

Harmonization Without Capacity: The Impact of AfCFTA Competition Cooperation on Consumer Protection Enforcement in Kenya

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Abstract

The African Continental Free Trade Area (AfCFTA) advances an ambitious vision of harmonized competition and consumer protection to support integrated and inclusive markets. However, the success of these regional commitments ultimately depends on national enforcement capabilities and political and institutional realities. This paper examines how AfCFTA-led cooperation in competition policy affects consumer protection enforcement in Kenya, with a focus on the gap between regional harmonization and domestic implementation. Using a qualitative case study approach, the research analyzes AfCFTA's consumer protection provisions in relation to Kenya's competition and consumer protection framework. It combines document review with key informant interviews of regulators, policymakers, and consumer advocates to assess institutional readiness, coordination mechanisms, and enforcement practices. The paper situates consumer protection within broader discussions of state capacity and regional governance, arguing that harmonization alone does not guarantee effective enforcement. The initial findings show that, although AfCFTA cooperation frameworks provide important normative guidance and opportunities for cross-border cooperation, their influence on consumer protection enforcement in Kenya is limited by a lack of technical capacity, weak interagency coordination, and inconsistent prioritization of consumer welfare. These constraints risk creating fragmented protection in an increasingly interconnected market, undermining the consumer-centered goals of regional integration. The paper concludes that improving consumer protection under the AfCFTA requires moving beyond formal harmonization to targeted investments in national regulatory capacity, clearer coordination structures, and sustained political commitment to consumer welfare. By highlighting the politics of implementation, the study contributes to discussions of regional cooperation, competition governance, and consumer protection in Africa's evolving markets.

Key Words: *AfCFTA; Competition governance; Consumer protection; Regulatory capacity; Regional cooperation; State capacity*

1.0 Introduction

The acceleration of regional economic integration in Africa has led to a complex set of continental and sub-regional rules aimed at reducing anti-competitive behavior, promoting cross-border trade, and encouraging fairer market outcomes. The creation of the African Continental Free Trade Area (AfCFTA) is the most ambitious of these efforts, offering a framework through which African countries, including Kenya, seek to align their competition laws and cooperate on investigations and enforcement (African Union, 2023). However, a key challenge accompanies this initiative: harmonization on paper does not guarantee effective enforcement in practice. When domestic institutions lack the technical, financial, or organizational capacity to carry out regional commitments, harmonization can become largely symbolic. This challenge forms the main focus of this paper: what are the effects of regional harmonization when the national institutions responsible for cooperative competition enforcement remain fundamentally underfunded? When markets develop faster than regulatory agencies can respond, the gap between legal objectives and enforcement practices poses a significant governance challenge.

Kenya offers a compelling, data-rich case study for examining this tension. The Competition Authority of Kenya (CAK) is widely regarded as one of the most active and procedurally advanced agencies on the continent (Banya, 2021; Nyangoro, 2020). It has taken significant enforcement actions across sectors, including insurance, retail, agriculture, telecommunications, and digital markets. However, Kenya's role as a regional trade hub also exposes it to cross-border mergers, regional cartels, and multinational digital platforms whose behavior cannot be fully controlled through national enforcement alone. For instance, Kenya's efforts to curb anti-competitive conduct in the cement and fertilizers markets often face jurisdictional limits because major players operate across East Africa, exploiting regulatory differences and enforcement gaps (Owuor & Muthoni, 2022). In this context, the AfCFTA Protocol on Competition Policy is important because it provides cooperation mechanisms such as information sharing and joint investigations. However, the Protocol does not include consumer protection provisions, a detail that should be corrected in earlier references to Kenya's framework. Consumer protection is therefore addressed here only as a factor influencing outcomes. It is significant because uneven enforcement often results in higher prices, fewer choices, and lower quality for consumers, but it is not within the AfCFTA's legal scope (African Union, 2023).

The rise of regional rules without adequate enforcement isn't just a technical issue; it raises deeper political and economic questions. Experts in regulatory governance argue that capacity isn't just about procedures but also about politics, revealing how resources, expertise, autonomy, and political will are distributed within the state (Fukuyama, 2013; Levi-Faur, 2011). When this capacity is uneven, regional commitments can lead to what's called "compliance theatre": the creation of complex legal frameworks without the ability to investigate, prosecute, or stop anti-competitive behavior. In such cases, firms, especially large multinationals and digital platforms, can exploit differences across jurisdictions by basing activities in states with weaker enforcement or slower investigative systems (Lianos & Gerber, 2020). These weaknesses cause real economic harm. Cross-border cartels in sectors such as transport, construction, and food commodities have historically raised prices in East Africa by exploiting the lack of coordinated enforcement (CUTS International, 2019). Similarly, the growing power of digital platforms creates challenges for collecting evidence, accessing data, and monitoring algorithms, issues that many African authorities, including Kenya, can't easily resolve without regional support (UNCTAD, 2022). In these environments, consumers in smaller or less capable countries become the "soft underbelly" of the continent's markets, suffering from higher prices and less competition.

Following the reviewers' guidance, this paper narrows its focus to competition policy under the AfCFTA, addressing consumer protection only when it is relevant to the welfare effects of competition enforcement decisions. It makes three main contributions. First, the paper redefines harmonization as a governance process shaped by state capacity, rather than a purely legal task. This view highlights the political aspects of implementation that determine the effectiveness of regional cooperation mechanisms (Nye, 2020). Second, it offers a practical assessment of Kenya's readiness to implement AfCFTA cooperation tools by identifying gaps in technical expertise, cross-border investigative capacity, evidence management, and interagency coordination. Third, it argues that unless domestic capacity is built, including political commitment, funding, and analytical skills, the benefits of the AfCFTA may remain aspirational and could unintentionally widen welfare gaps across the continent by allowing more advanced firms to exploit uneven enforcement.

The paper is organized as follows. Section 2 situates the analysis within the CAK conference themes and reviews the literature on regionalism, competition governance, and regulatory capacity.

Section 3 examines Kenya’s legal and institutional framework and clarifies the scope of the AfCFTA competition regime. Section 4 outlines the research methodology. Section 5 presents the main findings on harmonization challenges and capacity gaps. Section 6 uses sector-specific case examples to illustrate these dynamics. Section 7 discusses the broader implications of “harmonization without capacity,” and Section 8 provides policy recommendations.

2.0 Theoretical and Conceptual Framework

The 2026 CAK Research Conference promotes the theme “Promoting Competition and Consumer Welfare in Globalized & Dynamic Markets.” In this context, this paper contributes to the focus on regional cooperation by examining the limits of collaboration when national institutions lack the capacity to implement cross-border commitments. Globalized markets, especially those influenced by digital platforms, regional conglomerates, and integrated supply chains, require regulatory coordination that extends beyond national borders (UNCTAD, 2022). However, in many African countries, including Kenya, the structure of cooperation often exceeds the institutional capacity needed to support it. By focusing on Kenya’s readiness to implement the AfCFTA Protocol on Competition Policy, the study directly addresses the conference’s normative goal: building stronger competition regimes that enhance welfare outcomes.

It recognizes, however, that welfare cannot simply be increased through more regional rules. Instead, welfare improvements depend on the quality and consistency of enforcement, which are determined by state capacity (Fukuyama, 2013). This approach aligns the paper with the broader call to shift from merely harmonizing rules to ensuring effective enforcement. Importantly, the study is intentionally limited to the AfCFTA’s competition provisions. While consumer protection is an important domestic policy area, it is not included in the AfCFTA Protocol on Competition Policy (African Union, 2023). Consumer welfare, therefore, is viewed here strictly as an evaluative lens through which uneven enforcement affects daily market life, such as higher transportation costs due to cross-border cartels or lower service quality in digital markets where platforms face weak oversight.

2.2 Operationalization of Key Concepts

Harmonization refers to aligning laws, standards, and institutional practices across jurisdictions. In competition policy, harmonization aims to reduce regulatory fragmentation and create

predictable rules for firms operating in integrated markets (Sykes, 2014). However, experiences in Africa show that harmonization is often more about normative agreement than practical implementation. Laws may align, but investigative methods, resource availability, and enforcement priorities often differ significantly. Cooperation, by contrast, entails cross-border enforcement activities such as information sharing, joint investigations, coordinated remedies, and mutual legal assistance. For markets where anti-competitive conduct crosses national borders, cooperation is essential (Lianos & Gerber, 2020). However, cooperation depends on advanced infrastructure, including interoperable data systems, confidentiality protocols, specialized expertise, and institutional trust. Without these capabilities, cooperation remains a procedural goal rather than a practical reality.

Enforcement capacity encompasses staffing levels, investigative skills, data access, doctrinal expertise, litigation ability, and institutional independence (Ostrom, 1990; Levi-Faur, 2011). In the context of market competition, capacity also requires understanding complex market structures, identifying subtle collusive behavior, and conducting economic analysis, skills that are increasingly important due to digitalization. When these skills are lacking, the effectiveness of competition law as a deterrent drops significantly. Although consumer protection is not part of the AfCFTA competition regime, consumer welfare is still affected by competition enforcement. Price-fixing in fertilizers, bid-rigging in transportation, and exclusionary conduct by digital platforms cause direct and measurable welfare costs. Therefore, consumer welfare is used here not as a legal category but as an outcome domain that reveals enforcement gaps.

2.3 Theoretical Framework

African integration is often marked by an “implementation gap,” in which ambitious regional commitments lack mechanisms for binding oversight or effective domestic enforcement (Hartzenberg, 2011). This gap is not merely administrative; it reflects the political economy of states navigating domestic pressures, resource scarcity, and uneven bureaucratic capacity. As Söderbaum (2016) argues, African regionalism often advances through rhetorical ambition and legal proliferation, while practical enforcement lags. This dynamic mirrors the AfCFTA’s approach: a cooperation-based model without a supranational regulator. Consequently, domestic institutions remain the gatekeepers of regional enforcement, making national capacity the essential factor in continental harmonization.

Regulatory theory holds that regional enforcement is only as strong as the weakest jurisdiction involved (Abbott & Snidal, 2021). In a cooperative system, powerful firms exploit enforcement gaps by engaging in “jurisdiction shopping” to locate activities in states with weaker oversight. This creates what Lianos and Gerber (2020) call a regulatory asymmetry trap, where stronger authorities bear disproportionate burdens while weaker ones serve as safe havens for anti-competitive conduct. Kenya’s relative progress compared with some of its neighbors places it in a paradoxical position: it can benefit from cooperation, yet it is also constrained by the capacity of regional partners.

Digital platforms intensify the capacity challenge. Algorithmic pricing, data-driven exclusion, and cross-market leveraging require forensic digital analysis that exceeds the capabilities of many African authorities (UNCTAD, 2022). For example, investigations into digital ride-hailing services in Kenya have raised questions about data access, algorithmic transparency, and cross-border operations, issues that cannot be resolved within national borders alone (Nyangoro, 2020). This technological change makes cooperation not only beneficial but essential. However, cooperation is only as strong as the weakest investigative or data-governance system in the network.

Bringing these ideas together, the paper proposes the following thesis: Harmonizing competition rules under the AfCFTA will not significantly improve welfare unless African countries, including Kenya, build the technical, organizational, and political capacity for cross-border cooperation. Without this capacity, regional integration could worsen, rather than reduce, welfare disparities by creating uneven enforcement environments that well-resourced companies can exploit. This thesis reframes competition harmonization from a mere legal process to a capacity-dependent governance effort. It challenges the assumption that simply aligning norms will boost welfare, suggesting instead that the capacity to enforce rules is the true indicator of effective regional competition policy.

4. Research Design and Methods

4.1 Research Design

This study uses a qualitative case study design, with Kenya as a case example, to examine how capacity limitations affect the feasibility of regional cooperation under the AfCFTA Protocol on Competition Policy. A qualitative approach is appropriate for two main reasons. First, the research

focuses on institutional capacity, political motivations, and enforcement practices, phenomena that are difficult to quantify and best understood through interpretive, context-aware analysis (Yin, 2018). Second, competition enforcement often involves limited data transparency, especially in cross-border cases, making qualitative document review and expert insights crucial for understanding enforcement dynamics (Eisenhardt & Graebner, 2007). By situating Kenya within the larger continental institutional framework, the case study enables a detailed analysis of domestic capacity and broader comparisons of structural challenges shared across African countries. The study draws on three primary data sources: official documents, academic literature, and Key Informant Interviews with respondents possessing in-depth knowledge and expertise, selected through purposive sampling.

4.2 Sampling and Case Selection

The selection of Kenya is intentional rather than incidental. Kenya is widely regarded as having one of the more capable authorities on the continent (Nyangoro, 2020). Therefore, if Kenya encounters significant difficulties operationalizing AfCFTA cooperation mechanisms, similar or even more severe challenges are likely in jurisdictions with weaker institutional capacity. This “most-likely case” approach enhances the generalizability of the paper’s main finding: that harmonization cannot replace capacity. Interview respondents are selected through purposive sampling, focusing on individuals with direct professional experience in competition regulation, regional enforcement, or high-impact sectors where cross-border conduct is common. Including diverse perspectives from regulators, legal practitioners, and policy experts strengthens validity and triangulation.

5.0 Findings

The empirical and documentary evidence highlights a persistent gap between the goals of the AfCFTA Protocol on Competition Policy and Kenya’s institutional capacity. While Kenya, through the Competition Authority of Kenya (CAK), is often praised as one of Africa’s most active competition authorities, the country faces systemic technical, organizational, and political barriers that constrain its ability to fully implement regional cooperation. These findings underscore a broader continental issue: harmonization without sufficient capacity perpetuates structural weaknesses and may even introduce new vulnerabilities in an increasingly integrated market environment. Four main capacity gaps stand out: technical capability and market intelligence,

institutional coordination, cross-border cooperation infrastructure, and political economy constraints.

5.1 Technical Capability and Market Intelligence Deficits

Modern competition enforcement demands advanced economic and analytical expertise, especially in regional and digital markets, where corporate structures and pricing strategies are complex. While CAK has strong legal capacity, the depth of economic analysis required for cross-border cases often exceeds its current technical resources (Nyangoro, 2020). For example, price fluctuations in the fertilizer market across Kenya, Uganda, and Tanzania between 2018 and 2020 raised concerns about potential coordinated behavior. However, attributing price alignment to collusion rather than to global commodity shocks or supply chain disruptions requires detailed econometric modeling, reliable data sources, and cross-jurisdictional market intelligence, which CAK struggled to obtain independently (Owuor & Muthoni, 2022). Similarly, investigations into the cement sector revealed comparable pricing patterns across East Africa but lacked sufficient evidence to distinguish collusive behavior from oligopolistic interdependence (CUTS International, 2019).

Digital markets exacerbate these technical limitations. Platforms such as Uber, Bolt, Jumia, Amazon Web Services Africa, and Safaricom's M-Pesa ecosystem operate across borders and store data in multiple jurisdictions, often outside Africa. Investigating price discrimination, algorithmic manipulation, or exclusionary conduct requires access to algorithmic settings, transaction logs, metadata, and user-flow data. Many of these data points fall outside CAK's legal reach because servers are hosted abroad and international data-access cooperation mechanisms remain underdeveloped (UNCTAD, 2022). In one notable case, CAK sought to examine price differences in digital ride-hailing fares, but global platforms cited server locations in Europe and the U.S. to delay evidence requests (Lianos & Gerber, 2020). This illustrates how jurisdictional limits on data sovereignty hinder cross-border digital enforcement.

Effective competition enforcement depends on early detection of anti-competitive behavior through systematic market surveillance. However, CAK's market intelligence capacity remains limited relative to Kenya's economic size. Proactive detection is particularly weak in sectors with opaque supply chains, such as pharmaceuticals, edible oils, cross-border transport, and agricultural commodities. Staffing constraints and limited access to automated surveillance tools hinder CAK's

ability to identify anomalies in price movements, production trends, or trade flows. For example, recurring shortages and price hikes in Kenya's edible oil market during 2021–2022 raised public concerns about cartel-like coordination, but CAK lacked the cross-border market intelligence and forensic accounting capacity to quickly determine whether the behavior was due to collusion or to global supply disruptions (Banya, 2021). As a result, enforcement risks become reactive and piecemeal rather than strategic and forward-looking.

5.2 Interagency Coordination and Institutional Seams

Kenya's regulatory environment is fragmented across sectoral regulators, including the Communications Authority, the Energy and Petroleum Regulatory Authority, the Insurance Regulatory Authority, and the Agriculture and Food Authority, each with key data and oversight powers. Although memoranda of understanding exist to promote interagency collaboration, coordination remains inconsistent because of institutional silos, diverse mandates, and bureaucratic cultures (Makau, 2021). Competition issues in telecommunications, for instance, intersect with licensing, spectrum allocation, and consumer protection. The tension between the Communications Authority's focus on sectoral regulation and CAK's mandate to address market dominance has often delayed joint investigations and led to regulatory inconsistencies (Chege, 2019).

The lack of integrated data systems further hampers cooperation among agencies. Sector regulators often have real-time market data, such as subscriber numbers, pricing trends, supply chain movements, and company compliance records, which are crucial for competition analysis. However, many regulators use incompatible ICT systems that cannot connect seamlessly to CAK databases, leading to slow or incomplete data sharing. This structural gap weakens enforcement in sectors where rapid evidence gathering is vital. For instance, in the electricity and petroleum sectors, delays in obtaining data on pricing, capacity allocations, or import flows have hindered CAK's ability to investigate abuse-of-dominance cases involving vertically integrated firms.

The adjudication of competition cases involves review before the Competition Tribunal and the High Court. While judicial oversight guarantees procedural fairness, courts often lack the economic literacy needed to make prompt decisions on complex competition issues (Chege, 2019). Long litigation times, especially in merger review appeals or cartel cases, reduce deterrence and create uncertainty for both companies and regulators. Many practitioners interviewed noted that

firms frequently use litigation strategically to delay enforcement actions, anticipating delays stemming from judicial backlogs and limited understanding of competition economics.

5.3 Cross-Border Tools and Operational Trust Deficits

The AfCFTA Protocol assumes that national authorities can conduct reciprocal investigations, share evidence, and coordinate remedies. However, institutional capacity across African jurisdictions varies widely. While CAK has a functioning legal framework and experienced staff, many African nations lack fully operational authorities; some have fewer than 20 employees, minimal investigative budgets, and limited autonomy (Chirchir, 2018). This disparity hampers the AfCFTA's cooperative goals. For example, joint investigations into cross-border cartels in the maize and sugar sectors have faced challenges because partner authorities lacked the investigative tools or legal mandates to participate effectively.

Effective cooperation requires harmonized standards for evidence handling, confidentiality, leniency programs, and digital evidence protocols. However, differences in national procedures create operational friction. For example, the COMESA Competition Commission has a well-established leniency framework and extensive experience with regional mergers, whereas many domestic authorities lack similar tools or jurisprudence (Chirchir, 2018). When Kenya participates in COMESA-led investigations, discrepancies in thresholds, timelines, and notification requirements create uncertainty for firms and regulators alike. This undermines the predictability that harmonization aims to achieve.

Enforcing competition laws requires sharing sensitive commercial information, including internal communications, pricing strategies, and supply contracts. Therefore, cooperation depends on mutual trust and robust confidentiality measures. Interviews revealed hesitation among African authorities to share sensitive data because of fears of leaks, political interference, or misuse. These concerns are valid: several African authorities have faced political pressure in competition cases involving politically connected firms (Hartzenberg, 2011). Without trust, authorities might fulfill formal cooperation requirements only superficially and avoid deeper, meaningful engagement.

5.4 Political Economy Constraints

Competition enforcement intersects with political and economic interests. Investigations into sectors with powerful actors, such as telecommunications, banking, construction, and agriculture,

can provoke political backlash. Interviews with Kenyan regulators and practitioners confirmed that sensitive cases may encounter internal resistance, informal pressure from government ministries, or concerns about diplomatic repercussions when multinational firms are involved. These dynamics complicate regional cooperation, as assisting another country with a politically sensitive case could put domestic authorities at political risk.

Although CAK is relatively well funded compared with many African authorities, its budget still falls short of the increasingly technical demands of modern enforcement. Digital markets, cross-border mergers, and supply chain investigations require costly tools, data analysis software, secure evidence management systems, and forensic IT labs that exceed current budget allocations (UNCTAD, 2022). National fiscal constraints, including significant debt-servicing obligations, further limit the government's ability to increase CAK's budget to meet the needs of the AfCFTA framework.

Large multinational firms operating across Africa wield significant influence through lobbying, public relations, and legal appeals. Empirical evidence from African markets shows that firms often seek to shape competition policy by pushing for procedural hurdles, broad evidentiary standards, or relaxed enforcement frameworks (Lianos & Gerber, 2020). In the regional context, firms may exploit asymmetries by seeking favorable interpretations from weaker regulators, creating a "race to the regulatory bottom." These strategies weaken Kenya's ability to enforce policies effectively when cooperation depends on partner authorities that are more vulnerable to lobbying pressures.

The findings reveal a systemic mismatch between the AfCFTA's harmonization goals and the capacity of national authorities to enforce them. Kenya illustrates a paradox: despite having a relatively strong competition agency, its effectiveness is constrained by regional partners' limited capacity, inconsistent procedural frameworks, and a lack of effective cross-border investigative tools. This enforcement paradox suggests that harmonization could unintentionally exacerbate enforcement inequalities. Strong agencies like CAK are expected to manage regional enforcement, while weaker agencies become safe havens for anti-competitive behavior. This paradox challenges the view that competition integration will automatically lead to welfare gains. Without parallel investments in capacity, harmonizing rules may create a false sense of progress; continental

frameworks are adopted, but enforcement impact remains limited. This highlights the importance of making capacity-building a core element of Africa's competition-integration effort.

6.0 Illustrative Case Examples

The earlier analysis identified capacity gaps that limit Kenya's ability to participate effectively in regional cooperation under the AfCFTA Competition Protocol. To illustrate how these issues manifest, this section examines three specific case examples: (1) suspected cross-border cartels in fertilizer and construction materials; (2) multi-jurisdictional mergers reviewed simultaneously by Kenya and the COMESA Competition Commission; and (3) digital-platform markets, where algorithmic complexity and transnational operations make enforcement difficult. These cases reveal a pattern: Kenya's local enforcement is increasingly tied to regional factors, yet its capacity to address cross-border market power is constrained by dysfunctional institutional frameworks at both the local and regional levels.

6.1 Cross-Border Cartels in Fertilizer and Construction Inputs

Agricultural inputs and construction materials, especially fertilizer, cement, and steel, exhibit characteristics that make them highly vulnerable to cartelization: high market concentration, oligopolistic structures, and reliance on global supply chains with limited domestic processing. In East Africa, a few multinational groups dominate distribution channels, often through vertically integrated subsidiaries spanning Kenya, Uganda, Tanzania, and Rwanda (CUTS International, 2019). The combination of cross-border mobility, weak oversight in neighboring countries, and uneven access to trade data creates ideal conditions for anti-competitive coordination.

Between 2018 and 2020, fertilizer prices in East Africa moved in lockstep. While global commodity shocks partly explain these fluctuations, long-term price analyses revealed unusually synchronized changes across multiple countries, sometimes within the same week (Owuor & Muthoni, 2022). Kenyan distributors affiliated with multinational parent companies adjusted retail prices in ways that mirrored those in Uganda and Tanzania. This synchronization raised legitimate suspicions of tacit or explicit collusion. CAK undertook preliminary inquiries but faced constraints:

Cross-border evidence gaps: A significant share of communications, pricing directives, and supply contracts was stored in regional headquarters outside Kenya. Limited cooperation from partner

authorities: Competition authorities in Uganda and Tanzania lacked either the legal frameworks or the technical capacity to provide the data needed for a joint assessment. Analytical capacity limits: CAK lacked a dedicated econometrics unit capable of modeling multi-market pricing trends while controlling for global drivers, such as freight costs and currency fluctuations. Because competition authorities cannot establish cartel conduct based solely on parallel pricing without strong econometric or documentary evidence, CAK was unable to escalate the case. This situation shows how suspected regional cartels can avoid scrutiny, not because regulators lack the will, but because they lack supranational investigative tools, interoperable data systems, and fair cooperation partners (Banya, 2021).

The consequences of weak regional oversight were significant: Kenyan farmers faced inflated input prices, which reduced agricultural productivity in a country where food security remains precarious. Construction costs rose, increasing public infrastructure spending and inflating housing prices. SMEs dependent on fertilizer or construction inputs saw their competitiveness decline, weakening Kenya's industrialization agenda. These welfare losses align with international evidence that cartels in input markets place disproportionate burdens on consumers in small or fragmented economies (Connor, 2020).

6.2 Multi-Jurisdictional Mergers

The COMESA Competition Commission (CCC) has authority over mergers involving two or more COMESA Member States. Because Kenya is a key hub for multinational operations, many mergers affecting the Kenyan market must be notified to both CAK and the CCC simultaneously. These procedures highlight tensions within Africa's complex regulatory system, especially when domestic enforcement goals conflict with regional priorities (Chirchir, 2018).

Numerous mergers across the telecommunications, consumer goods, and financial services industries highlight this challenge. In several cases, CAK identified localized competitive harms, such as the potential foreclosure of smaller retailers or dominance in niche market segments, that required Kenya-specific behavioral remedies. Meanwhile, the CCC, using a broader regional assessment, approved the mergers without conditions because competition concerns were not significant at the COMESA-wide scale. For example was a large regional consumer-goods merger (details anonymized due to confidentiality obligations), where: CAK proposed conditions addressing potential vertical restraints affecting Kenyan distributors; the CCC imposed no

remedies, reasoning that the firms' combined market share did not raise regional concerns; and final outcomes remained fragmented, creating uncertainty for market participants regarding post-merger obligations. This divergence illustrates the “dual sovereignty” issue in African competition enforcement (Gathii, 2020), in which regional agencies focus on overall market effects while domestic agencies emphasize country-specific impacts.

Merger review requires deep analytical expertise: market-definition studies, counterfactual analysis, pricing simulations, and assessments of vertical or conglomerate effects. Interviews revealed ongoing constraints within CAK's Economics Division: insufficient staffing to handle simultaneous large mergers; inadequate access to detailed regional market-share data; minimal post-merger auditing tools, especially when merged entities structure their operations through regional value chains; and limited reciprocity from partner authorities, reducing Kenya's leverage in cases involving multinational restructuring. International competition authorities frequently use merger retrogression models and complex simulations, analytical tools that remain underdeveloped in most African jurisdictions (UNCTAD, 2022).

The multi-jurisdictional merger example shows that legal harmonization doesn't prevent divergent enforcement outcomes. If the AfCFTA cooperation framework lacks clear mechanisms to resolve jurisdictional disputes or align remedies, Africa risks creating a fragmented merger-control system. This underscores a key point: rule convergence must be matched by convergence in capacity, analytical skill, and institutional strength (Hartzenberg, 2011).

6.3 Algorithmic Conduct and Transnational Operations

Digital-platform markets, including ride-hailing, e-commerce, fintech, online advertising, and digital entertainment, pose unprecedented regulatory challenges. These markets are characterized by: transnational operations; data stored in foreign jurisdictions; algorithm-driven pricing and matching systems; network effects that lead to rapid dominance; and limited transparency in platform conduct. In Africa, digital-platform competition issues have emerged far faster than enforcement capacity has evolved (Lianos & Gerber, 2020).

Kenya's inquiries into ride-hailing platforms such as Uber and Bolt offer a suitable example. Investigations into potential unfair pricing, algorithmic discrimination, and abusive contract terms faced major obstacles: requests for algorithmic explanations were denied on the grounds of global intellectual property and trade secret protections. Data-storage laws in jurisdictions such as Ireland

and the United States limited Kenya's ability to compel disclosure of pricing parameters. Cross-border cooperation with neighboring states was minimal, given the weak digital competition frameworks in those states. The absence of regional standards for algorithmic transparency made it impossible to benchmark platform behavior. As a result, the Competition Authority of Kenya was limited to issuing sector guidelines rather than conducting a full competition investigation. This reflects the broader capacity gap across the continent described by UNCTAD (2022).

Kenya's mobile-money ecosystem, anchored by Safaricom's M-Pesa, has expanded across borders into Tanzania, Ethiopia, and beyond. While offering clear benefits to consumers, cross-border mobile payments raise competition concerns about exclusivity arrangements, interoperability barriers, data portability, and market dominance. However, cooperation remains limited because digital-financial regulators in neighboring states have different mandates and technical capabilities. Similarly, regional e-commerce platforms such as Jumia face accusations of self-preferencing, discriminatory commission structures, and a lack of transparency in search-engine rankings. Addressing such behavior requires coordinated algorithmic audits, which remain largely unavailable to African regulators (Ndung'u & Signé, 2020).

Digital-platform dominance can lead to: higher search and matching costs; exploitative pricing through algorithmic discrimination; the foreclosure of SMEs from digital markets; and the concentration of data power in a few multinational firms. These harms are structural vulnerabilities that regional harmonization cannot address without strong domestic and cross-border technological capabilities.

7.0 Harmonization Without Capacity as a Structural Governance Paradox

The findings of this study reveal a significant structural contradiction at the core of Africa's regional competition framework: the AfCFTA Competition Protocol, endorsed by the African Union as part of an ambitious integration effort, relies on domestic institutions that vary widely in readiness, independence, and technical skills. This contradiction is not merely administrative; it exposes deeper issues in African regionalism, where legal and normative goals often outstrip the enforcement capabilities of national governments. Kenya, despite having one of the continent's better-funded competition agencies, is constrained by this gap. Detailed case examples of cross-

border cartels, regional mergers, and digital-platform enforcement illustrate how capacity gaps hamper harmonization, undermining Kenya's enforcement goals and the broader aim of the AfCFTA to promote competitive, predictable, and integrated markets.

At the heart of this contradiction is a stark disconnect between normative ambitions and enforcement capacity. The AfCFTA Competition Protocol seeks to enable coordinated investigations, information sharing, and convergence in enforcement practices. However, the Protocol assumes a level of institutional strength across African countries that does not yet exist. While Kenya's Competition Authority (CAK) has a relatively advanced enforcement system, many partner agencies either lack fully operational structures, have very limited staff, or operate within fragile or underfunded frameworks (Hartzenberg, 2011; UNCTAD, 2022). This uneven institutional landscape means that Kenya cannot effectively rely on cross-border cooperation to combat regional cartels or digital abuses, even when such cooperation is legally possible. The result is a gap between the legal language of the AfCFTA Competition Protocol and the operational capacity needed to implement it.

This situation reflects what Abbott and Snidal (2006) call the "weakest link" problem in transnational regulatory governance: cooperative regimes are only as strong as their weakest members. In practice, even if CAK has the capacity to detect and investigate a cartel spanning Kenya, Uganda, and Tanzania, the investigation will falter if any of these jurisdictions cannot gather evidence, securely share data, or maintain confidentiality. Similarly, when Kenya works with the COMESA Competition Commission to review mergers, differences in institutional capacity and inconsistent investigative standards often lead to fragmented regulatory outcomes. In such cases, sophisticated multinational firms exploit these asymmetries, tailoring their strategies to jurisdictions with weaker enforcement or procedural ambiguity. This creates a structural bias favoring large firms at the expense of consumers and smaller competitors in weaker regulatory environments.

A key aspect of the governance paradox is what scholars call legal inflation or isomorphic mimicry, the adoption of advanced regulatory frameworks without building the institutional capacity to match them (Fukuyama, 2013; Andrews et al., 2017). African integration has traditionally emphasized treaty-making as a sign of progress. The AfCFTA framework follows this pattern: harmonization is celebrated as evidence of continental unity and modernization, while the practical

needs of enforcement, such as trained economists, forensic data analysts, interoperable digital evidence systems, and stable funding, remain secondary. As a result, national competition laws may appear aligned on paper, but enforcement practices are often inconsistent and sometimes incompatible. Kenya's experience with cross-border investigations highlights this reality: although legal pathways exist, the lack of capacity in partner jurisdictions turns cooperation into a largely symbolic effort, creating an illusion of convergence that masks deep structural fragmentation.

Digital markets amplify this paradox. The international reach of digital platforms, whether in ride-hailing, e-commerce, advertising, or fintech, renders national enforcement inadequate without strong regional cooperation. Yet digital enforcement requires advanced capabilities: algorithmic audits, server-level data access, cybersecurity infrastructure, and digital forensics skills. Few African regulators possess these capabilities (UNCTAD, 2022; Lianos & Gerber, 2020). For example, in Kenya's investigations into Uber and Bolt, CAK could identify problematic market behavior but lacked access to the algorithmic and transactional data needed to build a comprehensive competition case. Because neighboring countries lacked digital-competition frameworks and technical units, Kenya couldn't rely on regional cooperation to overcome its jurisdictional limits. Digital markets, therefore, reveal the clearest form of the harmonization paradox: the areas where cooperation is most needed are exactly where capacity gaps are deepest.

Political economy dynamics further complicate this environment. Competition enforcement inevitably intersects with entrenched economic interests, politically connected firms, and regulatory turf battles within national governments. In Kenya, as in many African jurisdictions, sectors such as telecommunications, agriculture, construction, and energy carry significant political weight. These sectors often host dominant firms whose influence can indirectly shape regulatory decisions, even within formally autonomous agencies like CAK (Nyangoro, 2020; Makau, 2021). When cross-border investigations threaten powerful domestic or regional actors, political incentives may discourage aggressive enforcement or deep cooperation. Additionally, multinational firms often engage in strategic jurisdiction shopping, tailoring arguments to CAK, the CCC, or smaller national regulators, depending on which venue offers weaker constraints. Such political and corporate pressures weaken the AfCFTA's cooperative ideal by turning enforcement decisions into negotiation spaces driven by state-business dynamics rather than by competition principles.

These dynamics strongly indicate that capacity should not be treated as a side issue in Africa's competition-integration agenda. Instead, capacity must be understood as the key factor in the success of integration. Without substantial investments in investigative expertise, digital forensics, economic modeling, judicial training, and secure data-sharing systems, harmonization risks becoming merely a show. The AfCFTA Competition Protocol currently offers legal support, but without the institutional foundation to back it, the structure remains weak. As Levi-Faur (2011) notes, regulatory power is not merely a legal role but an administrative capacity grounded in institutional design, professional skill, and political independence.

Africa's competition framework under the AfCFTA must prioritize capacity if it hopes to achieve meaningful enforcement. The governance paradox highlighted in this study can be summarized as follows: the AfCFTA Competition Protocol aims to unify Africa's competition landscape, yet its effectiveness is constrained by national institutions that lack the capacity to implement its cooperative mechanisms. This creates a regulatory environment in which rules are harmonized but enforcement is inconsistent, uneven, and susceptible to political and corporate influence. The paradox is neither temporary nor accidental; it is structural. Unless it is addressed through intentional, coordinated, and ongoing capacity-building efforts, it will continue to weaken the continent's pursuit of a competitive, integrated economy.

8.0 Conclusion

This paper examines the fundamental paradox at the heart of Africa's emerging regional competition regime: the AfCFTA Competition Protocol, developed under the African Union's leadership, is one of the most ambitious efforts to harmonize market-governance frameworks across the continent, yet its success depends on national institutions whose capacity varies widely and, in many cases, remains structurally limited. Kenya's experience clearly illustrates this tension. Through a detailed analysis of its institutional capabilities and a close look at three key market areas, including cross-border cartels, regional mergers, and digital platforms, the study shows that harmonization without sufficient capacity does not improve enforcement; it reveals deeper governance vulnerabilities.

Findings indicate that regional cooperation mechanisms, such as information sharing, joint investigations, and coordinated remedies, cannot function effectively without strong domestic

enforcement institutions. Although the Competition Authority of Kenya is relatively advanced for Africa, it still faces limitations due to gaps in technical expertise, digital forensics, market intelligence systems, and cross-border evidence-handling tools. Additionally, Kenya operates within a complex network of regional organizations, including the COMESA Competition Commission, whose procedural rules, analytical approaches, and jurisdictional mandates often do not align with domestic priorities. The result is a fragmented enforcement landscape in which continental harmonization rests on uneven national foundations.

This structural mismatch is not merely a procedural inconvenience; it significantly affects market outcomes, consumer well-being, and Africa's regional integration efforts. In sectors such as agriculture, construction inputs, and pharmaceuticals, regional cartels or coordinated actions can go unnoticed or unpunished because of weak cross-border enforcement. In merger control, multinational groups might engage in regulatory arbitrage by exploiting inconsistent thresholds or differing analytical approaches. In digital markets, algorithmic opacity and data sovereignty issues enable global platforms to strengthen their dominance with limited oversight. Together, these dynamics weaken competition, limit market access for small and medium-sized enterprises, and harm consumers.

This analysis shows that harmonization alone cannot ensure effective competition enforcement. Capacity is the key to regional integration. Without significant investment to strengthen institutions at both the local and regional levels, the AfCFTA Competition Protocol risks becoming a legal façade that masks operational weaknesses. This could erode trust in the regional initiative, entrench market power, and undermine the goals of fair, dynamic, and integrated African markets. The AfCFTA offers Africa a transformative opportunity to reshape its competitive environment, but only if implementation is grounded in the actual capacity of states. Kenya's case serves as both a warning and a guide: even relatively capable authorities are constrained by their neighbors' weaknesses. Therefore, a strategic shift is needed, one that makes capacity-building a core part of Africa's competition and integration efforts, recognizing that regional enforcement can only be as strong as its least-resourced national authority.

9.0 Recommendations

9.1 Recommendations for Kenya

1.) A key insight from this study is that Kenya cannot effectively participate in AfCFTA-driven cooperation without significantly strengthening its institutional and technical capabilities. The Competition Authority of Kenya (CAK) should prioritize targeted capacity-building investments to address challenges posed by cross-border cartels, digital markets, and regional mergers. First, CAK should establish a Specialized Market Intelligence and Analytics Unit staffed with industrial-organizational economists, data scientists, and forensic accountants. This unit should develop multi-country pricing models, detect suspicious trading patterns, and conduct advanced simulations for merger assessments. A dedicated budget line should support long-term recruitment to reduce reliance on consultants, who often lack continuity in ongoing investigations.

2.) Kenya should create an Integrated Competition Data Portal that connects CAK with sector regulators, including the Communications Authority, the Energy and Petroleum Regulatory Authority, the Insurance Regulatory Authority, and the Kenya Revenue Authority. The portal should enable automated, real-time data sharing on pricing, licensing, supply chain flows, and market entry behavior. It should also provide APIs for securely submitting confidential information from firms under investigation. Such a platform would significantly reduce delays in joint investigations and help CAK identify early signs of cartel formation or market foreclosure.

3.) Kenya should institutionalize structured collaboration through Joint Enforcement Taskforces for sectors prone to recurring competition issues, such as digital markets, telecommunications, agriculture, and construction inputs. These task forces should have formal mandates, clear timelines, and reporting obligations to ensure coordination goes beyond ad hoc cooperation. They should also conduct joint dawn raids and data-gathering exercises, especially in digital markets, where evidence is often fleeting and must be collected quickly.

4.) Kenya should enhance its judicial capacity by establishing a dedicated Special Bench for Competition and Market Regulation within the High Court. Judges assigned to this bench should complete mandatory training in competition economics and digital market regulation. Shortening litigation timelines is crucial to strengthening deterrence. Targeted procedural reforms, such as

requiring expedited hearings for cartel and digital market cases, would significantly improve the effectiveness of CAK's enforcement.

9.2 Recommendations for EAC and COMESA

1.) At the regional level, enforcement challenges stem from procedural fragmentation and uneven institutional maturity among neighboring competition authorities. To address this, Kenya should promote, within the East African Community (EAC) and COMESA, the adoption of uniform regional investigative protocols covering digital evidence, leniency procedures, merger-notification thresholds, and confidentiality rules. Consistent standards would enable CAK to work seamlessly with less-resourced authorities during cross-border investigations, eliminating delays caused by procedural differences.

2.) In the area of merger regulation, CAK and the COMESA Competition Commission (CCC) should establish Mandatory Joint Review Panels for mergers that significantly affect Kenyan markets. These panels should convene at predetermined stages of the merger process and jointly develop harmonized remedies. Decisions issued jointly by both agencies would help prevent conflicting outcomes, such as CAK imposing behavioral remedies while CCC clears a merger unconditionally, which can undermine regional certainty and promote regulatory arbitrage.

3.) Regional organizations should collaborate to develop a Shared Digital Enforcement Infrastructure, including a regional data forensics lab capable of analyzing algorithms, platform metadata, and search-ranking patterns. Because most East African authorities lack the technical tools to investigate digital activity, a centralized lab serving multiple jurisdictions would enable the region to conduct more thorough, evidence-based investigations of digital platforms and online marketplaces. It would also reduce resource duplication and strengthen the region's bargaining power in negotiating data access agreements with global technology companies.

4.) Kenya should encourage the EAC and COMESA to establish Regional Specialized Teams for High-Risk Sectors, such as pharmaceuticals, transport, agricultural inputs, and digital markets. These teams would handle cross-jurisdictional cases, enabling smaller or newer authorities to draw on regional expertise rather than tackling highly complex cases on their own.

9.3 Recommendations for AfCFTA and the African Union

- 1.) At the continental level, the success of the AfCFTA Competition Protocol will hinge on treating capacity-building as a core enforcement pillar, not merely an afterthought. The AfCFTA Secretariat should establish a Continental Competition Capacity Facility focused on training, institutional development, and technical resources. The facility should develop a structured curriculum covering cartel screening, merger simulation, algorithmic auditing, cross-border evidence gathering, and market definition in digital ecosystems.
- 2.) Additionally, the AfCFTA should establish a Continental Market-Intelligence Platform to collect data from national competition authorities, customs agencies, standards organizations, and regional bodies. This platform should enable the detection of unusual cross-border price correlations, suspicious import-export patterns, and market-concentration trends across the continent. Such infrastructure would enhance early detection of regional cartels and supply-chain manipulation, issues that individual authorities currently struggle to identify due to siloed data environments.
- 3.) Another important recommendation is to adopt Tiered Enforcement Responsibilities under the AfCFTA, recognizing that authorities do not have equal capacity. In this model, the most complex cross-border cases, especially those involving multinational firms, digital platforms, or regional cartels, should be assigned to “lead agencies” with greater analytical capacity. Other national authorities would support casework by gathering evidence and local intelligence. This tiered system reflects successful regional enforcement models in the EU and ASEAN and ensures that enforcement does not slow down because of the weakest national link.
- 4.) The AfCFTA should lead the development of Africa-wide Digital Competition Guidelines, establishing clear standards for algorithmic transparency, interoperability, data portability, and platform neutrality. These guidelines should form the basis for continent-wide negotiations with global digital companies, enabling Africa to adopt a unified regulatory stance rather than relying on fragmented national approaches that are easily circumvented.

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