

Introduction

Mor Bakhoum

The last decade has witnessed an increasing number of developing countries enacting competition laws and policies either on the national or on the regional level in the framework of regional trade agreements (RTAs). This development seems to stem from a mainstream view that regionalizing competition policies is a pertinent policy for developing countries. Regional competition policies, it is thought, would help developing countries not only overcome their lack of efficient institutional settings and enforcement challenges, but also ensure better control over free competition in their newly created common free trade areas.

As a consequence, competition-related provisions in RTAs are becoming ‘commonplace’. This trend has even been referred to by Michal Gal as the ‘new wave of regionalism’.¹ Not surprisingly, competition-related provisions in RTAs have attracted a lot of attention in the international arena recently and developing countries are keen to enact regional competition policies given the promise of such an approach. Although a broad consensus seems to exist on the benefits of regionalizing competition policies for development, *the issue of the design of a regional competition law and policy adapted to the economic, political and cultural situation of developing countries remains an unsettled question.*

The literature² exploring this new trend in developing countries is very optimistic on the potential benefits of regional integration and regional competition policies in achieving their development objectives. The current scholarship has the merits of providing valuable insights on the experiences in different regional integration systems. However, studies are rare that

¹ See, Gal, M. (2011), ‘International Antitrust Solutions: Discrete Steps or Causally Linked?’ in J. Drexler, W.S. Grimes, C.A. Jones, R.J.R. Peritz and E.T. Swaine (eds), *More Common Ground For International Competition Law?* Cheltenham, UK and Northampton, MA, USA: Edward Elgar, p. 239.

² See Gal, M. (2010), ‘Regional Competition Law Agreements: An Important Step for Antitrust Enforcement’, *60, U. Toronto L.J.*, 239 et seq.

address the interface between *regional integration* and *competition policy* while taking into account the specific issues faced by the developing jurisdictions. The often-heard argument is that a regional competition law is a must in the process of creating a regional market. However, the issues are more complex.

This book considers a new approach in dealing with regional competition policies. Rather than merely analysing and discussing the regional competition experience *stricto sensu*, as is commonly done in the literature, it addresses fundamental questions relating to *regional competition policy integration*; its incentives, goals, driving forces and its potential to help developing countries achieve their development goals. It is only when the issue of regional integration is analysed that the role of competition law and policy in the process can meaningfully be discussed.

Why do developing countries enter into RTAs in the first place? How does competition law help to achieve the goals set up in a regional integration group? If adopting a regional competition policy makes sense in an economic integration endeavour, what kind of competition policy would be suitable? From an 'integrationist' perspective, and against the backdrop of the experience in the European Union, it is often assumed that RTAs would help developing countries promote trade with neighbouring countries and that a regional competition policy would be needed to fight cross-border anti-competitive practices that arise from the setting up of a regional market. This general assumption is, as highlighted in this book, at least less convincing, sometimes even questionable in the context of developing countries.

Designing and implementing a regional competition law should not be done in the abstract. It has to fit the local context. Hence the historical context, the political situation, the economic features of the member states, the size of the member states, the degree of intensity of trade within a common market, the legal traditions (civil law or common law), the language differences, and the institutional settings of the member states, should all be fully taken account of when crafting and implementing competition rules within RTAs.

What kind of competition-related issues do developing countries face in the framework of RTAs? Should a regional competition policy be more centralized or decentralized? What effects does the intensity of intra-community trade have on the policy choice between centralization and decentralization? Does the fact that countries share the same language or belong to the same currency zone have an effect on intra-community trade? Should national competition authorities be given decision-making power in the enforcement of the community law? Should the member states' different

experiences be taken into account in the delimitation of competences between the regional level and the national level? Is a regional competition law even desirable in certain regional economic organizations? How should the relative smallness of the participating states influence the design of regional competition law? Does the trend of regionalizing competition policies in developing countries make the adoption of an international competition policy more likely or less likely?

These questions will most likely have to be answered differently according to the specificities of each regional organization. Of course, issues such as enforcement, lack of efficient institutional settings, and lack of resources, pose similar challenges in the developing countries. However, they should not lead to a generalization of the approach to regional competition laws in the developing world.

At a more fundamental level, in its concluding part, the book discusses the issues of the integration process itself and the role of competition law in this endeavour. The kinds of competition law countries need from a development and from a political perspective are also discussed.

The overall approach of the book has two components: reporting and discussing the regional integration experiences in different developing jurisdictions on the one hand, and taking a more transversal approach, drawing conclusions and lessons and providing guidance on how to approach regional integration of competition policies in the context of developing countries, on the other hand. This is done in the different contributions dealing with regional competition law experiences in ASEAN, WAEMU, COMESA, CARICOM, the Andean Community and the SADC. The conclusions in the last part of the book are devoted to the common and shared features of the different regional integration groups.

This book brings together 14 contributions by leading competition experts, scholars and practitioners from Europe, Africa, Latin America, Asia and the United States. It is the fruit of a workshop held at Frauenchiemsee in Bavaria in the summer of 2010. This workshop and the present book are part of a larger project on 'Competition Law in Developing Countries' initiated by Josef Drexl, Michal Gal, Eleanor Fox and David Gerber.

The book is divided into four parts, each dealing with a specific aspect relevant to the process of creating regional integration groups and enacting regional competition laws.

In Part I, 'Promises and Challenges in Implementing Regional Competition Policy Regimes', the obstacles some regional integration groups face in the process of creating a regional competition policy framework are discussed. In her opening contribution, Lawan Thanadsillapakul argues for a

regional competition regime in the context of ASEAN as a tool to complement and enhance the economic integration process in the region. Hence, according to her, as ASEAN is in the process of developing its integrated regional market, a regional competition law would facilitate intra-ASEAN trade and investment, by protecting, at the regional level, against anti-competitive practices. A regional competition regime, which does not exist yet, would complement and reinforce the ASEAN investment regime and regulations. But which approach is most suitable in designing a regional competition law for ASEAN? Building on the discussions at international level pertaining to an international competition framework and taking into account the specific challenges facing the ASEAN countries and what she terms the ASEAN 'open regionalism', and more specifically the ASEAN way, Thanadsillapakul proposes at the initial stage a synchronized model combining harmonized laws in member states and enforcement networks. With this approach, the regional law would set some standards that would take particular features and shapes in the specific national competition laws. At the regional level, she argues, a regional competition committee may be needed to oversee and enforce competition law in cross-border cases.

In his contribution, Anthony Abad points out the considerable diversity amongst the ASEAN member countries in terms of their respective economic and policy heritage, political governance systems, legal and economic institutions and policy frameworks. He describes the state of play in competition law in ASEAN member states. His analysis demonstrates that marked differences also exist in their level of implementation and enforcement of their national competition laws. He argues at the outset that those differences should be taken into account when designing and implementing national competition regimes. This approach, consisting of relying on national competition enforcement, is in line with the ASEAN Economic Community Blueprint whereby ASEAN member states are committed to introducing national competition policies and laws by 2015.

Regarding the South African Development Community (SADC), Gladmore Mamhare and Kasturi Moodaliyar discuss issues resulting from the differing levels of development and different competition law regimes in their respective chapters. Furthermore, they discuss the consequent issues that are raised at the regional level. Gladmore Mamhare provides us with an account of the different national experiences in SADC member states and the current status of the discussion on a regional competition law. So far, only a Declaration on Regional Cooperation in Competition Law and Consumer Policy regulates the regional framework. There is no regional competition law as such. This creates issues at the regional level regarding

the fact that South Africa, which has a well-functioning national competition law, is able to protect its own market, whereas other SADC members confronted with outbound restrictions of competition initiated by powerful South African firms are not. Hence, the issue of abuse of dominant position and anti-competitive practices by dominant South African firms in countries that do not have an effective competition law and policy, or whose competition laws are not advanced enough to address those issues, is a serious concern in the region. As the leading competition authority in the region, the integration of South Africa in a regional competition policy would help offset those regional competition concerns. Kasturi Moodaliyar is aware of the issue. However, in a very realistic assessment, she supports a step-by-step approach in building a regional competition law. She argues that SADC member states should first strive to develop their own national competition regimes. This bottom-up approach could constitute a stepping stone in the process of creating a sound regional competition regime. At this stage, she argues, it is doubtful that advanced competition jurisdictions such as South Africa and Zambia would be willing to surrender their jurisdiction in favour of a regional agency. Fostering national competition regimes, according to her, should be the first step towards harmonization at the regional level.

Part II of the book deals with 'Institutional Coherence, Regional Integration and Competition Policy' and discusses the respective experiences of the West African Economic and Monetary Union (WAEMU), the Economic Community of West African States (ECOWAS) and the Andean Community. Mor Bakhom and Julia Molestina in their contribution highlight the enforcement issues resulting from the centralized approach of WAEMU competition policy. Against the backdrop of eight years of enforcement experience and the practical limits of the centralized decision-making power in WAEMU, they call for a reform of the regional institutional design. Relying on the analysis of what they term 'competition constraints', they provide guidelines for the redefinition of the competences between the Commission and the national competition authorities. This contribution and its conclusions are very timely, since the WAEMU Commission has recently mandated a study on the revision of the institutional framework for the enforcement of the regional competition law.³ The conclusions of the

³ This study, conducted by the Max Planck Institute, has three components: (1) assessment of the regional institutional enforcement framework; (2) assessment of the national institutional framework; and (3) reform proposals on how best to design the enforcement orientation with a focus on the distribution of competences between the national level and the regional level. The study puts forward important

report, which are in line with Bakhoum's and Molestina's proposal, were discussed and approved by the WAEMU Consultative Committee on Competition (CCC) in its seventh session held in Dakar in November 2011. WAEMU is heading towards recognizing more decision-making power in its national competition authorities.

ECOWAS is in an advanced stage of creating a regional competition law. The regulations are adopted and a regional competition authority is in the process of being created. The new regional competition law would likely create enforcement and coordination issues with the already existing WAEMU competition law, because WAEMU is a sub-region within ECOWAS. Therefore, theoretically, ECOWAS' regional law is also directly applicable to all WAEMU member states. This issue, which so far has not been resolved, is a major highlight of Mbissane Ngom's contribution. The author discusses ways of breaking the deadlock. However the issue is still pending and no solution has yet been identified as to the mechanisms of collaboration between the ECOWAS regional authority and the WAEMU Commission.

The regional competition framework in the Andean Community is regulated by Decision 608 of 2005. One of the innovative features of Decision 608 is the way it aims at correcting the lack of competition laws in some of its member states. Namely, Decision 608 empowered Bolivia and Ecuador to directly apply the provisions of Decision 608 in their domestic setting. This mechanism has been referred to as the 'downloading' option. This transitory device is discussed by Javier Cortázar in his contribution. As now Ecuador and Bolivia have enacted domestic competition laws, the 'downloading' option is no longer applicable. However, this innovative approach seems to constitute a convincing mechanism to introduce a competition culture in countries that do not have national competition laws. In its current reform project of its institutional design, WAEMU is considering applying the same mechanism by allowing member states that so far do not have

reform proposals for the regional institutional framework. Three main recommendations need to be highlighted here: (1) to foster the enforcement tools of the regional competition authority; (2) to decentralize the decision-making power by recognizing national competition authorities' competence to apply the community competition law to national cases; and (3) to establish collaboration channels between the regional authority and the national competition authorities. The findings of the study were presented before the WAEMU regional Consultative Committee on Competition (CCC) in its 7th session held in Dakar in November 2011. The study will be published after the validation of the findings by the WAEMU Commission.

national competition laws to directly apply the community competition law in domestic cases. This would be the case with Guinea-Bissau.

In Part III of the book, 'Economic Structure, Regional Integration and Competition Law Enforcement', the competition-related issues in regional integration groups with specific economic structures are discussed. In a very informative chapter that interfaces economic structure with the historical, political, legal and social dimension, Taimoon Stewart discusses the case of the Caribbean Community (CARICOM). The importance of a regional competition law in the context of CARICOM cannot be overstated, according to her. She makes it clear: 'Integration is not an option for these territories; it is a necessity for survival in the world economy.' As pointed out, the small size of the economies and the need of firms to achieve economies of scale to be viable have led to the emergence of oligopolies, and the concentration of capital has already largely been inherited from colonial times. Furthermore, most consumer goods are imported to CARICOM which predominantly consists of small island states. Regional competition law is therefore crucial in order to discipline large capital holders and prevent them from engaging in cross-border anti-competitive practices. This is especially true for regional trade and investment, which is dominated by a few firms, mainly from Trinidad and Tobago. Stewart concludes that 'introducing and enforcing competition law is vital to preserving market access and to preventing abuse of dominance and high concentration in markets'.

From an institutional perspective, Delroy Beckford addresses the issue of the governance arrangements within CARICOM and the enforcement of the regional competition law. The institutional arrangements give competence to the regional authority to deal with conduct having cross-border effects, while national competition practices are dealt with by national competition authorities. When dealing with cross-border practices, the Community Commission can request that national competition agencies conduct a preliminary examination of the conduct. In jurisdictions such as Jamaica this would require amending the national law. In other member states, the regional authority does not have national competition authorities to rely on. So far, the only two fully functioning competition authorities in the region are to be found in Jamaica and Barbados. Delroy Beckford points out those issues that pose specific challenges to effective enforcement of competition policy in CARICOM.

The Common Market for Eastern and Southern Africa (COMESA) is the largest economic integration group in Africa. It comprises countries with different political backgrounds and levels of economic development. Advocating a sound regional competition regime, George Lipimile stresses the

role of the COMESA Competition Regulations as a means to establish the foundation stones of the economic integration process. This is most urgent in a context where the dismantling of public monopolies has led to a concentration of economic power in the hands of a few regional and national business operators. Various cross-border cases affecting two or more member states exemplify the need to have an effective regional competition policy. The Coca-Cola Company/Cadbury-Schweppes merger, the global Rothmans of Pall Mall/British American Tobacco merger and the takeover by Pretoria Portland Cement of South Africa and Lafarge of France of various cement companies in the region, although they affect the structure of the regional market, have been reviewed separately by different national competition authorities. As Lipimile rightly points out, 'a regional competition law with merger-control provisions would ... ensure that the beneficial effects of merger-control provisions will accrue to all COMESA countries'.

Concluding, Part IV of the book is devoted to 'The Development Dimension of Regional Integration and Competition Policy'. It builds on the different experiences of regional integration and competition policies discussed throughout the book and makes a transversal analysis of the issues and challenges that developing countries face in their integration process. In an analytical approach, this part draws conclusions and provides insights and recommendations on the factors to take into account when creating a regional economic area and crafting a regional competition law. Detangling the issue of 'economic integration' and the role of a regional competition law in the process, Josef Drexl discusses the very objective of economic integration in developing countries. From the outset, he questions the role of economic integration in the framework of developing countries. This question is very often overlooked in the current literature. Whereas in the case of the EU, economic integration was justified by political and economic considerations, in the case of developing countries, he argues, 'the role of economic integration may well have to be redefined in times of globalization'. In this vein, he observes that 'the role of regional integration in *integrating developing countries in the world economy*, and the benefits accruing from it, are much more important than what can be gained from integration of the individual economies'. In line with the proposed redefinition, he concludes that the goals of regional competition law should also be defined in the light of 'international economic integration'. In addition to this new approach of regional competition policies, Josef Drexl points out the benefits of fostering competition culture in the participating member states and empowering individuals to participate in the economy. The latter he refers to as 'social integration'. Practical guidelines on how to organize

the allocation of competences when designing the institutional approach are also discussed in his contribution.

Every regional integration endeavour is initiated, shaped and driven by political considerations. The political dimension has played and is still playing a crucial role in the integration process in the EU. After acknowledging the central role of the political dimension in the regionalization process, David Gerber puts forward some conceptual tools in order to discuss it meaningfully. Exploring the political dimension of regionalization, development and competition law, the author discusses the different incentives and decisional influences that come into play in the process of locating a competition law and policy at the regional level. In the political dimension, he considers regionalization as a process in which ‘decisions’ are taken every step of the way. Influences on the decisions have three dimensions: national, regional or ‘supranational’. Gerber applies those analytical tools to two important aspects of the process of regionalizing competition policies: one relates to the decision to regionalize competition law in the first place; the other relates to the actual implementation of competition on a regional level. Applying the national, regional and supranational influences respectively to the process of locating a competition law at a regional level and to effectively implementing it, David Gerber draws several conclusions. On the one hand ‘decisional influences relating to political authority tend to support formal regionalization’; however, ‘political factors provide far less support for implementation of competition law at the regional level’. Put in other terms, the political decision to formally create a regional framework is not supported at the implementation stage. As a consequence, Gerber stresses the importance of having a long-term perspective when it comes to enforcement.

In her contribution, Eleanor Fox discusses the development dimension of competition law and policy. After stressing the specific challenges developing countries face and their development objectives, she questions the suitability of the developed countries’ competition-law models for developing countries. She argues that ‘developing countries must develop their own brand of competition law, resisting pressures to copy “international standards” without regard to fit’. Developing countries’ need for sustained and inclusive growth and development commands a different kind of competition law, she argues. This new approach runs counter to the trend of forcing ‘international standards’ into developing countries’ legal landscapes, a temptation developing countries should resist. She stresses the urgency for developing countries to choose their own brand of competition law and to develop their own ‘perspective or center of gravity’ around which their

substantive competition principles are framed. ‘What is good for America is not necessarily good for (for example) sub-Saharan Africa’, she contends. In this vein, she sketches different options that developing countries could choose from when developing their competition law. These guidelines are by no means complete models; they only constitute leads for developing countries to follow when crafting their competition policies. Returning to the regional dimension, she argues that regional antitrust for developing countries is a potential showcase for ‘Spence antitrust’, or antitrust fit for inclusive growth.

Concluding the book, Michal Gal and Inbal Faibish Wassmer, after addressing the potential benefits and the possible obstacles to the successful realization of regional competition agreements, discuss in length the pre-conditions for the adoption of an RCA. Those preconditions are inter alia related to the Pareto-optimality for each member state, the equal distribution of benefits, the pre-existence of a competition culture, and sufficient resources. Most importantly, the authors submit ten recommendations in order to unleash the potential of regional agreements of developing jurisdictions. Those recommendations relate to: the clarity of the objectives, acknowledging and resolving the difficulties of collective action, the issue of membership in the RCA, the mode of cooperation among agencies, the case-selection aspect, sequencing, monitoring and enforcing compliance, the conflict-resolution mechanisms, the institutional-design issues, and the mechanisms to change the rules.

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On behalf of the editors, Mor Bakhoum
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