by economic interest. This is evidenced by the challenges that Europe faced at the time, specifically that of post-war economic reconstruction and the dependence of Western Europe on the United States.[78]

At the end of WWII, the death toll in Europe was estimated to be 15.6 million soldiers and 19.5 million civilians. Germany and Great Britain had suffered the loss and damage of 7 million homes due to mass bombing, and by 1945, there were 50 million displaced and homeless persons across Europe.[79] Western Europe had also lost its dominant global political and economic position, and the Soviet Union and the United States had now taken over as the two dominant powers. This is because, whereas before the Second World War, Western Europe was at the centre of world trade, industrial activity, and international capital movement, it had completely lost that position by the end of the war.[80] This included Great Britain, which, although it was a Great Power, couldn't exercise its position without the aid of the United States.[81] This aid was facilitated through a lend-lease agreement between the US and its allies. The lend-lease agreement was a policy initiative by President Theodore Roosevelt, in which the US would lend rather than sell military supplies to any country that was an ally of the United States.[82] It was driven by Prime Minister Winston Churchill's appeal to the US for aid as Britain had exhausted its resources in its fight against Germany.[83] On the other hand, the US aimed to use the lending agreement to safeguard its security

[77] *Id.*
[78] Dietmar Petzina, Wolfgang F. Stolper & Michael Hudson, *The Origin of the European Coal and Steel Community: Economic Forces and Political Interests*, 137 Z. FÜR GESAMTE STAATSWISS. J. INSTITUTIONAL THEOR. ECON. 450, 451 (1981).
[79] ANDREAS STAAB, THE EUROPEAN UNION EXPLAINED: INSTITUTIONS, ACTORS, GLOBAL IMPACT (3 ed. 2013), https://www.jstor.org/stable/j.ctt16gz6r5 (last visited Aug 15, 2023).
[80] Petzina, Stolper, and Hudson, *supra* note 78 at 451.
[81] *Id.* at 452.
[82] Lend-Lease Act (1941), NATIONAL ARCHIVES (2021), https://www.archives.gov/milestone-documents/lend-lease-act (last visited Aug 11, 2023).
[83] The Lend-Lease Program, 1941-1945 - FDR Presidential Library & Museum, https://www.fdrlibrary.org/lend-lease (last visited Aug 11, 2023).

by buying time as it prepared itself for the war.[84] The US Congress thus passed the Lend-Lease Act on March 11, 1941, allowing the US to meet the United Kingdom's need for supplies whilst remaining neutral as it prepared for war.[85] Though lend-lease was authorised primarily to aid Britain, it was extended to China in April, and the Soviet Union in September, but British Commonwealth countries and the Soviet Union were the principal recipients of the aid.[86][87]

Thus, by the end of the Second World War, the US was a world power, and living standards had actually increased, with the US commanding an estimated two-thirds of the world's industrial capacity. By contrast, most of Europe was exhausted, and living standards had greatly declined.[88] Such was the economic position of Western Europe at the time. Western Europe, therefore, needed a drastic change if it were to ever regain its economic and political stature on the global arena.

2.3.1 The German Question

There was a major challenge to this, however. Europe was torn on how to handle Germany. The reason for this division was the fear that if Germany were allowed to industrialise, it would rise to attack the rest of Europe once again. This fear was held especially by France.[89] However, the economic recovery of Western Europe was going to be difficult to accomplish without an economically viable Germany, and this was the position held by nations such as Britain.[90] The question, therefore, was to what extent would German post-war industrialisation be allowed.

Germany had suffered the greatest damage from the Second World War than most European countries. Allied forces had attacked or bombarded large parts of the country, causing massive infrastructural damage. The city of Dresden, for example, was destroyed[91], and the population of

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[84] In the words of the US Secretary of War at the time, Henry L. Stimson "We are buying...not lending. We are buying our own security while we prepare. By our delay during the past six years, while Germany was preparing, we find ourselves unprepared and unarmed, facing a thoroughly prepared and armed potential enemy."
[85] The Lend-Lease Program, 1941-1945 - FDR Presidential Library & Museum, *supra* note 83.
[86] Lend-lease | Facts & Definition | Britannica, (2023), https://www.britannica.com/topic/lend-lease (last visited Aug 11, 2023).
[87] By the end of World War II, the United States would use it to provide a total of some $49.1 billion in aid (equal to $690 billion in 2020 dollars) to more than 30 nations around the Globe, such as Australia, Poland, Netherlands, France, Brazil, Peru and New Zealand among others.

[88] Petzina, Stolper, and Hudson, *supra* note 78.
[89] *Id.*
[90] *Id.*
[91] Dresden: The World War Two bombing 75 years on, BBC NEWS, Feb. 13, 2020, https://www.bbc.com/news/world-europe-51448486 (last visited Aug 14, 2023).

Cologne had dropped from 750,000 before the war to less than 32,000.[92] The industrial capacity of Germany was also completely destroyed, and their currency was completely worthless.[93][94] It was also burdened with the greatest social influx of displaced persons from the East. Makeshift shanty towns housed hundreds of thousands of these Germans whom the Soviet occupation of the Eastern Provinces had displaced.[95] Moreover, Germany lacked a central government that could begin a reconstruction policy immediately after the war. Germany was, therefore, at the hands of the allied powers who were left to decide its fate.

The Allied powers developed a policy of completely deindustrialising Germany to prevent the possibility of the Germans rising to attack the rest of Europe again.[96] This policy was adopted in Quebec in September 1944 during the Octagon Conference, also known as the Second Quebec Conference. The British, however, were opposed to this approach, fearing its economic implications would be the denial of Germany's contribution to the economic recovery of Europe and that, politically, it would serve to strengthen Soviet dominance.[97]

Due to the fear of Germany, several efforts were made to undermine and curtail their power and ensure that they would not be able to rebuild and start another war. It would, however, later be recognised that the recovery of Western Europe wouldn't be possible without an economically productive Germany. As such, Germany was eventually allowed to operate at an increased capacity of 70-75% of its 1938 level. All limitations on the production of consumer goods were also abolished.[98]

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[92] Robert A. Peterson, *Origins of the German Economic Miracle | Robert A. Peterson*, (1988), https://fee.org/articles/origins-of-the-german-economic-miracle/ (last visited Aug 14, 2023).
[93] *Id.*
[94] William H. Peterson, who was a member of the Allied occupation forces, described the scene this way: "German men and women, for the most part ragged, hollow-eyed, thin, for-lorn-looking, peddled what wealth had escaped the bombing and burning: silver, jewellery, Zeiss binoculars, Leica cameras, Meissen china (frequently chipped) and bric-a-brac including ashtrays, lamps, clocks, and cheap paintings—all at fancy prices. I saw a used commonplace alarm clock go for the equivalent of $85 in 1945 dollars." He goes on to recount how a carton of cigarettes retailed at $200, Mickey Mouse wristwatches which sold in the US for about $5.95, sold for $150, and Waltham watches, retailing in the US for around $16.95, went for $300.
[95] Peterson, *supra* note 92.
[96] Petzina, Stolper, and Hudson, *supra* note 78.
[97] *Id.*
[98] *Id.*

Therefore, Western Europe therefore went ahead with the plan of having an economically viable Germany so that Europe could recover from the damage it had suffered during the Second World War.

2.4 The Marshall Plan

The US responded to the state of the European continent in 1948 with a proposed reconstruction plan called the European Recovery Program (ERP). The ERP would later be known as the Marshall Plan. The Marshall Plan's aim was to provide any willing European nation, including the Soviet Union and the countries under its military occupation, with substantial financial aid to promote economic reconstruction and growth.[99] The US also used the Marshall Plan as a vehicle to prevent the spread of communist ideologies across Europe as it feared that the poverty, unemployment and other challenges brought about by WWII would push countries towards communist ideologies. [100]

Whereas the Soviet Union refused the aid and barred the Eastern European countries from receiving it, 16 other European countries, such as the UK, France, and West Germany, eventually participated in the program. [101]

Through the Marshall Plan, the US distribute more than $13 billion in economic aid over a four-year period in the form of food, staples, fuel and machinery shipments. It also began offering aid through investments in industrial capacity, which boosted the expansion and independence of the European economies. The aid helped to move the European countries away from communism by establishing free market-leaning and capitalist economic systems across Europe.[102]

This helped to stabilise the continent and form a transatlantic link towards the United States and away from the Soviet Union. It also brought cooperation among the European nations as part of the objectives stipulated was that Western European nations work together economically and politically to receive economic aid, thereby fostering European integration and reducing the likelihood of another war in the region. [103]

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[99] NICHOLAS HUDSON, *The European Coal and Steel Community: The Path Towards European Integration*, (2016), http://archives.pdx.edu/ds/psu/17370 (last visited Aug 15, 2023).
[100] STAAB, *supra* note 79.
[101] HUDSON, *supra* note 99.
[102] *Id.*
[103] Eline Poelmans, *Changes in the Structure of Coal and Steel Industries Under the ECSC (1952-1967): Was West Germany Kept "Small"? Winner of the James Soltow Award 2012*, 30 ESSAYS ECON. BUS. HIST. 5 (2012).

Ultimately, the Marshall Plan proved successful as the Western European countries receiving the aid experienced a rise in their gross national products of 15 to 25 per cent during this period. The plan contributed greatly to the rapid renewal of the Western European chemical, engineering, and steel industries.[104]

Beyond economic growth, the Martial Plan also facilitated the development of the Organisation for European Economic Cooperation (OEEC), which was later renamed the Organisation for European Economic Development (OECD). The OEEC was organised by the US to ensure the Marshall Plan aid was distributed effectively. It was also the first forum for the European Countries to attempt supranational economic integration. The OEEC gave European states their first dose of Economic cooperation through an institutionalised medium. This included the formation of the European Payments Union (EPU), which was created by the 18 member states of the OEEC to facilitate the convertibility of European currencies by determining exchange rates thought to represent the economic circumstances of each nation.[105] The EPU was critical in securing the complete stability of exchange rates and promoting free trade among member states.[106]

2.5 The Road to the ECSC

It was against the backdrop of a war-ravaged and economically disintegrated Europe that Robert Shuman presented the plan for deeper cooperation. As I have also previously pointed out, the ECSC's political aim was to prevent another war, especially between Germany and France. European nations were concerned about the German Coal and Steel Industry, which had previously been the predominant economic force in Europe. Western Germany, it was feared, still possessed the technological knowledge and experience to regain its pre-war position. Western European countries were, therefore, apprehensive about restoring Germany's economic independence.[107] The French, in particular, held this fear as the US intended to increase West Germany's ceiling for coal and steel production due to the rising tensions between the East and the West. There was also a shortage of steel in Europe that led the French to fear that the scarcity of steel in the European

[104] Marshall Plan | Summary & Significance | Britannica, (2023), https://www.britannica.com/event/Marshall-Plan (last visited Aug 15, 2023).
[105] The European Payments Union - Historical events in the European integration process (1945–2009), CVCE.EU BY UNI.LU, https://www.cvce.eu/en/education/unit-content/-/unit/02bb76df-d066-4c08-a58a-d4686a3e68ff/ab473e40-d7d8-419b-b507-ac6d7a7ffe76 (last visited Aug 15, 2023).
[106] *Id.*
[107] Poelmans, *supra* note 103.

Market would give the advantage to Germany, which had Europe's most well-established steel industry in Ruhr. Germany would, therefore, be able to assert its more dominant position in production and perhaps even be capable of rebuilding its military while preventing other European countries from rebuilding their industries and economies. As such, Monnet and Robert Schuman proposed a community of coal and steel which was to be between France, Germany, The Netherlands, Luxembourg, Italy and Belgium. This would ensure that France could at least retain access to raw materials necessary for its steel industry. On the other hand, West Germany wanted to gain more control of their land, industries and international image as they were tired of the control measures imposed upon them.[108]

To ensure smooth running and oversight over the community, the ECSC treaty established a High Authority which would be responsible for fulfilling the purposes stated in the treaty. The High Authority would supervise the market, monitor compliance with competition rules and ensure price transparency. It would be assisted by a consultative committee whose members were representatives of producers, workers, consumers and dealers.[109] It also established an Assembly, which was to have supervisory authority, thereby checking the powers of the High Commission; a Council of Ministers whose job it was to coordinate the High Authority's operations with the governments' overall economic policies; and finally, there was a Court of Justice which ensured the proper interpretation and implementation of the treaty.[110]

Ultimately, the ECSC established a common market that abolished all barriers to trade, such as import and export duties, limitations on the flow of steel and coal and other discriminative measures or practices and state assistance.[111]

2.6 The ECSC and Antitrust

Right from the onset, the European Coal and Steel Community (ECSC) aimed at combating anti-competitive practices. During the negotiations leading to the treaty, the French argued for and defended those provisions in the treaty, which made economic partnerships that impeded trade

[108] HUDSON, *supra* note 99 at 13.
[109] Treaty Establishing the European Coal and Steel Community, https://eur-lex.europa.eu/EN/legal-content/summary/treaty-establishing-the-european-coal-and-steel-community-ecsc-treaty.html (last visited Aug 16, 2023).
[110] *Id.*
[111] *Id.*

illegal. According to the French, the community aimed to increase production, as opposed to cartels, which aimed to control and decrease output.[112]

Additionally, one of the aims of the ECSC treaty was to ensure that all consumers who were in a similar position in the common market enjoyed the same access to the sources of production;[113] As such, restrictive trade practices geared toward the exploitation or division of the market were seen as incompatible with the treaty.[114]

Article 65 (1) of the ECSC Treaty prohibited "all agreements between undertakings, decisions by associations of undertakings and concerted practices tending directly or indirectly to prevent, restrict or distort regular competition within the common market, especially agreements aimed at fixing or determining prices, to limit or control production, technical development, or investment, to share markets, products, customers or sources of supply."[115]

The treaty, however, allowed the High Authority to exempt agreements to specialise in producing, selling, or buying certain products provided that led to better marketing and production of the products in question. The agreement doesn't give the enterprises the power to influence prices or to control or limit the production or marketing of a reasonable amount of the relevant products.[116]

Under Article 66 of the treaty, the High Authority was also tasked with entrusted with approving any transaction that would result in a concentration inside the borders of a member state of the European Community Security Council (ECSC) or a European state whose foreign affairs are taken over by a member state. The authorisation was only granted if the High Authority found that the transaction in question wouldn't confer upon the interested persons or enterprises the power to influence prices, control or restrain production or marketing or impair effective competition in a substantial part of the market.[117]

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[112] Hans A. Schmitt, *The European Coal and Steel Community: Operations of the First European Antitrust Law, 1952-1958*, 38 BUS. HIST. REV. 102 (1964).
[113] Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951), CVCE.EU BY UNI.LU 3(b) (2015), https://www.cvce.eu/en/obj/treaty_establishing_the_european_coal_and_steel_community_paris_18_april_1951-en-11a21305-941e-49d7-a171-ed5be548cd58.html (last visited Aug 16, 2023).
[114] Schmitt, *supra* note 112 at 105.
[115] EU/Competition - Antitrust/Article 65 of the ECSC Treaty, https://ec.europa.eu/competition/antitrust/legislation/art65_en.html (last visited May 6, 2023).
[116] Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951), *supra* note 113 at 65(2).
[117] *Id.* at 66.

However, the treaty's authority was limited to the territory of EU member states and the coal and steel industries and did not extend to other sectors. Article 80 of the treaty limited the definition of an enterprise to any enterprise that produced or distributed coal and steel within a member state's borders or in a European state whose foreign relations a member state has taken on.[118]

It is critical to note that the provisions of Article 65 of the ECSC treaty did not begin to apply immediately. Although Jean Monnett insisted that the old system, which cartels ran, was against the spirit of the Treaty, the Community had to allow a grace period for agreements that contradicted the ECSC's anti-trust provisions to be systematically and gradually ended. The High Authority, therefore, allowed these now illegal arrangements to operate until 31st August 1953.[119] However, this move to phase out cartels was hampered by a shortage of coal that forced the community to gradually accept cartels as temporary devices authorised under challenging times, provided they maintained a uniform and non-discriminatory supply of all customers. [120] The authorisation would expire when the difficult times were over, or the cartel violated non-discrimination rules.[121]

There were also other instances where cartel-like structures were allowed to operate. For example, an undertaking which would be outlawed under Section 65(1) could be allowed to operate under Article 65 (2). Section 65 (2) stipulates that businesses may agree among themselves for the High Authority to permit specialization in the production of certain goods or cooperative purchasing and selling of those products, provided that the joint purchasing and selling or specialization results in a significant improvement in the product's production, purchase, or sale.[122]

The application of Article 65(2) was seen when two French steel firms (Compagnie des Forges d'Audincourt and Socibt Lorraine Escaut) made a deal in which one would supply all special steels needed by the other to production transformers. Although such an agreement would be illegal under the wording of Article 65(1), the High Authority decided that the agreement was necessary as it led to a huge improvement in the manufacturing of the transformers and it approved the transaction.[123]

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[118] *Id.* at 80.
[119] Schmitt, *supra* note 112.
[120] Petzina, Stolper, and Hudson, *supra* note 78.
[121] *Id.*
[122] Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951), *supra* note 113.
[123] Schmitt, *supra* note 112.

The High Authority followed up this decision with several similar ones. For example, they permitted a concentration of several mining enterprises, seeing it as a more efficient and economical means of supply than separate marketing by each firm. They also made a similar decision in the Ruhr, where they allowed a group of three large sales companies to obtain the right to dispose of the output of the largest coal-producing area in Europe.[124]

The High Authority's decisions, thus, made it clear that Section 65(2) of the ECSC took precedence over Section 65(1) as long as such agreements constituted "substantial improvements" in sales and production and that these "substantial improvements" could not be brought about any other way.[125]

Other agreements also found a way past the provision of section 65(1). These were agreements whose volume of business and, therefore, the overall effect was so negligible as not to affect the competition within the ECSC's Common Market. For instance, the Groupement des Hauts Fourneaux et Acieries Belges, a Belgian group, was permitted to jointly purchase manganese because the quantities involved were small and the ingredient's effect on the final product's price was so small as to not affect the market's ability to compete.[126]

Export cartels also did not fall under the ambit of the ECSC treaty unless one could prove that they aimed at interfering with competition in the common market. Export cartels, however, did not include undertakings operating in one or more territories of a member state.[127]

The High Authority, however, did not always take a liberal line in its approach to cartels. On December 18, 1957, the authority held that France violated the ECSC treaty as its government was behind a cartel controlling coal imports. The Association Technique de l'Importation Charbonnibre (ATIC) was a monopoly under the French, which specialised in controlling coal imports. In 1956, the High Authority also found that the operations of ATIC were in contravention of the ECSC treaty.[128]

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124 JACQUES HOUSSIAUX, CONCURRENCE ET MARCHE COMMUN (1960).
125 *Id.*
126 Isay Rudolf, *Montan-Union Und Export-Kartelle*, III WIRTSCH. WETTBEW. 591 (1953).
127 Schmitt, *supra* note 112 at 111.
128 ECSC HA SEVENTH GENERAL REPORT, 172 (1959).

2.6.1 Did the High Authority Succeed in its Mandate?

The European Coal and Steel Community's founding treaty's articles 65 and 66 allowed the High Authority to take autonomous action to thwart restrictive agreements, regulate mergers, and even forbid them if required. It was not required to interact with other Community agencies prior to making any judgments and only the Court of the ECSC would accept appeals with no room being left for redress through national judicial systems.[129]

The challenge with these regulations is that they left the High Authority with a very heavy burden. The High Authority was primarily tasked with ensuring compliance with the competition laws and was generally in charge of overseeing the common market's smooth operation in the cartel sector. It created the regulations and pursued offenders in accordance with the treaty, thus performing the functions of legislature prosecutor and judge. The Community was compelled to carry out these numerous responsibilities under strict guidelines due to the nature of its fundamental instrument.[130]

What made it more challenging was that the pertinent treaty clauses did not undergo proper public participation process as is usually the case with parliamentary bills, and there was no parliamentary amending procedure because the Common Assembly lacked legislative authority. This meant that the Executive was completely bound by the treaty, and the only recourse in the event that these clauses proved to be ineffective or insufficient was a six-power accord that had to be confirmed by six parliaments.[131]

What the High Authority essentially succeeded in doing was dealing with two industries that had always been vulnerable to regulation and cartelisation. In discharging its functions, it had to weigh between curtailing Restrictive practices that had a negative effect on the market whilst allowing agreements which brought about the benefit of increased productivity. Therefore, the High Authority cannot be said to have leaned too heavily on either side by either being overly strict or lax on enforcement.[132]

[129] Fernand Spaaks, *Competition in the ECSC*, (1960).
[130] ECSC HA, *Report on the Fact Finding Mission to the United States . . . for the Purpose of Studying Anti-Trust Activities There*, 12 (1958).
[131] *Id.*
[132] Schmitt, *supra* note 112.

Critically, it succeeded in completely preventing the establishment of supranational cartels and monopolies, which were seen as the biggest threat to the successful functioning of the common market and capable of neutralising the power of the entire Community.[133]

2.7 Enforcement of Competition Law Under the EU's Current Regime.

Right from the onset, competition has been a big part of EU law. The Treaty Establishing the European Economic Union had as one of its primary goals the creation of a system that ensured that competition in the market was not distorted. The drafters saw EU competition law as an integral part of the treaty and, therefore, saw the need for strong centralised enforcement. The treaty, hence, assigned the task of enforcing competition law to the European Commission, herein referred to as the Commission. These general rules were supplemented by Regulation 17/62/EEC, which laid out the Commission's authority, listed the types of decisions it may make, named its investigative instruments, and established the parameters for levying fines. There were also introduced a number of important guidelines for collaboration between the EU Member States and the Commission.[134]

The Commission devised a practical enforcement mechanism under this architecture. Under Regulation 17/62/EEC, comfort letters were frequently used in enforcement to advise businesses on whether the agreements they were about to enter into may be judged anti-competitive. The Commission also made rulings to penalise cartels and abuses of dominance simultaneously. The Commission was the chief enforcer of EU competition laws, and the Member States' national competition authorities (NCAs) had a limited role. This enforcement mechanism was obviously centralised.[135] The commission's reach also appears to have an extraterritorial application as it made several decisions on infringement of competition law on undertakings not in the common market but whose actions affected the EU common market.[136]

The EU competition model is instructive as it has undergone two phases. As I have already stated, during the first phase of its enforcement competition, law enforcement was centralised as the

[133] *Id.*
[134] Maciej Bernatt & Laura Zoboli, *The Enforcement of Competition Law in the EU: A Critical Overview*, (2022), https://papers.ssrn.com/abstract=4309073 (last visited Aug 17, 2023).
[135] *Id.*
[136] A Ahlström Osakeyhtiö and others v Commission of the European Communities, (1993), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61985CJ0089%2801%29 (last visited Aug 18, 2023).

commission made all the decisions, and national competition authorities played more of a secondary role. Nonetheless, Regulation 1/2003 improved collaboration between the commission and NCAs and allowed NCAs and national courts to enforce all facets of EU competition law. Therefore, this thesis shall look at these two different regimes to better understand the path AfCFTA should follow in implementing its competition regime.

2.7.1 Regulation 1/2003

Council Regulation No.1/2003 came into force on 1 May 2004. It was a marked change in direction as it considerably changed the manner of enforcement of Articles 81 and 82 of the EC Treaty (Now Articles 101 and 102). Notably, it empowered national competition authorities and national courts to harness competition regulation in full.[137]

Previously, under Regulation 17/62, there was a centralised notification and authorisation system for article 101(3) of the TFEU. It meant that businesses *ex-ante* informed the Commission of all potentially anticompetitive arrangements to avoid any punishment.[138] This was superseded by Regulation 1/2003, which established an enforcement framework based on the full application of Articles 101 and 102 of the EC Treaty. As a result, it eliminated this mechanism and installed a decentralized ex-post enforcement structure whereby the European Commission, the courts, and the national competition authorities of the EU Member States jointly prosecute violations of Articles 101 and 102 TFEU.[139] Member states' National courts and NCA can also grant exceptions under Article 101(3).[140] There is, therefore, a system of parallel enforcement in which each competition authority is competent to conduct its own investigations and make decisions.

Key reasons were given for departing from the old *modus operandi*:

- The first is Resource efficacy; due to the European Commission's constrained resources, adding NCA resources enables much more resources to be devoted to identifying and punishing violations of Articles 101 and 102 TFEU.

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[137] Ailsa Sinclair, *Regulation 1/2003: How Has This Landmark Reform Worked in Practice?* (2009).
[138] European Commission, 'REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES.' <https://one.oecd.org/document/DAF/COMP/GF/WD(2018)8/en/pdf> accessed 19 August 2024.
[139] *Id.*
[140] COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A02003R0001-20090701 (last visited Aug 18, 2023).

- Second is Better case distribution: In situations where local, national, or regional markets are relevant, the NCAs involved are more informed than the Commission.
- The third reason is better enforcement: Multiple enforcement agencies increase the number of cases that can be evaluated and foster a dynamic environment of close cooperation to enforce competition laws.[141]

The link between Articles 101 and 102 of the treaty and national competition laws is outlined in Article 3 of the Regulation. Articles 101 and 102 of the treaty must be applied by competition authorities and courts in Member States to agreements or actions that may have an impact on trade between Member States. It also establishes a uniform evaluation criteria for agreements, coordinated actions, and decisions made by associations of undertakings.[142]

Additionally, it forbids national competition laws from limiting agreements that meet the requirements of Article 101(3) or that do not impede competition as defined by Article 101(1) of the Treaty.[143] Any agreements between undertakings or coordinated practices that do not impede competition, improve the production or distribution of goods, or advance technical or economic advancement while giving consumers a fair share of the benefits that result are excluded under Article 101(3) of the Treaty.[144]

Article 22 provides for the cooperation between the Competition Authorities of member states and the Commission. It allows National Competition Authorities to conduct investigations in their territories on behalf of another NCA or on behalf of another Commission.[145]

2.7.2 Framework for Cooperation Between NCAs and the Commission

To guarantee both an effective and consistent execution of EU competition laws and an effective division of labour, the same Regulation established the European Competition Network (ECN) as the new form of close cooperation between the Commission and the NCAs. The principles of

[141] European Commission, *supra* note 51.
[142] Sinclair, *supra* note 137.
[143] COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *supra* note 140 at 3.
[144] EUR-Lex HTML (EN), 81(3), https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:61985CJ0089(01) (last visited Aug 18, 2023).
[145] Andreas Resch, *Phases of Competition Policy in Europe* (2005), https://escholarship.org/uc/item/7wr2g49j (last visited May 16, 2023).

cooperation are outlined in Chapter IV of the Regulations. The rules outline four pillars upon which these cooperations shall stand.

The Commission and NCAs working together is the first pillar. The Commission is required to provide copies of the most significant documents it has gathered in its application of Articles 7, 8, 9, 10, and Article 29(1) of the Regulations to the competition authorities of the Member States as part of the cooperation process.[146] Secondly, NCAs must immediately inform the Commission when acting under Article 101 or Article 102 of the Treaty commencing the first formal investigative measure. Lastly, before making an enforcement decision, the NCAs must inform the Commission at least 30 days before the adoption of the decision. Therefore, the NCAs must provide the Commission with a summary of the case and the envisaged decision, and where they are yet to make a decision, they must provide other documents indicating the proposed course of action.[147] Additionally, that information can also be availed to the other NCAs.[148]

The second pillar is the exchange of information. The commission and the NCAs of member states have the power to exchange and use confidential information for the purposes of applying articles 101 and 102 of the treaty.[149]

The third pillar is the termination or suspension of proceedings. This means that the NCAs can terminate or reject proceedings if they find out that the complaint has already been received and is being handled by another member state or has already been dealt with.[150]

The fourth pillar is the Advisory Committee on Restrictive Practices and Dominant Positions. The Commission is required to consult with the Advisory Committee before making any decision on

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[146] Articles 7,8,9 and 10 provide for the steps the commission will take when it finds that there is an infringement of Art 101 and 102 of the TFEU. This may entail either requiring the undertakings to bring the infringements to an end, ordering any interim measures to be undertaken, or requiring the undertakings to make certain commitments, which may be made binding upon them, or the commission may find that Art 101 and 102 are not applicable to the agreement, concerted practice or decision by the undertakings, because the conditions under Article 101(10 have not been met or the conditions under Article 103(2) have been met. Article 29 provides for the withdrawal of exemption regulations by either the commission or a competition authority.

[147] COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, *supra* note 140 at 11.

[148] *Id.*

[149] *Id.* at 12.

[150] *Id.* at 13.

Articles 7, 8, 9, 10 and 29(1) of the Regulations. The advisory committee comprises the representatives of the NCAs of member states.[151]

Collaboration with National Courts is the fifth pillar. The National Courts of the member states collaborate with the Commission and NCAs in this regard. Therefore, national courts may request information or the Commission's opinion on the application of competition laws in order to consult with the Commission. Conversely, any written judgment rendered by the National Courts regarding the interpretation of Article 81 or Article 82 of the Treaty must be shared with the Commission.[152]

Lastly is the Uniform application of EU Competition law. National Courts cannot make a decision on Articles 101 and 102 of the treaty that is not aligned with the decisions that the Commission has made or that it is likely to make. In a similar vein, the NCAs of the Member States are unable to decide differently from the Commission regarding Articles 101 and 102 of the treaty.[153]

2.7.3 The Court of Justice for the European Union

The Court of Justice of the European Union was established in 1952 as part of the European Coal and Steel Community.[154] The Court was established in 1957 as a joint court for the European Economic Community (EEC) and the European Atomic Energy Community (EAEC), representing all three Communities.[155] The CJEU consists of the Court of Justice, General and Specialised Courts. It comprises 27 judges, each from an EU country, and has 11 Advocates General. The 27 judges will elect a President and a Vice-President from amongst themselves. The role of the President is to direct the court's work and to preside over hearings and discussions in the Grand Chamber before the entire court, and the Vice-President will usually step in to assist the President when necessary.[156]

[151] *Id.* at 14.
[152] *Id.* at 15.
[153] *Id.* at 16.
[154] Court_of_Justice.pdf, http://aei.pitt.edu/74891/1/Court_of_Justice.pdf (last visited Sep 7, 2023).
[155] *Id.*
[156] Presentation - Court of Justice of the European Union, CURIA, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/ (last visited Sep 7, 2023).

The Advocates General's work is to give an independent and impartial opinion on cases which are before the judges for determination. These opinions are not usually binding but are usually very instrumental in guiding the Court on its final determination.[157]

The Court is responsible for ensuring EU law is interpreted and applied uniformly and consistently in every European Country. As part of that mission, the Court of Justice of the European Union examines the legitimacy of the actions of the European Union institutions, makes sure that the Member States uphold their obligations under the Treaties, and, upon the request of the national courts and tribunals, it interprets European Union law. There is no appeal against a judgement from the court, and as such, its judgment is final.[158]

The court also enforces EU law, where it listens to cases brought against national governments for failing to comply with EU law. These cases can usually be instituted by another country or by the EU Commission. If the nation is found to be at fault, it has to rectify the error immediately or risk having a second case being brought against it and a fine being preferred against it.[159]

Appeals are typically filed at the Court of Justice, whereas disputes pertaining to competition are typically decided by the EU's General Court (previously the court of First Instance). Cases may, and occasionally must, be referred by national courts to the European court.[160]

The court also has the power to annul any EU Act that violates the EU treaties and fundamental rights. These requests can be brought to it by the government of a member state, the EU Commission, the Council of the EU (CUE), the European Parliament (EUP) or even a private citizen. [161]

It also ensures that the EUC, the CUE and the EUP take appropriate action and don't slack in any of their mandates. If any of these institutions fail to take the appropriate action required, a complaint may be brought against them other EU institutions or by a company or a private individual under certain circumstances.

157 *Id.*
158 Court_of_Justice.pdf, *supra* note 154.
159 Presentation - Court of Justice of the European Union, *supra* note 156.
160 Court_of_Justice.pdf, *supra* note 154.
161 Court of Justice of the European Union | European Union, https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/search-all-eu-institutions-and-bodies/court-justice-european-union-cjeu_en (last visited Sep 29, 2023).

Lastly, the CJEU has the power to sanction other EU institutions. This is where an act or omission by the EU or its staff harms the interests of an individual or a company.[162]

There are a number of things which this thesis sees as instructive especially when it comes to ensure the uniform application of laws across a wide territory.[163]

First, to ensure that the Court is powerful, the 1993 Treaty on European Union gave the ECJ power to 'impose a lump sum or penalty payment' on a Member State that didn't comply with a judgement. In July 2000, the CJEU in the *Commission v. Greece (C-387/97)* case, exercised this power by ordering the Hellenic Republic (Greece) to pay €24,600 for each day it delayed implementing an earlier judgement concerning waste disposal in Chania, Crete.[164]

Secondly, in 1964, in *Costa v. E.N.E.L*, the Court pronounced itself on the supremacy of community law by ruling that it took precedence over national law. It declared that domestic legal rules could not supersede community law due to its unique and original characteristics, since this would strip it of its status as Community law and raise doubts about the Community's legitimacy.[165]

Thirdly, we also have the 1991 decision in the *Andrea Francovich and Danila Bonifaci and others v. Italian Republic,* where the CJEU accorded individuals the ability, in certain situations, to seek compensation for harm if the State fails to promptly and correctly execute EC Directives.[166]

Fourth, we have the 1963 decision of *NV Algemene Transport- en Expeditie Onderneming van Gend2c & Loos v Netherlands Inland Revenue Administration (case 26/62),* wherein the court determined that EU legislation was directly applicable since it had the authority to create legal rights that could be enforced by both natural and legal persons before of Member State courts.[167]

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[162] *Id.*
[163] *Id.*
[164] EUR-Lex - 61997J0387 - EN, EUROPEAN COURT REPORTS 2000 PAGE I-05047;, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX%3A61997CJ0387 (last visited Sep 14, 2023).
[165] Flaminio Costa v ENEL, (1964), https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:61964CJ0006 (last visited Sep 14, 2023).
[166] EUR-Lex - 61990J0006 - EN, EUROPEAN COURT REPORTS 1991 PAGE I-05357; SWEDISH SPECIAL EDITION PAGE I-00435; FINNISH SPECIAL EDITION PAGE I-00467;, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?isOldUri=true&uri=CELEX%3A61990CJ0006 (last visited Sep 14, 2023).
[167] EUR-Lex - 61962J0026 - EN, EUROPEAN COURT REPORTS; FRENCH EDITION PAGE 00003; DUTCH EDITION PAGE 00003; GERMAN EDITION PAGE 00003; ITALIAN EDITION PAGE 00003; ENGLISH SPECIAL EDITION PAGE 00001; DANISH SPECIAL EDITION PAGE 00375; GREEK SPECIAL EDITION PAGE 00863; PORTUGUESE SPECIAL EDITION PAGE 00205; SPANISH SPECIAL EDITION PAGE 00333; SWEDISH SPECIAL EDITION PAGE 00161; FINNISH SPECIAL EDITION

These decisions, which emphasised and applied the supremacy of EU law, I argue, have been instrumental in the CJEU's role to ensure uniform application of EU law, and Africa can borrow from this. We, however, discuss how Africa can do so in the next chapter.

2.7.4 The European Commission

The European Commission is based in Brussels and is made up of 27 commissioners. Each EU member state nominates one commissioner, but the EU parliament must approve each one. The EU Commission has several functions, among which is to initiate legislation by making Legislation proposing laws for consideration by the European Parliament and Council of the European Union for approval. It also enforces EU law by sanctioning businesses or states that are failing to comply with EU law. It also manages policies and drafts budgets, and it represents the EU in negotiations with other countries or organisations.[168]

Regarding competition law, the European Commission's responsibility is to guarantee that EU competition regulations are correctly applied. Thus, it keeps an eye on anti-competitive agreements and, when needed, intervenes to prevent them, as well as mergers, acquisitions, abuses of dominant position by enterprises, and government backing. As a result, the Commission has extensive inspection and enforcement authority, including the ability to convene hearings, carry out investigations, and provide exemptions.[169]

2.7.5 The Treaty of Rome

The Treaty of Rome, also known as the Treaty Establishing the European Economic Community, comprised 6 countries: Belgium, Germany, France, Italy, Luxembourg and the Netherlands. Their goal was to use trade to promote economic growth and integration. As a result, they established a common market built on the unrestricted flow of capital, products, and people. The treaty was

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PAGE 00161;, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A61962CJ0026 (last visited Sep 19, 2023).

[168] Citizensinformation.ie, *European Commission*, https://www.citizensinformation.ie/en/government-in-ireland/european-government/eu-institutions/european-commission/ (last visited Sep 26, 2023).

[169] EU institutions and competition policy, https://competition-policy.ec.europa.eu/about/what-competition-policy/eu-institutions-and-competition-policy_en (last visited Sep 27, 2023).

signed in tandem with the treaty establishing the European Atomic Energy Community (Euratom).[170] The EEC and the common market had the common aim of:[171]

1. altering the trade and manufacturing environments within the borders of its six members
2. act as a first step toward a deeper European political integration.

To achieve these aims, the signatories had the following goals:[172]

i. To lay the groundwork for a closer relationship between Europeans.
ii. To guarantee the progress of their countries' economies and societies by cooperating to break down trade and other obstacles.
iii. To enable their citizens to have better living and working conditions.
iv. To guarantee balanced trade and fair competition.
v. To lessen social and economic divides between the different regions of the EEC
vi. To steadily remove trade barriers by implementing a unified trade strategy.
vii. To uphold the obligations enshrined in the UN charter.

2.7.6 The Treaty on the Functioning of the European Union.

The Treaty establishing the European Community (TEC or EC Treaty), as established by the Treaty of Maastricht, gave rise to the Treaty on the Functioning of the European Union (TFEU), which was created due to the Lisbon Treaty.[173] The EC Treaty was built upon the Treaty establishing the European Economic Community (EEC treaty), which was signed in Rome on March 25, 1957. The signing of the Treaty of Maastricht on February 7, 1992, which resulted in the creation of the European Union, marked a significant advancement toward the political unification of Europe. However, the European Union did not displace the European Communities but rather incorporated it under the same '3-pillar' structure:[174]

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[170] Treaty of Rome, https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-rome-eec.html (last visited Sep 7, 2023).
[171] Treaty of Rome (EEC) | EUR-Lex, https://eur-lex.europa.eu/EN/legal-content/summary/treaty-of-rome-eec.html (last visited May 2, 2024).
[172] *Id.*
[173] Treaty of Rome, *supra* note 170.
[174] Treaty of Rome (EEC) | EUR-Lex, *supra* note 171.

1. The European Communities (the EC, the European Coal and Steel Community (ECSC) until 2002, and Euratom) made up the first pillar.
2. The second pillar was made up of the coordination of EU foreign and security policy among member states.
3. Cooperation between EU nations in the areas of justice and home affairs was covered under the third pillar.

The articles are renumbered after every new treaty. The TEC was rebranded as the TFEU and the three pillars were combined to form the reformed EU by the Treaty of Lisbon, which was signed on December 13, 2007, and came into effect on December 1, 2009.[175]

2.7.7 The European Competition Network

This system of National Competition Authorities of member states, together with the Commission, is what forms the European Competition Network.

The Joint Statement of the Council and the Commission on the Functioning of the Network of Competition Authorities and the Commission Notice on Collaboration within the Network of Competition Authorities (ECN Notice) both outline the fundamental guidelines for how the ECN should operate.

The ECN ensures that the work on case investigations is divided up effectively. The ECN members have reached an agreement on flexible work-sharing procedures, including guidelines for case distribution that are not legally binding. The ECN Notice outlines the standards by which an ECN member is deemed qualified to handle a case. Neither Regulation 1/2003 nor the ECN Notice grants an undertaking any rights or expectations about which competition authority will handle its matter. However, according to the ECN Notice, a single NCA is best suited to deal with violations mainly within its territory. This changes when the violation spans the territory of when the agreements or practices span the territories of more than three member states. Where the agreement or practice spans the territory of two member states, the competition authorities can designate a

[175] *Id.*

lead authority between themselves. According to the DHL[176] and Pfleiderer case law [177], the ECN does not adopt rules binding on NCAs or national courts.

The European Competition Network (ECN) has evolved over time into various forums where its members can discuss a variety of topics at various levels, including the meeting of the heads of the European competition authorities, the so-called DGs' Meeting, the ECN Plenary, the meeting of the working groups of the ECN dealing with horizontal issues of a legal, economic, or procedural nature, as well as the meeting of the sectoral subgroups dealing with specific sectors. These fora are where productive debates, viewpoint exchanges, and the creation of consensus viewpoints and policies take place.[178]

2.7.8 Changes Brough about by the Implementation of Regulation 1/2003.

The enforcement of EU competition laws has significantly intensified since Regulation 1/2003 was put into effect. By the end of March 2009, the Commission and state competition authorities had taken legal action in over a thousand instances based on EU competition laws across a range of industries. By December 31, 2021, the NCAs had notified the Commission and other NCAs of 2515 investigations conducted under Articles 101 and 102 TFEU, and they were expecting final rulings in 1336 cases that would terminate violations, impose fines, or accept undertakings.[179]

Additionally, the Commission released 429 fresh investigations to the Network during the same time frame and passed 137 final decisions per TFEU Articles 101 and 102. By accepting more than 90% of all rulings, the national competition agencies have essentially become the main public enforcers of Articles 101 and 102 TFEU.[180] The network's enforcers have likewise had no trouble sharing work, and when there have occasionally been disagreements about case assignment, they have typically been settled quickly.[181]

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[176] Case C-428/14: Request for a preliminary ruling from the Consiglio di Stato (Italy) lodged on 18 September 2014 — DHL Express (Italy) srl, DHL Global Forwarding (Italy) SpA v Autorità Garante della Concorrenza e del Mercato, (2014), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62014CN0428 (last visited May 17, 2024).
[177] Pfleiderer AG v Bundeskartellamt, (2011), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62009CJ0360 (last visited Aug 19, 2023).
[178] European Commission, *European Competition Network (ECN) - Concurrences*, (2023), https://www.concurrences.com/en/dictionary/european-competition-network (last visited Aug 19, 2023).
[179] Wouter Wils, *Regulation 1/2003: An Assessment After Twenty Years*, CONCURR. REV. 0 (2022).
[180] *Id.*
[181] *Id.*

At the time of the introduction of Regulation 1/2003, the Commission was handling between 150 to 200 notification cases annually.[182] Therefore, a lot of its time and resources went into cases that didn't add any value to the enforcement of Articles 101 and 102 of the TFEU. The transition from a Commission-centric enforcement system to an NCA and National Court focussed one has thus been successful. NCAs and courts of member states which are better placed to respond to cases at the national level, have seamlessly taken over the role previously played by the commission, and the commission is now free to dedicate its resources to critical areas that require its attention.

2.8 Possible Changes to Regulation 1/2003

As already stated, Regulation 1/2003 and Regulation 773/2004 created a procedural framework to guarantee that Articles 101 and 102 of the Treaty on the Functioning of the European Union are applied consistently and effectively. When Regulation 1/2003 was adopted, it marked a momentous change in how EU antitrust laws were applied. Specifically, it strengthened the cooperation between the Commission and the NCAs, empowered Member States to apply all aspects of the rules, introduced a system of direct application of antitrust laws, and improved enforcement tools to enable the Commission to better identify and prosecute violations of EU antitrust laws.[183]

On 30th June 2022, the European Commission launched a call for evidence and a public consultation inviting feedback on the performance of EU Regulations 1/2003 and Regulation 773/2004 which give the procedures for the application of EU competition law.[184] They invited the public to give their feedback on whether these regulations should be supplemented or amended and how these changes could be effected. This initiative was driven by the fact that it had been almost twenty years since both these regulations had been introduced and since then a lot of changes had occurred in the markets they were regulating and whereas the Commission's enforcement action had done its best to adopt to the evolving markets and new technologies, the rules of procedure had remained unchanged.[185]

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182 *Id.*
183 Antitrust, EUROPEAN COMMISSION - EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_4194 (last visited Apr 3, 2024).
184 *Id.*
185 *Id.*

A number of changes have been proposed since then, among them is for the rules of procedure to become more inclusive by allowing Civil Society Organisations and the public at large to be part of the discussion on the enforcement of competition laws.[186] It was argued that the procedural rules laid out by both the aforementioned regulations required that only parties with a 'legitimate interest' or 'sufficient interests' had the legal ground/basis to intervene or take part in antitrust proceedings.[187] A number of regulations were pointed out. These include:[188]

- Regulation 1/2003, Article 7(2), which specifies that only member states and natural or legal entities with a "legitimate interest" are permitted to file a complaint.
- Article 5(1) of Regulation 773/2004, which restates that, for the purposes of Article 7 of Regulation 1/2003, only natural or legal persons who demonstrate a “legitimate interest” may file a complaint.
- Article 27(3) of Regulation 1/2003 states that, if it deems it appropriate, the EC may hear cases from natural or legal persons who demonstrate a "sufficient interest."
- Article 13(1) of Regulation 773/2004 states that, if a natural or legal person demonstrates a "sufficient interest," they may be given a hearing (except from those mentioned in Articles 5 and 11 of that Regulation).

To remedy this, it was proposed that the 'legitimate interest' concept be given a broader interpretation to include other people or groups with interests in the market of concern.[189]

Another recommendation was that antitrust procedures take too long, and as such, there is a need to accelerate antitrust investigations and decisions.[190] An example that was cited was the Rail Rolling Stock case[191] in which the commission took 6 years between the time it made inspections and the time it filed a Statement of Objection. Similarly, in the Google shopping case, it took nearly

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[186] 'Feedback from ARTICLE 19' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13431-EU-antitrust-procedural-rules-evaluation/F3347485_en> accessed 3 April 2024.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 19.
[190] BEUC THE EUROPEAN CONSUMER ORGANISATION, *EVALUATION OF THE FRAMEWORK FOR ANTITRUST ENFORCEMENT OF ARTICLES 101 AND 102 TFEU BEUC's Response to the Public Consultation in Relation to the Evaluation of Regulation 1/2003*, 06/10/2022.
[191] Commission sends Statement of Objections, EUROPEAN COMMISSION - EUROPEAN COMMISSION, https://ec.europa.eu/commission/presscorner/detail/en/IP_22_3585 (last visited Apr 3, 2024).

seven years between the beginning of the case and the Commission's decision and a further four years for the General Court's decision, which upheld the Commission's findings to be rendered.[192]

A similar concern is that digital issues require more modern rules and that the Commission is unable to react quickly enough to antitrust violations in the digital sphere. The blame for this does not lie on procedural law. Rather, it falls on the intricacy of novel technology and business models, the requirement for in-depth research, and the requirement for properly evaluating intricate defence pleadings. The intricacy of the facts and the scarcity of resources—rather than the rules—are the issues.[193] It has, however, been argued by some that the addition of more workers can be a better solution for the latter. In addition, the Digital Markets Act, which addresses issues in the platform economy, is being presented for "gatekeepers". Further tightening would be problematic for the rule of law given the numerous presumptions and shifts in the burden of proof in favour of the Commission that have already been adopted in antitrust legislation.[194]

A further recommendation is the amendment of Regulation 1/2003 to mandate that businesses wishing to resolve antitrust disputes through settlements or pledges include a system that provides compensation to consumers harmed by the relevant activity. This is due to private follow-on damages lawsuits not proving to be an effective means of providing compensation for consumers injured by violations of competition law.[195]

2.9 Conclusion

The European Union differs from the African Union in that it lacks several different Regional Economic Communities with varying systems of competition law enforcement. However, the European Union, just like the AU and AfCFTA, was formed with a similar vision, which is to open up the national markets to establish a more integrated regional economy, thus overcoming economic fragmentation along national borders. This was noted by Hallstein, the European

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[192] Johannes Persch, *Google Shopping: The General Court Takes Its Position*, KLUWER COMPETITION LAW BLOG (2021), https://competitionlawblog.kluwercompetitionlaw.com/2021/11/15/google-shopping-the-general-court-takes-its-position/ (last visited Apr 3, 2024).

[193] Arnecke Sibeth Dabelstein-Sebastian Jungermann, *20 Years on: Should EU Competition Law Be Amended?*, LEXOLOGY (2022), https://www.lexology.com/library/detail.aspx?g=933b5cf2-f81c-4435-8310-e68cc045e595 (last visited Apr 3, 2024).

[194] *Id.*

[195] THE EUROPEAN CONSUMER ORGANISATION, *supra* note 190.

Commission's first President, "the goal of 'the transformation of the market relations in the European Community whole was to build a new giant big enough in a world of giant powers."[196] Thus, beyond just the opening up of markets was the desire to compete at the global stage with other great powers such as the US. Similarly, beyond just opening up its market, Africa also has the desire to have a competitive market and to have a global voice, one which it cannot achieve through fragmentation but through a united and integrated front. Thus, EU competition law, particularly the integration of this law is instructive. This is the primary reason why we have laboured in investigating how EU competition law developed, the reason behind the EU choosing to create an integrated competition policy and how this competition policy currently functions.

The EU model is further instructive in two distinct ways. First, it has ran two different systems, one of a centralised method of enforcement and another which is more decentralised with the National Competition Authorities and Courts taking centre stage in the enforcement of competition law. It thus allows us to contrast between the two systems as we query into which is the best way to enforce a competition regime across Africa.

Additionally, beyond just economic integration, the European Union just like the African Union leaned on antitrust regulations to help rehabilitate its struggling economy. This is important as antitrust regulations especially when applied uniformly played a huge role in helping European economies bounce back from the ravages of the war. Whereas Africa is not looking rehabilitate a war-ravaged economy, it is looking to recover from the effects of colonialism and poor leadership and economic policies that have left it on its back foot. Many African economies are still in a poor state and Africa has been left behind by many of its contemporaries. Therefore, it is important for all African nations to embrace competition law to protect its consumer base, to foster economic growth and to promote and encourage innovation as the proper way to build market share. This cannot just be done at the national level or merely at the regional level but must be done on a continental scale for the effects to be widespread and sustainable.

As such, based on my study of EU competition law, it is evident that Africa needs a competition regime to which it adheres. Secondly, Africa needs a voice at the centre that will ensure that Africa's (AfCFTA) competition law is being uniformly applied and enforced. What has also

[196] COMPETITION FOR COMPETITIVENESS: The Politics of the Transformation of the EU Competition Regime, https://repository.ubn.ru.nl/bitstream/handle/2066/69011/69011.pdf (last visited Jan 10, 2024).

become clear to me is that given the sheer size of the African continent and the number of countries involved, a purely centralised method of enforcement could quickly overwhelm whichever body that will serve as the chief organ of competition law enforcement in Africa. Thus, it will be important to embrace a more decentralised model, similar to what the EU has come to embrace.

It is also clear that to achieve a uniform application of competition law across Africa, all African countries must be guided by the same competition law regime and must strive to have coherence in its application across the continent. We will, however, have a deeper look at this in the next chapter.

CHAPTER 3: The Competition Regime Under the Draft AfCFTA Protocol

3.1 Introduction

This thesis aims to discuss how Africa can achieve a harmonised competition policy under the African Continental Free Trade Area. In so doing, this thesis discussed in the first Chapter the African Continental Free Trade Area and the need for a harmonised competition policy to ensure uniform application of competition law across the African continent. The second chapter discusses the European Union and its path to economic integration, as well as a harmonised competition policy. Therefore, in this chapter, we will analyse the previous two chapters as we make a stronger case for a harmonised competition policy and look at how Africa has gone about harmonising its competition law regime under the AfCFTA through the Protocol on Competition Policy. We will discuss AfCFTA's Protocol on Competition Policy, the nature of the regime this protocol seeks to implement, and whether AfCFTA will achieve the goal of harmonising its competition regime under this Protocol. We will critique its regime and move on to suggest what would perhaps have been a better approach to the enforcement of competition law under AfCFTA.

3.2 The Challenges to Harmonisation

As previously discussed, the AfCFTA is an agreement that establishes a single market for goods and services, anchored on the movement of persons to intensify economic integration in the African Continent.[197] As we have seen with Europe, right from the onset, having an effective competition regime is critical to the fabric of any such integration and economic cooperation efforts. Given the vast and varied landscape in Africa regarding the enforcement of competition law, there is, therefore, the need to ensure a uniform application of competition law across the continent. If this is not accomplished, the African dream may die an early death as powerful companies from within and outside Africa may dominate the industries and the various sectors across the continent if they are not checked. There may also be an explosion of agreements and collisions across the continent as undertakings look to take advantage of the market.

However, to achieve this goal, Africa has several challenges to overcome. In our first chapter, we saw the varying levels of competition regimes in Africa. Some countries had a competition law

[197] Agreement Establishing the African Continental Free Trade Area, https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf (last visited Sep 6, 2023).

and an authority, and others lacked both, while others had a competition law in place but were yet to have an enforcement mechanism. This would make it difficult, for example, to have a system of enforcement such as the one adopted by the EU, where the NCAs and courts play a big part in the enforcement of competition law in the continent. There must, therefore, be the development of the necessary infrastructure to enforce competition law in Africa if the goal of harmonisation is to be achieved.

Africa also differs from Europe in the sense that it is a much larger continent with more countries involved in its fabric. Therefore, the harmonisation of laws faces a greater challenge as more countries have to be involved in the negotiation than Europe. Additionally, there is also the challenge of multiple overlapping memberships where several African countries are involved in multiple regional economic communities with varying competition regimes. To bring all of these competing REC legislations under one uniform umbrella will thus prove to be a great challenge as each has established its own way of operating.

In addition to these challenges, Africa also faces the following additional challenges[198]:

1. Lack of Institutional Capacity: Because competition law and policy are still a relatively new area in some countries, many African countries have yet to develop and begin to apply it effectively, and others, as we saw in the first chapter, are still lagging behind. They may, therefore, need guidance and help to set up proper competition enforcement structures and apply competition law effectively in their markets.
2. Lack of Political Support: having a harmonised competition law may involve giving up some sovereignty. It will involve accepting to fall under the AfCFTA Competition regime and Authority and other regional bodies and cooperating with other countries to combat anticompetitive conduct. Such regional bodies may not be tolerant of practices such as state aid, and governments may, therefore, have some reluctance in that regard as they may not always be able to run this as they used to.
3. Stakeholder Engagement and Consultation: developing a harmonized competition regime will involve a lot of consultation with many governments and other stakeholders such as companies and so on. It will be expensive and time-consuming to do so.

[198] ChatGPT, OPEN AI, https://chatgpt.com (last visited Jul 24, 2023).

4. Enforcement Challenges: because the African market is so wide and diverse (spanning 55 countries), it may be difficult to ensure uniform enforcement across such a wide market. A lot of cooperation and assistance as well as oversight from the AfCFTA competition authority will therefore be required to ensure uniform enforcement.
5. Cross-Border Issues: because the African market is so diverse, as we have stated, a lot of cooperation and expertise will be required, especially where there is a need for cross-border enforcement. This may not always be so easy to achieve due to lack of cooperation and different enforcement strategies and mechanisms which are there at the moment.
6. Data and Information Sharing: for there to be uniform enforcement mechanisms, data will have to be shared especially among the various competition authorities. Sharing such sensitive information may prove to be difficult, and it will require a lot of trust among the various competition authorities, which had previously not worked together.
7. Capacity Building: For there to be uniformity in harmonisation, there has to be a lot of training that will be done to ensure that the new regime is rolled out and adopted smoothly. This will be expensive in times of both time and money.
8. Resistance from powerful undertakings and cartels: because harmonisation involves casting a wider net to curb anticompetitive conduct, powerful undertakings and cartels may try to lobby against such a regime as it may threaten or harm their interests. They may thus try to stop the adoption of a harmonized competition law from the onset.
9. Harmonizing Penalties and Sanctions: Presently, especially at the regional level, we already have competition law mechanisms and methods of enforcement. To have a uniform voice, it will be necessary to harmonize the penalties and sanctions across various RECs, at least by adopting a minimum fine or penalty for anticompetitive conduct. This may not be easy to achieve as each of them already has its own established penalties and ways of dealing with anticompetitive conduct.

Addressing these challenges requires a collaborative approach, open dialogue, and a phased implementation strategy that considers the unique circumstances of each African country while striving for a more integrated and competitive continent.

However, whereas all these varying dynamics provide a challenge, they could also be an advantage. The RECs, for instance, have, for years, served as the blueprint of an integrated African continent. African countries are, therefore, not strangers to integration, nor are they new to such negotiations. The task of negotiations will be challenging, but there is the backdrop of experience from prior negotiations, which should serve as a good stepping stone. The fact that competition law has not been well developed in Africa may also prove to be an advantage as it means that developing a more harmonised regime may be easier to implement as not many countries may be resistant to the change due to their already well-established systems.

AfCFTA, therefore, faces some challenges, and we will discuss these at length as we look at how the AfCFTA agreement along with AfCFTA's Policy on Competition Policy, have gone about achieving a harmonised competition policy. Before we look at the Protocol on Competition Policy, however, let us first look at the AfCFTA Agreement.

3.3 How AfCFTA Proposes to Tackle the Challenges Presented.

One of the biggest challenges faced by the AfCFTA Competition regime is the varying regimes established under the different RECs. The AfCFTA agreement recognises the RECs as the building blocks towards establishing the Free Trade Area.[199] This aligns with the 1980 Lagos Plan of Action and the Treaty establishing the African Economic Community (Abuja Treaty). Given the number of Regional Economic Authorities, the first question we must ask is how AfCFTA will co-exist with all these other RECs simultaneously.

If there is a discrepancy between the AfCFTA agreement and another agreement, the AfCFTA agreement will take precedence to the degree of that particular discrepancy, according to Article 19 (1) of the agreement.[200] However, state Parties who are members of other RECs that have achieved higher degrees of integration among themselves than under the AFCFTA are required to maintain such higher levels of integration among themselves under article 19(2) of the agreement.[201] Additionally, Article 5 of the treaty gives the principles that will govern AfCFTA. These principles are that AfCFTA[202]:

a. Will be driven by Member States of the African Union.
b. The RECs' Free Trade Areas (FTAs) are building blocs for the AfCFTA.

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[199] Agreement Establishing the African Continental Free Trade Area | African Union, *supra* note 5 at 5 & the Preamble.
[200] *Id.* at 19(1).
[201] *Id.* at 19(2).
[202] Agreement Establishing the African Continental Free Trade Area, *supra* note 197 at 5.

c. Will be driven by the concept of variable geometry, meaning that African countries will be allowed to move at different speeds towards integration.
d. Will be driven by the principle of flexibility and special and differential treatment. This is similar to the benefits accorded to the Least Developed Countries (LDCs) that are members of the WTO.
e. Will be driven by transparency and the disclosure of information.
f. Will aim towards the preservation of the acquis.
g. Will be governed by the Most-Favoured-Nation (MFN) Treatment Principle, meaning that countries cannot discriminate between their trading partners or grant any of them special treatment.
h. Will be driven by substantial liberalisation, meaning the promotion of policies that encourage free trade, deregulation, elimination of subsidies, price controls and rationing systems, and, often, the downsizing or privatisation of public services.[203]
i. Will be governed by consensus in decision-making.
j. Will be built upon best practices in the RECs, in the State Parties and International Conventions binding the African Union.
k. National Treatment.
l. Will be governed by reciprocity.

What is of note here, however, is that AfCFTA will be member-driven, that the RECs are the building blocs and that it will be governed by the preservation of the acquis and the best practices of the RECs.[204]

The French word acquis translates to "that which has been agreed" in English.[205] The notion of acquis became part of Africa’s integration language in 2008 when the Heads of State of SADC, the EAC and COMESA agreed to form a unified trade regime in the form of the Tripartite Free Trade Area (TFTA), consisting of these three RECs.[206] These plans would, however, change, and in 2011, they decided that the RECs would continue to trade under their own trade regimes alongside the TFTA. Acquis was therefore adopted as a guiding principle of the TFTA. Regarding

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[203] Rethinking Poverty Report on the World Social Situation 2010, https://www.un.org/esa/socdev/rwss/docs/2010/chapter6.pdf (last visited Sep 6, 2023).
[204] The role of Negotiating Principles in the design of the AfCFTA - tralac trade law centre, https://www.tralac.org/blog/article/15746-the-role-of-negotiating-principles-in-the-design-of-the-afcfta.html (last visited Sep 6, 2023).
[205] Making the AfCFTA and the RECs work - tralac trade law centre, https://www.tralac.org/blog/article/15233-making-the-afcfta-and-the-recs-work.html (last visited Sep 4, 2023).
[206] *Id.*

the Tripartite Free Trade Agreement, this indicates that talks ought to start at the same time as trade talks with COMESA, the EAC, SADC, and other regional economic communities have reached a conclusion. Tariffs and trade concessions would be negotiated by Member/Partner States of the Tripartite FTA in order to safeguard and advance the acquis if they did not already have preferential agreements in place.[207]

Thus, whereas the AfCFTA agreement is supposed to have precedence over other agreements, it will, in certain instances, take a backseat to the RECs, especially where they have attained a higher level of integration. The AfCFTA agreement thus envisions a situation in which it coexists with other RECs rather than erases them. RECs that have their own regional integration agendas will pursue such plans in addition to other disciplines thought to be required for local requirements.

The challenge with this is that whereas the RECs are supposed to be the building blocks of AfCFTA, they may very well be the obstacle to AfCFTA's goal of creating a single market. This is because the RECs may serve as competitors to AfCFTA, especially when they have attained a higher level of integration. Member states of such RECs may thus feel more comfortable trading under the umbrella of their REC than under the AfCFTA, thereby undermining the goal of a single market and of continental integration.

Nevertheless, these principles of the preservation of acquis and the RECs serving as building blocs for AfCFTA are critical to the goal of having a harmonised competition policy in Africa. As we saw in the first chapter, there are several Regional Competition regimes in Africa, and each REC has, in its own way, attempted to have the initiatives that have led to adopting national competition laws and authorities in Africa. Africa, therefore, has the foundational pieces from which to build a harmonised competition regime. Under this model, there thus appears to a three-tier model of competition enforcement: at the national level, at the regional level and at the continental level. There can thus be a harmonised competition law that borrows from the already existing frameworks and best practices across the continent. What will be critical will be the uniformity of enforcement of these laws across the continent.

These same principles of the preservation of the acquis and the principle of variable geometry will be critical in tackling the challenge of lack of Institutional Capacity and that of uneven economic

[207] *Id.*

development. First, under the principle of variable geometry, African countries will be allowed to adopt their competition policies at varying speeds to give them sufficient room to adapt to the new regime. Also, the AfCFTA agreement does not propose to do away with the current regime to build upon it. This should make the transition to this new competition regime much easier.

Additionally, when it comes to uneven economic development, Competition law tends to improve market dynamics, making it easier for smaller competitors to compete and establish themselves in the market. This should open up the market space for smaller players, thus opening up the market for more players, creating more opportunities and better economic opportunities and growth for these smaller economies.

Having said that, AfCFTA already has a Protocol on Competition Policy that was adopted by the AU Assembly during its 36th Ordinary Session held from 18 to 19 February 2023 in Addis Ababa, Ethiopia. The Protocol will come into effect thirty days following the deposit of the 22nd instrument of Protocol ratification. Ratifying or joining the Protocol will only be possible for States Parties to the AfCFTA Agreement.[208] I will discuss this Protocol in the next Segment and how it further solves these problems that we anticipate.

3.4 The Protocol on Competition Policy

The Protocol on Competition Policy is part of the recently concluded Phase II protocols. Although the Protocol has been adopted, details of the Protocol are yet to be fully released. We, however, have the draft Protocol and other scholarly articles written about the Protocol, which I shall rely on to analyse the provisions of the Protocol.

One of the goals of the Protocol is to create a unified competition policy regime that will ensure that the benefits of trade liberalisation are not lost to anti-competitive conduct. Additionally, the competition regime it creates is designed to manage the confluence of sector-specific regulatory legislation and competition regimes at the national, regional, and continental levels.[209]

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[208] AfCFTA Protocol on Competition Policy: Factsheet - tralac trade law centre, https://www.tralac.org/resources/infographic/16150-afcfta-protocol-on-competition-policy-factsheet.html (last visited Oct 19, 2023).

[209] Harnessing Africa's free trade agenda – AfCFTA Protocol on Competition - Bowmans, (Sep. 26, 2023), https://bowmanslaw.com/insights/competition/harnessing-africas-free-trade-agenda-african-continental-free-trade-agreement-afcfta-protocol-on-competition/, https://bowmanslaw.com/insights/competition/harnessing-africas-free-trade-agenda-african-continental-free-trade-agreement-afcfta-protocol-on-competition/ (last visited Oct 5, 2023).

The Protocol applies to 'all the economic activities by persons or undertakings within or having a significant effect on competition in the AfCFTA Market' and 'conduct with continental dimension and having a significant effect on competition in the AfCFTA Market'. It thus does not purport to pronounce itself on competition matters that have a regional effect and whose competence would be under a regional competition authority. Additionally, the Protocol also does not apply to matters falling within the respective jurisdiction of the national competition authorities. However, where there is a conflict between the Protocol and a regional agreement, the Protocol takes precedence pursuant to Article 19 of the AfCFTA agreement.[210] Thus, the Protocol honoured the principle of preservation of the acquis under the AfCFTA agreement.

Under Article 12 of the draft AfCFTA Protocol, State Parties are given the following responsibilities[211]:

1. In one (1) of the working languages of the African Union, the Secretariat shall notify other State Parties of its laws, regulations, and any other commitments under an international agreement relating to any matter covered by the Protocol within six (6) months of the Protocol's entry into force.
2. To notify the Secretariat, in one (1) of the African Union working languages, of any new or amended laws, regulations and international commitments relating to matters covered by the Protocol within six (6) months after their entry into force.
3. To enact competition laws and establish competition enforcement bodies upon entry into force of this Protocol or their accession to the AfCFTA Agreement if they were yet to enact competition laws and have an enforcement body.
4. To designate a body as a focal point for implementing this Protocol.
5. To harmonise their competition laws to ensure consistency with this Protocol.
6. State Parties are entitled to control competitive practices within their borders, notwithstanding paragraph 5, and this Protocol acknowledges their ability to pursue justifiable policy goals.
7. To ensure that their respective competition laws adhere to the principles of transparency, independence and procedural fairness.

[210] AfCFTA Draft Protocol on Competition Policy, https://www.bilaterals.org/IMG/pdf/en_-_draft_afcfta_protocol_on_competition_policy.pdf (last visited Oct 5, 2023).
[211] *Id.*

Thus, whereas State Parties are required to endeavour to harmonise their national competition laws to ensure consistency with the Protocol, the Protocol also recognises the State's right to regulate competition practices within their territories and gives them the authority to enact competition laws better suited to their local needs.

Whereas the Protocol prohibition of anticompetitive practices mirrors that seen in both national and regional jurisdictions across Africa, it still needs to be fully clear how the Authority will implement its competition regime across Africa. For example, it does not specify market share thresholds that will determine the threshold of what will constitute dominance and the abuse of market power, nor does it give the procedure for the imposition of fines, penalties and so on. This will have to be determined by subsidiary legislation.[212]

3.4.1 Key Provisions of the AfCFTA Draft Protocol and Notable Differences with the TFEU

The draft Protocol includes several key provisions which are very similar to those found in the TFEU and numerous other RECs in Africa. It consists of the following Key Provisions[213]:

a. It prohibits any agreements between undertakings, decisions made by groups of undertakings, and coordinated actions taken by undertakings with the aim of preventing, limiting, or distorting competition in the market.
b. It also prohibits the abuse of a dominant position in the market by undertakings.
c. It prohibits any mergers or acquisitions that are likely to prevent, restrict or distort competition in the Market.
d. It also prohibits abuse of economic dependence, which is the exploitation of platforms' advantageous bargaining positions, which leads to supply-chain inefficiencies that harm trade and the goal of regional integration.[214]
e. The Protocol stipulates, among other prohibitions, that platforms may be designated as gatekeepers and are forbidden from self-preferencing or exploiting business user data to compete against the business user.

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[212] The AfCFTA holds more than economic Promises - tralac trade law centre, https://www.tralac.org/blog/article/15737-the-afcfta-holds-more-than-economic-promises.html (last visited Oct 18, 2023).
[213] AfCFTA Draft Protocol on Competition Policy, *supra* note 210.
[214] The AfCFTA holds more than economic Promises - tralac trade law centre, *supra* note 212.

f. It also prohibits restrictive horizontal practices such as price fixing, collusive tendering and bid-rigging, restraints on production quotas and so on.
g. It prohibits the use of minimum resale price maintenance and restrictive vertical business practices.

3.4.1.1 Vertical and Horizontal Practices

As stated above, these provisions bear similarities with Article 101 and 102 of the TFEU. However, unlike the TFEU, it divides the prohibited practices into prohibited vertical and prohibited horizontal practices. Among the prohibited horizontal practices is[215]:

i. agreements directly or indirectly fixing prices and trading conditions (similar to the provisions of Article 101 (1)(a) of the TFEU.
ii. Restraints on the production or sale including by quota or output restriction. This wording is similar to that of Article 101 (1)(b) of the TFEU with minor differences in that the TFEU does not limit its restriction to production but also includes technical developments and investment.
iii. Collusive tendering or bid rigging, which is not included in the TFEU, most likely because the tendering process is a big part of doing business in Africa.
iv. Agreements, which result in market or customer allocation, similar to Article l01 (1) (c) which prohibits agreements to share markets or sources of supply.
v. concerted refusal to purchase or supply which is not included in the TFEU; and
vi. collective denial of access to an arrangement, or association, which is crucial to competition (also not included in the TFEU).

When it comes to vertical integration, the Draft Protocol prohibits[216]:

i. The practice of minimum resale price maintenance.[217]
ii. Any Agreement, decision by associations of undertakings or concerted practice between undertakings in a vertical relationship restricting passive sales.

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[215] AfCFTA Draft Protocol on Competition Policy, *supra* note 210.
[216] *Id.* at 7.
[217] Resale price maintenance (RPM) is a vertical restraint by an upstream supplier that constrains the price at which a downstream firm, such as a retailer or distributor, can resell its products. RPM can be a price floor (min RPM), a price ceiling (max RPM), or a fixed price RPM. The challenge with RPMs is that they can reduce or eliminate intra-brand competition between resellers or clear the way for inter-brand collusion between suppliers.

iii. Any Agreement, decision by associations of undertakings or concerted practice between undertakings in a vertical relationship if it has the effect of distorting, preventing or restricting competition in the Market, unless a party to the Agreement, decision and/or concerted practice, can prove that any technological, efficiency or other pro-competitive, gain resulting from it outweighs that effect.

It's crucial to remember that a producer or supplier may be permitted to suggest to a reseller of a good or service the minimum resale price, provided that they explicitly state that the recommendation isn't legally enforceable and that, in the event that the product has a price listed, the words "recommended price" appear next to the listed price. [218]

Whereas Articles 101 and 102 of the TFEU do not expressly mention Resale Price Maintenance (RPM), RPM is considered a 'hardcore violation' of the TFEU.[219] A hardcore violation is a severe restriction that will likely restrict competition and harm consumers.[220] Therefore, agreements and concerted practices which aim either directly or indirectly to create a fixed or minimum price that distributors are to adhere to are, in principle, illegal.[221] In this regard, the draft Protocol on Competition and EU competition law agree.

In its judgement on 29th June 2023, the ECJ gave its judgment in *Super Bock Bebidas* (C-211/22)[222], where it stated that a hardcore violation under the Vertical Block Exemption Regulation (VBER) does not necessarily equate to a "by object"[223] infringement under EU competition law.[224] Determining the impact of Resale Price Maintenance on competition, therefore, requires taking into account the terms of the agreement, its goals, and the legal and

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[218] AfCFTA Draft Protocol on Competition Policy, *supra* note 210 at 7(2).
[219] Kennisbank -, BANNING ADVOCATEN, https://www.banning-legal.com/publication/eu-competition-rules-for-distibution-agreements-1-resale-price-maintenance/ (last visited Mar 26, 2024).
[220] Fox Williams LLP-Hannah McCullagh & Stephen Sidkin, *Resale Price Maintenance - Has the Position Changed?*, LEXOLOGY (2023), https://www.lexology.com/library/detail.aspx?g=0efdca74-2f69-4a80-87fe-5fdb23f46465 (last visited Mar 26, 2024).
[221] Kennisbank -, *supra* note 219.
[222] Super Bock Bebidas SA and Others v Autoridade da Concorrência, (2023), https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62022CJ0211 (last visited May 17, 2024).
[223] A "by object" infringement means that the agreement, from the outset, aimed to restrict competition. If an agreement is found to have aimed to have the restriction of competition as its object, that agreement will be held to be unlawful without any further analysis, meaning that it won't be necessary to prove that it has anticompetitive effects. It differs from a restriction of competition by effect violation in which undertakings do not aim to restrict competition, but the outcome of their agreement is the restriction of competition in that respective market. In such a case, an economic analysis will have to be done to determine the restrictive effect of the agreement.
[224] Super Bock Bebidas SA and Others v Autoridade da Concorrência, *supra* note 222.

economic framework in which it was formulated. It is only after such analysis that one can determine if the RPM is a "restriction of competition by object".[225]

Additionally, a firm can also argue that the RPM agreement had a positive/pro-competitive effect on the market. This is the position of US antitrust law, where the anti-competitive effects of a RPM are usually weighed against the pro-competitive effects to determine the lawfulness of the agreement.[226]

Article 7(4) of the draft AfCFTA protocol appears to be in line with these clauses because it exempts RPM agreements in cases where the parties to the agreement, decision, and/or concerted practice can show that the benefits of technology, efficiency, or pro-competitive behaviour outweigh the negative effects on the market.[227]

3.4.1.2 Abuse of Dominant Position

Regarding the abuse of a dominating position, the TFEU and the Protocol on Competition Policy are comparable in that they both forbid an undertaking or group of undertakings from abusing their positions to the extent that it interferes with trade between member states. It outlines seven criteria that businesses will be judged to be exploiting in order to limit or stifle competition in the market. These include conduct which[228]:

(i) Eliminates or restricts or is likely to eliminate or restrict any other undertaking(s) from the Market.
(ii) Directly or indirectly imposes unfair purchase or selling prices or other restrictive terms or conditions.
(iii) Sets prices below cost.
(iv) Limits the production of goods or services for the Market to the detriment of consumers.
(v) makes the conclusion of an Agreement subject to acceptance by another party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such Agreement.
(vi) refuses to give a competitor or customer access to an essential facility or input when it is economically feasible to do so.

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[225] McCullagh and Sidkin, *supra* note 220.
[226] *Id.*
[227] AfCFTA Draft Protocol on Competition Policy, *supra* note 210 at 7(4).
[228] *Id.* at 9(2).

(vii) Applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage.

On the other hand, Article 102 of the TFEU outlines abuse of dominant position as[229]:

a. Imposing unfair selling or buying prices or other unjust trading conditions, either directly or indirectly.
b. Restricting markets, production, or technological advancement in order to disadvantage customers.
c. Putting them at a competitive disadvantage by imposing different terms on comparable transactions with other trading parties.
d. Concluding agreements subject to the other parties' acceptance of additional duties that, by definition or in accordance with business use, have nothing to do with the topic of such agreements. Thus, the wording of the Protocol and the TFEU is quite similar, and they both seek to prohibit conduct of similar nature.

Regarding the definition of what a dominant position is, the ECJ gave the definition in *Case 2/76, United Brands Company and United Brands Continentaal BV v Commission of the European Communities,* where it was said that dominance is a financial standing that permits a business to act mostly independently of its competitors, clients, and ultimately consumers, so preventing the continuation of healthy competition on the relevant market.[230]

It is also possible for two or more independent economic entities to jointly have a dominant position in a certain market. It is referred to as collective (or joint or oligopolistic) domination in this context.[231] According to the Court's decision in *Gencor Ltd v Commission of the European Communities*[232], within a tight oligopoly[233], in which the market structure allows the firms to

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[229] CONSOLIDATED VERSION OF THE TREATY ON THE FUNCTIONING OF THE EUROPEAN UNION, 102, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12012E/TXT:en:PDF (last visited Mar 26, 2024).
[230] United Brands Company and United Brands Continentaal BV v Commission of the European Communities, (1978), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61976CJ0027 (last visited Mar 26, 2024).
[231] GLOSSARY OF TERMS USED IN EU COMPETITION POLICY: ANTITRUST AND CONTROL OF CONCENTRATIONS, (European Commission ed., 2002).
[232] Gencor Ltd v Commission of the European Communities, (1999), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61996TJ0102 (last visited Mar 26, 2024).
[233] An oligopoly is a market structure in which a small number of companies collectively control a significant portion of a particular market or industry. Even though the group is very powerful in the market, no single company

predict one another's actions, it is possible for the firms to be highly motivated to develop a symbiotic relationship in which they coordinate their behaviour in the market to limit production so that they can raise their prices and maximize their combined profits.

The draft protocol is yet to give its definition of what a dominance would entail but states that the determination for dominance in a market may be based on[234]:

a. A firm's market share, which will be determined through regulation and the level of Concentration in the market.
b. Market power considerations include barriers to entry, countervailing power, the degree of current or future competition in terms of the number of rivals, the capacity for production, the demand for the product, or the past competition and rivalry amongst rivals.

This approach is itself not very different from the EU's approach, as market share is also an integral part of determining market power. For example, a market share of between 50-70% is likely to be seen as a dominant position, whereas above 70% would usually be considered as a super dominant position and the EU Commission would usually require an undertaking in this position to be careful so as not to further weaken the market. Similarly, a firm may that enjoys a 40% market share may be considered to be dominant in a market where other 60% is being shared by other smaller players.[235] Thus, whereas it remains to be seen how AfCFTA will go about assessing what a dominant position is, the criteria it will use is quite similar to that of the EU competition law.

3.4.1.3 Mergers and Acquisitions.

Mergers and acquisitions fall within the scope of Article 10 of the draft protocol. The provisions of Article 10 apply to mergers and acquisitions, which have a continental dimension where[236]:

(i) (i) either one of the purchasing undertakings or the target undertakings, or both of them, participate directly or indirectly in the market.

is strong enough to overthrow the others or take market share. Because there is some level of competition, prices in this market are therefore moderate.

[234] AfCFTA Draft Protocol on Competition Policy, *supra* note 210 at 9(2).
[235] Paul Mcmahon, *Market Dominance*, A GUIDE TO BREXIT, http://brexitlegalguide.co.uk/market-dominance/ (last visited Mar 27, 2024).
[236] AfCFTA Draft Protocol on Competition Policy, *supra* note 210 at 10(1).

(ii) The total annual turnover and/or assets of the impacted undertakings equal or above the thresholds to be established by a Regulation.

The thresholds are yet to be determined but will be decided upon later. The threshold for notification and merger notification fees will, however, be calculated based on the combined annual continental turnover or combined value of assets.[237] Additionally, undertakings that fall within the scope of Article 10 that seek to enter a merger control of a continental dimension must notify the AfCFTA Competition Authority, or else the merger will not be effective.[238]

As far as penalties are concerned, the protocol sets the penalty for competition law violation at a maximum of 10% of an undertaking's continental turnover in the preceding year (for those undertakings operating within the AfCFTA market) or for those undertakings operating outside the AfCFTA market, 10% of their global turnover in the preceding financial year.

In the EU, merger control falls under the ambit of Council Regulation (EC) No 139/2004 of January 20, 2004. The regulations vest the Commission with the authority to oversee significant corporate reorganizations that have the potential to cause profound structural changes on the market, with an impact that extends beyond the boundaries of individual Member States. The EU Merger Regulation's goal (EUMR) is to prevent such actions from seriously undermining effective competition in the internal market or in a sizable portion of it, to prevent long-term harm to competition.[239] The regulations forbid mergers and acquisitions that would establish dominant corporations that are likely to raise prices for consumers or that would considerably limit competition in the Single Market.[240]

Furthermore, similar to AfCFTA, it is mandatory for undertakings to notify the commission if they are part of a merger that meets the community dimension. For a merger to reach the EU notification threshold, there are two alternatives. The first is that the merging undertakings must have a combined worldwide turnover of € 5,000 million, or for at least two of the merging undertakings

[237] *Id.* at 10(2).
[238] *Id.* at 10(3).
[239] 2021 merger control - European Commission, https://competition-policy.ec.europa.eu/public-consultations/2021-merger-control_en (last visited Mar 27, 2024).
[240] Merger control procedures, https://competition-policy.ec.europa.eu/mergers/procedures_en.

have an EU-wide turnover of € 250 million. The second alternative is for the merging undertakings to have[241]:

i. A combined worldwide turnover of €2,500 million or

ii. A combined turnover of all the merging firms to be at least €100 million in each of at least three member states,

iii. a turnover of over €25 million for each of at least two of the firms in each of the three Member States included under ii, and

iv. EU-wide turnover of each of at least two firms of more than €100 million.

However, if an undertaking achieves more than two-thirds of its EU-wide turnover within a single Member State, it would not have achieved either of the EU thresholds.[242]

After notification, The EUMR, gives two phases before the merger approval. Under the first phase, the commission has 25 working days to analyze the merger. The commission will either clear the merger conditionally or unconditionally or may open a phase II investigation if the merger still raises competition concerns.[243] The Phase II investigation is a deeper, more thorough investigation of how the merger could potentially impact the market. Usually, the Commission has ninety working days from the start of a Phase II investigation to reach a final determination regarding whether the proposed transaction complies with the EU Merger Regulation.[244]

Unlike the EUMR, the AfCFTA does not break down the procedure of merger approval into phases. What is clear, however, is that after notification, both the commission and the AfCFTA Competition Authority have the task of either approving or disapproving the merger. The Commission or the Authority may either[245][246]:

[241] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), 024 OJ L 1(2) & (3) (2004), http://data.europa.eu/eli/reg/2004/139/oj/eng (last visited Apr 1, 2024).
[242] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) (Text with EEA relevance), *supra* note 241.
[243] Procedures - European Commission, https://competition-policy.ec.europa.eu/mergers/procedures_en (last visited Apr 2, 2024).
[244] *Id.*
[245] AfCFTA Draft Protocol on Competition Policy, *supra* note 210 at 10(9).
[246] Procedures - European Commission, *supra* note 243.

- Unconditionally approve the merger
- Accept the merger subject to terms/conditions or
- Prohibit the merger if the merging parties have not offered sufficient solutions to address competition concerns.

3.4.3.2 Enforcement

When it comes to enforcement, the Protocol establishes the AfCFTA Competition Authority, which will be an autonomous body made up of a decision-making board and an investigative body with powers to investigate anti-competitive, examine and approve or deny merges and acquisitions, prosecute, and adjudicate competition activities under the Protocol. Additionally, it creates the AfCFTA Competition Tribunal, whose ruling will be final and which will hear appeals against decisions made by the AfCFTA Authority regarding the Protocol's implementation.[247]

The Protocol thus does not give the AfCFTA Competition Authority any competence over regional and national competition matters, and the duty of enforcement at these levels has been left to RECs and to the national governments. The Protocol simply states that State Parties will endeavour to harmonise their competition laws to ensure consistency with the Protocol. It does not designate to the Competition Authority or any other body the power to ensure such harmonisation or to impose fines for failing to implement the Authority's decisions. Its authority is strictly limited to undertakings and not State Parties. Additionally, whereas the Protocol prevails where there is a clash between its provisions and those of regional agreements, it does not apply to matters falling under national competition authorities, nor does it purport to govern matters at the regional level.

This model of competition enforcement thus differs from what we see under the TFEU. It means that AfCFTA does not introduce a competition regime that all members of the FTA can adhere to. Instead, it gives a blueprint to which members of the AfCFTA can harmonise their national and regional competition regimes. The African Competition Authority, therefore, has a very limited jurisdiction and may not be able to ensure the uniform application of competition law across the continent. The Protocol has failed to introduce one binding legislation to which all members of AfCFTA must adhere. It has preserved the acquis by maintaining the regimes that previously existed and limiting itself to only those matters that have a continental dimension and have a

[247] Harnessing Africa's free trade agenda – AfCFTA Protocol on Competition - Bowmans, *supra* note 209.

weighty effect on competition in the market and other economic activities by persons or undertakings within or that have a considerable effect on competition in the market.

The challenge with this is that many of the problems within the sphere of enforcement of competition law in Africa will persist because the Protocol has introduced a somewhat limited enforcement regime. Thus, instead of ushering Africa into the next stage of economic integration, it seems the AfCFTA regime is buying time for another regime to achieve the continent's goal of economic integration.

In comparison, the TFEU assigns the primary role of enforcement of competition law to the Commission. It is tasked with looking into allegations of anticompetitive behaviour, making decisions about prohibitions, levying fines, and signing legally binding contracts with businesses. The Commission also ensures that national competition authorities in the Member States implement EU competition laws consistently in a system of parallel enforcement. Along with the European Parliament and the Council, the Commission is also crucial in the development of EU competition laws.[248] The Commission's Directorate-General for Competition (DG COMP) is in charge of formulating EU competition policy, looking into claims of anti-competitive behaviour, and making the required decisions to preserve or bring back the free flow of competition in the Single Market. The European Commission has extensive investigative authority, including the capacity to conduct surprise inspections of businesses' locations and to order them to produce information that is necessary for their investigations. The College of Commissioners[249] must adopt any final, formal decision which involves the Commission as a whole in its accountability.[250]

As already stated in this thesis, whereas the commission has the principal responsibility of enforcing competition law, it does not perform this role in a solitary fashion. This is due to Regulation 1/2003, which made it possible for the NCAs and courts to also apply EU competition laws directly.

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[248] Background paper: Enforcement of EU competition policy, https://www.eca.europa.eu/lists/ecadocuments/bp_competition/bp_competition_en.pdf (last visited Apr 2, 2024).
[249] The College of Commissioners is a group of people who represent the 27 nations that make up the EU. This group of people is what makes up the Commission's political leadership, and they usually serve a five-year term. The President of the Commission usually gives them charge of particular policy domains.
[250] Background paper: Enforcement of EU competition policy, *supra* note 248.

As a result, there is a system of parallel enforcement whereby every competition authority is free to act independently and initiate its own inquiries. The Commission and the NCAs thus collaborate to enforce competition law through the European Competition Network, with the Commission also having the responsibility of ensuring that all NCSs apply competition rules uniformly.

In contrast, the AfCFTA Competition Authority does not have such far reaching power as it is not the primary body tasked with enforcing competition law on the African continent. Instead, it relies on cooperation with both national and regional competition authorities, non-African competition authorities and other sector regulators.[251] This is further exemplified by Article 22 of the Protocol, which gives the Council of Ministers the responsibility of developing regulations to establish a network comprised of national, regional, and continental competition authorities to facilitate cooperation and coordination of the Protocol.[252] Thus, the AfCFTA Authority's primary responsibility is to implement the provisions of the Protocol and to facilitate cooperation with both regional and national competition authorities to achieve this objective. Pursuant to Article 3, it does not pronounce itself on matters falling within the jurisdiction of NCAs but only on economic activities that have a significant effect on the AfCFTA market and conduct, which has a continental effect.[253] It does, however, enjoy supremacy over the regional competition authorities as the provisions of the Protocol prevail in the event that there is a clash between its provisions and those of the regional agreements.[254]

3.4.3 Critique of the Protocol on Competition Policy.

It is important to note that under the Lagos Plan of Action, Africa's stated goal was to achieve the integration of its economies to become more self-sufficient as a continent and to rely less on other powers for its sustenance.[255] Under the Lagos Plan of Action, African countries also pledged to support economic communities that are currently in place and those that form in the future in order to coordinate and harmonize efforts toward the eventual creation of the African Common Market.[256]

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[251] AfCFTA Draft Protocol on Competition Policy, *supra* note 210 at 15.
[252] *Id.* at 22.
[253] *Id.* at 3(2).
[254] *Id.* at 3.
[255] Lagos plan of action, 104, Preamble.
[256] Lagos plan of action, *supra* note 255.

The regime established under the Draft Protocol does not meet this threshold and does not promote African Economic Integration. It also does not purport to deal with the challenge of the varying competition regimes across the various RECs nor with the challenge of overlapping memberships. Thus, it preserves the status quo and does not contend to build upon it to ensure uniform enforcement of competition law across Africa. It merely creates another sphere (a continental sphere) with a different competition regime and gives it prominence in the event that it clashes with that of an REC. This puts into question the development of a harmonised and more predictable competition regime across Africa. It leaves it with the same challenge of fragmentation that it had before the enactment of the protocol.

Additionally, the Protocol does not establish a court, nor does it defer to the African Court of Justice and Human Rights to interpret the provisions of the Protocol and to ensure its enforcement.

When you compare the competition regime established under the AfCFTA and that of the EU, there is a massive difference. The primary goal of the EU competition rules is to ensure that the EU's internal market operates optimally, given that it plays a key role in the prosperity and well-being of EU citizens, businesses and society.[257] In order to prevent competition in the internal market from being hampered or distorted, the EU has thus incorporated competition law into the Treaty on European Union Treaties (TFEU). The Protocol on Competition Policy fails to achieve this threshold. Whereas the AfCFTA treaty emphasises the importance of cooperation in competition policy, and other documents such as the Abuja Treaty and the Lagos Plan of Action (which we have discussed) emphasise the importance of economic integration, the Protocol failed to create a uniform and integrated regime and has left the jurisdiction of its enforcement mechanisms at the continental level. This gives room for varying competition regimes across the continent and fails to present a united front. The RECs and National governments should have been responsible for implementing the competition policy rolled out under the AfCFTA. Thus, we do not have a mechanism to ensure uniform enforcement of competition law in Africa.

It is important that all of Africa is held to the same standards when it comes to the enforcement of competition law and that fines should be imposed not just on undertakings that violate the competition regime that governs the market (AfCFTA) but on jurisdictions that do not vigorously

[257] Competition policy | Fact Sheets on the European Union | European Parliament, (2023), https://www.europarl.europa.eu/factsheets/en/sheet/82/competition-policy (last visited Sep 27, 2023).

enforce the competition regime which has been set out to govern the market. To emphasise the argument made by Reginald Green and Ann Seidman (mentioned in my first chapter): No African state is economically large enough to construct a modern economy by itself.[258] Therefore, rather than seeking to hide behind national or regional lines, African states must open themselves up to embracing economic development at a continental scale and not shy away from economic integration.

In the next segment, this thesis will therefore address how the Protocol and the African continent may have gone about the process of having a harmonised competition regime.

3.5 Implementation

To understand how to implement this goal of uniform application of competition law effectively, we can borrow from the European Union. Unlike Europe, Africa lacks a community law binding the entire continent. However, Africa has had the goal of economic integration for a long time and has put the building blocks in place to achieve this. We have already discussed several of these building blocks, and among them are the RECs and the various competition regimes across the continent. However, there is also the African Court of Justice and Human Rights, which can be highly instrumental to this goal of a harmonised competition policy.

3.5.1 The Role of The African Cout of Justice and Human Rights on Harmonisation.

The African Court of Justice and Human Rights (ACJHR) was formed by merging two African Courts. These were the African Court of Justice (ACJ) and the African Court on Human and People's Rights (ACHPR). These two Courts had been established by the Protocol on the African Court of Justice adopted on 11 July 2003 in Maputo, Mozambique and the Protocol on the African Charter to Human and People's Rights established in Ouagadougou Burkina Faso on 10 June 1988, respectively.[259] Article two of the Protocol On The Statute Of The African Court of Justice and Human Rights merged the two courts into one, thereby establishing a single court.[260]

The court comprises 16 judges who are nationals of States Parties. The Court has strived to be as representative as possible, as no single member state is allowed to have more than one judge.

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[258] Ankomah, *supra* note 15.
[259] Protocol on the Statute of the African Court of Justice and Human Rights | Treaties Database, 1, http://kenyalaw.org/treaties/treaties/870/Protocol-on-the-Statute-of-the-African-Court-of-Justice (last visited Sep 8, 2023).
[260] Protocol on the Statute of the African Court of Justice and Human Rights | Treaties Database, *supra* note 259.

Additionally, the court has strived to have each geographical region of the Continent represented as they are each represented by three (3) Judges except the Western Region, which has four (4) Judges.[261]

Article 28 of the Protocol gives the jurisdiction of the Court on the following:[262]

a. The interpretation and application of the Constitutive Act.
b. The interpretation, application or validity of other Union Treaties and all subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity.
c. The interpretation and the application of the African Charter, the Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, or any other legal instrument relating to human rights, ratified by the States Parties concerned.
d. Any question of international law.
e. All facts, decisions, regulations, and directives of the organs of the Union.
f. All matters expressly provided for in any other agreements that States Parties may conclude among themselves or with the Union and which confer jurisdiction on the Court.
g. The existence of any fact which, if established, would constitute a breach of an obligation owed to a State Party or the Union.
h. the nature or extent of the reparation to be made for the breach of an international obligation.

Because Article 28(b) gives the Court jurisdiction over the interpretation, application, and validity of other union treaties and all other subsidiary legal instruments adopted within the framework of the Union or the Organization of African Unity, it may allow the ACJHR to make decisions on competition law. Under Article 17 of the Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, the General Affairs Section of the Court is given competence to hear all cases under Article 28 of the Statute (Statute of the African Court of Justice and Human Rights) except those assigned to the Human and People's Rights Section and the International Criminal Law Section.[263]

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[261] *Id.*
[262] *Id.* at 28.
[263] Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, 17, https://au.int/sites/default/files/treaties/36398-treaty-0045_-

Furthermore, the Court has jurisdiction over all subjects specifically covered by any additional agreements that state parties may reach among themselves, according to Article 28(f).[264] Thus, it is possible for the AfCFTA Protocol on Competition Policy to be amended to confer jurisdiction on competition matters to the Court. This would align with the Protocol's aim to improve market efficiency, promote inclusive growth, and ensure that the benefits of trade liberalisation are not offset or weakened by anti-competitive activities. The role of the ACJHR will thus be extended to ensure that there is a uniform application of competition law across Africa. The ACJHR also ought to be granted the power to impose fines on countries which do not implement its judgements in the area of competition policy.

According to the Lisbon Treaty, national courts or member state tribunals may ask the CJEU to issue preliminary opinions on the interpretation of Union law or the legality of institutional acts.[265] This allows for national courts and tribunals to table cases before the court for a preliminary rule reference, where they need direction on a question that touches community law before they can give a judgment themselves. This is critical in ensuring uniform application of EU law.

Therefore, to make room for such uniform application, Article 29 of the Protocol of the Statute of the African Court of Justice and Human Rights ought to be amended to allow national courts and tribunals of member states to be among the entities eligible to submit cases before the Court on any dispute or issue provided for in Article 28, as they are the ones that deal directly with competition cases. There can also be a provision to allow for natural persons to approach the court for private enforcement of competition law.

In the previous chapter, we discussed four decisions which were critical to the uniform application of EU law by emphasising the supremacy of EU law over national law. These decisions were:

i. In the *Commission v. Greece (C-387/97)* case, the European Court of Justice (ECJ) exercised its authority to "impose a lump sum or penalty payment" on a Member State that failed to comply

_protocol_on_amendments_to_the_protocol_on_the_statute_of_the_african_court_of_justice_and_human_rights_e.pdf (last visited Oct 25, 2023).

[264] Protocol on the Statute of the African Court of Justice and Human Rights | Treaties Database, *supra* note 259 at 28.

[265] The Treaty of Lisbon amending the Treaty Establishing the European Union and the Treaty Establishing the European Community, 9F(3)(b), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238419/7901.pdf (last visited Oct 3, 2023).

with a judgment. In this case, Greece was ordered to pay €24,600 for each day that it postponed implementing a previous judgment regarding waste disposal in Chania, Crete. This power was granted by the 1993 Treaty on the European Union.[266]

ii. The second is the case of *Costa v. E.N.E.L.*, in which the CJEU declared that community law was superior to national law.[267]

iii. Third is the 1991 decision in the *Andrea Francovich and Danila Bonifaci and others v. Italian Republic,* where the CJEU accorded individuals the ability, in certain situations, to seek compensation for harm if the State does not execute EC Directives promptly and correctly.[268]

iv. The fourth case is *Van Gend en Loos v. Nederlandse Administratie der Belastingen (Case 26/62)*, in which the Court determined that laws enacted by EU institutions had the authority to create legal rights that could be invoked in Member State courts by both natural and legal persons. This means that EU legislation is directly applicable in those states.[269]

Thus, in these cases, the CJEU made it clear that the EU law took precedence over national statutes, whether they came before or after the EU law in question. It, however, does not mean that when EU law and national law, contradict each other that the national provisions are automatically annulled or invalidated. It does mean, however, that the national authorities and courts will not apply those contradicting provisions where there is such a clash. Thus, the goal of the principle of priority is to guarantee that everyone living in an EU member state is equally protected by EU legislation.[270]

Based on the foregoing treaty provisions and judicial decisions, this thesis argues that the Protocol should develop a harmonised community law for AfCFTA, which should have supremacy over national and regional competition law. This is crucial because the African Continental Free Trade Area aims to further the continent's economic integration by establishing a single market for goods and services made possible by the unrestricted movement of people. Therefore, in order to ensure that it attains this goal, the Protocol on Competition policy ought to create such a framework. The protocol also ought to grant power to the ACJHR to decide competition disputes, especially

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[266] EUR-Lex - 61997J0387 - EN, *supra* note 164.
[267] Flaminio Costa v ENEL, *supra* note 165.
[268] Andrea Francovich and Danila Bonifaci and others v Italian Republic, *supra* note 166.
[269] EUR-Lex - 61962J0026 - EN, *supra* note 167.
[270] EUR-Lex - primacy_of_eu_law - EN - EUR-Lex, https://eur-lex.europa.eu/EN/legal-content/glossary/primacy-of-eu-law-precedence-supremacy.html (last visited Oct 19, 2023).

concerning disputes between national, regional and the AfCFTA competition law. There ought to be emerging jurisprudence from this court that guides the African continent on the operation of competition law within the Free Trade Area and within the continent. As such, African countries will be guided by this court's decisions regarding developing and applying competition policy within their respective jurisdictions. Additionally, the decisions of the court ought to be binding on member states. They should be directly applicable before national courts by both natural and juristic persons, and states which fail to abide by this law ought to be liable to pay a fine to ensure compliance across the continent.

3.5.3 The Council of Ministers and its Role.

Under the AfCFTA, there is established a body known as the Council of Ministers. It is the body whose functions most resemble that of the EUC. It is composed of the Ministers in charge of trade as well as other ministers, officials, or authorities that the State Parties have properly designated. Its responsibility is to make sure the Agreement is implemented and enforced effectively.[271] The Council of Ministers plays a critical function within the framework of the AfCFTA and in the implementation of competition law within the Free Trade Area. As far as competition policy is concerned, the Council plays the following critical functions:

- The Council of Ministers develops the Rules of Procedure for the Authority and recommends these rules to the Executive Council for approval.
- It determines other sources of funding that the AfCFTA Competition Authority will rely on apart from the annual budget of the AfCFTA Secretariat.
- It appoints the members of the AfCFTA Competition Authority Board.
- It receives recommendations from the AfCFTA Competition Authority Investigative Body based on the market studies and inquiries it has made.
- It appoints the Executive Director of the AfCFTA Competition Authority.
- The Council of Ministers, in accordance with Article 11 of the AfCFTA Agreement, is responsible for establishing the Committee on Competition Policy and assigning to it its functions, which include *inter alia* developing and recommending Regulations for the effective implementation of

[271] Agreement Establishing the African Continental Free Trade Area, *supra* note 197 at 11.

the Competition Protocol, including the procedures and powers of the Authority, for the consideration of the Council of Ministers.

- It is also responsible for developing future regulations and procedures to address the concurrent jurisdiction between the AfCFTA Competition Authority and Regional Competition Authorities.
- It receives and considers the Regulations for the effective implementation of the Competition Protocol from the Committee on Competition Policy.
- It is responsible for establishing a Regulation establishing a network composed of national, regional and continental competition authorities to facilitate cooperation and coordination in the implementation of the Competition Protocol.
- The Council of Ministers is responsible for the implementation of policies, strategies and measures for the effective implementation of the agreement.
- State parties must abide by the decisions made by the Council of Ministers, particularly those with structural, legal, and financial ramifications.

The role of the Council of Ministers is thus critical in implementing competition law in the AfCFTA. This is due to the fact that the body in charge of executing competition policy under the AfCFTA needs to be one that is essential to the Agreement in order for it to be successful in doing so.

3.6 Why Africa Should Adopt this Approach of a Harmonised Community Law.

As we have seen, this thesis critiques the model of Competition law enforcement adopted by the Protocol on Competition Policy. It differs from the current regime that has developed a competition regime which simply functions at the continental level and fails to address competition law at the regional and national levels. Instead, it simply states that state parties shall harmonise their competition laws to ensure consistency with the protocol. Instead, this thesis takes the approach that the Protocol ought to have established a community competition regime that is binding at both the continental and national levels. This competition regime should have been capable of enforcement by both national and regional competition authorities. To ensure consistency in the implementation of AfCFTA competition law, the Protocol should also have established a court to which these national competition authorities and courts could refer cases for a preliminary rule reference, in which they require a ruling on a community law issue before they can render a judgment.

Additionally, the court should have the authority to provide preliminary rulings on the interpretation of AfCFTA competition legislation or the legality of institutional acts upon request from national courts or tribunals of member states. The Protocol could have either established this court or the Protocol could have simply conferred jurisdiction upon the ACJHR.

Whereas the proposals made by this thesis may seem ambitious, it is essential to note that African Countries are not unfamiliar with such an arrangement where they are guided by a community law which takes precedence over national law. For instance, Article 7(f) of the COMESA competition regulations states that one of the Commission's responsibilities is to assist Member States in promoting their national competition laws and institutions. The goal is to harmonize these national laws with the regional regulations to achieve consistency in the interpretation and implementation of competition law and policy within the Common Market.[272]

The WAEMU regime is also a very good example. WAEMU's governance structure is comprised of the following organs:[273]

(i) The Conference of Heads of State and Government.
(ii) The Council of Ministers.
(iii) The Commission.
(iv) The Court of Justice.
(v) The Court of Auditors.
(vi) The Interparliamentary Committee.

The WAEMU Commission is responsible for developing and implementing community policies. Under Article 90 of the WAEMU Treaty, the WAEMU Commission has been assigned the role of enforcing competition rules in Articles 88 and 89 of the treaty. It does so under the supervision of the Court of Justice.[274]

As I had pointed out earlier, as per the Court of Justice's Opinion No. 003/2000, Member States lack the authority to oversee and control competition, therefore, the exclusive jurisdiction to handle

[272] COMESA Competition Regulations - English, COMESA COMPETITION COMMISSION, baker (last visited Sep 14, 2023).
[273] WAEMU Treaty (1994) - Electronic Database of Investment Treaties (EDIT), *supra* note 63 at 16.
[274] *Id.* at 90.

matters related to competition rests with the commission.[275] Although it is not exactly clear how the Commission and the NCAs are to work together, WAEMU's Member States are required by Article 6 of Directive No. 02/2002/CM/UEMOA to take all necessary measures to harmonize their national competition laws—including sectoral laws—with the community legislation and to modify their national competition agencies to restrict the agencies' authority to the tasks outlined in the Directive.[276] Article 3 of Directive No. 02/2002/CM/UEMOA provides that general investigative duties be conducted by the national authorities in accordance with the investigative powers and related processes stipulated by international and national law, based on a request submitted at the national level or a direct directive from the Commission.[277] The national competition agencies carry out these duties by receiving and submitting to the Commission applications for negative clearance, notifications for exemption, and complaints from both persons and entities. They compile a list of State aid, report on it quarterly to the Commission, and create an annual report on the state of competition in the nation.[278] Thus, the role of the WAEMU member states is to work together with the Commission in applying competition rules by keeping an eye on how markets are operating by creating reports on the health of competition and quarterly notes on market functioning, supporting the Commission when it conducts inquiries or checks, cataloguing health aid, and taking part in decision-making.[279] Ultimately, only the Commission can sanction anti-competitive practices in the common market, but it has to inform the NCAs before undertaking investigations. Following that, the NCAs will support the Commission in carrying out the inquiry and participate in the decision-making process via the Advisory Committee on Competition. The powers of the Advisory Committee are, however, limited as it can only give its opinion, but the Commission is not obligated to abide by this opinion.[280]

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[275] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT VOLUNTARY PEER REVIEW OF COMPETITION POLICY: WEST AFRICAN ECONOMIC AND MONETARY UNION, BENIN AND SENEGAL OVERVIEW, *supra* note 62.
[276] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, PREPARATORY REPORT FOR THE EX POST REVIEW OF THE COMPETITION POLICY OF THE WEST AFRICAN ECONOMIC AND MONETARY UNION (2021), https://www.un-ilibrary.org/content/books/9789210052672 (last visited Sep 21, 2023).
[277] *Id.*
[278] *Id.*
[279] *Id.*
[280] Mor Bakhoum & Julia Molestina, *Institutional Coherence and Effectivity of a Regional Competition Policy: The Case of the West African Economic and Monetary Union (WAEMU)*, (2011), https://papers.ssrn.com/abstract=1965508 (last visited Sep 25, 2023).

The decisions of the commission are kept in check by the Court of Justice, which determines whether the Commission's decisions are legal. The court also hears and determines appeals filed against the Commission's decision. It can amend or nullify a decision or vary the sum a fine imposes.[281]

Thus, there is an existing framework upon which the AfCFTA can build in the development of its competition regime. Having looked at the frameworks provided by both the African and European competition regimes, it is clear that there are three pillars upon which the implementation of a competition regime can be built:

- First is a competition regime that establishes the framework for implementing and enforcing competition law.
- Second is a commission or authority responsible for investigating and sanctioning anticompetitive conduct.
- Third is a court responsible for interpreting the treaty's provision, establishing the competition regime and checking the decisions made by the commission or authority.

Given the foregoing, AfCFTA can take advantage of the already existing frameworks within Africa. It may, however, not be able to do so in a similar manner to the EU, where the EUC is the primary organ of enforcement. This is because the AU Commission has a limited function and can only elaborate, promote, align, and harmonise its programmes and policies with those of the RECs. Additionally, under the Agreement establishing AfCFTA, the AUC simply plays a transitional role, playing the role of the AfCFTA Secretariat, whose functions will later be determined by the AfCFTA Council of Ministers. Therefore, at best, the AUC does not have under its mandate an authoritative role within the framework of AfCFTA. However, as we have seen, under the AfCFTA agreement, we have a Competition Authority and a Tribunal as well as the Council of Ministers, which are capable of playing the role of ensuring uniform enforcement of competition law.

3.7 Summary

It is clear that the agreement establishing the AfCFTA sought to create a complete body capable and competent enough to manage its own affairs (only stopping short at the establishment of its

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[281] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, *supra* note 276.

own court). It has done this by establishing a reasonably solid foundation (through the Competition Protocol) upon which we can have competition law enforced uniformly across the continent.

It has also ensured that Competition Law is indeed central to AfCFTA and has established a competition authority and a tribunal to enforce competition law. This position should grow more robust and more pronounced when the Council of Ministers develops the bodies, rules and procedures which it is required under the competition protocol.

However, given that the goal of AfCFTA was to create a self-sufficient body that could manage its affairs, the laws governing AfCFTA should not shy away from establishing an African Economic Community bound by laws that govern and confer benefits upon the members of this community. It should go a step further than the Agreement Establishing the African Union did and honestly look to capitalise on this unique and rare opportunity that AfCFTA brings in terms of Africa’s economic integration. It should not shy away from creating a community law that binds all its members. It should boldly remove the traditional barriers that have existed, and which have brought about the fragmentation of the African continent along the lines of borders established during the colonial era. AfCFTA is the beginning of a brand-new era in the Pan-African Movement, and Africa cannot afford to let this opportunity go.

Thus, the Protocol on Competition Policy cannot be shy about pronouncing its supremacy over national and regional competition policies. It cannot shy away from conferring jurisdiction upon the ACJHR to ensure that there is uniform enforcement of competition law across the continent and the members of the AfCFTA. Alternatively, it can create its own court that can rule on competition matters and other economic matters within the Free Trade Area. Although this may not be easy, African States ought to take time to deliberate until they can come up with a community competition law that they deem favourable to all the members of AfCFTA. Failure to do so may continue the same trend of fragmentation which has not been favourable to the African continent.

CHAPTER 4: Conclusion and Recommendations

This thesis has discussed the African Continental Free Trade Area, its goals and aims, and the need for a harmonised competition protocol to achieve its objectives. We have also discussed the AfCFTA draft policy on competition law. We discussed the strengths and weaknesses of this draft protocol and critiqued it, stating that it fell short in terms of creating a uniform AfCFTA competition regime. Having critiqued the draft Protocol, in this chapter, we will focus on the conclusions that we have arrived at and the recommendations we are making based on the analysis we have conducted in the first three chapters.

4.1 Conclusions

As we have already discussed, the AfCFTA draft policy on competition law creates an AfCFTA Competition and an AfCFTA Competition Tribunal, with the Authority being responsible for enforcing competition law in AfCFTA and the Tribunal serving as an appellate body. This is an important step for AfCFTA and Africa at large as this will be the first time competition law will be enforced at a continental level.

The draft policy, however, does not address some of the challenges mentioned in the previous chapter, such as overlapping memberships and concurrent jurisdictions between the AfCFTA

Competition Authority and the REC Competition Authorities. It simply provides for the Competition Authorities of the RECs to retain their jurisdictions as the building blocks for an integrated competition regime in Africa.[282] It leaves the task of developing future regulations and procedures to address the challenge of concurrent jurisdiction to the Council of Ministers.[283]

This means that the draft protocol has largely preserved that status quo by allowing for the existence of both Regional and National jurisdictions simultaneously. It has further limited the jurisdiction of AfCFTA competition law to only sanctioning conduct that has a continental dimension and that greatly influences the level of competition in the market and all economic activities by persons or undertakings that significantly affect competition in the market.[284]

AfCFTA, therefore, as we saw, does not purport to create a community competition regime. It aims to create a regime that presides over and tackles competition matters at the continental level whilst leaving regional and national matters to the National Competition and Regional Competition Authorities.

Whereas this approach is an important first step and is aimed at preserving the acquis and keeping the spirit of the Abuja treaty, which entails using the RECs as the fundamental components of an African Economic Community, it fails to push regional integration to the next level at a continental scale. Additionally, it does not tackle the challenge of overlapping memberships.

4.1.1 Overlapping Memberships

Typically, there are three approaches that Trade agreements take to this challenge of overlapping memberships. The first is the member nations' consent to have only one trade agreement, gradually or instantly terminating their current accords upon the implementation of a new one and therefore permitting the existence of only one trade agreement.[285]

The second approach is that the member states agree to preserve the already existing agreements, thereby creating parallel regimes.[286] An example of this is the ASEAN Comprehensive Trade

[282] AfCFTA Draft Protocol on Competition Policy, *supra* note 210 at 20 (1).
[283] *Id.* at 20 (2).
[284] *Id.* at 3 (1) (a) and (b).
[285] Regional integration and the African Continental Free Trade Agreement: from parallelism to harmonisation, https://www.ibanet.org/regional-integration-afcfta (last visited Dec 10, 2023).
[286] *Id.*

Agreement, which provides that no member state's rights or duties under any other international agreement to which it is a party will be affected by anything in the agreement.[287]

The third approach is that member states agree that if there is a dispute between their existing agreements, they will consult each other and devise a mutually agreeable solution.[288] The best example of this is Article 1.2(2) of the Comprehensive And Progressive Agreement For Trans-Pacific Partnership, which provides that on request, the relevant Parties to the other agreement will confer to find a mutually agreeable resolution if a Party believes that a provision of the Agreement conflicts with a provision of another agreement to which it and at least one other Party are parties.[289]

The AfCFTA agreement, on the other hand, recognises the RECs as the building blocks of AfCFTA, and under Article 5 (l) of the Agreement, one of the governing principles of AfCFTA is the adaptation of the most effective methods in the RECs, in the State Parties and International Conventions governing the African Union.[290] More specifically, the Protocol on Competition Policy takes the second approach by preserving the existing agreements, thus creating parallel regimes.

The AfCFTA agreement and, more specifically, the Protocol on Competition Policy has yet to find a way to resolve the challenge of competing and overlapping memberships when it comes to competition policy. The Protocol on Competition Policy has added to this cocktail of confusion and failed to achieve AfCFTA's goal of creating a single market. Instead, we have the maintenance of several existing regimes at once, especially concerning competition enforcement. The challenge with the overlapping memberships regarding competition enforcement is that several African countries are subject to varying competition regimes. Within the context of a single market where there is supposed to be the free movement of people, goods, services and capital, this fragmentation could significantly hamper the enforcement of competition law under AfCFTA.

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287 ASEAN COMPREHENSIVE INVESTMENT AGREEMENT: A GUIDEBOOK FOR BUSINESS AND INVESTORS, 44 (ASEAN ed., 2016).
288 Regional integration and the African Continental Free Trade Agreement, *supra* note 285.
289 COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP, https://www.iilj.org/wp-content/uploads/2018/03/CPTPP-consolidated.pdf (last visited Dec 10, 2023).
290 Agreement Establishing the African Continental Free Trade Area, *supra* note 197 at 5.

Additionally, AfCFTA could lead to more mergers and acquisitions as well as an increase in cross-border trade as firms look to extend their market beyond their national and regional borders. Although we are yet to see widespread occurrences of cross-border transactions it is beginning to occur. For example, M-Pesa, a mobile payments service which initially started in Kenya, has now expanded its reach to include eight other countries such as Lesotho, The Democratic Republic of Congo, Tanzania, Mozambique, Ghana, Egypt and most recently Ethiopia. M-Pesa's market, therefore, not only cuts across national borders but also regional borders as it is present in East, West, Central, South and North Africa, thus cutting across multiple RECs. MTN, a pan-African mobile and telecommunications operator headquartered in Johannesburg, South Africa, also cuts across multiple countries. It is Africa's largest mobile operator Presently, MTN has about 292 million mobile subscribers and about 20 million mobile money subscribers.[291] It operates in about 20 countries, including Afghanistan, Benin, Botswana, Cameroon, Côte d'Ivoire, Cyprus, Ghana, Guinea Bissau, the Republic of Guinea, Iran, Liberia, Nigeria, the Republic of Congo (Congo-Brazzaville), Rwanda, South Africa, Sudan, South Sudan, Swaziland, Syria, Uganda, Yemen and Zambia.[292] Thus, MTN's operations also cut across the African continent and several African RECs. AfCFTA is bound to create even more of such conglomerates as intra-African trade grows and firms look to extend their market share either through the formation of Joint Ventures or through Mergers and Acquisitions and other means. this means that there is the likelihood or the growth of competition in Africa as well as the growth of anti-competitive conduct, especially at the onset. AfCFTA must, therefore, look to stamp its authority on anti-competitive conduct right from the start, failure to which it may be left trying to reel in such conduct at a point in which it will be much advanced.

The opportunities that AfCFTA creates must thus not only be harnessed and taken advantage of but also be protected from abuse. Given the emergence of such large undertakings in Africa and the removal of trade barriers, it has and will continue to become increasingly clear that Africa is no longer made up of several small markets but one large single market. This is also the mindset that Africa ought to adopt if it is to become more competitive within the global economy. Thus, Africa faces the risk of failing to embrace the larger African market under AfCFTA at the expense

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[291] MTN Group, MTN.COM, https://www.mtn.com/ (last visited Feb 3, 2024).
[292] MTN Group, WORLD ECONOMIC FORUM, https://www.weforum.org/organizations/mtn-group/ (last visited Feb 3, 2024).

of being more national and regional-centric. The overlapping memberships thus threaten the idea of a single African market as they could serve as barriers rather than facilitators of trade as firms will be forced to cope with several regulations, including those set under the AfCFTA regime, in order to expand their market share. Thus, the multiple overlapping competition regimes may not serve to enhance competition and the development of the market but may serve to undermine it instead.

4.1.2 The Harmonisation Approach

Right from the onset, this thesis took the approach of harmonisation—the harmonisation of competition policy in Africa to develop one comprehensive regime. In the first chapter, we delved into great detail of why this was important, especially in the context of Africa. We also discussed why having a firm competition policy was necessary for Africa's development and the potential gains that could be drawn from this. We analysed the different competition regimes in Africa at the national and regional levels, creating a picture of competition policy in Africa. We delved into why the RECs served as a necessary and firm foundation for the laying down of a solid competition policy in Africa. It, however, appears that Africa is still stuck in the REC level and has failed to take a leap into a continental stratosphere, which I argue goes against the idea of Pan-Africanism. The RECs, as I see them, are simply the building blocks and not the structure itself. Thus, this thesis argues that Africa ought to have adopted a harmonised community law regarding competition enforcement within the single market created by AfCFTA. The AfCFTA was an opportunity to abandon the regional mentality and embrace the coming together of the entire continent.

This thesis further argues that a harmonised community competition law would better curb the effects of anti-competitive conduct within the AfCFTA single market. Whereas the competition regime that the Protocol on Competition Policy would tackle anti-competitive conduct that has an impact at the continental level, thus enhancing the current level of enforcement, it doesn't create a structure of accountability that would ensure uniform enforcement across the single market. Instead, it does feel that the competition regime being established under AfCFTA seems to allow RECs and National Competition Authorities to enforce competition law in their own way.

Article 12 (5) of the draft protocol states that state parties shall endeavour to harmonise their competition laws to ensure consistency with the protocol. It, however, needs to clarify what harmonise in this context means and give guidelines on how this should be done. It also does not mention the RECs and whether they, too, will be required to harmonise their competition laws. Given the different regimes of competition law we saw in the first chapter, and how each REC has varying enforcement methods, we have a very fragmented method of competition enforcement at the national and regional levels across the single market.

Therefore, this thesis argues that rather than looking to continue with the current fragmented approach to competition policy, Africa must abandon its regional mindset and embrace a more continental one. Therefore, instead of looking to simply preserve the REC competition laws, Africa needs to shift towards a continental competition law under AfCFTA. This would allow Africa to begin to pull toward the economic integration that it envisions. It would also open the door for accountability at a continental level, with each nation and each REC being held accountable for the enforcement of competition law within its territory. This is essential because as we have argued, Africa is shifting from its division along national and regional boundaries set by its former colonial masters. Globalisation and the AfCFTA regime are steering Africa towards the framework of a single deeply interconnected market. Thus, the failure by any of the players to enforce and enhance competition within its sphere may have a ripple effect on the African economy. This is what informs the conclusions arrived to by this thesis. By limiting itself to only that conduct, practice, merger or Agreement which has a significant effect on the competition in a market shared by at least two State Parties that are subject to the jurisdiction of separate RECs, the draft protocol has significantly limited its reach. Economic and regional integration, means that even conduct which does not meet this threshold will have an effect on the market especially as trade under AfCFTA continues to grow.

It is important to also note that Africa is still a long way from achieving the targets that it has set for itself under Agenda 2063. Key among these goals is the goal of gender equality which is critical in an African continent in which women are yet to be fully integrated into the African economy. For the African economy to be competitive, women must be woven into the fabric of the economy. This is necessary because gender inequality may facilitate locking out women from the economy by preventing them from registering businesses or owning land and wealth. Not only is this a violation of the socio-economic rights of women and a huge waste of their potential but it does also hinder the market from being competitive. Usually, the gap left by the exclusion of the women will be filled by less competitive entrepreneurs who are not offering the same quality of service and competition that these women would have offered. Women may also be barred from participating in certain professional roles that are more male dominated, resulting in lower quality professional services being offered at much higher prices. The net effect of this is weaker competition and the strengthening of the more dominant players at the top.[293] In the preamble of The AfCFTA Competition Protocol, the member states of the African Union recall agenda 2063, in which gender equality is embodied. Thus, in avoiding the harmonisation route, AfCFTA competition regime, may fail at achieving this goal of gender equality. It is important for a body as important as the AfCFTA Competition Authority spearhead the African continent along with their respective bodies to achieve this goal. There has to be a common pull towards the same direction, and this will be difficult to achieve in a fragmented regime.

Competition law has been shown to be a key ally in this fight to achieve gender equality.

Given the foregoing, I have a number of recommendations which I will make in the next segment.

4.2 Recommendations.

1. **Africa Must Understand and Harmonise its Competition Law Agenda.**

The thrust of this thesis is the harmonisation of African competition law. To accomplish this, it is imperative for Africa to understand what its competition agenda is. It must audit the present effects of anti-competitive conduct in Africa and how this could affect the single market. Africa must understand what it is trying to prevent and what it is trying to accomplish with its competition agenda. As is, Africa seems to have taken a timid approach towards harmonisation. Inasmuch as Articles 5 to 11 of the Protocol seem to drive towards harmonisation, there is a limitation under Article 3 with the scope of application of the protocol, which limits the application of AfCFTA competition law to only matters that have a continental effect or which have a significant effect on competition in the market. Under Article 12 (5) of the Protocol, state parties are required to harmonise their competition laws to ensure consistency with the protocol. Whereas this is an important step, we have no article applying the same to the RECs. This takes away from any efforts to have Africa collectively combat anti-competitive behaviour. It fails to create a harmonised

[293] Chris Pike, *What's Gender Got to Do with Competition Policy?*, (2018), https://papers.ssrn.com/abstract=3487588 (last visited Sep 19, 2023).

structure to which all of Africa can adhere and strive. Therefore, it seems that Africa has a fragmented agenda when it comes to competition law, and the continent should strive to move in the same direction. The principle of Variable Geometry is supposed to allow African countries to slowly come to the table. However, Africa must guard against complacency and encourage all the countries to come to the table to pursue the same goal rather than use it as an excuse to deploy delay tactics.

I believe that this lack of a harmonized competition agenda is what has led to a slow approach to Africa's adoption of a harmonized competition regime.

To be clear, having a harmonised competition law does not involve doing away with the competition authorities at the national and regional levels. It also doesn't involve getting rid of national competition legislation, but it does mean involving them in the vehicle of enforcement of competition law in Africa.

Article 3 (1) of Regulation 1/2003 mandates that NCAs and the National Court apply articles 101 and 102 of the TFEU to any behaviour by undertakings that may impact competition among member states when applying their national competition laws.[294] Additionally, Under Article 3(2) of the same regulation, Agreements, decisions made by associations of undertakings, or coordinated actions that could influence trade between member states but do not restrict competition in the sense of Article 101 of the TFEU and satisfy the requirements outlined in Article 101 (3) may not be prohibited by national competition legislation.[295] As such, the community competition law plays a role at the national level and occupies a place of supremacy over national competition law.

Therefore, whereas the Protocol on Competition Policy has done well to introduce a competition regime at the continental level and has introduced an AfCFTA Competition Authority and Tribunal, it is vital to have a harmonised competition regime to which all other competition legislations will align. The AfCFTA Competition Authority can play a similar role to the European Commission, being the authority responsible for harmonising competition legislation in AfCFTA and ensuring competition in the single market is not distorted. This would form a pyramid structure

[294] COUNCIL REGULATION (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 3 (2002).
[295] *Id.*

with the AfCFTA Competition Authority and Tribunal at the top, the RCA Competition Authorities at the middle and NCAs and courts forming the base of the pyramid. Each of these bodies would be working towards ensuring that competition authority is enforced uniformly across the single market.

2. Implementing the Principle of Subsidiarity

Having done so, the AfCFTA should adopt a principle of subsidiarity where the issues that can be handled at the lower level should be handled at the lower level, and those which are best handled at the top are handled at the top. Under Article 5 (3) of the FTEU, according to the subsidiarity concept, the Union only becomes involved in non-exclusive spheres of influence when local, national, and regional authorities are unable to adequately address a given issue due to its magnitude and the Union is the most appropriate entity to handle it.[296] It aims to ensure that local authorities can run independently of higher bodies. Consequently, it entails the delegation of authority among many tiers of government, an idea that serves as the institutional foundation for federal states. This translates into the AfCFTA Competition Authority being free to handle only those matters specified in the Protocol that have a continental effect or could significantly affect competition in the market. It also means that the local and regional authorities should be empowered to handle any matter which can be handled at their level.

3. Developing the African Competition Network

My third recommendation is the development of an African Competition Network (ACN) in line with Article 22 (3) of the draft protocol. Under Article 22(3), the Council of Ministers is tasked with developing a network of national, regional and continental competition authorities to facilitate cooperation and coordination to implement the protocol.[297] Similarly to the European Competition Network (ECN), the ACN should become a forum for discussion and cooperation when the AfCFTA competition law is applied. As such, both NCAs and RCAs should take advantage of the network by helping each other with investigations, coordinating investigations where necessary, exchanging information and evidence, etc. The purpose of this network would be to better coordinate and implement the application of AfCFTA competition rules in this single market. It

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[296] Consolidated version of the Treaty on the Functioning of the European Union, 326 OJ C 5(3) (2012), http://data.europa.eu/eli/treaty/tfeu_2012/oj/eng (last visited Dec 14, 2023).
[297] AfCFTA Draft Protocol on Competition Policy, *supra* note 210.

would ensure that both RCAs, NCAs, and the AfCFTA competition authority can curb anti-competitive conduct across the market and develop the best practices for enforcing competition policy in Africa. It would also better help with harmonisation as the competition authorities can discuss the AfCFTA competition regime, share their decisions with each other and decide.

Additionally, the ACN should be the body responsible for spearheading competition law in the single market. It should be at this forum where the various competition authorities across AfCFTA can meet to discuss the state of competition law in Africa and make recommendations on achieving better regulation and enforcement of competition law in Africa. Presently, the only such forum is the African Competition Forum (ACF), an informal network of African national and regional competition authorities. However, because of its informal nature, its impact has been limited. The ACN would be looking to go further than this and be a significant driver of Africa's competition agenda.

4. The AfCFTA Competition Protocol needs to include a provision that prevents state aid.

One of the provisions which is notably missing in the Competition Protocol and in the AfCFTA agreement is a provision prohibiting state aid. State aid is any advantage given in any form by the government to undertakings on a selective basis. According to the EU, for a measure to qualify as state aid, it must meet the following criteria[298]:

I. There must be an intervention by the State or through State resources.
II. State intervention confers an advantage to the recipient.
III. The intervention is likely to affect trade between Member States.
IV. It must disrupt or distort competition within the EU's internal market.

However, state assistance is permitted in some situations, particularly when it's required for a fair and functional economy.

[298] Overview - European Commission, https://competition-policy.ec.europa.eu/state-aid/overview_en (last visited Dec 15, 2023).

The treaty also requires that States give prior notification to the Commission before issuing any State aid. Typically, before providing such assistance, the States must wait for the commission's permission.[299]

The purpose of such a provision under AfCFTA would be to prevent states from undermining competition in the market and, as such, keep States in check. Given that the Protocol already prohibits undertakings from undermining competition in the market, it is necessary also to have a provision that checks State Parties.

5. **Africa ought to have a court to decide on competition matters.**

From the onset, Africa's goal has been economic integration, which is the purpose of the AfCFTA agreement. Considering that more than 70% of African nations are ranked in the bottom half of all nations when it comes to the perceived level of local competition and the presence of the foundations of market-based competition and that in comparison to other regions, oligopolies, duopolies, and monopolies are quite common in Africa, with single operators controlling more than half of the market share in the transportation and telecommunications industries in over 40% of African nations, the importance of competition law cannot be stressed enough.[300] For Africa to enhance competitiveness in its market, it will need to have a uniform application of competition law in Africa. This will be necessary to ensure that undertakings do not take advantage of the cracks in the single market to advance an anti-competitive agenda. While not every agreement, conduct or concerted practice may have a cross-border effect, it is important to ensure accountability and a united front, even at the national level.

Africa will thus need a court that will guide and ensure that the AfCFTA competition laws are being applied uniformly across the continent and that will guide the application of the AfCFTA competition rules. The court can work alongside the authority to ensure that the goal of uniform application of competition law is achieved. As stated in the previous chapters, this role can be played by the African Court of Justice and Human Rights, given its mandate under Article 28 (b) of the protocol establishing the court. Also, given that some of the RECs already have Regional Courts that give direction on competition matters, there needs to be a voice at the top spearheading

[299] *Id.*
[300] THE WORLD BANK GROUP. 2016. BREAKING DOWN BARRIERS: UNLOCKING AFRICA'S POTENTIAL THROUGH VIGOROUS COMPETITION POLICY., *supra* note 12.

Africa's competition agenda. The whole purpose of this is to achieve Africa's goal of economic integration and maximise the potential of the single market.

6. The AfCFTA Competition Authority ought to have a worldwide voice.

In her article, Integrating Africa by Competition and Market Policy, Eleanor Fox argues that unlike Europe and the USA, Africa does not have a voice at its centre that pronounces itself on competition matters. This voice should speak to issues affecting the internal market (AfCFTA) and global problems. Without such a voice, Africa will continue to be left behind on the global front, with the developed world taking centre stage, dictating policies, and predicting the results of all megamergers, global cartels, big tech abuses, and other international restrictions that have a substantial influence on Africa while remaining uncoordinated on the home front.[301] I see this to largely be true, as the whole purpose of economic integration is to not only enhance trade within the African continent but to also amplify the voice of Africa as a whole. This would allow Africa to speak with one voice on the global stage and establish itself as a global player in the world economy, a feat which it has not been able to achieve in its presently disintegrated state. With the pyramid structure proposed in this recommendation, we can have the AfCFTA Competition Authority at the top, acting as the voice of competition law in Africa. Additionally, we can have the ACJHR alongside it, also playing the role of shaping the future of competition law in Africa.

To achieve this, however, Africa will have to implement the first recommendation and first understand what it wants to accomplish with its competition policy and which direction the continent intends to take with its competition policy and enforcement.

7. **African Countries Must Start seeing themselves as a Block and Not as Single Entities.**

To achieve all these recommendations, it goes without saying that African Countries must first see beyond their individual identities and embrace their collective African identity. Throughout this thesis, we have called for a collective rather than an individual approach in the way Africa approaches matters. This approach goes beyond just competition laws but touches on Africa's economy as a whole. This thesis emphasises the importance of using competition law as a key piece in achieving economic growth and integration. Thus, developing healthy competition

[301] Eleanor M. Fox, *Integrating Africa by Competition and Market Policy*, REV. IND. ORGAN. (2022), https://link.springer.com/10.1007/s11151-022-09854-1 (last visited Mar 14, 2022).

transcends national borders. It moves into the purview of allowing African businesses to be able to compete effectively across the continent and to open up borders by giving up national protections and measures such as state aid, which are aimed at protecting rather than allowing the African market to thrive.

Removing this individual identity is essential in allowing Africans to embrace a more collective identity and see opportunities not just within their national borders but across the continent. It involves a paradigm shift in the African mindset that sees undertakings and businesses from other African countries as being foreign while at the same time viewing those from their Western counterparts through a more nationalistic lens. Africans must, therefore, get rid of any internalized discrimination against each other and begin to celebrate their collective identity. Any African business ought to be comfortable in any African country, and it should no longer be strange to have African businesses thrive in each other's market. Africans have collectively become accustomed to seeing and embracing giants from the Western world and are used to opening up their markets to their products. They must now learn how to do this to African businesses as well and learn how to develop and support their own giants. Without this, Africa will never be able to compete and put its imprint on the global economy. With a continent of more than 1.4 billion people, most of whom are the youth, Africa has a large enough market and a large enough talent pool to build itself up and be more impactful in the global economy. It is time to shed the narrative of being a continent in need of aid by embracing our collective identity as Africans and then following it up by allowing free and fair competition among ourselves in order to achieve the best outcome for the African consumer.

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