Chapter 4 The nexus between competition and investment: Competition as an investment enabler

Theoretically the relationship between competition and investment is ambiguous, and empirical studies have shown that competition can either enhance or constrain investment (see chapter 2). Conversely, investment can affect the parameters that influence competition. The actual effect of competition on investment is case-specific and depends on the type of investment and the precise competition-enhancing measures in place.\textsuperscript{383}

As predicted by economic theory, competition affects investment through its influence on factors that are key to investment decisions. These factors can be structural or behavioural barriers as well as regulatory.

Structural barriers to entry are the sunk costs that firms must bear upon entry—costs that cannot be recovered in the event of a firm’s exit from the industry. Sunk costs act as a barrier to entry when they push the total cost of the project above the expected net present value of the investment.

Behavioural barriers to entry are the ways that incumbent domestic, foreign or state-owned firms impede market access by abusing their market power. Incumbent firms do this by maintaining exclusionary arrangements with suppliers of inputs or with market outlets that prevent competitors from accessing the market. Such conduct is often taken as normal business practice and includes setting contractual provisions with wholesalers, restricting retailers from selling competitors’ products or requiring contractual clauses in lease agreements that restrict property owners from leasing to competitors. Such provisions are usually accepted by market players, but they are often challenged when competition regulations and enforcement are introduced.
Links between competition, open markets and investment

The relationship between competition and investment requires that competition policy be consistent with policies promoting investment. There are four ways in which competition and investment policies may interact and these must be considered in shaping competition policy (figure 4.1).

Figure 4.1 What investment policy can do

**CONTRADICT COMPETITION POLICY**
Investment policy may encourage, or even require conduct or conditions that would otherwise be in violation of the competition law. For example, investment policy may permit price co-ordination or require territorial market division, which may be considered anti-competitive under competition law.

**USE COMPETITION POLICY METHODS**
Instruments to achieve investment regulatory objectives can be designed to take advantage of market incentives and competitive dynamics. Co-ordination may be necessary to ensure that these instruments work as intended in the context of competition law requirements.

**REPLACE COMPETITION POLICY**
Investment policy may try to control market power directly, by setting prices and controlling entry and access, especially where monopoly has appeared inevitable. Changes in technology and other institutions may lead to reconsidering the basic premise in support of regulation—that competition policy and institutions would be inadequate to the task of preventing monopoly and the exercise of market power.

**REPRODUCE COMPETITION POLICY**
Investment rules and regulations may prevent co-ordination or abuse in an industry, just as competition policy does. For example, regulations may set standards of fair competition.

Source: ECA

It has been argued that one of the best ways to deal with barriers to market entry is to maintain open trade and investment policies. The reasoning behind this line of argument is that competition from potential foreign investors or from imports will discipline those firms seeking to exercise some form of market power. In effect, by maintaining open trade and investment regimes the market is no longer limited to the national market.

Experience suggests, however, that open market regimes are insufficient for maintaining contestability in national markets. Even in the context of liberal trade and investment regimes, structural characteristics in an economy can buffer incumbent firms from competition. Such characteristics can include factors inherent in the local nature of some markets, such as the non-tradability of certain products and services, cultural values that promote secrecy and deterrence from whistleblowing, and regulations that are not restrictive from an investment perspective—for example, standards and licensing requirements. Further, restrictive business practices, such as collusion, may inhibit investment.
While trade liberalization opens markets to competition, structural characteristics of the market and the behaviour of incumbent firms in that market may lead to less or no competition. Competition policy helps to make markets more competitive and ensures that it leads to desired development outcomes. It serves as a surrogate competitor in a market where structural conditions make it difficult for competition to occur. Surrogate competition is common in markets where competition does not exist and where regulations that are enforced are used to promote and create a competitive market.

Policies that maintain conditions favourable to competition make markets efficient. Enforcement of competition policy prevents private market abuses from reversing the benefits of economic reforms. A complement to competition enforcement is competition advocacy, which is the promotion of competitive market principles in policy and regulatory processes. Together with enforcement, advocacy leads to increased competition. This creates opportunities for entry by more efficient firms while at the same time facilitating the exit of less efficient firms. Increased competition also incentivizes the efficient use of resources and triggers innovation, thus improving productivity and, ultimately, economic growth and improved consumer welfare.

Traditionally, policies underpinning open markets were based on a perfect competition model that, among other things, assumes the existence of many sellers dealing in homogeneous products or services, who sell their products or services at prices set by a market with low entry and exit barriers. Such policies are relevant in the context of the existing trade configuration and the prevailing international trading environment. However, the composition of trade and the international trading environment are changing. Technological advantages, economies of scale and multinational corporations are playing growing roles in international trade. Government involvement in ownership of businesses and its championing of some enterprises are also more common. Furthermore, the shares of total trade and production for resource- and labour-intensive commodities have shrunk steadily, and shares for science-based, scale-intensive and differentiated commodities and services have grown. Imperfect competitive behaviour thus seems increasingly relevant, and perfect competition less so. Consequently, equilibrium in global markets is often determined by small numbers of large agents, not by large numbers of small agents. Such oligopolistic equilibria have a different character from perfectly competitive equilibria and respond to government policy initiatives quite differently.
The status of the AfCFTA Competition Protocol and challenges to Phase II

Negotiations for the protocol on competition have yet to commence. They were scheduled to start in March 2018, immediately following the signing of the agreement establishing the AfCFTA. But in the Thirty-third Ordinary Session of the AU Heads of State and Government, held in Addis Ababa, February 2020, it was reported that negotiations would commence immediately after the summit and conclude by December 2020. The negotiations were put on hold because of the COVID–19 pandemic and a new deadline of 31 December 2021 for the conclusion of negotiations was subsequently agreed.

Given the market disruption caused by COVID–19, defending competition has become increasingly difficult. Market failures have caused harm to firms and consumers alike, and competition concerns include excessive pricing for health-related products, abusive price increases and collusion. Competition authorities have continued to monitor markets, and, in April 2020, the United Nations Conference on Trade and Development (UNCTAD) recommended governments take five key actions during the COVID–19 crisis to protect competition in markets:

• Ensure equal conditions exist between companies to maintain a level playing field.

• Temporarily allow cooperation arrangements to ensure the supply and distribution of essential affordable products to all consumers to prevent shortages.

• Closely monitor markets of essential products—disinfectants, masks and gels—to ensure their availability, if necessary through temporary prices caps, to protect the health of consumers during the pandemic.

• Vigorously enforce competition law against companies who create cartels or abuse their market power to take advantage of the crisis.

• Adapt competition procedures and deadlines to address the extraordinary circumstances created by the pandemic.

In light of the growing pressures on continental markets due to COVID–19, it is more important than ever to have the AfCFTA Competition Protocol in place as soon as possible.

Despite the challenges in starting the negotiations, it is unclear which of three forms the Competition Protocol should take:

• A supranational AfCFTA competition authority.

• A competition cooperation framework.

• A sequential approach in which a supranational authority follows an initial competition network.
The debate is about which of the three is the best approach or whether there should be a hybrid of two. Informed by the lenses of these three approaches, this chapter examines how the AfCFTA Competition Protocol may be formulated and enforced.

**Competition policy in Africa: State of play and challenges**

The interactions between competition and investment policies underline the level of analysis required to develop coherent policies at the heart of the AfCFTA’s Phase II negotiations. Phase I, which continued well into 2019, was concerned with negotiations on tariff concessions, rules of origin, and services concessions. The preamble of the Agreement Establishing the African Continental Free Trade Area calls for common rules to govern trade in goods and services, the Competition Protocol, and Investment and Intellectual Property (IP) Protocols among state parties under the AfCFTA. The rules are required to be clear, transparent, predictable and mutually advantageous to achieve policy coherence and to resolve the challenges of multiple and overlapping trade regimes, including relations with third parties. Member countries are thus obligated by statute to come up with a Competition Protocol that is consistent, not only with the policies adopted under the AfCFTA, but also those adopted by member countries.

Countries in Africa have put in place different measures aimed at promoting investment, including bilateral investment treaties, tax holidays and other targeted incentives. Such incentives may be counterproductive if they are found to be inconsistent with the competition policy to be adopted under AfCFTA.

Markets in most African countries are characterized by low competition. According to the World Bank, more than 70 percent of African countries rank in the bottom half on the intensity of local competition measure and on the existence of fundamentals for market-based competition. In many African countries, competition is restricted by businesses practices that undermine competitive dynamics and by government interventions and regulations that create obstacles to healthy competition. In a number of African countries, this is aggravated by the absence of competition laws or weak enforcement of existing laws. Among African countries, 23 have both competition laws in force and competition authorities to enforce them. A further 10 have laws but no authority, 4 have competition legislation in an advanced stage of preparation and 17 have no competition law. Also, fewer than 50 percent of national economies have the necessary policy instruments required for a larger and more liberalized market.

The Competition Protocol under the AfCFTA may be informed by AfCFTA states’ domestic policies. But to achieve a level of harmonization, the states will have to reform policies to align with continental policy governing competition and investment. This also points to an opportunity for countries to harmonize existing regulations through the AfCFTA protocol on competition. The AfCFTA Competition Protocol will be an opportunity to address competition regimes among African countries that are diverse in their provisions and in their types of institutions.
While competition policy is ordinarily addressed at the domestic level through national laws that regulate domestic markets (see chapter 2), the effects of competition with liberalized trade are now flowing over borders. Regional economic communities (RECs) are creating harmonized competition rules for their members. The competition regulation landscape in Africa also includes subregional frameworks, and most African countries have overlapping memberships in multiple subregional economic blocs. With deepening regional and continental integration, it will be worth examining these arrangements and seeing how others can be effectively and successfully implemented. The AfCFTA protocol can provide a continental framework for connecting the layers and addressing substantive shortfalls or gaps.

At the REC level, five regional economic communities have enacted competition laws, and they are at different stages of implementation. As of 2019 (ARIA IX), some existing RECs, such as the Common Market for Eastern and Southern Africa (COMESA), have established systems for competition law and for dealing with cross-border anti-competitive practices. Others, such as the East African Community (EAC), have set up the necessary institutions, and Economic Community of West African States (ECOWAS) and West African Economic and Monetary Union (WAEMU) are setting up enforcement regimes. The Southern African Development Community (SADC) and the Southern African Customs Union (SACU) enforcement cooperation framework complicates the situation since some members of these two RECs are also members of COMESA. Countries that belong to both COMESA and
SACU or SADC have the option of applying the COMESA rules, making uniformity across all three RECs difficult. Since competition authorities have recently been established in EAC and ECOWAS, jurisdictional practices between EAC (within COMESA) and WAEMU (within ECOWAS) will need to be defined. This overlapping and fragmented coexistence reflects the challenges in regulating competition in African countries and RECs.

The elimination of tariffs and nontariff barriers under the AfCFTA is likely to open opportunities for competition to a wider continental market, as economic activities will no longer be restricted to national borders but combined in one community market. However, the prevalence of anti-competitive business practices and regulatory impediments to competition, coupled with imperfect market structures, raises the risk that opportunities for competition may be impeded. These opportunities include innovation, increased choices, growth of markets, lower consumer prices, job creation and other socioeconomic benefits. States often must strike a balance between increased profits for investors and improved consumer and public welfare.

The protocol on competition policy scheduled for negotiation under Phase II of the AfCFTA, alongside investment and intellectual property rights, is intended to provide remedies to address these impediments. In the context of regional trade arrangements, competition policy, in addition to applying to conduct that has negative effects on competition, also applies to business practices that negate trade liberalization by restricting trade flows between countries. In this regard, the protocol on competition policy will reinforce the elimination of tariffs and nontariff barriers by ensuring that no firm, regardless of where it is located within the AfCFTA, can impede trade flows between member countries. Within the context of regional value chains, the AfCFTA will create a conducive environment that ensures effective competition to support intermediary trade in essential goods and services.

### Anti-competitive business practices

Anti-competitive practices refer to a wide range of practices firms use to restrict competition in order to maintain or increase their profits and relative market positions without necessarily providing goods and services at a lower cost or at a higher quality. The UN Set of Principles and Rules on Competition defines anti-competitive business practices as behaviour by enterprises that restrains competition or limits access to markets, has or is likely to have adverse effects on international trade, or through formal, informal, written or unwritten agreements has the same impact. Anti-competitive practices lead to market concentration and market failure as the price signal is not allowed to operate to clear the market. The results can be a combination of higher prices, lower supply, economic inefficiency, misallocated resources, reduced consumer choice than under competitive conditions and ultimately lower consumer surplus.

Besides the behaviour of private operators, state aid can also intervene in the operation of markets. Table 4.1 flags examples of anti-competitive conduct across the world that warranted regulatory action.
Table 4.1 Sample cases of anti-competitive trade practices

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<thead>
<tr>
<th>ANTI-COMPETITIVE PRACTICES</th>
<th>EXAMPLE</th>
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<tr>
<td>1. Companies collectively engage in strategies that create quasi-monopolistic conditions under which they are able to inflate consumer prices. Colluding businesses maximize their joint profits.</td>
<td>Private schools in Malawi colluded in fixing their tuition fees.</td>
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<td>2. Cartels (sometimes referred to as conspiracies or combinations) are underpinned by an explicit arrangement. Conscious parallelism is based on tacit collusion whereby enterprises fix output or price based on the behaviour of the market leader.</td>
<td>Poultry industry operators restricted their chicken meat output in Chile.</td>
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<td>3. Anti-competitive practices may be horizontal (companies operating on the same level of the supply chain) or vertical (companies are active at different levels).</td>
<td>Brazilian suppliers of industry gases (used in the health care and water utility sectors) engaged in customer allocation, bid rigging and price fixing.</td>
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<th>TYPES OF BEHAVIOUR</th>
<th>EXAMPLE</th>
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<td><strong>Price/margin fixing</strong></td>
<td>Private schools in Malawi colluded in fixing their tuition fees.</td>
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<td>Companies agree to set a price or profit margin for a certain product.</td>
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<td><strong>Output restrictions</strong></td>
<td>Poultry industry operators restricted their chicken meat output in Chile.</td>
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<td>Businesses supply the market at a lower rate to provoke a price increase.</td>
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<tr>
<td><strong>Market allocation (or division)</strong></td>
<td>Brazilian suppliers of industry gases (used in the health care and water utility sectors) engaged in customer allocation, bid rigging and price fixing.</td>
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<td>Businesses segment the market or customers so as not compete against each other. Collusive tenders in bidding represent a particular subtype of market division.</td>
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<tr>
<td><strong>Group boycott</strong></td>
<td>Physicians in the US orchestrated group boycotts against insurance providers to force higher reimbursements.</td>
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<td>Businesses agree not to deal with a certain provider. Some countries prohibit this practice.</td>
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**ABUSE OF DOMINANT MARKET POSITION**

An enterprise exploits its dominant position to discourage or eliminate competitors through exclusionary practices.

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<td><strong>Vertical restrictions (restraints)</strong>&lt;br&gt;Entities at different levels of the supply chain enter into exclusive agreements. These agreements designate a single dealer, possibly belonging to the same company's group, who enjoys the exclusive right to market products. This may amount to exclusive dealing, also named exclusive territory market restrictions and selective distribution. Selectivity clauses enforcing exclusive purchasing compel buyers and sellers to only purchase or sell the given good or services exclusively from the dominant company. Exclusive territorial restrictions can partition markets, which negates the objective of continental integration.&lt;br&gt;Selective distribution is normally assessed on a rule of reason basis as there may be economic/technical justifications for such restrictions and these outweigh the anti-competitive effects. Under resale market price maintenance, the supplier of goods upstream enforces a minimum price at which the reseller downstream must sell the goods to the final consumers. The supplier in the upstream market controls and maintains minimum prices of the product sold to the downstream reseller.</td>
<td>Total Kenya prevented its distributors from selling competitors’ products in the vicinity of their filling stations.&lt;br&gt;A COMESA example is Coca Cola Beverages Africa (CCBA). CCBA had resale price maintenance clauses in agreements with independent distributors throughout the Common Market.</td>
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<tr>
<td><strong>Market (vertical) foreclosure</strong>&lt;br&gt;Companies prevent competitors’ access to upstream supplies or suppliers or downstream buyers. Pre-emptive purchase of facilities and long-term and exclusive contracts represent typical foreclosure strategies. Patent misuse, or refusal to license essential patents to competitors, is illegal in some jurisdictions.</td>
<td>Qualcomm paid Apple for the exclusive purchase of its baseband chipsets and thus drove out other chipset manufacturers.</td>
</tr>
<tr>
<td><strong>Excessive or unreasonable pricing</strong>&lt;br&gt;The dominant company applies a price to its products that significantly exceeds the market competition level.</td>
<td>Turkish website Sahibinden.com was found commanding excessive prices in the online markets of real estate sales and rental and car sales.</td>
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<td><strong>Predatory pricing</strong>&lt;br&gt;Producers sell products at artificially suppressed prices that smaller companies or new entrants cannot match. Dumping* denotes the practices of selling product in export markets at prices below cost.</td>
<td>Finnish dairy company Valio pushed down its prices to thwart milk imports.</td>
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<td><strong>Tied selling</strong>&lt;br&gt;Buyers of a certain product are obliged to buy an otherwise unrelated product. Under full-line forcing, the purchaser must not only buy the desired product but also an entire line of products.</td>
<td>Google compelled manufacturers to pre-install the Chrome browser and Google Search applications on mobile devices running the Android operating system.</td>
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ANTI-COMPETITIVE MERGERS AND ACQUISITIONS

Mergers (amalgamation of two or more companies into one) and acquisitions (purchase of equity by one firm in another firm) can impact the competitive conditions in the market and result in lower efficiency and consumer welfare.

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<th>TYPES OF BEHAVIOUR</th>
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<td><strong>Horizontal mergers</strong></td>
<td>Merger between Sainsbury’s and Asda in the UK was blocked by the national regulator over fears of the impact on prices and choices for consumers.</td>
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<td>These are mergers between two companies competing in the same market. They result in higher market concentration, and, if they involve major players, they may create an entity with a high market concentration that may decrease competition.</td>
<td>In the Rubis/Galana merger, which involved an importer of fuel and a retail distributor of fuel, the merging parties provided undertakings to the COMESA Competition Commission that they would not engage in discriminatory practices against their downstream competitors.</td>
</tr>
<tr>
<td><strong>Vertical mergers</strong></td>
<td>Similarly, in Orange/MTN joint venture, the COMESA Competition Commission obtained undertakings from the parties to the joint venture that the services of the joint venture company would be available on an equal basis to all mobile services operators.</td>
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<tr>
<td>These are mergers between two companies at different rungs of the supply chain. The newly created entity may engage in upstream foreclosure when one part of the company also provides essential inputs to other rival downstream companies. An alternative, and less definitive, way of foreclosing access is by selling the input to competitors at a higher prices or lower quality.</td>
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* Dumping is not addressed under competition law and would normally be addressed under the main trade agreement between the Member States (for example, Section 51 of the COMESA Treaty).

Note: Examples based on cases where the conduct was found anti-competitive by national regulators or the EU Commission (Qualcomm and Google cases).


**Cross-border competition issues**

The realization that competition policy is pivotal to development has spread across the continent. Enforcement is catching up as regional groups organize to protect their markets from abuses and anti-competitive practices imported from other continents through e-commerce and cross-border trade. So it is essential to encourage the proliferation of competition policies in Africa and thus encourage growth and development across the continent.392

In the absence of regulation, African economies continue to struggle when faced with import competition. As the barriers to trade have fallen and regional trading blocs have formed, African economies are increasingly connected to each other and the global economy.393 Regional enforcement solutions are needed as problems from competition stretch across countries. Also important is cooperation between competition authorities and regional competition bodies.394
The most significant competition-related issues are problems created by regional mergers and by cartels spread across the SACU region, especially by a cartel in the cement industry. A number of lessons can be drawn from the operation of this cartel. At the heart of the cartel arrangement was market division and information exchange done through the industry association. This effectively removed price competition since the commitment by the major producer to a pricing structure meant other producers could readily align their prices, while market sharing meant there was no incentive to discount. The companies in the arrangement were well aware of the provisions of competition legislation and regulations, as they had previously been granted an exemption, which allowed the legal cartel to continue until 1996 when it was ended by the then-Competition Board of South Africa.

Faced with cross-border competition issues, African countries have not necessarily been caught unawares. They have developed cross-border competition regulations that are now operational, even though cross-cutting issues such as e-commerce, procurement and inter-agency collaboration need to be further addressed, possibly within the framework of the AfCFTA Competition Protocol.

Supranational competition regimes covering a number of regions in Africa have formed. In 2013, the Common Market for Eastern and Southern Africa (COMESA) Competition Commission was established to promote and encourage competition within the region by preventing business practices that restrict the efficient operation of the market. The ultimate goal is to enhance the welfare of consumers in the region.

Other regional trading blocs have advanced into regional competition regimes. In 2006, the East African Community (EAC) agreed to competition legislation for the bloc, and the organization has established an operational competition authority. The West African Economic and Monetary Union (WAEMU) operates a voluntary merger regime where the parties file with the regulator without being compelled to do so by an order or by meeting a compulsory threshold. The Competition Commission and the Court of Justice can take action under Articles 88–90 of the WAEMU Treaty of Union against anti-competitive agreements or any transaction that creates or strengthens a dominant position within the WAEMU common market or a substantial part of it.

The Central African Economic and Monetary Community (CEMAC) has introduced a mandatory merger control regime and, while its competition authority is not yet fully operational, it has recently started to accept merger notifications. The CEMAC Regulation also prohibits anti-competitive agreements.
The Economic Community of West African States (ECOWAS) first introduced competition legislation in 2008, including a prohibition on anti-competitive mergers. The ECOWAS Regional Competition Authority was launched in 2019 and is based in Banjul in Gambia.\(^{396}\)

As for the Southern African Development Community (SADC), it does not have a regional competition law, but its members are committed to cooperating in the application of their national competition laws. In May 2016, SADC members entered into a memorandum of understanding that enables heightened cooperation on competition policy. When conducting merger reviews, SADC members collaborate on evidence gathering, remedy design and implementation.

There is membership overlap across the African regional blocs, particularly among COMESA, EAC and SADC. As a result, complexities in enforcement arise when rules, procedures and enforcement approaches differ. Enforcing AfCFTA competition policy will soften these challenges, particularly if the continental jurisdiction criteria match those adopted under the regional blocs. Adopting a uniform continental regime through the AfCFTA will ease difficulties by harmonizing the multiple regimes and by creating a supra-national competition enforcement regime on a par with the European Union.

**Protecting intellectual property rights and enhancing competition**

To improve the investment climate in Africa, intellectual property (IP) and competition require that the two protocols be deliberated in a complementary way (chapter 5.). A competition policy should be balanced, and innovation should not be punished by disregarding intellectual property rights (IPRs). Implementation of competition policy should not unduly sanction conduct that creates efficiencies and contributes to development.

IPR and competition policies are both concerned with promoting technical progress to benefit consumers. They complement each other. Firms are more likely to innovate if they are protected against free-riding by other firms. And they are more likely to innovate if they face strong competition. The problem is that, at least in the short run, legitimate uses of intellectual property rights can restrict competition, thus producing a trade-off between the benefits of increased competition and the gains from further innovation.\(^{397}\) However, maximum protection may hinder innovation by “making inputs to future innovation too costly and too cumbersome to sustain over time.”\(^{398}\) As the protection of intellectual property rights is an example of a limit to competition that is considered beneficial, competition policies need to be formulated and implemented in a manner that creates proper balance between innovation and protection.
The IP system is designed to reward innovation, diffuse new knowledge and solutions to technical problems and promote competition based on quality, originality and innovation of products and services. Effective enforcement procedures add to the value of IP rights. As a private right, IP enforcement is primarily through civil and administrative procedures. Criminal law applies when the infringement of IP rights is at a scale and in a manner that harms public interest. According to WTO’s TRIPS agreement, trademark counterfeiting and copyright piracy on a commercial scale are criminal offences. National laws extend criminal liability to other IP infringements, such as breach of confidence by employees of enterprises leading to the disclosure of trade secrets.

In international trade negotiations, IP enforcement is largely considered a matter of law and law enforcement. Developed countries have attempted to consolidate enforcement standards under the Anti-Counterfeiting Trade Agreement (ACTA), concluded in 2011. While the ACTA was signed by several countries, it never came into force. Some of ACTA’s proposed measures raised constitutional questions for some countries, and the European Parliament rejected ratifying the agreement. Some trade agreements between African countries and the European Union or United States have increased the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) minimum standards for enforcement.

IP enforcement should address three broad areas:

First is the effectiveness and fairness of enforcement standards. Do the national laws and regulations provide adequate procedures and effective remedies—including awards sufficient to compensate the losses of the right holder—to deter further infringement?

Laws and regulations should enable the enforcement of IPRs and clearly identify the responsibilities of rights holders and law enforcement agencies. Not only must the judicial authorities have power to issue orders—say, for the preservation of evidence and injunctions—but law enforcement officials should be able to execute judicial orders promptly and efficiently. If compensation for infringement is not seen as fair and adequate, it could discourage right holders from using enforcement procedures and so fail to deter infringement. At the same time, standards should also protect defendants. For example, in ordering discovery of evidence, the judicial authorities should preserve defendants’ trade secrets.

The second area for IP enforcement is investing in non-legal solutions. Are enforcement standards provided under the law the appropriate approach for effective enforcement of IPRs?

There is a limit to what laws, judges and law enforcement officials can do. The loss of revenue by the music industry is an example. Despite major legislative reforms, led by the 1998 United States Digital Millennium Copyright Act, the music...
industry in the United States had lost significant revenue since the advent of digital technology. The peak for the industry in the United States was in 1999, when revenue was $21.5 billion. It declined continuously until 2015, when it reached $6.9 billion. The downward trend demonstrated how copyright enforcement laws, whether civil or criminal, have become less effective in the context of the digital economy. Although all forms of copyrighted materials have been affected by digital technology, its disruption of the music industry has been the most significant. Surprisingly, since 2015, US music industry revenue has recovered. A new business model involving streaming services though major digital platforms, as opposed to enforcement, appears to be the driving force behind the recovery. The case demonstrates why copyright law by itself is not a solution for critical challenges of protecting audio-visual works in the digital context.

It is also important to consider the economic incentives behind counterfeiting and piracy from both the supply side and the demand side. Considering the purchasing power of consumers, insufficient limitations and exceptions to copyright could compel students to reproduce educational materials. For some developing countries, the price of software and reference materials is so high that consumers may have no other option than to use unauthorised copies or forgo accessing the software or material altogether.

Third is competition policy and abuse of enforcement procedures. Do competition regulations and enforcement procedures sufficiently address the potential abuse of IPRs?

IPR enforcement could be used strategically to affect competition in the marketplace. The problem of standard essential patents (SEPs) is a good example. These patents are essential parts of a specific digital technology, for example patent technology that makes up Wi-Fi or 5G. If patent holders refuse to license a patent or conceal a claim of patent from standard setting agencies—for instance, the International Standards Organisation (ISO)—the patent holder could prevent the deployment of new technologies or even demand excessive licensing fees and royalties for use of the patent. The holders of an SEP could use IP enforcement procedures to extract more value than their technology is worth. In 2014, the European Commission found that seeking and enforcing an injunction on the basis of an SEP constituted an abuse of a dominant position, and this was prohibited by European Union competition rules. In such a situation, judicial authorities may refuse to grant an injunction to stop defendants from using the SEP. Instead, judicial authorities may only authorise the payment of royalties that they think are fair and adequate. Standard setting organisations have adopted the fair, reasonable and non-discriminatory (FRAND) principles to address the challenges of SEP and enforcement.

In the era of the digital economy, the conflicts between intellectual property and competition can be mitigated through advocacy initiatives and by cooperation and partnership between the regulators of these two specialized areas, and by promoting convergence of ideas and enforcement priorities.
E-commerce and the digital economy

The rise of the digital economy and e-commerce cannot be ignored, since they are transforming societies globally. In this chapter, the digital economy is defined as “that part of economic output derived solely or primarily from digital technologies with a business model based on digital goods and services.” The quick pace of technological development has changed the nature of markets and business models. This has posed challenges for competition law and policy, which need to be adapted to the new market realities and business models. To ensure competitive and contestable markets in the African context, competition policy needs to complement digital policy and policies should address the market imperfections that are worsened by e-commerce. Regulation of the digital space is critical. Just as investment regulation in the digital space needs careful attention, so does competition regulation of the digital economy.

Cross-border competition issues are likely to grow as businesses transition from brick and mortar to trade through e-commerce. E-commerce, however, comes with challenges that can raise competition risks. Uncompetitive delivery infrastructure, fragmented markets and rising barriers to cross-border e-payments can stifle competition or even result in market foreclosure. Unfortunately, regulations have not kept pace with digital developments. According to the United Nations, 32 of Africa’s 54 countries have laws in place that govern e-transactions (online exchanges), 23 have laws on data protection and privacy and only 20 address online consumer protection. So it is imperative for the AfCFTA Competition Protocol to have provisions in place that will regulate e-commerce and online markets and that will complement the protocol on e-commerce (to be negotiated by AfCFTA states in Phase III of the AfCFTA).

Online marketplaces provide an opportunity to drive inclusive growth across Africa, with e-commerce likely to create as many as 3 million jobs by 2025. Benefits will include servicing Africa’s fast-growing consumer class, offering women access to new business opportunities and opening markets to otherwise isolated rural communities. Much as competition principles are pro-innovation, there is a need to strike a balance between innovation that stifles competition and innovation that is pro-competition.

Experiences from other regions highlight the need for such a balance. For example, in 2017, the European Commission launched three separate investigations to assess whether certain online sales practices prevented consumers from enjoying cross-border competitive price choices in consumer electronic, video game and
hotel accommodations. The commission came up with a Digital Single Market Strategy that identified barriers hindering cross-border e-commerce and proposed initiatives to address these. The strategy is built on three pillars:

- Enabling better access to digital goods and services for consumers and businesses across Europe.
- Creating the right conditions and a level playing field for digital networks and innovative services to flourish.
- Maximizing the growth potential of the digital economy.

The strategy also included an anti-trust competition inquiry into the e-commerce sector to identify possible competition concerns requiring regulatory action. Possible areas of concern were anti-competitive online distribution agreements and restrictions on the development of internet sales in general. National competition authorities continue to monitor these and other pressure points.

The African continent is a lucrative market for exploring e-commerce investments, especially as liberalization and competition have opened up markets. For instance, Uber, the ride hailing app, has asserted itself and taken up significant market share. Since launching in Johannesburg in August 2013, Uber has expanded to 14 cities in Sub-Saharan Africa. It has consolidated in major hubs in Cape Town, Lagos and Nairobi, while moving into secondary cities and broadening its services beyond the sedan vehicles that dominate mature markets.\textsuperscript{412} Uber has also spurred innovation in the taxi industry in Africa, encouraging other businesses to introduce taxi hailing apps.

Uber has, however, faced regulatory challenges, labour disputes, technical challenges, passenger security issues and violent protests in some countries because of the disruption the technology has brought to the passenger transport sector. In 2019, the COMESA Competition Commission called for the notification of Uber’s acquisition of Careem and imposed a number of behavioural remedies regarding Uber’s service quality and the fees Uber charges drivers. As the Uber case illustrates, e-commerce has the potential to displace smaller, weaker and traditional market players who rely on their businesses for their livelihoods.\textsuperscript{413} This makes e-commerce a competition issue worthy of regulatory oversight. In the absence of proper regulation, stronger and technologically more advanced firms can monopolise some industries by pushing informal sector players to the fringes. This is why it is imperative for e-commerce players to be pro-regulation and cooperate with competition authorities from the onset. (Chapter 6 explores how the digital economy and e-commerce require some form of regulatory framework for Africa to reap their full benefits).
Internet use in Africa, e-commerce, competition and foreign direct investment

E-commerce thrives when internet use is also high as this creates a conducive environment for viable business ventures. So Africa needs to boost internet penetration across the continent thus growing e-commerce and enhancing the competitive conduct of firms. However, as costs are high, only a quarter of Africa’s population regularly uses the internet. On average, across Africa 1 GB of data costs 9 per cent of monthly income. The International Telecommunication Union (ITU) estimated that at the end of 2019, 54 per cent of the global population, or 4.1 billion people, were using the internet. At 25 per cent, Africa is lagging behind and needs to catch up if some markets are to rely on e-commerce for operations, especially in the critical areas of internet-based payments and the management of information.

In terms of the volume of business done online in Africa, the region lags behind the rest of the world on the UNCTAD B2C E-commerce Index, which measures four composite indicators relevant to online shopping. Mauritius—with a ranking of 55—is the highest ranked African country, and as many as nine of the bottom ten countries are in Africa. However, the continent is showing progress in key indicators related to B2C e-commerce.

Most shopping is still done offline through brick and motor shops or through informal trade. This is largely because of weak regulatory frameworks that do not support online businesses and to low investment in e-commerce because of entry barriers across the continent to e-markets. A competitive e-commerce ecosystem attracts FDI and venture capital, as in Thailand where in 2017 e-commerce was the largest recipient sector of venture capital funding.

Although some e-commerce strategies and policies are at play, Africa falls behind on adopting key regulations, and legal uncertainty exists on multi-jurisdictional issues—privacy, e-transactions, digital identity and consumer protection. According to the World Economic Forum, Africa needs an inclusive pan-African perspective for e-commerce and the digital economy. It is anticipated the AfCFTA will come up with an enabling regulatory environment that is multifaceted and appropriate to meet the challenges. So it is critical to view the AfCFTA and its Competition Protocol as an opportunity to strategically address areas of e-commerce and to catch up with the rest of the world in creating an enabling environment that attracts investment and new players to the market.
Public procurement policies and their effect on competition

Economic activity can also be through public procurement. Public procurement is an area where competition for contracts is not only a political issue, but also a socioeconomic process. In Malawi and South Africa, procurement legislation includes provisions for empowerment of local firms by giving them priority in public sector contract awards. This is done through legislation of procurement strategies that supports the government’s socioeconomic objectives. Public procurement can also exclude rivals from national markets, as in the construction industry, when it is used together with other policies—such as state aid and subsidies—that give a competitive edge on pricing to local and not foreign firms.

Traditionally public procurement was thought of as an administrative task with a set of fair and transparent rules and procedures to ensure adequate fiduciary control. Now, because a significant volume of public expenditure passes through procurement, countries increasingly recognize it as a strategic function and an important development policy tool for supplying quality goods, delivering services effectively and efficiently to citizens, and implementing civil works with a focus on performance while obtaining more value for money. There are important prerequisites for these functions to be achieved—instiutions need to perform well, professionals need to be qualified, technology needs to be used strategically and contract management needs to be nimble. Conversely, poor procurement outcomes reduce development effectiveness through reduced fiscal space for social investment, high costs of doing business and reduced competitiveness.

If approached progressively, public procurement can enable competition. But it can also be abused to foreclose markets, discourage or limit players in a market, or result in price distortions. Kenya’s public procurement and disposal law includes guidance in price determination, especially in the construction industry. The guidelines ensure that the procurement process is competitive and follows due process. It also ensures participation of local contractors in construction projects, while boosting local capacity in the construction industry. The law requires that 40 per cent of foreign contract business be handled in Kenya or by local contractors, thereby passing on technical skills to local firms.

Governments are increasingly using their procurement policies to support socioeconomic objectives that are not core to the procurement process but directly influence the effectiveness of public expenditures, and the quality of services and infrastructure investments, and promote national industries and employment. Protection provisions in national laws and regulations are important in reducing the pressure of competition from foreign players, and these provisions are common in public procurement legislation and economic empowerment policies.

Such protection provisions require clear national policies that are well articulated independently of any procurement framework. More important, these policies should provide a balance between specific procedures supporting socioeconomic objectives and sound procurement frameworks to avoid negative impact or inconsistency with international agreements if they shut out participation from foreign firms, which in itself is anti-competitive and defeats regional integration objectives.
Public procurement policies regulate the public sector's interactions with domestic and international markets in ways that directly affect their efficiency and competitiveness. Bidding and contractual procedures are affected as the role of private businesses evolves from that of service providers to that of partners, including through public–private partnerships (PPPs) and outsourcing. With the increasing use of such contracts in Africa, the private sector has made progress in developing its technical and financial capacity. So, it is important that governments develop mechanisms to promote local competition and engage stakeholders frequently, openly and equitably. This requires deep market assessment of the overall investment and business environment.\textsuperscript{421}

A significant and pervasive recent trend in public procurement is the increasing use of technology-based tools that open participation to firms beyond a country's borders. The range of options—from open websites to e-tendering—is large. E-procurement enables easier and faster access to information, helps lower transaction costs, allows for participation of a larger pool of firms from broader markets and expedites the bidding process. It also builds trust, improves interactions with bidders and enhances transparency and accountability in the use of public funds. The interface of procurement with public financial management and budgeting is also facilitated through the growing use of technology, and this is essential to better managing resources and improving service delivery.\textsuperscript{422}

As globalization has blurred the distinction between bidders from developed and developing countries, procurement policies can be crucial to government efforts to gain from trade by creating a level playing field for both foreign and national firms or by protecting domestic markets from competition. So the interplay between competition and public procurement should be properly interrogated within an AfCFTA context and woven into the fabric of subsequent deliberations.
Anti-trust bodies and capacity building

Anti-trust bodies—commonly referred to as competition authorities or regulators—undertake investigations under legal mandate in the markets where they have jurisdiction. So it is important that national and regional competition authorities have the capacity to act effectively as regulators.

There are several bottlenecks that affect effective enforcement of competition at national and regional level. One of the most obvious obstacles is the different levels of maturity of anti-trust bodies across Africa. This can be illustrated by statistics compiled by the World Bank in partnership with the African Competition Forum (ACF). The number of jurisdictions with competition regimes has expanded from 13 in 2000 to more than 30 in 2017, reflecting the growing role of competition policy in the development agenda. Some agencies, however, are in their infancy, while others are mature. Nigeria’s competition authority that has been in existence for less than five years, but South Africa’s has been in existence for more than 15 years.

Capacity building can help address gaps in research, strategy, expertise and other areas. This institutional arrangement can be best facilitated through the AfCFTA Competition Protocol which goes further to delineate the policies, institutional arrangements and enforcement modalities. This will strengthen anti-trust bodies across Africa and will achieve the aspirations expressed in the African Competition Forum.

Investment in effective institutional arrangements should not be ignored. Full capacity in terms of financial, human and legal instruments will improve the integrity of the work of enforcement agencies. Competition authorities must invest in training their staff in competition legislation, rules of evidence collection and handling, and rules of procedure for summoning witnesses, interviewing techniques and referrals. While such training is indispensable, there should also be a knowledge-application monitoring system within organizations to ensure that those trained in a specific area actually apply their knowledge and do not continue to seek further training repeatedly but fail to put what they learn into practice.

International donors can also provide legal and technical capacity building as needed. This will be particularly important where local authorities do not have the resources to investigate, or the alleged infringer has few operations physically based in the jurisdiction.

Over and above agency capacity building, the interface between these agencies is critical for successful regional integration, which requires close cooperation between the competition bodies of the different countries. For this to be effective, each member country also needs to develop its own effective competition law and implementation of the law.

Capacity building can help address gaps in research, strategy, expertise and other areas.
Despite the signing of many memorandums of understanding, African trading blocs still aspire to incorporate competition provisions into international trade agreements. Depending on the different legal systems, this is often hard to achieve as it requires legislative approval and ratification. This aspiration, however, provides a window of opportunity for harmonizing the competition value system across Africa.

A maturing competition regulatory ecosystem is taking shape in different places and at different times across the continent. So, the task for regional authorities is to ensure that competition policy frameworks are consistent with membership in multiple regional authorities. Regional authorities will also need to avoid duplication of compliance requirements that create barriers for investors. This is important as competition policy is increasingly taking up space in African trade agreement negotiations. One example is the Tripartite Trade Agreement. Although still not yet ratified by all states, the agreement between COMESA, EAC and SADC aims to conclude negotiations on competition policy within two years of the agreement coming into force.

Considering its inherently borderless potential, policymakers must ensure that they create an enabling environment for e-commerce investments. This calls for firmly anchoring e-commerce within the African Continental Free Trade Area negotiations and encouraging more African governments to join the plurilateral negotiations on e-commerce at the World Trade Organization. In February 2020, there was discussion on a progressive approach for incorporating e-commerce into the AfCFTA—whether as a standalone chapter or protocol or by building on existing African Union instruments. E-commerce barriers have every chance of being overcome through strengthening regulations that allow FDI investments to be made in tech.

Regional integration comes with its own nuances. Unregulated competition can be harmful to smaller economies, so there is a need to set up relevant protocols and implementing institutions so that integration is meaningful to both big and small economies. This points to the important relationship between deeper and more balanced regional integration and industrial policies. Regional integration exacerbates economic polarization if it is not accompanied by appropriate regional development policies. The poultry meat industry in Southern Africa is a good case in point. Eliminating all trade restrictions would be short-sighted, since doing so would be detrimental to the smaller countries’ domestic industries. The South African poultry industry is large and well developed, and its scale economies would likely mean that South African poultry, along with imported Brazilian and EU poultry, would flood the smaller domestic markets. Another example is in the cement industry. In at least 18 African countries, one supplier holds more than 50 per cent of the market while the rest of the market is divided among smaller firms.
Competition operates at the regional as well as the national level, and there is an interaction between competitive outcomes and regional integration, such that consumers have competitively priced products and firms make investments to realize the productive potential. At the national level, countries need to depart from protectionist policies that distort competitive performance. Government policies have played an important role in protecting national industries and supporting investments. In the short term, these policies reduce competition from imports and support the market power of domestic suppliers. In the medium term, if the policies are temporary, the investment in expanded supply can mean greater regional competition. But there is a danger that government policies designed to protect and develop local production could decrease competition within a country and that the benefits from these policy interventions could be captured by the large firms and their shareholders.

**Policy recommendations**

Mutually reinforcing policies in competition, intellectual property and digitalization can level the playing field, thus attracting more intra-African investment and FDI. Creating and improving conditions for competition, innovation and the use of technology will allow companies to access the AfCFTA as a continental market. The ultimate objective is to prepare AfCFTA states for productive investments channelled to competitive activities and to adding value—such as in the knowledge economy, technology and innovation, and the digital space—all while taking advantage of economies of scope and scale in an AfCFTA common investment area. A continental competition framework will invite firms within the free trade area to make investment and location decisions from a regional perspective.

The dynamics of investment decisions that shape the competitive landscape must also be understood over time. The existence of significant scale economies makes competition across the region even more important. It is important to understand that investment decisions and arrangements regarding regional trade are made by considering the nature and extent of competition in national and regional markets.

Supranational authorities have a broad mandate to legislate and detect anti-competitive practices and mergers that have a cross-border impact. Their greater extraterritorial reach helps them address cross-border practices that go beyond the powers of national authorities. However, clarifying the boundaries of supranational jurisdictions is necessary, especially on merger control, as this gives businesses and national authorities legal certainty when making decisions about mergers that cross borders.

It is recommended that:

- Members states conclude the AfCFTA Competition Protocol and ensure that it covers the main substantive issues. These include cartels, merger control, abuse of dominance, anti-competitive agreements and consumer protection. As the ultimate benefit for competition is consumer protection, the adopted protocol should embrace consumer protection as a dedicated chapter.
• National competition authorities conduct competition-related market inquiries into the digital economy to understand how these markets function and how regulations can be enforced. These inquiries should inform the protocol so that it addresses relevant competition issues in the digital economy.

• AfCFTA states, during Phase II negotiations, ensure that the competition protocol has provisions that capture e-commerce and online markets. It is strongly recommended that the protocol include additional criteria for defining the market, for defining dominancy and for setting out the rules of the game in the digital sector.

• National competition authorities invest in capacity building to understand and regulate broader markets. Advancing the digital economy raises challenges for regulators and skills must be harnessed to understand such markets. Since the current capacity of competition authorities is limited, competition authorities should invest in capacity building so they can better identify new developments, players and business models, and thus better regulate the market.

• AfCFTA states, in concluding the Competition Protocol and in future negotiations, deliberate state aid and the exemption of the application of competition law. If these are left in abeyance, they could be counterproductive to the community practice of competition law.

• The Phase II negotiations clarify public procurement and protectionist provisions for infant industries. To achieve national level acceptance, the private sector and other stakeholders will need to be actively engaged in the discussions. If these issues are left untouched the common market could enable export cartels into weaker economies and create continental monopolies that then destabilize markets. A continental procurement policy can complement the Competition Protocol and vice versa. The protocol will ensure predictability, transparency and harmony in procurement policies and make government procurement competitive.

Trade policy without competition policy means no rules or principles to control harmful and distortionary effects on the market. The reduction of barriers to trade and the removal of barriers to entry for domestic and foreign investment need to be regulated. The Competition Protocol can secure gains from trade liberalization and market opening. Without the protocol, firms—especially multinational corporations— can acquire significant market power and thus influence pricing and volumes of supply in ways detrimental to the objectives of market liberalization.

Competition provides safeguards that enable the intentions of trade policy to take effect. The subsequent Phase II expert discussions will focus on firming up the investment, competition and intellectual property rights protocols. As this chapter has shown, these areas are interdependent, and there is a need to produce draft protocols that take into account the linkages between them. On their own and cumulatively, the three protocols hold promise for transforming, harmonizing and simplifying the rules on the continent, thus contributing to a level playing field that is also easier for African companies to navigate.
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End notes

388 ECA, 2019.
389 ECA, 2019.
393 Roberts, 2016.
396 ECA, 2019.
399 The Anti-Counterfeiting Trade Agreement was a proposed multilateral treaty for the purpose of establishing international standards for intellectual property rights enforcement.
401 The United States Department of State adopted principles for its initiative on enforcement of IP rights in 2006, that underscored:
  - Laws protecting intellectual property rights must be enforced.
  - The federal government and intellectual property owners have a collective responsibility to take action against violations of federal intellectual property laws.
  - The Department of Justice should take a leading role in the prosecution of the most serious violations of the laws protecting copyrights, trademarks and trade secrets.
  - The federal government should punish the misappropriation of innovative technologies rather than innovation itself.
  - Intellectual property enforcement must include the coordinated and cooperative efforts of foreign governments.
See United States Department of Justice (2006).
403 Routley, 2018.
404 Priest 2008.
405 Karaganis, 2011.
406 Ménière, 2015.
408 Bukht and Heeks, 2017.
412 Lits, 2019a.
413 Uber’s introduction has been controversial especially with traditional taxi drivers who see the app and its legion of drivers as a threat to their livelihoods (Lits, 2019b).
414 ITU, n.d.
415 UNCTAD, 2018.
417 Preferential Procurement Policy Framework Act (“PPPFA”) have been published and will take effect from 1 April 2017 in South Africa.
419 Public Procurement and Disposal Act 2015.
423 World Bank, 2016.
424 Fox, 2012.
426 Pratt and Diao, 2008.
428 In North Africa there is a significant presence of Lafarge Holcim with plants in Algeria and Egypt. Dangote’s Obajana plant stands out in West Africa. PPC and Lafarge Holcim are the most prevalent in Southeast Africa (African Competition Forum, 2019).
430 Roberts, 2016.
431 ECA, 2019.