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Pro-competitive services sector regulation: a possible direction for the AU CFTA Agreement?

by Viola Sawere¹

1. Introduction

The African Economic Community (AEC) was established by the Abuja Treaty (1991) as an integral part of the African Union (AU)². One of its objectives is to promote economic, social and cultural development and the integration of African economies in order to increase economic self-reliance and promote endogenous and self-sustained development. The Treaty sets a six-stage transitional period to achieve its objectives which include the gradual removal of obstacles to the free movement of persons, goods, services and capital and the right of residence and establishment.

The Free Trade Area (FTA) was to be established within 10 years but it was only in January 2012 that the AU Summit of Heads of States/Government endorsed the action plan for the establishment of the Continental FTA (CFTA) by 2017. The Summit in June 2015 subsequently launched the negotiations. The negotiations will be phased, covering trade in goods and services in the first phase and investment, intellectual property rights and competition policy in the second phase. Currently, the AU Commission (AUC) is undertaking preparations for phase 1 negotiations including defining the negotiating modalities and training member states' officials.

A practical question is what should be the starting point and ambition for the CFTA services chapter. Clearly, Article 6 of the Abuja Treaty embeds the *acquis* principle i.e. CFTA agreement will build on the achievements so far in the eight³ African Regional Economic Communities (RECs). However, learning from the World Trade Organization (WTO) General Agreement on Trade in Services (GATS), the Trade in Services Agreement (TISA) currently under negotiation, and other non-African

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² At the time of signing the Abuja Treaty the institution was called the Organization of African Unity (OAU) and changed to the African Union in 1999 under the Sirte Declaration.

³ The eight regional blocks for AEC are: Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), Economic Community of Western Africa States (ECOWAS), the Community of Central African States (ECCSA), the Inter-Governmental Authority on Development (IGAD), the Community of Sahel-Saharan States (SAN-CED) and the Southern Africa Development Community (SADC).

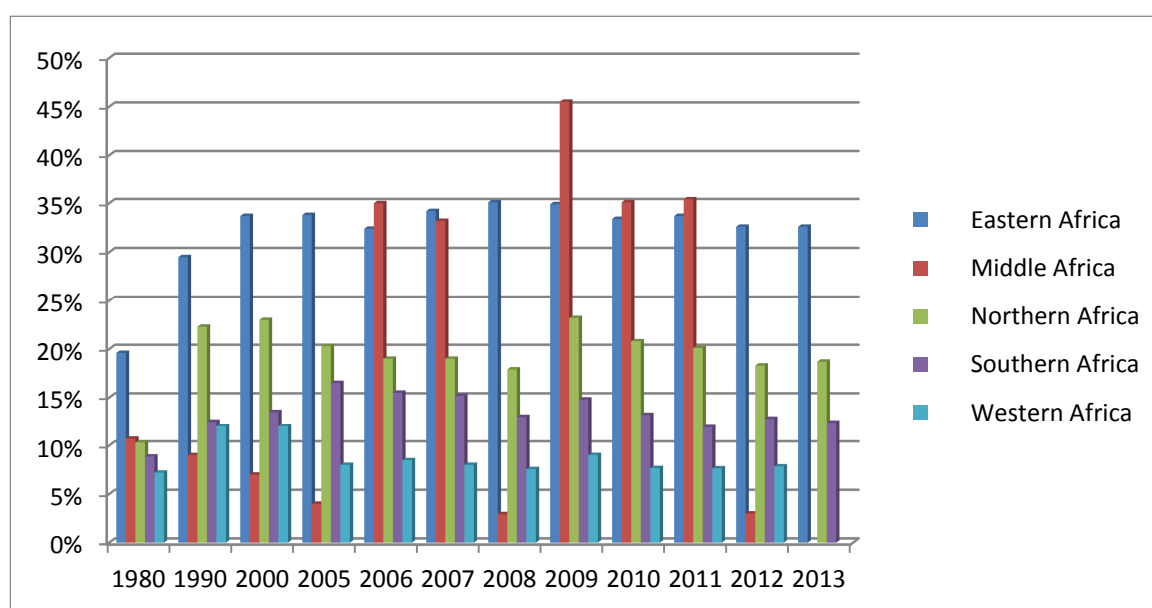
FTAs, the value of the agreement will depend on its response to business challenges and sector development.

2. Africa trade in services

Services sector play an indispensable role in the economic development of most African countries. World Bank statistics 2003-2012, indicate that services contributed about 47% to GDP on average, the lowest being 4% for Equatorial Guinea and the highest of about 84% for Seychelles. The average contribution of services to employment is about 37% although this varies considerably across African countries. Between the years 2009-2012, the sector grew at 4.6% compared with 5.4% in the rest of the developing world. In 2013 total exports and imports value reached \$275 billion, growing at 6.6% on average (UNCTADstat, 2013). The performance indicates the sector's potential to become a significant driver of sustained economic growth and structural transformation.

Figure 1 show services exports since 1980, from which it can be seen that Eastern Africa's share of total exports is relatively higher and steady compared with other regions. Middle and Northern Africa has also fared relatively well compared with Southern and Western Africa, recording 13% and 9% respectively. The decline observed in 2008, except for Eastern Africa, can be attributed to the global financial crisis. While all other regions picked up in 2009, the performance of Northern Africa seems to reflect the shocks from the 2011 Arab spring.

Figure 1: Services Exports Share by Africa Region



Source: Author's commutation based on data from UNSTAT

Travel and transport services dominate Africa's services exports, accounting for about 40% and 27% of total exports respectively. See Table 1 below for export details of major services sectors in the period 2005-2014. The trend in travel and transport services is largely due to increasing visits to Africa for holiday, investment-related and other business as well as freight transport services, particularly in countries endowed with natural tourism attractions and those located on transit corridors and maritime transport routes respectively. The liberalisation of mobile telephony, the introduction of mobile money transfers and the increasing promotion in the use of information and communication technology (ICT) in other sectors such as education and health has contributed to the 11% share of exports enjoyed by telecoms, computer, and information services. Studies have identified several countries to have competitive potential for non-traditional services exports in sectors such as business services, ICT, distribution, financial and educational services.

Table 1: Africa's Total Services Exports by Sector (US\$ millions current prices & exchange rate)

Sector/Year	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Goods-related services	1 220	1 730	2 100	2 110	2 710	2 540	2 140	2 100	1 460	1 970
Transport	15 370	17 860	20 140	23 590	20 120	24 440	26 280	27 790	28 460	29 470
Travel	29 040	32 870	38 820	40 610	38 580	42 410	40 940	43 680	40 270	42 058
Construction	1 090	1 100	1 740	2 270	1 530	1 860	1 630	1 740	1 940	1 630
Insurance and pension services	1 160	680	840	1 020	960	1 030	1 210	1 470	1 240	1 100
Financial services	1 150	1 250	1 490	1 740	1 500	1 760	1 960	2 210	2 240	1 760
Charges for the use of IP n.e.i.	340	290	330	330	260	-	-	280	300	230
Telecoms, computer and information services	2 170	2 750	3 330	4 930	4 270	4 750	5 370	5 650	5 850	4 980
Other business services	5 830	6 340	8 380	9 770	9 380	9 890	10 470	12 050	11 730	11 800
Personal, cultural and recreational services	280	320	350	380	360	340	490	550	550	450
Government goods and services n.e.i.	3 800	4 240	4 570	5 420	5 050	4 990	6 520	5 450	5 730	6 720

Source: Author's commutation based on data from UNCTAD database

Generally, telecoms, energy, transport and business services are considered as inputs in the production of goods, hence their influence on productivity and competitiveness. There is a need to promote the role of services in global and regional value chains in order to build complementarities between the services sector and other sectors of the economy including agriculture and manufacturing. Competitive infrastructural services i.e. communication, financial and transport as well as professional services, have a positive impact on the performance of other sectors of the economy. Also, the

increasing use of ICT has improved the quality and access to social services such as health, education and entertainment. Africa must measure the link between these services and the industries they support by prioritizing those services that are relevant for regional value chains and those of strategic importance to individual countries.

3. Challenges in the African services sector

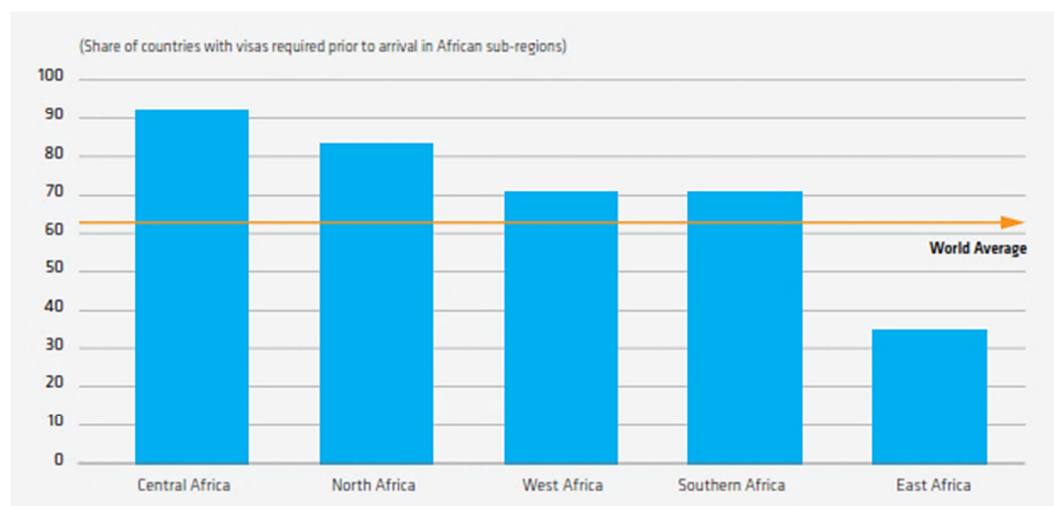
Infrastructure development for many services sectors is still a challenge and thus limits access to and delivery of services and goods in Africa. Most economies remain poorly integrated; links in regional roads, rail, ICT and power infrastructure networks are missing; capacity at ports is constrained; and access to airways is restricted (AfDB, 2014). In addition, access to investment capital, electricity and ICT services by the private sector remains poor for many countries, thus affecting the delivery of services which remain suboptimal and delivered at a high cost due to market failures such as limited access, quality, affordability and competition. Insufficient infrastructure development contributes to low productivity and low levels of intra-regional trade, and thus limits the continent's ability to harness the full potential of the services sector.

A 2008 World Bank survey of 104 countries (27 African) covering five sectors indicated an average Services Trade Restrictiveness Index (STRI) of 32.88 compared to the world average of 28.31; only 13 African countries scored better than the world's average. Although this varies across countries, telecommunication and business, professional services in particular, are relatively the most liberal sectors on average, while the most restrictive sectors are distribution and financial services. The CFTA Services Agreement should promote the necessary regulatory reforms in response to business challenges explained in the next paragraphs.

Lack of transparency, insufficient or no regulation, the combination of regulatory and policy functions as well as insufficient regulations to curb anticompetitive practices and consumer protection are among the regulatory challenges in Africa's services sector. Some countries do not make their laws available for public access, making it difficult for businesses to get information about registration and licensing procedures. In some cases, the laws do not provide for or are not clear about costs and paid-in minimum capital, if any; procedures and timeframes for issuing licences or registration certificates; and procedures for appeals against unsuccessful applications. Regulatory ambiguities create loopholes for unprecedented **bureaucratic procedures** and **red tape** in decision-making related to business registration and issuance of licences.

Entry visas are often used to restrict foreign participation in the provision of services, especially where the supply of a service requires the presence of natural persons. All the eight AU-RECs provide for agreements to facilitate the movement of persons, mostly up to 90-day visa-free entry and standardized travel documents, yet there exist major concerns on actual implementation. Only a few countries such as Comoros, Madagascar, Mozambique, Rwanda and the Seychelles implement visa-free entry or visa-on-arrival regimes to all Africans citizens. Figure 2 indicates that most African RECs, except the East African Community (EAC), have visa requirements above the world average and on average Africans need visas to visit 60% of African countries, from a low of 41% for the Gambia to a high of 84% for Somalia (ADB, 2014). This limits not only the actual benefits of inclusive regional integration but also the movement of goods and services among member countries.

Figure 2: Visa Requirements in African Regions



Source: Extracted from AfDB 2014, pg. 54

The need for a regional agreement to facilitate possible changes, particularly on number of entries and length of stay, fees and charges, harmonised application procedures and improved transparency, is indispensable to support African businesses. The West African Economic and Monetary Union (WAEMU) regional migration agreement and the Business Card for Asia-Pacific Economic Cooperation (APEC) are examples of regional approaches that promote business-friendly border controls. The most recent efforts in Africa include the Accelerated Economic Integration Program (AEIP) among five COMESA states (i.e. Malawi, Mauritius, Mozambique, the Seychelles and Zambia), where members agreed to develop an instrument that will facilitate movement of business persons accompanying goods and services. In 2010, the COMESA-EAC-SADC Tripartite Summit mandated its member/partner states to develop an instrument to facilitate movement of business persons in the Tripartite FTA region, but the actual negotiations have signalled divergent and very

limited political will to any change in the existing regimes. An obvious concern is whether CFTA negotiations offer any chance of political shifts and support from national migration control to regional border management to facilitate business and skills movement.

Economic empowerment policies seem to be increasingly appealing to many governments in the developing world as poverty alleviation and job creation tools and have been recently widely adopted by many African countries. The objective of these policies is to promote the participation of nationals or **marginalised** socio-economic groups in economic activities and mainly applicable in the services sectors. Although there is a shared rationale of the policy, the objectivity and effectiveness of the approach lies in its application which differs across the region. For example, Sudan does not have such requirements but rather has a list of economic areas reserved for nationals, while others such as Zimbabwe have linear formula of not less than 51% of local ownership and others have different requirements for a particular sector or area.

The need to ensure optimal approaches to achieve a balance between attracting foreign investment and maximising the participation of nationals in economic activities cannot be understated. Mafemba, 2013 questions whether ‘these empowerment policies have become shrewd bargain-hunting, state arm-twisting manoeuvres or over-ambitious empire-building exercises’ and argues that, as risk aversion by investors reaches the extremes, in the long-run this may result in the freezing of capital flow. The truth of the matter is that in many cases the empowerment requirements constitute policy reversal from trade liberalisation of services and contradicts GATS commitments. There is mixed impact in attracting Foreign Direct Investment (FDI) and some countries have been forced to revise the application process to make it more liberal e.g. South Africa and Zimbabwe (linear approach versus sectoral point-based approach) while others make local participation even higher e.g. Ghana’s requirements progressively increases to 80% by 2020 in the oil and gas sector (Chiwunze, 2014 and Lexafrica, 2010).

None of the African REC agreements provide for disciplines on economic empowerment and where liberalisation commitments exist at REC level, for example COMESA and EAC, they do not necessarily embrace such requirements. Given the trend in many African countries, an unanswered question is its impact on regional integration and whether it is too sensitive to deal with due to its political inclination. Perhaps the AU CFTA could be used to model the empowerment requirements and where possible promote regional accumulation to encourage intra-Africa investments.

4. RECs services agreements achievements – a building block for CFTA

All of the eight RECs recognised by the Abuja Treaty have some sort of agreement on trade in services. In June 2015, the COMESA-EAC-SADC Tripartite FTA countries launched their Phase II negotiations which include trade in services, although to date they are yet to engage in actual negotiations. Generally, there has been limited achievement on the liberalisation of trade in services in the REC agreements. Substantial progress has been made only in the case of COMESA, EAC and SADC (see details in Table 2). The framework agreements for trade in services in these three RECs are modelled on the GATS scheduling approach (i.e. ‘positive listing’ of sectoral coverage, supported by ‘negative listing’ of market access and national treatment limitations) and members aspire for deeper and better-than-GATS commitments through negotiation of schedules of commitments. COMESA and EAC each cover seven sectors while SADC negotiations are focused on six priority sectors. All other RECs are as yet to start negotiations except where trade liberalisation commitments are covered in sectoral agreements like in the case of Union Monétaire Ouest Africaine (UEMOA) and Communauté Économique et Monétaire de l’Afrique Centrale (CEMAC).

Table 2: RECs Services Agreement – State of Play

REC	Services liberalisation agreement	Sectoral agreements	State of play-implementation
AMU	Not achieved	None	N/A
COMESA	Trade in Services Regulations: - Schedules of commitments in communication, financial, tourism and transport services (only 10 out of 19 Member states were adopted and gazetted)	Transport and Financial sectors Protocol on Free Movement of Persons, Labour, Services, Right of Establishment and Residence (not yet entered into force)	Negotiating offers in the four services sectors by five member states are underway Negotiating offers in business, construction and energy-related services have not commenced
EAC	Common Market Protocol: - Schedules in business, education, communication, financial, distribution, tourism & transport sectors - MRA in accounting, architectural, and engineering services	Air transport integration programme – liberalisation of air traffic rights	Implementing schedules of commitment in the seven sectors already ratified by all Member states - Currently re-negotiating mode four commitments
ECOWAS	Not achieved	UEMOA regulations in Business (dental, medical, accounting, legal & architectural), Telecommunication and Transport sectors	Services liberalisation to be launched soon

REC	Services liberalisation agreement	Sectoral agreements	State of play-implementation
ECCSA	Not achieved	Communication, Transport, Energy, Education and Training and Tourism sectors - CEMAC cooperation in Telecommunication and Transport	Yet to launch trade in services negotiations
IGAD	Not achieved	None	Negotiating movement of persons
SAN-CED	Not achieved	None	Yet to launch trade in services negotiations
SADC	Protocol on trade in services	Transport, Communication & Meteorology, Education & Training, Energy, Finance & Investment, Health; Information, Sports & Culture, Tourism Development, Facilitation of Movement of Persons	Negotiating: - schedules of commitments in communication, construction, energy, financial, tourism and transport services - sectoral pro-competitive regulatory disciplines

Source: Author's compilation from various RECs' reports

It has been observed that some members' commitments in COMESA and EAC do not necessarily reflect the applied regimes or may be backtracking on GATS commitments. It will be logical for the CFTA agreement, at least, to aim at **locking-in the current level of liberalisation** at national level in the applied regime or at REC level, whichever is more liberal. This will of course depend on the ambition of the Member States and goes hand in hand with their political commitment. A key question is whether CFTA schedules of commitments, negotiated between 54 member states and improving on GATS commitments, are the way forward or whether a general standstill commitment would be sufficient.

FTA services agreements involve ceding of some national sovereignty and require regulatory changes which may be politically sensitive. **Political support** at the right levels is very key both at the time of setting the ambition and during the negotiations as it will determine the commitments to be implemented under the resulting agreement. For instance, EAC member states demonstrated a high level of commitment to regional integration and took measures to ratify and honour the agreements, whereas SADC has some agreements which are unenforceable due to an insufficient number of ratifications for their entry into force. Given the SADC experiences and the large number of member countries with different socio-economic development levels, CFTA services liberalisation agreement may get limited political support at the implementation stage as already demonstrate in the slow take of AU decisions on liberalisation programmes e.g. the AU Declaration on Air transport liberalisation. Therefore, the **ambition should be moderate** and could start with countries that are politically

committed to the process while providing flexibilities for other countries to accede when they are ready.

The EAC completed their negotiations on the general services framework and schedules in seven sectors in a period of less than three years. However, challenges were encountered in the implementation and, as a result, mode four commitments are being re-negotiated to resolve some conflicts in the schedules linked to movement of labour. SADC took 10 years to agree on the general framework agreement i.e. Protocol on Trade in Services was signed in 2012. Since then, the negotiations on the schedules of commitments are ongoing in six priority sectors.

Unlike the EAC, there are SADC sectoral protocols (mentioned in Table 2) which promote cooperation among member states. It has been observed that these protocols may not sufficiently reinforce the need for pro-competitive regulations necessary to support market access and national treatment commitments in the sectors. Hence, SADC member states are currently negotiating sectoral annexes to the Protocol on Trade in Services to bridge the gap.

Some RECs agreements do not include schedules of commitments especially those that aim at creating a single market or deeper integration e.g. the European Union (EU) Single Market and the Caribbean Community (CARICOM) Single Market. In a single market, ideally member states would virtually maintain no any restrictions. The provisions for the right of establishment apply to services and non-services sectors in both the EU and CARICOM agreements for single markets. The Treaty on the Functioning of the EU and the CARICOM Revised Treaty of Chaguarama guarantees their respective national companies, the freedom to establish in other member states and the freedom to provide services in the territory of another member state other than the one in which they are established. The EU commitments are implemented through directives and other legislations in the specific sectors and areas of concern such as financial services, transport, telecommunications, broadcasting and the recognition of professional qualifications. The CARICOM states agreed on a programme of removal restrictions on right of establishment and a list of professions for movement of skills (i.e. mode four and movement of labour).

Other FTAs like the North American FTA (NAFTA) and the EU-CARIFORUM-Economic Partnership Agreement (EPA) have opted for a negative list approach. As opposed to positive list used in EAC, COMESA and SADC, a negative list approach allows member countries to list only the non-conforming measures by modes of supply in the services sectors. This approach is considered to encourage deeper liberalisation commitments in comparison to a positive list approach.

All African countries, except eight (i.e. Algeria, Comoros, Equatorial Guinea, Ethiopia, Liberia, Libya, São Tomé and Príncipe, and Sudan who are observers), are signatories to the WTO and thus have some services commitments under their GATS schedules. Concerns have been raised about the effectiveness of GATS-type agreements owing to the scope of policy space sought to be maintained by members expressed partly by the gap between commitments vis-à-vis actual liberalisation in the member countries. Further progress in GATS negotiations has been slow, mainly because the negotiations have been linked to the negotiations on agriculture and non-agricultural market access, where progress has been difficult. These have contributed to the emergence of the TISA negotiations by 23⁴ WTO member states who are trying to agree to deeper liberalisation commitments outside the GATS process.

It is important to note that already there are some continental agreements and programmes in some services sectors. These include the AU New Partnership for Africa's Development (AU/NEPAD) Tourism Action Plan 2004; AU Reference Framework for Harmonization of Telecom and ICT Policies and Regulations in Africa; and the Continental Frameworks on Road Transport and Programme for Infrastructure Development in Africa (PIDA). Generally, the implementation stage of the commitments varies across the programmes, as summarized in Table 3. Progress has been achieved in air transport liberalisation with an increasing number of countries signing bilateral agreements for scheduled flights between their territories. In January 2015, eleven Member States (i.e. Benin, Cape Verde, Congo Republic, Côte d'Ivoire, Egypt, Ethiopia, Kenya, Nigeria, South Africa, Rwanda and Zimbabwe) affirmed their commitments towards a single market for air transport in Africa. A Ministerial working group of these Members was formed and adopted rules of procedure and a roadmap for the establishment of the single market in April 2015. Also, good progress has been recorded in the communication sector towards ICT development including the establishment of separate regulators, development of national ICT policies and the migration from analogue to digital terrestrial television broadcasting.

⁴ As of July 2015, participants in the TISA include: Australia, Canada, Chile, Chinese Taipei (Taiwan), Colombia, Costa Rica, the European Union (i.e. the EU 28), Hong Kong, Iceland, Israel, Japan, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Republic of Korea, Switzerland, Turkey and the United States.

Table 3: State of Play – AU Sectoral Instruments

Name of the Instrument	Objectives/focus	Progress in implementation
AU Declaration on Air Transport Liberalisation	Internal liberalisation of air transport market (3rd, 4th & 5th freedom traffic rights as defined in the Chicago Convention) - Establishment of Single Market on Air Transport by 2017	11 countries committed to the establishment of the single market - Ministerial Working Group April 2015 - adopted rules of procedure and roadmap
AU/NEPAD Tourism Action Plan 2004	Accelerated development of tourism sector	1st Ministerial Working Group meeting in 2014
Convention of the African Energy Commission	Establishment of the Commission responsible for: - developing policies, and strategies mobilising resources for regional and continental energy projects	Signed by 46 countries and ratified by 32 states subsequently entered into force in 2006
AU Reference Framework for Harmonisation of Telecom and ICT Policies and Regulations including: - Broadband connection for Africa - Master Plan for the Postal sector - African Space Agency (ASA) - Analog to Digital Switch Over	Support harmonised policies for ICTs and an efficient regulatory environment conducive to massive investments required by ICT infrastructures and applications in the African Countries	- More than 23 countries have adopted a national broadband policy - 40 countries have a separate regulator - By 2012 about 48 countries had national ICT strategies - By 2014 about 40 countries had started migrating from analogue to digital TV
African Maritime Transport Charter	Cooperation towards harmonised shipping policies in international maritime	Signed by 39 AU states but ratified by only 13 states – provisionally entered into force in 2004
Programme for Infrastructure Development in Africa (PIDA)	Developing regional and continental infrastructure policies, establishing prioritised programmes and the proposal of implementation strategies	Several infrastructure projects are being implemented at national, regional and continental levels covering: - ICT, transport, energy and water sectors

Source: Author's compilation from AUC, United Nations Economic Commission for Africa (UNECA), International Telecommunication Union (ITU) and NEPAD reports

Examining the states of play in the RECs, seemingly the requirement to build on the 'acquis' at REC level may not be appropriate, the question is what should be the starting point for the CFTA negotiations. Different options could be explored. One option is to apply the liberalisation requirements by sector building on the existing RECs and AU sectoral agreements. Another, is to build on REC achievements i.e. EAC, COMESA and SADC or even Tripartite FTA if the process will be finalised (which is unlikely) before the start of the CFTA negotiations. A third option could be starting at the level of GATS commitments. A fourth option, to start with the current level of autonomous liberalisation in the member states. Nonetheless, all the options would require a thorough stocktake to establish the state of liberalisation across all AU countries as well as regulatory audits to establish regulatory gaps in the various sectors. See Table 4 for further comments for each of the options.

Table 4: Starting Point for CFTA Trade in Services – Options

Options for starting point for negotiations	Comments
1. Existing REC/AU sectoral agreements	These agreements (e.g. protocols) set out policy and/or regulatory objectives for the sector covered, but are not necessarily trade related or trade enhancing. Considerable work would be needed to build a suitable pro-competitive regulatory framework, but this option offers the best way of achieving meaningful reforms of regulations in the sectors. The frameworks developed at the CFTA level could be cascaded to REC level for implementation, enhancing REC level achievements.
2. REC level achievements in trade in services	These achievements, where they exist, build on GATS commitments by including preferential commitments and additional sectors and modes of supply. In some RECs such as COMESA and SADC, these achievements are still being negotiated. It is doubtful whether those Member States would be willing to make further commitments at the AU level, although they may be willing to extend agreed REC commitments to other countries outside the REC. This approach remains to be considered in the Tripartite FTA negotiations.
3. GATS commitments	This approach is taken by most RECs that have agreed on or are still negotiating trade in services agreements. Not all RECs covered by the Abuja Treaty have yet set out on the regional path of trade in services liberalisation and this approach can be expected to be adopted at REC level. This being the case, it is difficult to see what additional commitments and commercial value are likely to be achieved at the CFTA level. A negotiation of this kind involving 54 Member States is likely to be a lengthy process.
4. Current levels of autonomous liberalisation	It is common in trade negotiations to adopt a ‘standstill’ commitment under which Member States agree not to introduce new, more restrictive measures that could have a negative impact on trade, since such action could be seen to have the effect of artificially improving a country’s negotiating position. This is not to prevent Member States from introducing measures for legitimate national policy reasons under the right to regulate. However, it is also common for Member States to leave themselves with ‘policy space’, by binding at less than current levels of autonomous liberalisation.

5. Pro-competitive services regulations – an optimal approach?

In 1995, WTO members agreed on a number of regulatory principles for basic telecommunications to underpin commitments in the sector. The GATS envisage the development of some disciplines to ensure domestic regulations complement the market access and national treatment commitments by members in the services sectors. Many of the regional and bilateral services agreements signed immediately after 1995 leaned towards limiting the scope of liberalisation to market access and national treatment, leaving regulatory aspects for future negotiations. The global trend has since changed to include ‘pro-competitive regulatory principles’ in support of liberalisation. This is especially important for privatised state-run network services and the separation (i.e. unbundling)⁵ of

⁵ Unbundling refers to the separation of those segments of network services sectors in which competition can be introduced.

locally-delivered services from core infrastructure services such as telecommunication, transport, electricity and water.

Relaxation of trade rules such as the right of establishment, nationality and residency rules may not be sufficient to yield effective market access. Effective and efficient delivery of infrastructure services is typically dependent on monopolistic networks (whether public or privately owned or local and/or national). Economic regulation therefore needs to address concerns about competition (asymmetries of information and abuse of dominance) and consumer interests (universal access, affordability and quality). Also, the promotion of regional infrastructural development programmes e.g. Programme for Infrastructure Development in Africa, transport development corridors, the Southern Africa Power Pool and management of shared resources such as water and other natural resources necessitates the need for regional regulation.

A number of researchers such as OECD, tralac and the World Bank, support the inclusion of pro-competitive regulatory reforms to complement market access and national treatment commitments in order to achieve greater benefits from the liberalisation of trade in services. Countries find value in signing trade agreements that promote pro-competitive reforms by incorporating disciplines beyond market access to maximise the gains from trade liberalisation. The experience of the WTO Reference Paper on Basic Telecommunications has been successful in promoting fair competition in this sector, and could serve as a model for other services sectors where agreements involve commitments found in domestic regulations. An OECD study (Miroudot, et al., 2007), found that the principles in the basic telecommunications reference paper guided regulatory reform in some developing countries, in particular the Dominican Republic, Malaysia and Sri Lanka.

However, the World Bank (Hoekman and Mattoo, 2012) asserts that regulatory reforms may be impeded by vested interests that benefit from protection, hence it is sensible for a country to adopt policies that increase the efficiency of domestic services. This could be achieved through trade agreements that embed pro-competitive regulatory disciplines to balance competing interests i.e. reforms balancing import and exporting interests, and benefiting consumers through a variety of services supplied at lower cost and higher quality.

As explained in the previous section, the ongoing SADC negotiations involve development of sectoral annexes aimed at complementing the market access and national treatment commitment as well as the promotion of pro-competitive regulations in the sectors of consideration. To date, member states are

engaging on five proposed texts in four sectors⁶ such as: communication (two papers i.e. postal and courier, and telecommunication services); financial; transport and logistics services; and tourism services. The main issues covered in the proposed texts differ by sector as indicated in Table 4. The development of the texts largely borrows from the approach of the GATS reference paper on basic telecommunication and the annex on financial services; they are informed by the content of the existing SADC sectoral protocols and try to respond to member states' requests that could not fit in the schedules of commitments. The approach is flexible to allow adoption of the agreed texts either as annex or reference papers as in the case of GATS⁷ taking into account that some member states may opt not to be bound by proposed principles in whole or part (already there is an indication by a few member states in case of financial services).

Table 5: Coverage of the Draft SADC Sectoral Regulatory Principles

Sector	Coverage
Financial	'Prudential carve-out', transfers and processing of information, and clearing, payment and settlement systems.
Postal and courier	Interconnection, anti-competitive practices, independent regulators and universal service.
Telecommunication	Interconnection, anti-competitive practices, independent regulator, universal service, access to and use of scarce resources.
Tourism	Competitive safeguards, access to tourism infrastructure, sustainable development, standards, education and mutual recognition.
Transport and logistics	Fees and charges, third country rule, promotion of investment, anti-competitive practices, and trade and transport facilitation.

Generally, the idea of sectoral principles under the SADC Trade in Services Protocol has received varied interests across the membership as well as by sectors. Most countries see the value addition in matching liberalisation efforts with commitments to institute necessary regulatory reforms for regional market integration. A few countries are wary of whether the inclusion of regulatory principles in trade agreements would obtain effective support at the time of implementation or not. Nevertheless, the current process involves both sectoral experts and trade negotiators, although the effective participation of regulators is solely a decision of a member state. Some regulators e.g. communication and transport, fully support the approach and believe that the process is very important and will complement the sector protocols, most of which lack the trade related aspects. Also, the process will

⁶ Proposals for construction and energy related services are being prepared by the Secretariat after initial discussions with the member states.

⁷ An annex will be equally binding to all member states where as for reference paper, a country may decide whether or not to bound in whole or party.

motivate and pressurise sector regulators to re-examine national legislations to ensure they promote trade and competitive services supply.

Also, it is important to note that the European Commission (EC) has systematically included a section on regulatory framework in its ongoing trade in services negotiations with African Caribbean and Pacific (ACP) countries and Korea. The European Union and the Caribbean Forum (EU-CARIFORUM) EPA regulatory sections cover computer, electronic commerce, postal and courier, telecommunication, financial, international maritime transport and tourism services. The EU-Korea EPA and the proposed text for EU-SADC-EPA cover the mentioned sectors except tourism services. Table 5 provides an overview of the sectoral issues covered in the regulatory section of the EU-CARICOM EPA. There are other FTA agreements which include some regulatory principles, for instance the North America Free Trade Agreement (NAFTA) covers telecommunication and financial services. These experiences could be used in developing the AU-CFTA sectoral regulatory frameworks.

Table 6: Overview – EU-CARIFORUM EPA Regulatory Framework

Sectors	Coverage
Computer services	Understanding on computer services
Postal & courier	Scope and definition, anti-competitive, universal services, individual licences and independence of regulatory authorities
Telecommunication	Definitions, regulatory authorities, authorisation to provide telecom services, competitive safeguards, interconnection, scarce resources, universal services, confidentiality of information and disputes between suppliers
Financial	Scope and definition, effective and transparent regulation, prudential carve-out, new financial service, data processing and specific exceptions
International maritime transport	Scope, definitions and principles
Tourism	Scope, anticompetitive practices, access to technology, Small- and medium-sized enterprises, mutual recognition, increasing the impact of tourism on sustainable development, environmental quality and standard, development and technical assistance, and exchange of information and consultation
Electronic commerce	Objectives and principles, exchange of information and consultation, and regulatory aspects of e-commerce

Source: EU-CARIFORUM EPA

The objectives of the CFTA in relation to trade in services could conceivably be hinged on the promotion of African services market integration. Market integration includes issues beyond market access and national treatment commitments and extends to the promotion of regulatory cooperation and sector development. The EAC Treaty envisages the adoption of common policies through harmonisation of national policies to promote community activities in several services sectors i.e.

transport, communications, education, energy and finance (Article 4.1 & 2(e)). This provides a clear starting point for consideration of an AU-wide agreement on sectoral policies to promote pro-competitive regulation in the respective sectors. Basically, this could be approached sector by sector in the main agreement as in the EU EPAs, where the provisions focus only on competition related issues in the respective sectors as indicated in Table 5. Alternatively, the approach could be through general principles in the main agreement e.g. SADC Protocol on Trade in Services and provide for its implementation through separate sectoral agreements like in the case of SADC sectoral annexes or EU sectoral directives and legislations.

Since there are also some continental sectoral agreements (e.g. transport, communication and energy), as shown in Table 3, the CFTA sectoral section should focus on bridging any regulatory gaps to promote trade liberalisation and competition in the sector. For example, in the case of air transport services or the telecommunication services, the inclusion of the trade related provisions could be done in a form of amendment or addendum to the AU decision on the Yamoussoukro declaration and to the telecommunication framework respectively. In sectors where there are no existing sectoral agreements, the development of the envisaged agreements/protocols could be in such a way as to provide for both sectoral development issues and to promote regulation cooperation while taking into account issues of competitive trade related provisions.

It is clear that the CFTA agreements would comprise of some standalone agreements on Investment as well as on Competition, hence the need to ensure coherence and consistence between these agreements and the sectoral regulatory sections and avoid any unnecessary duplication. For example, the competition agreements could provide for general principles on anti-competitive practices which will be further explained in the sectoral sections as applicable in the respective sectors. It is important to ensure that these agreements are clear on the institutional arrangement and inter-relationship between the sector regulators and the overall mandate of competition and investment promotion authorities.

6. CFTA Services Agreement – possible structure

The CFTA services agreement could be structured to include two main parts i.e. the framework agreement and the sectorial sections. The first part would cover general issues such as the objectives and scope, classical trade in services rules (i.e. Most Favoured Nation treatment, market access, national treatment, transparency, the right to regulate and competition issues, etc.), other related matters (e.g. promotion of regional value chains, entry visas for services providers, etc.), and the

institutional framework. The regulatory sections would elaborate on applicable trade rules and a set of key principles to promote competition in the respective sectors as explained in the subsequent paragraphs. Table 6 provides illustrative lists of objectives and key issues that could be covered under the regulatory frameworks in selected sectors.

Anticompetitive safeguards: this would include a definition or identification of sectoral issues which constitute anticompetitive behaviours i.e. unfair business practices (e.g. unfair business mergers, price curtails, etc.) in the sectors. This includes business operators' behaviours that may put some service suppliers in an advantageous position, or disadvantage the consumers. Countries would commit to undertake some regulatory measures, both at national and regional levels, against such behaviours and promote competition while protecting consumers.

Separation of regulatory and policy function: this aims at encouraging members to take measures to establish sector regulators who are separate and independent or autonomous from government ministries or departments. Where possible, the agreement may provide for classical functions of a regulator (e.g. licencing, consumer protection, price management vis-à-vis price control) and clearly define what are considered as policy issues in the sector.

Transparency: define what could be considered as public information and encourage transparency in application and the processing of business registration and licences, including the criteria thereof. Also, the agreement could indicate the timeframe for processing the applications and appeal procedures in case of dissatisfaction with decision of the registrar or the licencing authority.

Local content and empowerment policies: countries could agree on a set of basic principles on local content and empowerment initiatives in the member states to encourage intra-regional cumulation as well as take into account sectoral development need and peculiarities.

Human resource development: this could look at possible ways of necessary skills development in the sectors and could include the establishment of regional or continent centres of excellence and promote employ exchange programmes by private sectors in Africa.

Regulatory cooperation: countries may wish to establish mechanisms for cooperation among sector regulators through exchange of information on sectoral issues, research and business information and regular interventions to encourage regulatory learning among African countries.

Table 7: Possible Structure of the AU-CFTA Services Agreement

Sectorial Regulatory Framework		
Sector	Benefits of regulatory reforms	Coverage
Communication	Improved consumer access to affordable mobile telephony services. New investment in technology to allow faster access to the Internet and mobile banking.	Transparent procedures and converged licences, anti-competitive practices; independence of regulatory authorities, interconnection, scarce resources, universal services, confidentiality of information and dispute settlement.
Construction	Vital to the region's needs for infrastructure and industrial development while promoting transparent and non-discriminatory procurement rules.	Covered procurement, mutual recognition, tendering, contractors and related professionals' registration, local content.
Finance	Improved access to finance, especially for SMEs and MMEs that wish to trade across the region.	Scope and definition, transparent regulation, prudential carve-out, data processing, cross-border insurance, new financial services, microfinance institutions, inter-territorial mobile money transfer, payment systems, exchange control and dispute settlement.
Tourism	Improved cross-boundary and sustainable tourism trade.	Anti-competitive safeguards, access to tourism infrastructure, sustainable development, standards, education and mutual recognition, involvement of local communities, collective/joint promotion of regional tourism and protection of trans-boundary tourism resources.
Energy	Improved investment climate to help tackle the problem of power generation capacity shortages.	Unbundling of energy services, interconnection and access networks, anti-competitive practices, independence of regulators, universal services, etc.
Transport	The need to support trade in goods by reducing transport costs, particularly for landlocked countries.	Fees and user charges, anticompetitive practices, promotion of investment, trade facilitation, access to infrastructure, technical standards, etc.

7. Conclusion and recommendation

The services sector plays a vital role in terms of employment, export trade and GDP contribution in the economies of many African countries and has a potential for socio-economic development of the continent. The African services exports share is growing for all African regions although it is a marginal share (only about 2%) of the world services trade. Several countries on the continent have services export competitive advantages over others, particularly in some infrastructural sectors such as telecommunication, ICT, transport and finance hence the intra-regional trade opportunities. However, there are regulatory and policy challenges which impede intra-Africa trade, not only in the services sectors but also in goods.

Apart from SADC, the COMESA and EAC agreements are limited to liberalisation commitments through schedules and do not have comprehensive agreements to promote pro-competitive regulatory reforms in the services sectors. The scope for value addition in the CFTA agreement will be virtually non-existing if the agreements would be limited to liberalisation commitments through the schedules on the basis of improvement to the GATS or RECs schedules. Given the limited achievements at RECs level in terms of the services liberalisation agreement, there is a need for analytical work to establish the starting point for CFTA agreements. The analysis should include an assessment of state of liberalisation in the different sectors and member states' GATS commitments and continental agreements. This will help to avoid duplication of agreements and rather identify gaps and map the supplementary measures or agreements necessary for sector development.

Nevertheless, the AEC treaty provides for cooperation in sectors such as transport, communication and tourism, which have agreements and or initiatives in place with some even showing a degree of progressive success. The CFTA services agreement offers a greater opportunity for regional approach in addressing the regulatory challenges to promote competition and intra-regional value changes while dealing with infrastructure development through a separate mechanism like PIDA. There is a need to ensure that any of the regulatory reforms in a particular sector take into account the existing AU-sectoral agreement/interventions. The key question to be answered is: will the CFTA services agreement get enough political support to embrace any regulatory reforms at national level?

The following are the key recommendations:

- a) Ensure optimal involvement of member states' regulatory authorities and where relevant regional authorities or associations.
- b) Regulatory frameworks to be negotiated as annexes to the main agreements and sectors be handled separately to maximize any possible quick wins and avoid halting the negotiations because of sectoral sensitivity i.e. avoid the principle of 'single undertaking'.
- c) Enhance implementation and avoid any possible duplication of efforts, CFTA regulatory frameworks could be cascaded to REC level for implementation and effective monitoring.

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