Regional Integration and Competition Policy in West Africa: Interfacing Regional and Continental Competition Policies

By:

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Introduction

Regional economic integration occupies a significant place in the development process and political dynamics in West Africa. As early as 1960, one could trace a strong political voice calling for integrating the African economies to overcome the drawback of decades of economic exploitation and lack of diversification of their economies. From a political standpoint, regional integration was a response to decades of the colonial ruling. However, nowadays, integrating the world markets and benefiting from economic globalization are key regional economic and political integration objectives in Africa.

This dual objective of fostering intra-state trade and integrating world markets has been translated into policies aiming at integrating national economies by

establishing free trade areas or common markets with a free movement of goods, peoples, services, and the freedom of establishment. In West Africa, the West African Economic and Monetary Union (WAEMU) and the Economic Community of West African States (ECOWAS) translate this dynamic of regional economic integration. Both regional organizations seek to foster trade between their member states, reduce tariffs and non-tariff barriers, and create business opportunities by establishing larger markets and diversifying the production of goods and services.

The objective of integrating the African economies is now continental. Hence, the entry into force of the African Continental Free Trade Agreement for a Continental Free Trade Area (AfCFTA) marks a new and more ambitious stage in the process of integrating African economies[1]. Generally, regional integration projects and initiatives have a strong focus on the trade dimension. They aim at lowering and eliminating trade barriers by prohibiting participating members' restraints of trade in the internal market or by creating a common market. The trade dimension is important. However, its objectives would not be achieved without a competition policy dimension as a compliment. Hence, restrictions of competition on the regional level have both a trade and a competition component. To achieve the objective of creating regional markets free of trade barriers, it is crucial, in addition to the prohibiting restriction of trade, to police private and State initiated anti-competitive behaviors.

Regional integration and competition policy in West Africa

In West Africa, the trade and competition dimensions are at the center of regional integration policies. In WEAMU, the competition dimension is part of the building blocks of the integration process. Articles 88, 89, and 90 of the WAEMU Treaty have outlined the main orientation of WAEMU competition policy which focuses on regulating cartels, abuse of dominance, and states aids. The WAEMU Treaty gives the Commission the power to exclusively enforce the regional law in collaboration with member states' competition authorities. On WAEMU`s competition policy, see, Mor Bakhoum, l´articulation du droit communautaire et des droits nationaux de la concurrence dans l´Union Economique et Monétaire Ouest Africaine (UEMOA).

Likewise, ECOWAS has taken the same principles by adopting supplementary acts outlining its competition policy. ECOWAS competition policy prohibits cartels and abuse of dominance, regulates mergers. An independent authority tasked with enforcing the regional law is set up. Hence, the ECOWAS Regional Competition Authority (ERCA) has started operations and is located in the Gambia. ERCA is in the process of adopting supplementary regulations for the enforcement of the law.

The initiative to have competition policies both in WAEMU and ECOWAS is very welcome. However, there are flaws in the process of designing the regulations and the enforcement framework.

WAEMU has adopted a centralized enforcement approach of its competition policy which vested to the WAEMU Commission the essential decision-making power. Regional enforcement preempts national enforcement, Yet, the regional authority cannot deal with all anti-competitive practices at the regional and national levels. For instance, since the Commission started operation in 2002 with the adopting of the supplementary regulations, the enforcement records are thin. Most of the cases dealt with by the Commission focus on State initiated or hybrid restraints of competition. ***National markets are left uncontrolled as a consequence of an over-centralized enforcement policy***. Moreover, despite efforts made by the enforcement authority, factors such as lack of resources, limited personal, a limited collaboration of national competition authorities, and more importantly, the flaws in the design of the enforcement institutions have limited the enforcement results.

ECOWAS' approach in designing its enforcement institutions is different from WAEMU. Unlike WAEMU, ECOWAS' regional law is applicable only when trade between member states is affected. From an institutional perspective, instead of integrating the enforcement authority within the Commission, ECOWAS has created an independent enforcement authority.

WAEMU and ECOWAS belong to the same geographical space with integrated and cross memberships. All member states of WAEMU are also member states of ECOWAS. This situation creates overlaps and conflicts. The possible conflicts may be vertical and horizontal.

a. ***Possible vertical conflicts***: WAEMU member states are obliged not to apply national competition laws anywhere within the WAEMU community. ECOWAS member states, on the other hand, are encouraged to enact national competition laws and create functioning national competition authorities. A WAEMU member could not exercise its freedom under ECOWAS to have and enforce a national competition law without violating its obligations under WAEMU. WAEMU's centralized approach indirectly contradicts and affects ECOWAS's objective to build functioning national competition policies in its member states.

b. ***Possible horizontal conflict***: ECOWAS's regional competition authority is authorized to investigate and sanction anti-competitive practices, issue advisory opinions, cooperate with national and regional competition authorities, undertake studies and publish reports on the status of regional competition, and provide training programs. Conflicts may arise when the two regional competition authorities operate within the same regional space and have jurisdiction over the same practices involving the same companies. More so, an agreement can be cleared by one regional authority and prohibited by another. Likewise, standards for the assessment of a merger may differ. Potential abuse of dominance may be assessed differently by the two competition authorities. Companies may lack certainty about which regional authority to ask for clearance or exemption. There is also a risk of a dual sanction for an alleged anti-competitive practice.

As a result of the possibility of vertical and horizontal conflicts, only close cooperation and coordination between the WAEMU and ECOWAS competition authority could mitigate the potential jurisdictional conflicts between WAEMU and ECOWAS' competition authority.

From an institutional perspective, cross memberships between WAEMU and ECOWAS, flaws in the design, diversity of member states, lack of political will to support the national and regional enforcement institutions have negatively impacted both the trade and competition objectives of regional integration in

West Africa. Designing a continental competition framework within AfCFTA adds another layer of complication.

Designing a continental competition policy: the African Continental Free Trade Agreement (AfCFTA)

Coordinating national and regional enforcement in West Africa is not a smooth process. Design issues, lack of political, limited cross-border trade, and nationalism affect interstate trade and the effectiveness of regional competition policies. The coordination issue that WAEMU and ECOWAS face at the regional level would certainly arise at the continental level with the adoption of a continent-wide competition policy in the framework of the African Continental Free Trade Agreement (AfCFTA).

The African Continental Free Trade Agreement, which creates a Continental Free Trade Area (AfCFTA), is a bold and ambitious project. The Agreement is signed, and participating states aim to create a continental market with free trade area. The project would not only help African countries in their development process, but it would also help them bargain at the international level and integrate world markets, thereby benefiting from globalization. Competition law and Intellectual Property are part of the AfCFTA agenda. They are currently being negotiated. On competition law and the AfCFTA, see Vellah Kedogo Kigwiru, The Cooperation on Competition Policy under the AfCFTA, and Elizabeth Gachuiri, Approaching competition policy in the AfCFTA.

The future of competition law in Africa with the adoption of a continental-wide competition policy is at stake. The subject has attracted attention from a political and technical point of view. National and regional competition authorities and regional integration groups are brainstorming the best approach of a future continental competition policy. The topic is of paramount importance. The issues it raises could not all be discussed in this blog post. However, a number of aspects deserve attention in the process of designing a continental competition policy.

Is it pertinent to have a continental competition policy? This question is often overlooked. From a policy perspective, the creation of continental free trade areas goes hand in hand with regulating the market at the continental level with a competition policy. Though acceptable, the likelihood of success of

the process depends on its ambition. A too ambitious continental competition policy would not stand a chance of success. National and regional competition policies have preceded a continental competition policy. The first challenge in designing the continental competition policy is the interfaces between national, regional, and continental enforcement. Preexisting national and regional competition policies should inform and define what should be done at the continental level. From an economic and political point of view, African states are different from economic, political, and social points of view. Thus, they would not necessarily have the same expectations from continental competition law. Diversity is an asset. It could also constitute a challenge in designing a continental competition policy. Participating members are not at the same level of sophistication with regard to competition law enforcement. Diversity and contradictory vision of a global competition policy was the reason for the failure to implement a global competition law within the WTO. The same issue may be noticed with the continental competition law project of (AfCFTA).

Defining the scope of a continental competition policy. A continental competition policy should be bold. It, however, should be limited to the "continental competition issues" and only focus on what could not be handled at the national or regional level. In this respect, a continental competition law should not be approach or design as a "traditional" competition authority with classical enforcement powers. *It should focus on issues that need coordination at the continental level*. The continental level should also be the center from which core principles that go hand in hand with the continental free trade zone should be adopted. On the first issue, global mergers that affect the continent as a whole should be coordinated at the continental level. Even though national or regional competition authority may play a role, the assessment of such a merger should be coordinated at a continental level.

International cartels that have cross-border effects on member states should also be dealt with at the continental level, coordinating with the national and regional competition authorities. On the issue of cartels, it is also important to require members to ban export cartels that affect the national or regional markets of (AfCFTA) member states. Additional enforcement aspects such as supporting national and regional competition authorities, coordinating enforcement,

Institutional design: a political or a technical authority? The "continental competition authority" should be both. It should politically orient the continental competition policy, deal with the issues of interest of the continent, coordinate enforcement mechanisms in member states and help build capacities of national and regional competition authorities.

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[1] On March 21, 2018, 44 African countries signed the African Continental Free Trade Agreement for a Continental Free Trade Area (AfCFTA) which started on 1st January 2021.

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