Benefits of Supranational and One-Stop-Shop Approach to Competition Regulation in Africa

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Introduction

African countries introduced competition laws to their legal and economic systems as they increasingly move from command to market economies. Over 25 African countries have adopted competition regimes. However, several others are yet to, leading to swathes of unregulated markets (on the spread of competition law in Africa, see Büthe and Kigwiru). This portends risk of under-development and non-attainment of the full economic potentials of the continent, despite its enormous natural, human and economic endowments.

The menace could be remedied by adopting a one-stop-shop approach and establishing a supranational competition regulator for Africa. Proponents touted this approach due to the slow pace of accepting competition ideals and adopting substantive competition law in Africa. The rationale being that

countries without adequate resources to support an efficient competition regime could collaborate to adopt a joint competition regulatory approach and thereby benefit from the experience and competence of the supranational authority. Critics, however, oppose the idea because of the challenge in aggregating conflicting national interests due to the lack of uniform economic development in Africa. This blog post offers a critical review of the benefits of a one-stop-shop approach to competition regulation in Africa.

Benefits of a supranational regulator and one-stop-shop approach

The first benefit of the one-stop-shop approach is consistency and harmonization. In line with globalization and the ongoing debates about the internationalization of competition law, a supranational approach will lead to consistency, certainty, and predictability rather than having diverse national approaches. A single unified rule applies to all businesses across the continent, addressing concerns of foreign investors on conflict of laws.

However, the devil in this approach is in the detail and aggregating the various interests of the 54 countries with diverse cultures, history, and at different stages of economic development to arrive at a consensus approach of competition regulation. It could be the policy of a state to like what could be offensive to another. For example, the South African (SA) competition law is rooted in the idea of using the law to address an economic imbalance between historically disadvantaged persons in the economy. This creates a problem of adopting a common approach as other countries may not have the same social experience as SA. Also, there could be a clash of national interests because some countries may prefer a protectionist approach while others want a unified approach.

The second benefit is leveraging on supranational authority for capacity building and deeper integration. Lack of sufficient resources to support a domestic competition regime has been a challenge to small developing African countries. This constraint can be addressed with the help of supranational organizations, like the ECOWAS Regional Competition Authority (ERCA). Through this joint approach, supranational bodies could help build capacity and expertise among member states' stakeholders. Ultimately, improving skills and bridging the competence gap, which is important due to the complexities in

competition law. However, there could be a challenge of brain drain in this approach. The capacities built from smaller economies may opt to migrate to states with more advanced regimes since their home countries may not have resources to support them.

Similarly, a one-stop-shop approach helps in institution building, efficacy and accountability: a supranational approach ensures that member states are more accountable to an external/higher authority in their enforcement of competition law. This is usually the case in a regulatory model where the national regulator's decisions are subject to the appellate jurisdiction of the supranational body. This approach guards against preferential treatment of domestic champions to the detriment of foreign firms. It also helps build institutions in countries without competition regimes to ensure that they don't become a dumping ground or safe haven for anticompetitive practices.

However, there could be some concerns regarding sovereignty as several countries in recent times desire to control their domestic affairs and not subject themselves to the decision of foreign judicial bodies. Also, domestic political actors could see this as a threat to national sovereignty and an invasion of its territorial boundaries. Countries that realize high earnings through protected domestic champion's export cartel activities will most likely oppose the idea because of the likely loss of revenue.

Furthermore, a supranational competition regulatory regime enables countries to enjoy the gains of international competition regulations in the absence of a domestic regime. Enacting a competition regime in emerging countries of Africa usually presents a herculean advocacy task and protracted legislative journey, as the case of Nigeria, which lasted 17 years. During that time, several anticompetitive practices went unchecked, like discriminatory pricing in the aviation industry by British Airways and Virgin Atlantic, between 2004 and 2006 . If there was a supranational competition regime, Nigeria could have used it to address these practices pending the enactment of the domestic regime.

Finally, a supranational competition authority facilitates a higher volume of foreign investments. The certainty to the legal regime leads to increased ease of doing business as investors are absolved of the stress of complying with multi-jurisdictional requirements in business combinations like mergers in

Africa. For example, the ECRA was established in 2019 as a one-stop shop on competition law, especially mergers for ECOWAS member states. Its establishment heralded an inflow of massive foreign investments in the region.

However, while ECRA aimed to ease enforcement and regulation of competition law, its conflicting status with domestic regimes like that of Nigeria under its new competition Act could be a challenge to attaining its goals. To address this potential and apparent conflict, this blog post suggests that the powers of the supranational body should be restricted to regional or cross-border transactions. At the same time, the national authority retains jurisdiction over domestic matters. This will save investors the burden of being subjected to conflicting regimes in countries like Nigeria.

Conclusion

In conclusion, while there are obvious gains in adopting a one-stop-shop approach as highlighted above, it is unclear whether it is realistic and to what extent it can apply. This results from the different individual needs of African countries at different developmental stages, as experience over time has shown that one size does not fit all in competition regulation.

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