Increasing the Benefits, Reducing the Costs: Adding Competitiveness to the Theory and Practice of Free Trade Agreements and Regional Integration in Africa

By:

Jonathan Klaaren

October 28, 2019

With an increase in the spread and impact of independent regulatory agencies, Africa now has a nascent but significant network of competition authorities and other economic regulators. This growth in African regulatory practice and influence contribute to the value of adding competitiveness to the theory and practice of African regional integration. To add competitiveness may well increase the total benefits and speed of these developments of multinational agreements and regional integration. A competition policy for Africa consistent with developmental integration should attend to enforcement institutions (courts and authorities) and be flexible regarding its national/supranational

balance.

The Spread of Competition Authorities and Africa as a Regulatory Space

It is now easily arguable that we should regard Africa as a regulatory space. The mode and style in which public and private authorities engage capitalist firms on the African continent is increasingly that of regulation. Africa-wide, there is a recognition of the role that the private sector may play in economic development. The growth of independent regulatory agencies (particularly competition authorities) as well as the developing significance of regional economic communities shows the increasing significance of regulatory governance in Africa.

In particular, competition regimes within Africa have rapidly spread over the past two decades and continue to do so to this day. By 2016, the World Bank reported that "competition laws have been enacted in 27 African countries and five regional communities." 15 years earlier, there were only 13 jurisdictions with competition law regimes. The majority of these 32 regimes have enforcement agencies that describe themselves as independent. In July 2019, ARIA IX notes 23 countries with both laws and authorities. In addition, these authorities are coordinating at the African level, having set up an African Competition Network. Building on work begun in 2010, the network launched in Nairobi, Kenya in 2011, with 19 jurisdictions participating and the UK and Canada providing funding. This spread and the deepening influence of competition authorities is perhaps an example of the influence and impact that soft law can have: law-like influence across borders beyond treaties and agreements.

Much of this comes from the growth of enforcement capacity. In work focusing on the Southern African region, Mark Burke and others have described the growth of enforcement capacity for the competition law regime in nine African countries. (Burke, 2017). In the past 20 years, competition authorities have been established in Botswana, Malawi, Mauritius, Namibia, South Africa, Tanzania, Zambia and Zimbabwe. Burke et al. note that in 2016, the nine competition authorities had a total staff complement of 472 staff members and

a combined budget of US$ 38,1 million.

Burke et al. find a significant level of enforcement, with nearly 300 cases filed during the period 2014-2016 concerning restrictive business practices. South Africa has just over half of these cases, but there is significant competition enforcement activity in the rest of SADC. Likewise, there is a large and growing caseload of merger notifications and approval. During this three year period, a total of 1595 merger cases were identified across 8 jurisdictions in southern Africa (two-thirds from South Africa). While considerable variation and gaps remain, there is little doubt that competition regulation has become a discernible force in African markets, a premise upon which the recent study by Fox & Bakhoum is based.

Adding Competitiveness to the Theory and Practice of Free Trade Agreements and Regional Integration in Africa

Competition policy may be roughly defined as government measures aimed at influencing behaviour of firms and market structures. The purpose of competition policy is to promote, preserve and protect the competitive process and competition; not protect competitors. Further, it aims to promote economic efficiency, inclusive of consumer welfare and other objectives. Competition policy should complement other policies including trade policy and industrial policy. Competition law usually prevents anticompetitive agreements, prevents abuse of dominance, and prohibits anti-competitive mergers. It is well-recognized that competition law and enforcement needs competition policy and compliance to have impact at scale.

Free trade agreements in Africa are closely linked with the various regional economic communities and the drive towards common markets and even, with the AfCFTA, an African common market. There are varying perspectives on regional integration. One view sees it primarily as a form of liberalization (removing tariffs and non-tariff barriers). Another view sees deeper strategy of regional integration with attention to infrastructure development (and other elements of industrial policy), with attention to institutional arrangements, and with regard to collaboration to build regional value chains.

Building from this second view, we should ask the question: “To what extent

are markets, firm behaviour and market power regional?" In answering, we can see the relationship between developmental regional integration and competition policy. This is because the nature of competitive rivalry and the power and interests of large firms and their owners is at the heart of how countries develop. Anticompetitive arrangements can have a regional and international scope. Thus, the gains from regional integration are greater when imperfect competition is taken into account. Indeed, gains can be had even from integration of similar economies. Inclusive growth has a competition dimension and for this to be properly understood it needs to be seen from a regional perspective – as Roberts, Vilazaki, and Simbanegavi have argued.

Beyond supporting inclusive growth through regional integration by attending to competition regulation, there are other benefits of such attention. These include the exercise of regional cartel busting. For instance, at least seven of the cartels busted in South Africa had cross-border effects, see Klaaren & Sibanda pp. 68-72.

It is a larger topic than can be examined fully here, but what should be some of the AfCFTA competition policy starting points? Arguably, the existence and capacity of implementing institutions and regional courts (and/or national courts with regional jurisdiction) is a more significant factor than the binding nature of the supranational law in this policy area. Here, it is important to recognize that the SADC and the EAC regimes are 'flexible' rather than legalised in terms of the influential description of the African trade regimes by James Gathii (2011). Further, with respect to the overlap of national and supranational laws, it is important to: recognise and accept the degree of overlap between national and supranational regimes; recognise and accept that supranational regimes have a useful role to play in two areas: (a) where there are true gaps in national regulation (such as no national competition law and/or no national competition authority) and (b) where it is appropriate to have a particular substantive focus on regional competition law enforcement, such as cross-border mergers; and have a coordination mechanism for areas of enforcement overlap, including a mechanism to allocate matters to appropriate authorities.

View online: Increasing the Benefits, Reducing the Costs: Adding Competitiveness to the Theory and Practice of Free Trade Agreements and Regional Integration in Africa

Provided by Afronomicslaw