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

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The opening up of trade through a common market, a customs union, or a free trade zone is necessarily linked to a need to protect free competition in the markets concerned by this opening up as Mor Bakhoum, 2011, pp 305 - 332, points out. Therefore, the increasing liberalization of direct investments and the progressive removal of trade barriers oblige States to make competition law the new guardian of the proper functioning of the market economy throughout the world, as the Continental Law Foundation stipulates in its report. Since it is the sovereignty of each State to define how it intends to use the legal instrument of competition law to achieve its development objectives, a pooling of some of this sovereignty and its exercise by two or more States sometimes seems to help make better use of human and material resources in the implementation of competition policies in developing countries.

Competition Regimes in Developing Countries

Despite the plurality of competition policies in developing countries, they are still struggling to find their competition policy model. At times the policies have overlapping objectives. As Mor Bakhoum, 2011, pp 351-378 points out, the emergence and rapid development of competition laws in developing countries testify to such policies' supposed or real virtues in the economic development process. Most of these laws were adopted thanks to the first reforms for adopting competition policies in the 1990s. Developing countries perceived these reforms as an injunction from the Bretton Woods institutions (IMF, World Bank). However, the current reforms seem to have been made easier by the political will of certain countries to make competition law an effective instrument for regulating the market.

In Africa, the evolution of competition law has led to four distinct outcomes, according to Tim BÜTHE and Vellah Kedogo KIGWIRU,2020. These are countries with a national competition law (but no competition agency), national competition law, and a competition agency, without a national competition law but covered by a regional competition regime (RCR) and countries with neither a national competition law nor a national competition law access to an RCR. These contrasting results raise questions, particularly with regard to the possible bridges of effective coexistence within a single RCR or between two or more RCRs, and between RCRs and the new dispute settlement mechanism provided for under the African Continental Free Trade Area (AfCFTA). Therefore, the thorny question remains how a country with or without a national competition regime can effectively interact with the RCRs on which the new dispute settlement mechanism of the AfCFTA is intended to be based.

Critiques of Competition Regime Models Applied to Developing Countries

According to Eleanor M. Fox, 2012, the thorny question for developing countries so far is what kind of policy and law is needed for their development. She explains that during the 1990s, the answer used for this purpose was the prescriptions of the Washington Consensus, which subsequently failed because of its excessive rigidity in the face of the needs and socio-economic context of developing countries. This consensus, which has its philosophical basis in the

elimination of government barriers and distortions, licenses, trade barriers, subsidies, and total market freedom, could only work with great difficulty for all countries. In this regard, Fox argues that competition policies in developing countries should aspire to the Spence Consensus, not the Washington Consensus.

Therefore, drawing lessons from the failure of the Washington Consensus model in the context of market globalization, a new approach to development inspired by the Spence Consensus is needed, especially for developing countries. Despite the disparity of these countries in their level of development, they share common characteristics, namely the scarcity of human and financial capital, the lethargy of markets, in particular the lethargy of capital markets, the high concentration of markets, barriers to entry and expansion, omnipresent state or quasi-state ownership and privileged privatization, an extensive informal economy, omnipresent corruption, and often a marginalized majority excluded from participation in the economic life of the community. This is why these countries need to create joint mechanisms that would allow them to act effectively in a regional framework against anti-competitive practices.

Bridges Between National and Regional Competition Regimes in Africa

According to Tim BÜTHE and Vellah Kedogo KIGWIRU,2020, of the 13 countries in Africa that do not have a national competition law, 11 are members of one or more of the 5 African RCRs that have adopted competition laws at the supranational level. In addition, 9 of the 41 countries with competition law do not yet have a competition regulatory agency. However, while these results appear satisfactory, enormous challenges remain for both countries that already have a national competition regime and those that do not.

Indeed, adopting a competition law is the main step in the competition regulation mechanism for countries that do not have one. Establishing a competition agency is an intermediate step for countries that already have competition laws. What follows then is equipping the competition regulatory agency with qualified human resources, adequate financial and material resources to allow the effective achievement of the objectives of competition policy for all states. It is in this sense that Eleanor M. FOX and Mor BAKHOUM,

2019 argue that factors such as political interference, corruption (as an overriding concern), and the limited resources available to many African competition agencies contribute to some markets remaining inaccessible to new entrants and prevent efficiencies from materializing to the benefit of consumers. They rightly point out that the agencies' judgments or decisions are often entirely devoid of substantive reasons, let alone robust economic analysis.

Although reluctant because of the political economy of their private and public sectors, I believe that countries without a competition law in a RCR have a gap that can be filled by joining a cooperative RCR (soft law). Such membership can also serve as a transition to adopting a competition law (hard law) while allowing the country to install the competition culture within itself. For countries with a competition law belonging to a RCR but without a competition agency, creating a competition agency offers them a comprehensive tool for adapting and implementing regional competition policy at the operational level in a way that is compatible with their socio-economic context.

Countries that do not have competition law and do not belong to any of the RCRs have a great opportunity to forge their model of competition policy by drawing on successful examples such as South Africa, which has been able to establish a genuinely national competition law with fairly flexible and effective enforcement against anti-competitive practices. In this regard, I would argue for a combination of 3 of the 6 models of competition law proposed by Eleanor M. Fox, 2012.

Indeed, the first model would adopt the general principles inspired by the United States model but would modify the rules and standards to fit the market realities of each developing country. Thus, developing countries would take stock of their situation and might decide, for example, that a rule that tends to destroy and deter the sole promoter in a monopolized market is more important than a rule that protects the freedom of dominant firms to engage in low-price practices, or conversely, they might prefer to protect low prices for consumers, however transitory. In any event, they would adjust market descriptions, behaviour, and likely effects to the reality of their markets.

The second model would combine the laws of some developing countries that have already developed a competition policy compass. This basket of laws could include South African jurisprudence, which is the most developed body of competition jurisprudence from developing countries and reflects the struggle of lawyers to integrate workable enforcement, given the authority's limited resources, well-endowed adversaries and historically favoured dominant firms, with the need to formulate and apply sound principles that promote competition and do not undermine economic efficiency. The South African competition tribunal decisions, several which were overturned by the Court of Appeal on technical and interpretive grounds, are particularly worthy of study by nations attempting to build a model for inclusive development in a nation with a legacy of exclusion privilege and statism.

More so, this model could include the European Union's emphasis on openness and access as a means of producing and maintaining efficient and dynamic markets. It would also combine aspects of European Union legislation that limit abuses by the state and state-privileged enterprises. This could include efforts to create markets where they are blocked by corruption, privilege, and statism.

The third model would explicitly introduce the value of equity for local market actors. It would reflect a distrust of deep pockets and the influence of powerful multinational firms. The model could conflate notions of competition and unfair competition, recognizing how the economies of many developing countries have been shaped by colonizing and imperial powers that have reserved a path of exploitation and exclusion for themselves.

Conclusion

In conclusion, whatever their level of evolution in competition regulation, developing countries, particularly African countries except for a few rare success stories such as South Africa, need to interrogate their RCRs and national competition laws. 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.

Once this diagnosis has been made, it will enable them to know whether the national regulatory and institutional frameworks for competition are adapted to their needs, realities, and development context. To this end, they can refer to

the Spence Consensus, which, unlike the Washington Consensus, advocates a new vision of development that considers the socio-economic realities of developing countries. If this is not done, the spectrum of the Washington Consensus may loom large on the horizon for a long time to come and may jeopardize the development time horizon of many developing countries in the context of achieving Sustainable Development Goals.

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