Domestication, Compliance and Enforcement

Key to Keeping Momentum of African Continental Free Trade Area (AfCFTA)

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Introduction

The Agreement establishing the African Continental Free Trade Area (AfCFTA) entered into force on 30 May 2019 after attaining the required 22 ratifications as provided for in Article 23 of the AfCFTA Agreement. As of February 2022, all AU Member States had signed the Agreement, except for Eritrea, while 41 have ratified and deposited their instruments of ratification[1].

There is no doubt this has been a remarkable achievement, thanks to the commitment and political goodwill of Member States. The operational phase of AfCFTA was set for 1 July 2020 but delayed due to Covid-19. Trading under the AfCFTA commenced on 1 January 2021. The maiden trade under the AfCFTA took place in January 2021, two consignments of alcoholic beverages and cosmetic products were exported from Ghana to South Africa by air and Guinea by sea respectively. So far Member States have agreed to trade about 88% of tariff lines under preferences. Greater attention remain focused on conclusion of outstanding negotiations, including the Rules of Origin and services under phase 1 and the Protocols on Investment; Competition Policy; Intellectual Property Rights (IPRs); E-Commerce; and Women and Youth in Trade under phase II negotiations. Conclusion of these negotiations is critical for operationalization of the AfCFTAagreement.

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However, there has been growing disquiet against expectations that once the AfCFTAis launched, domestic markets would widely be open for goods and services to flow freely across the region. On the contrary, actual trading is not taking place with the zeal and impetus reflected in the signature and ratifications. This has been attributed to several factors, including but not limited to prolonged negotiations on Rules of Origin, inadequacies in financing, multiple memberships to Regional Economic Communities (RECs), technical

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capacity constraints in the AfCFTA and Member States and externally instigated factors, among others. But the reality of the issues is that until Member States domesticate, comply and effectively enforce agreed trading and related instruments, the realization of the goals and aspirations of the agreement will remain difficult to come by.

The AfCFTA essentially aims to create a single market for goods and services facilitated by movement of persons in order to deepen the economic integration of the African continent. With an estimated population of about 1.3 billion people and combined GDP of USD 3.4 trillion, the AfCFTA promises a virtuous circle of greater market opportunities, triggering more trade and investment, and allowing greater value addition and productivity growth leading to more and better jobs with social inclusion, and thus further enlarged markets[2]. World Bank estimates that full implementation of the AfCFTA could boost income by 7 percent, or nearly $450 billion in 2014 prices and market exchanges and expand African trade particularly intra-regional trade in manufacturing. The AfCFTA can lift 30 million Africans from extreme poverty by 2035. It also has potential to increase employment opportunities and wages for unskilled workers and help close the gender-wage gap[3]. According to the International Monetary Fund (IMF) the AfCFTA is estimated to have welfare gains of about 2-4 percent mainly from reduction in Non-Tariff Barriers (NTBs)[4].

Why strengthening compliance and effective enforcement of agreed instruments is desireable

Whereas the aforementioned challenges and constraints remain a hindrance to effective implementation of the AfCFTA agreement, strengthening compliance and strict enforcement of agreed instruments by Member States can be a game changer. Once agreements have been reached in critical instruments such as the origin criteria and payment systems, Member States need to go back to their capitals and institute comprehensive processes of reviewing and streamlining existing institutional and regulatory frameworks in conformity with various AfCFTA protocols. This is by no means a simple exercise if past experiences in the RECs and World Trade Organisation (WTO) are anything to go by. Fixing domestic legislative changes is a complex process involving multiple public and private stakeholders, sensitizing and lobbying legislators and engagement of broad spectrums of professionals. It is even more complex in cases where relevant legislations, rules and regulations are absent and require to be developed and where Member States belong to multiple RECs as is the case.

Domestication of the AfCFTA can be made much easier if the same is equally being done under the existing RECs as well as at multilateral level. The AfCFTA and the RECs should and must be seen as being complementary and not competitors per se. The fact is that domestication remains a challenge across all the continental RECs. Under COMESA, for instance, the Free Trade Area (FTA) was launched on 31 October 2000, but more than 20 years down the line only 16 of 21 countries are participating. Besides, intra-COMESA trade has remained below 10 per cent of total trade, yet recent studies indicate potentials for export expansion in excess of US$100 billion. A similar fate faces the COMESA-EAC-SADC Tripartite framework, where substantial achievements in harmonization of market integration has been realized, even prior to enforcement of the agreement. It is worth noting that the AfCFTA trading instruments borrowed heavily from the work done in the three RECs. However, weak domestication at both levels remains a major stumbling block to realization of potential benefits of liberalization and regional economic integration in both cases.

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Indeed, implementation of AfCFTA also faces the challenge of institutional capacity and coordination where anchoring implementation may not be clearly defined at the national and regional level and structural challenge of mainstreaming regional and continental trade policies into national developmental agendas of countries[5]. The good news however, is that the African Union has an institutional framework; the Ministerial Committee on the Challenges of Ratification/ Accession, and Implementation of the OAU/ AU Treaties. The Committee is responsible for advocating for the ratification, domestication and implementation of OAU/AU treaties by all Member States.

Although significant progress has been made to bring down barriers to movement of persons, goods and services, there remains significant reluctance, apathy and fear among most countries. For instance, the AU summit adopted the Protocol on Movement of Persons (FMP) alongside establishing the AfCFTA to free the flow of goods and services across African markets in January 2018. Going by numbers of signatories and ratifications, there has been higher level of enthusiasm for the AfCFTA compared to the Free Movement of Persons. According to Hirsch (2021)[6], Member States have been rather reluctant to bring down barriers to free movement of persons, rights of residence and rights of establishments immediately the FMP comes into force. On the other hand, it was widely understood that ratification of the AfCFTA did not mean immediate implementation but rather paving way to detailed and prolonged negotiations. Nonetheless, the AU has the cardinal role of sustaining momentum for socio-economic and political integration of Africa.

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But even with institutional framework, strengthening of RECs as building blocs for Africa’s integration remains the key strategy to restoration of the momentum for the realization of the AfCFTA goals and aspirations. This requires establishing structures for monitoring, evaluation, and review of implementation of agreed protocols and trading instruments, continued sensitization and awareness at Member States level. Within COMESA, the recent Council decision to conduct regular trade policy reviews across Member States is fundamental to fostering domestication. Beyond the regional approaches, the biggest role lies with the Member States themselves as signatories of these agreements. Deliberate steps are required to strengthen coordination of RECs activities at national level in terms of capacities and financing. It is not surprising that in some countries, two or three experts participate in virtually all negotiations without representation or inputs from relevant technical authorities or agencies. As regional integration is a costly affair, governments have the cardinal responsibility to invest more in establishing institutional and regulatory structures in tandem with the commitments made.

Given the competing demand for domestic resources and need to maintaining fiscal balances, development partners and regional/national development agencies have equally been instrumental in supporting various trade facilitation programmes at regional and national levels. In COMESA for instance, the European Union, the Word Bank, Organisation of African, Caribbean and Pacific States (OACP), the International Organization for Migration (IOM), UN Agencies, African Development Bank, Afrexim Bank and COMESA's own Trade and Development Bank (TDB) are all supporting critical trade facilitation programmes. At the continental level, the AfroChampions Initiative, an official platform of exchange between the private sector and African leaders committed to carry advocacy and awareness campaigns and consultations for the AfCFTA, Private sector members of AfroChampions Initiative donated US$1 million for the campaigns[7]. The private sector in the East African Community (EAC), have expressed willingness to invest in other regions in Africa however, there is low awareness of the AfCFTA, status of implementation, its benefits and level of political will[8].

How RECs can foster increased intra-AfCFTA trading

The RECs are envisaged to play an important role in the Africa integration agenda. The Treaty establishing the African Economic Community (AEC) provides for coordination and harmonization of activities among the existing and future economic communities as one of the modalities for establishing the AEC. Article 5 of the Agreement establishing the AfCFTA, provides for RECs' Free Trade Areas (FTAs) as building blocs for the AfCFTA. The 33rd Ordinary AU Assembly held in February 2020 in Addis Ababa directed that the AfCFTA Secretariat and Regional Economic Communities develop the Framework of Collaboration before the start of trading and work closely with Member States, the Secretariats of the RECs and other relevant intergovernmental organizations in the continent, to enhance planning and coordination of activities and meetings and minimize the potential conflicts of dates and other overlaps.

The Protocol on Relations between the African Union (AU) and the RECs entered into force on 10 November 2021. The protocol aims to: strengthen the existing regional economic communities in accordance with the provisions of the Treaty; and promote the coordination and harmonization of the policies, measures, programmes and activities of regional economic communities towards an efficient integration of the regional economic communities into the African Common Market among others. Four RECs have signed the Protocol namely; The Community of Sahel-Saharan States (CENSAD), The Common Market for Eastern and Southern Africa (COMESA), Economic Community of Central African States (ECCAS) and The Southern African Development Community (SADC).

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Coordination efforts are ongoing, the first meeting of Heads of RECs on the implementation of the AfCFTA was held in September 2021.

Indeed the mandates of various RECs are clearly in line with the aspiration of AEC in different dimensions and they support the modalities for the implementation of some AfCFTA provisions. However, they cover more issues than the AfCFTA, and differ in terms of the scope, process and level of economic integration. Some RECs Treaties contain the objectives of the AEC but have gaps in the operational legal instruments on which they should operate, and bound by the AEC policy decisions[9]. RECs are at different stages of integration and are to maintain the high levels of integration already achieved in accordance with Article 19 of the AfCFTA Agreement.

The implementation of AfCFTA could benefit from the successes and challenges in the RECs FTAs and Customs Unions. Article 5 of the AfCFTA Agreement provides that the AfCFTA shall be governed by best practices in the RECs, in the State Parties and International Conventions binding the African Union. The implementation of AfCFTA can leverage the RECs trade integration achievements, some RECs have developed institutional frameworks and instruments and are implementing various regional integration programmes which could be adapted or scaled up at the continental level. For example, COMESA has developed various trade facilitation instruments such as the simplified Trade Regime (STR), the Regional Customs Transit Guarantee Scheme-RCTG-CARNET, the Yellow Card among others. Some of these instruments are being used by other countries that are not COMESA Member States.

RECs should use their platforms to facilitate and expedite the process of domestication of the AfCFTA provisions by Member States, develop the regional implementation strategy through the consolidation of national AfCFTA implementation strategies; the AfCFTA should leverage on RECs-FTA implementation to develop a roadmap which would serve as a framework for RECs in defining the activities, objectives and priorities for cooperation towards the implementation of the AfCFTA; collaborate with RECs to develop a monitoring and evaluation system for the AfCFTA implementation comprising measures of compliance and outcomes monitoring as well as impact evaluation[10].

Whereas some of the RECs have developed AfCFTA implementation strategies, COMESA is in the process of developing one. However, heterogeneity, weak enforcement mechanisms, weak institutional capacities, human resources, and inadequate financing inhibit REC's ability to contribute to the implementation of the AfCFTA and its interface processes with RECs[11].

Conclusion and suggestions

Regional trading instruments require adjustments of national legislations, rules and regulations of customs and trade related aspects. Effective domestication of regional integration legal instruments after signature and ratification is not only a show of commitments by Member States but critical for eventual realization of economic integration goals and aspirations. There is urgent need for Member States to ensure compliance and enforcement of agreed commitments in the AfCFTAas well as the RECs in order to maintain the momentum for the continental integration and effectively address development challenges bedevilling the region. At the same time, greater attention needs to be focused on strengthening existing RECs as a strategy to complement domestication of continental trading instruments. Strengthening implementation of RECs would make it easier for the AfCFTAintegration to overcome challenges associated with prolonged negotiations by basically building on the acquis. Effective coordination of activities between AFCTA Secretariat and the RECs, including collective planning of meetings and related activities is urgently required. Luckily, the Protocol on Relations between the African Union (AU) and the RECs provides the coordination framework for achieving this.

Ultimately, the success of the AfCFTA implementation will depend on the extent of domestication of agreed instruments and coordination mechanisms between the RECs and the AfCFTA Secretariat.

In view of the foregoing discussions, we make the following suggestions:

i. Urgent deliberate steps by Member States to direct energies and resources towards review and domestication of national laws, rules, and regulations for actual implementation of agreed AfCFTA trading instruments.

ii. Strengthening national and regional integration institutional coordination frameworks to ensure effective coordination of commitments made under various RECs and the WTO. Presently, many focal points in Member States are inadequately staffed and barely involve relevant competent authorities' participation in integration matters. Apart from fostering domestication, this would also help address duplications and possible conflicts of interests.

iii. Effective implementation of the protocol on Relations between RECs and the AfCFTA. This would require strengthening and building the capacity of the RECs to play their role of building blocs through harmonization of regulations, strengthening enforcement mechanisms, institutional capacities and financing among others.

iv. Disciplining compliance and enforcement of agreed trade and legal instruments through sanctions, fines and other deterrent measures.

v. Harnessing donor support towards domestication of REC agreements. This would help un-clog the effectiveness of various trade facilitation programmes pertinent to achievement of viable economic integration initiatives.

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