Symposium Introduction: Markets, Competition and Regional Integration in the Global South - New Perspectives

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August 2, 2021

Introduction

This Symposium is jointly organized by AfronomicsLaw, the Chair of International Relations at the Hochshule für Politik, Technical University of Munich Germany, and the Mandela Institute at the University of the Witwatersrand in South Africa. It builds on a paper written by Prof Tim Büthe

and Vellah Kedogo Kigwiru in the inaugural issue of African Journal of International Economic Law, titled 'The Spread of Competition Law and Policy in Africa: A Research Agenda'. The journal article set out a research agenda for better understanding the reality, promise, and limitations of competition law and policy in Africa at the national and regional level. Consequently, this Symposium brings together competition law scholars, practitioners, and competition agencies' bureaucrats across the world to critically and comparatively discuss the reality, promises, and challenges facing the enforcement of specifically regional level competition policies in the Global South.

Generally, Regional Trade Agreements (RTAs) create regional markets wider than national markets by removing trade barriers and enhancing the free movement of goods, services, and people. This creation of wider and competitive markets provides firms with increased incentives to diversify, expand, enter into new markets. Thus, the inclusion of a competition framework within RTAs has been justified because it supplements trade liberalization efforts by ensuring that private restraints in the form of anti-competitive conduct do not substitute the removal of trade barriers.

Pursuing these policy benefits, most developing countries have formalized their participation in regional competition regimes (RCRs). In Africa alone, seven regional economic communities (RECs) -CEMAC, COMESA, EAC, ECOWAS, SACU, SADC, and WAEMU- have RCRs. In Latin America and the Caribbean, three RECs-ANDEAN, CARICOM, and MERCOSUR- exist. In Asia, ASEAN recently established an RCR. However, RCRs' institutional design and substantive provisions differ, most adopting either a confederate or supranational model. In a confederate model, Member States commit to adopting national competition laws and enforcement without establishing a common set of competition laws. The RCR thus acts as a cooperation, coordination and information-sharing platform. In contrast, in a supranational RCR, Member States delegate political authority to the RCR to make legally binding decisions on competition cases affecting trade between the Member States. On models of RCRs, see Both, Models of Regional Cooperation in Competition Law and Policy from Around the World.

The proliferation of RCRs in developing countries, perceived to be modelled after the European Union (EU) RCR, has invoked an interest from various stakeholders and researchers on how they enforce the regional competition laws and policies in practice. Although these regimes are still at their nascent stages of development, the emerging scholarly work has shown a disparity between the stated objectives and enforcement capacity and capabilities. These studies have highlighted the challenges facing the enforcement of competition law by RCRs, such as constrained capacity resulting from a limited budget and inadequate human expertise, jurisdictional conflicts from national competition agencies (NCAs), lack of competition laws at the national level, and competition culture. Most troubling, is the political unwillingness from some Member States and NCAs in recognizing RCRs' exercise of authority. For recent scholarly books, see Drexel et al, Competition Policy and Regional Integration in Developing Countries, Fox and Bakhoum Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa, Burton Ong, The Regionalisation of Competition Law and Policy within the ASEAN Economic Community, and Julia Molestina, Regional Competition Law Enforcement in Developing Countries.

While these studies advance our understanding of the challenges facing the actual implementation of RCRs in developing countries, our view is that focusing on these challenges without contextualizing why they occur underplays the actual steps that developing countries' RCRs have undertaken towards effective regionalization of competition law and policy. Many RCRs have taken such steps, and some have been effective. Unfortunately, studies and discussions that analyze the current enforcement activities of RCRs in developing countries, why such challenges occur, and the actual steps such RCRs have undertaken to address these challenges are so far limited. To partially remedy the research gap identified, Kigwiru and Klaaren convened this Symposium with the aim of deepening our understanding of the regulation of regional market competition in the Global South in a comparative analysis.

Contributors

Starting off the Symposium from the viewpoint of private and public practitioners is Toussaint Nabonswendé WOBRAOGO, currently in charge of procedural and litigation issues at the National Competition and Consumer

Commission of Burkina Faso (CNCC). Drawing from extensive literature that questions the goals of competition law in developing countries, Wobraogo explores the prospect of competition law that enhances the achievement of sustainable development goals. He argues that developing countries should move from the Washington Consensus to the Spence Consensus, emphasizing the contextual underpinnings of policy adoption and enforcement. Wobraogo notes that 'countries without a competition regime or law have the advantage of avoiding the Washington Consensus trap and forging a national competition law tailored to their development goals'. Moreover, as the regulatory capacity and capability of developing countries' enforcement of competition law are constrained, 'these countries need to create joint mechanisms that would allow them to act effectively in a regional framework against anti-competitive practices'. Thus, Wobraogo supports establishing RCRs in developing countries to complement national-level efforts in regulating markets.

Enyinnaya Uwadi, Head of Competition Law Practice Group, Tetralex Legal and Advisory, Lagos, Nigeria discusses the benefits of having a supranational and one-stop-shop approach to competition regulation in Africa. He further explores the factors that will limit each of the expected benefits. For instance, despite the benefits associated with supranationalism, Uwadi underscores that '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'. To address any conflict between the RCR and NCAs, Uwadi recommends that RCRs should limit their scope of authority to regional or cross-border transactions. At the same time, the national authority retains jurisdiction over domestic matters. However, Uwadi cautions that 'while there are obvious gains in adopting a one-stop-shop approach…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'.

To understand Uwadi's warning that it is unclear whether the benefits of a supranational RCR are realistic and the extent to which they apply, in the blog articles that follow, RCRs bureaucrats in WAEMU, COMESA and CARICOM share their experiences in enforcing regional competition laws and policies. Ado

Olivier Angaman, the Director-General, West African Economic Community (WAEMU), traces the implementation of the WAEMU regional competition policy since it was established in 2002, nearly twenty years ago. WAEMU RCR is the only RCR with a highly centralized institutional framework in the world, where the RCR has the exclusive jurisdiction to regulate competition within the REC. NCAs only play a cooperative role. This institutional framework has been contested because it has pre-empted the development of national competition enforcement.

Nonetheless, Angaman explores the question, what has been the contribution of the WAEMU RCR to the construction of the WAEMU common market? To answer this question, he first describes the material and procedural rules of the Community competition policy and then assesses the level of implementation of this policy. Whereas the WAEMU competition regime does not have merger provisions, its role in regulating state aid cannot be underestimated. For instance, the WAEMU RCR has, in several cases, 'ordered certain Member States to withdraw the measures taken in favour of certain undertakings that were liable to distort Competition'. However, Angaman notes a need to 'resolve the question of the division of powers definitively by revising the WAEMU Treaty, as stressed in the last opinion of the Court of Justice of the WAEMU'.

Unlike WAEMU RCR, which has a centralized supranational RCR, COMESA has a decentralized RCR sharing competencies with NCAs. Delineating CCC's scope of authority, especially during the earlier years of its existence when the merger threshold was zero, caused backlash from NCAs. Mr. Willard Mwemba, the current acting Director-General of the COMESA Competition Commission (CCC) and Vellah Kedogo Kigwiru, a doctoral research fellow at the Chair of International Relations, Hochshule für Politik Technical University of Munich and guest researcher at the Max Planck Institute for Innovation and Competition discuss how CCC has addressed any conflicts with NCAs. Ultimately, the Commission aims to be building authority beyond mergers. They recommend the need for young supranational RCRs to provide technical assistance to NCAs, increase competition awareness and establish cooperation mechanisms with NCAs.

Rommell Hippolyte, Economist at the CARICOM Competition Commission, and Nievia Ramsundar, Executive Director of the Commission, highlight the benefits

the CARICOM Single Market and Economic (CSME) region enjoy by having a regional competition framework to coordinate competition enforcement and market surveillance activities in the region. The authors further discuss the challenges faced by the Commission in discharging its mandate, such as the confederate institution design in which the Member States retain the supremacy of national sovereignty. According to Hippolyte and Ramsundar, the confederate institutional design has significantly constrained' the ability for decision making by regional institutions and intervention, since regional enforcement can only occur through national legislation'. However, to enhance cooperation with the NCAs, the Commission has adopted various strategies, including establishing the CARICOM Competition Network (CCN) since 2016. The authors call for effective cooperation between NCAs and RCR.

Whether competition law scholars agree with these analyses of the WAEMU, COMESA, and CARICOM RCRs, is a subject of debate that raises interesting research questions. If not, what is the way forward for RCRs in the Global South? Prof Eleanor Fox, the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law, has published extensively on competition law in developing countries. In this Symposium, she provides a new prism in understanding the challenges facing the implementation of RCRs in Africa. She argues that in explaining why RCRs lag in living up to their potential, 'two critical elements are virtually always overlooked, and unless they are recognized and prioritized, the hope of the regional agreements will never be realized'. First, RCRs fail to appreciate and control *hybrid (public/private) border restraints*. Secondly, they fail to take a community-wide "vision from the top". According to Fox, 'ignoring these elements is a product of myopic vision, path dependency, and silo thinking. It is the product of a technocratic and overspecialized world in which we are taught reductionist economics and bounded thinking'. Unless these two elements inform the establishment of RCRs, then it will make meaningful economic integration impossible.

Mor Bakhoum, an Assistant Professor, University Virtuelle du Sénégal and Affiliated research fellow, Max Planck Institute for Innovation and Competition, discusses the WAEMU and ECOWAS RCRs, a topic on which he has written extensively. WAEMU and ECOWAS are located in the same geographical space. All WAEMU Member States are members of ECOWAS. Yet, their institutional models differ, creating possible vertical and horizontal conflicts. Thus according

to Bakhoum, 'from an institutional perspective, cross memberships between WAEMU and ECOWAS, flaws in 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'. Bakhoum cautions that designing an ambitious competition policy at the continental level will not stand a chance of success. If established, then the continental competition authority should be both a political and technical authority.

Burton Ong, a professor at the National University of Singapore and editor of the book, The Regionalisation of Competition Law and Policy within the ASEAN Economic Community, provides a prism in understanding the implementation of an RCR in ASEAN. ASEAN Member States have adopted a confederate RCR that is not underpinned by the convergence and harmonization of ASEAN regional competition policy. Ong argues that the possibility of having a supranational RCR in ASEAN is unlikely, resulting from 'the "ASEAN approach" towards prioritizing state sovereignty and preserving the autonomy of each state to design national legal frameworks that are tailored to suit domestic priorities and socio-economic conditions'. If so, how can ASEAN Member States enhance convergence and harmonization of competition law, albeit the absence of supranational RCR? According to Ong, 'in light of the geopolitical realities in the ASEAN Community, 'rather than trying to formulate a comprehensive set of treaty provisions covering a broad swathe of competition-related matters that have to be approved by the law-making bodies of ten different jurisdictions, a far more practical way forward would be to work on achieving greater substantive and procedural alignment between the AMSs on specific competition law issues that arise in cross-border compliance cases'.

In her piece, Elizabeth Gachuiri, an Economist at UNCTAD, who has published extensively on competition policy in Africa, COMESA, and the AfCFTA, examines the role of national competition agencies in enforcing regional competition laws. Drawing from COMESA's experiences, she argues for effective cooperation between the NCAs and RCRs. She notes that 'what happens at the national level in terms of competition law enforcement determines regional enforcement of competition provisions'. She also discusses the measures that NCAs have adopted in enforcing competition law in Africa. Gachuiri unravels the inability of

NCAs to enforce competition law during the Covid-19 pandemic resulting from no or limited technology infrastructure. She further recommends that 'it is imperative to examine the legal provisions required to deal with digital markets such as online platforms and embrace emerging business models'.

Nelly Sakata, a Principal Legal counsel at the Competition Commission of South Africa, explores the obstacles undermining effective regional cooperation in enforcing competition law in the Southern African region. She analyses the Southern African trade agreements- SACU, SADC, and COMESA- that promote cooperation between member states in competition enforcement. She warns that because developing countries 'face their own political and economic realities, any comparison with developed countries should be made with caution'. However, she unravels these RCRs' efforts to further cooperation in cross-border regulation of competition cases. For instance, SADC has fostered cooperation through technical committees, memorandum of understandings (MoUs), and Bilateral Memoranda of Understandings (BoUs) among national competition agencies (NCAs). However, Sakata argues that Southern African countries must show political will and sharing of information, especially confidential information, amongst the agencies.

In their article, Willard Mwemba and Molly Askin, Counsel for Antitrust at the US Federal Trade Commission, provide a compelling argument on African RCRs' role in enhancing international cooperation in competition policy. The authors argue that an insatiable appetite for trade among nations has increased over the past several decades. Consequently, competition agencies have also increased their investigation into the cross-border nature of business. Moreover, this has 'presented opportunities for competition authorities to work together to enforce national and regional competition laws more effectively through international enforcement cooperation'. Drawing from a recent report by the OECD and ICN, which analyses international enforcement cooperation data collected from competition authorities worldwide, the authors provide a compelling argument for RCRs to play a central role in enhancing international cooperation on competition laws among NCAs.

Dr. Zlatina Georgieva a postdoctoral researcher at the Hochshule für Politik, examines how digital markets should be regulated in Africa. She examines the substantive and procedural issues surrounding the adoption and

implementation of the 2020 EU Digital Markets Act. Already as Georgieva observes, 'the DMA has come under fire as a protectionist 'industrial policy' instrument. It is contested that the EU aims to create its digital giants and ban those originating in the coveted Silicon Valley through the DMA'. She argues that because the EU already has 'a developed (telecommunications) infrastructure that can maintain state-of-the-art digital technologies… and might also be able to tackle data-driven network effects in the long run,' a lean towards an industrial policy is not justified. In contrast, Dr. Georgieva argues that such an industrial policy could be desirable in the African context, whose telecommunication infrastructure is still in a nascent stage. She posits, while an industrial policy in regulating digital markets 'can be deleterious to a mature, economically liberal regime such as the EU (a point argued above), it might just be the cure that the African continent needs to bridge the unevenness in the spread of its digital technologies'. Consequently, this will temporarily enable the growth of national champions in developing countries. And once 'viable global competitors have emerged locally, a more open, market-oriented competition policy can be enforced'.

Conclusion

In conclusion, this set of rich essays has shown that, indeed, RCRs in the Global South are key drivers of regional integration, competitive markets, and internationalization of trade. Yet, their capacity and capability in enforcing regional competition policies is marked with various challenges, including political unwillingness from the Member States, jurisdiction conflicts, low competition culture and awareness, and lack of adequate funding. However, these challenges are peculiar to young institutions across the world. The potential of RCRS can be strengthened by increased cooperation with NCAs, prioritizing enforcement activities, and strategic stakeholder engagement.

Contributors

Toussaint Nabonswende WOBRAOGO: Competition Regimes in Developing Countries: The Prospect of a New Approach to Achieving Development Goals

Enyinnaya Uwadi: Benefits of Supranational and one-stop-shop approach to Competition Regulation in Africa

Ado Olivier Angaman: The Experience of West African Economic and Monetary Union (WAEMU) in the Field of Competition

Rommell Hippolyte & Nievia Ramsundar: The CARICOM Competition Commission as a Regional Institution

Prof Eleanor Fox: Competition Law, Developing Countries, and Regional Agreements: Tearing Down Silos and Building Up Scaffolds

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

Burton Ong: Developing a Regional Competition Law Regime in the ASEAN Economic Community: A Button-Up Policies

Elizabeth Gachuiri: Regional Integration and the Role of National Competition Agencies in Competition Law Enforcement: Lessons from the Covid-19 Pandemic

Nelly Sakata: Southern African Regional Competition Regimes - Where are we Today?

Willard Mwemba & Molly Askin: The Role of Regional Competition Regimes in Supporting International Enforcement Cooperation

Zlatina Georgieva: How (Not) to Regulate Digital Markets in Africa: Lesson from the EU

Willard Mwemba & Vellah Kedogo Kigwiru: The COMESA Competition Commission (CCC), Earlier Experiences and Lessons for Regional Competition Regimes in Developing Countries

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