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## The attribution of competence to community and national competition authorities in the application of competition rules

Report by the UNCTAD secretariat\*

- *Executive summary*

- This report examines a cross-section of community/regional competition regimes, in both developed and developing countries, arising from economic integration efforts through free trade agreements (FTAs), partial scope arrangements and customs unions. The main focus is the state of play in Africa, the Caribbean, Europe and Latin America, insofar as they have competition provisions in their trade agreements. The report compares various systems of regional integration with competition instruments and the outlay of attribution of competences between community/regional authorities and national competition authorities (NCAs). The European Union has established institutional frameworks with clear definitions of jurisdiction between various institutions. Africa and the Caribbean are in the process of setting up institutions and are at different stages. Latin America has competition provisions in its respective regional arrangements, though implementation has been slow. East and South-East Asia have limited objectives assigned to competition in regional arrangements. This report looks at various challenges facing each region on competence attribution, and comes up with issues for further discussions and future research.

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\* This document was submitted on the above-mentioned date as a result of processing delays.

## **I. Background**

1. At its eighth session, the Intergovernmental Group of Experts on Competition Law and Policy recommended that the ninth session of the group consider the issue of the attribution of competence to community and national competition authorities in the application of competition rules. The United Nations Set of Principles and Rules on Competition<sup>1</sup> encourages States at the national, regional or subregional levels “to adopt, improve and effectively enforce appropriate legislation and implement judicial and administrative procedures for the control of restrictive business practices”. This report examines the different aspects of sharing of responsibilities in enforcing competition laws between community and national competition authorities. UNCTAD carried out a survey on attribution of competence and refers to responses received from member States, where necessary.<sup>2</sup>

## **II. Introduction**

2. In this report, the terms “community” and “regional” competition authorities are used interchangeably, since some regional groupings use the term “community”, while others use the term “regional”. This report focuses on national and regional/community regimes which have common competition provisions and jurisprudence sharing between implementing agencies.

### **A. Concepts**

3. In law, “competence” refers to the authority of a court to deal with specific matters or the legal “ability” of a court to exert jurisdiction over an issue/person/thing that is subject to a suit. “Attribution” has to do with assigning some quality or character to a person, thing or institution. It is an aspect of allocating or sharing responsibilities according to a plan or laid down procedures. “Sovereignty” can be defined in different ways. For this report, it is the exclusive right to complete control over an area of governance, people or oneself. The decision of a Government to belong to a regional grouping involves loss of some sovereignty. The delay in the enforcement of regional agreements could be attributed to these factors as well as others discussed in UNCTAD (2005).<sup>3</sup>

### **B. Competence allocation in competition law enforcement**

4. Attribution of competence to two institutions involves a give-and-take geometrical outlay. It involves a creation of a power base at the regional level and also giving away some of the power at the national level. When discussing attribution of competence, one cannot avoid thinking about sovereignty of States in their decision-making process and the issue of policy space, which are both subjects of debate in international trade forums.

### **C. Centralization vs. decentralization**

5. In competition law enforcement, two types of structures are observed in national or regional competition regimes: centralized and decentralized. In

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<sup>1</sup> UNCTAD (2000). *The United Nations Set of Principles and Rules on Competition*. UNCTAD/RBP/CONF/10/Rev.2. Geneva. United Nations. Part E, Paragraph 1.

<sup>2</sup> As of 29 February 2008, those who responded to the survey were Albania, the Andean Community, Barbados, Bhutan, the Bolivarian Republic of Venezuela, Bosnia and Herzegovina, Bulgaria, Burkina Faso, Colombia, Costa Rica, the Czech Republic, Denmark, the European Union, France, India, Indonesia, Italy, Jamaica, Japan, Latvia, Pakistan, Panama, Peru, Portugal, the Russian Federation, Singapore, Slovakia, Switzerland, Tunisia, Turkey, Uruguay, Viet Nam, Zambia and Zimbabwe.

<sup>3</sup> See United Nations Publication No. UNCTAD/DITC/CLP/2005/1, chapter 1.

centralized structures, the central competition authority has the enforcement power. In decentralized structures, competition authorities delegate part of their enforcement power to national/State competition authorities. In economic analysis, the two structures exhibit some advantages and disadvantages. Decentralization addresses informational asymmetries between competition agencies and enterprises. This is known as the principal–agent relationship.<sup>4</sup> In the context of competition, national and supranational competition authorities are considered as principals, whereas enterprises are considered as agents. The agents may either conceal or provide false information to the authorities to protect their interests. It is easier for firms to provide information to NCAs as opposed to supranational authorities.

6. Decisions adopted by member States of a regional grouping may have cross-border effects. When enforcement is centralized, it may reduce or eliminate externalities.<sup>5</sup> There are economies of scale and transaction cost savings due to uniform application of common competition rules by supranational authorities acting as one-stop shops in dealing with anticompetitive cases.

7. While considering the above arguments, one should not lose sight of competition authorities' capture by the private sector.<sup>6</sup> This issue, combined with the national champions argument, places supranational competition authorities in a better position to protect regional interests. In cases where lobby groups act together at the regional level, increasing their leverage against the supranational authority, the above arguments are weakened.

8. In countries with federalist structures, the competence to enforce competition laws is allocated between the competition authorities of “länder” in Germany and of “States” in the United States, and the national competition authorities.<sup>7</sup> The competences of NCAs extend to anticompetitive practices affecting trade between länder/States. In Germany, “land” competition authorities have competence on cartel prohibitions and abusive practices, whereas Bundeskartellamt has exclusive competence on merger control. In the United States, all mergers and acquisitions are examined by the Department of Justice (DOJ) and the Federal Trade Commission (FTC). Mergers may also be reviewed by competition authorities of one or more States in the United States. It is argued that large countries with big domestic markets would benefit from “federalized competition policy structures”.<sup>8</sup>

### III. Regional groupings and competence allocation

9. Regional integration efforts heightened in the 1990s following liberalization and globalization of markets. The choice of regional integration as a development strategy has become a global trend.<sup>9</sup> Research has shown that an estimated 250 regional integration schemes exist in form of FTAs and/or customs unions. These initiatives have evolved over time and have diversified across continents and as subsets of others. However, there are fundamental differences and peculiarities in each region.

10. There has been an increase in the emergence of bilateral cooperation agreements on competition enforcement on South–South, North–North and North–

<sup>4</sup> Van den Bergh R (1996). Economic criteria for applying the subsidiarity principle in the European Community: the case of competition policy. *International Review of Law and Economics*. Vol. 16:363–383.

<sup>5</sup> *Ibid.*: 366–367.

<sup>6</sup> *Ibid.*: 370.

<sup>7</sup> Bundeskartellamt in Germany; Department of Justice (DOJ) and United States Federal Trade Commission (FTC).

<sup>8</sup> Budzinski O (2007). An international multilevel competition policy system. February. Available at SSRN: [ssrn.com/abstract=927710](https://ssrn.com/abstract=927710).

<sup>9</sup> UNCTAD (2006). Policy issues for African countries in multilateral and regional trade negotiations (UNCTAD/DITC/TNCD/2006/69).

South bases. Bilateral agreements are an important development in competition enforcement, but their dynamics are beyond the scope of this report. Detailed discussions on the state of play in other regions concerning sharing of competences between national and regional competition authorities will be undertaken below.

11. Regional arrangements in East and South-East Asia – mainly the Association of South-East Asian Nations (ASEAN) and ASEAN Free Trade Area (AFTA) – do not include competition provisions. The Asia–Pacific Economic Cooperation (APEC) is more active in the field of competition. APEC established the Competition Policy and Deregulation Group in 1996 to improve the region’s competitive environment and to develop an understanding of regional competition laws and policies. APEC undertakes training courses, experience-sharing discussions and other activities to promote a competition culture. The East Asia Conference on Competition Law and Policy – co-organized annually by the Japan Fair Trade Commission, the Asian Development Bank and hosting country Governments – provides an opportunity for discussing competition issues and sharing experiences. Bilateral cooperation agreements exist between countries in the region and from outside the region.<sup>10</sup> However, these efforts are not yet transferred into setting up a regional competition regime, and hence competence allocation is not an issue in this region.

12. The Interstate Council for Antimonopoly Policy (ICAP) is a regional body which contains the member States of the Commonwealth of Independent States (CIS). The Agreement on Coordinated Antimonopoly Policy does not provide for the establishment of a supranational competition authority. ICAP coordinates activities of antimonopoly authorities of CIS member States and ensures harmonization of national competition legislations. The Russian Federation’s response to the UNCTAD survey reveals that, in the mid-1990s, ICAP adopted a “model law on the protection of economic competition”, to assist member States without competition legislation.

## A. Africa

13. Regional economic integration in Africa can be divided into distinct groups with different characteristics. The African scenario is the most complex, with regional and subregional integration characterized by overlapping memberships and subsets within certain groupings. This report will focus on regional groupings which have competition provisions in their treaties. These include the Economic and Monetary Community of Central Africa (CEMAC), the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC), the Southern African Customs Union (SACU), the Southern African Development Community (SADC) and the West African Economic and Monetary Union (WAEMU).

14. The emerging trend is that more and more regional groupings are looking for ways and means of developing regional competition rules and encouraging their members to enact domestic laws. The move towards having competition provisions in regional agreements/treaties is grounded in the United Nations Set on Competition, “recognizing also the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries”.<sup>11</sup>

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<sup>10</sup> Chang D (2005). Suggestions for enhancing the effectiveness of cooperation on competition law and policy at the regional level from the experience of the Republic of Korea. In *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1): 415–442.

<sup>11</sup> UNCTAD (2000). UNCTAD/RBP/CONF/10/Rev.2. Geneva. United Nations:8.

Competence sharing between regional and national competition authorities in the region is discussed below.

## 1. Economic and Monetary Community of Central Africa<sup>12</sup>

15. CEMAC replaced the Customs and Economic Union of Central Africa through an agreement signed in 1994 to create a common market. CEMAC has a community competition law,<sup>13</sup> which has provisions on cartels, merger control and abuse of dominance. Cartels are prohibited but mergers are evaluated by rule of reason approach. Mergers significantly damaging the regional economy are blocked. Article 9 accords competence to evaluate mergers with a community dimension to the community competition authority. Article 14 of the community law allows member States to evaluate mergers of national interest in public health, trade on weapons and financial stability.

16. Similar to the European Union model, CEMAC competition law applies to anticompetitive practices affecting trade between member States. The Competition Monitoring Body, which includes the Executive Secretariat and the Regional Competition Council, monitors the implementation of the community law. The council is the decision-making body on infringements. The Arbitration Court examines appeals against council decisions.

17. There are concerns about the capacity to implement the community competition law. Despite political will at the regional level, institutional weaknesses in member States affect implementation capacity. Cameroon is the only member State with national competition law and authority. There is still much to be done at the national level to address resource constraints for effective application of community laws. There is clear allocation of responsibilities between community competition authorities and NCAs. However, until the system is put into practice, it is difficult to comment on its effectiveness in dealing with anticompetitive practices.

## 2. Common Market for Eastern and Southern Africa

18. The 1994 COMESA Treaty, which replaced the former Preferential Trading Area Treaty of 1981, brought together countries in Eastern and Southern Africa to create an economic and trade area large enough to overcome difficulties faced by member States. COMESA envisages a competitive common market; competition law and policy are the economic policy tools available for regulating the market.

19. Article 55 of the COMESA Treaty provides for the development of regional competition rules to ensure that cross-border anticompetitive practices do not erode the benefits derived from integration. The COMESA Council of Ministers adopted Competition Regulations and Rules (Regulations) in December 2004.

20. COMESA encourages its member States to enact domestic competition laws. The regional law addresses cross-border competition issues affecting the common market. In this respect, the COMESA competition regime is similar to that of the European Union. COMESA Regulations cover mergers and acquisitions, and anticompetitive business practices, including abuse of dominance. They also cover consumer protection, which is a deviation from the common formulation of

<sup>12</sup> This section draws on “Règlementation communautaire de la concurrence et renforcement du processus d’intégration économique en Afrique centrale”, by Yves Kenfack. United Nations (New York and Geneva 2000) (UNCTAD/ITCD/CLP/Misc.15).

<sup>13</sup> Regulation 1/99-UEAC-CM-639 of 25 June 1999; and Regulation 4/99/UEAC-CM-639 of 18 August 1999.

regional/community competition rules.<sup>14</sup> Under article 5 of the regulations, member States are required to take “all appropriate measures... to ensure fulfilment of the obligations arising out of these regulations or resulting from action taken by the commission under these regulations”. Article 16 prohibits restrictive business practices which “affect trade between member States” and “have as their object or effect the prevention, restriction and distortion of competition within the common market”. Article 18 addresses “any abuse by one or more undertakings of a dominant position within the Common Market or in a substantial part thereof”.

21. COMESA Regulations provide for the creation of two institutions for enforcement of the provisions, the COMESA Competition Commission and the Board of Commissioners.<sup>15</sup> The board is the supreme policy body of the commission as prescribed in article 13 of the regulations. The COMESA Court of Justice deals with disputes arising from the application of the regulations and hears appeals against decisions of the board on matters of law.<sup>16</sup> Its decisions are binding to all member States. It has unlimited jurisdiction to review the board’s decisions, including imposing penalties for infringements.

22. On competence sharing, the commission has a supranational position vis-à-vis the NCAs in competition cases. When the commission receives an investigation request concerning an anticompetitive conduct taking place in a member State, it can resolve the case in various ways. It can order the enterprise concerned to take a specific course of action. The commission may apply to the relevant national court for an appropriate order if the enterprise fails to comply within a specific time period.<sup>17</sup>

23. Article 24(7) on merger control provides member States with the opportunity to request the commission to refer the merger for consideration “under the member State’s national competition law if the member State is satisfied that the merger” will have negative impact on competition in its territory. The commission has the final determination on whether to pass the merger for review to the requesting member State or to deal with it at the regional level. Article 23 provides that if one or both enterprises involved in the merger proposal operate in two or more member States, the Commission has jurisdiction.

24. Articles 27–38 on consumer protection cover several categories of offences against the consumer. The commission has jurisdiction over these practices insofar as they affect trade between member States.

25. An important aspect of competence sharing between the commission and NCAs is the determination of jurisdiction and the existence of an effective mechanism to allocate cases between regional and national agencies. The regulations bring out three issues: (a) the commission has the primary role for action on all cases affecting trade between member States; (b) the decisions taken by the commission will take precedence over those of NCAs in respect to the same case; and (c) NCAs and the commission need to cooperate for the effective implementation of the COMESA Regulations.

26. The court plays a significant role in the enforcement of the regulations. The Secretary-General of COMESA has the mandate to evaluate all cases recommended to the court for action in consultation with the concerned member State or the

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<sup>14</sup> Lipimile GK and Gachuri E (2005). Allocation of competences between national and regional competition authorities: the case of COMESA. In *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1):365–414.

<sup>15</sup> Rule No. 5 on the Enforcement Institutions, Part 2, p. 3.

<sup>16</sup> Article 19 of the treaty.

<sup>17</sup> Article 21 of the regulations.

Council of Ministers. It is only after such negotiations that a case can be presented to the court. The council can resolve the case without reference to the court.

27. While COMESA Regulations may appear comprehensive enough in sharing jurisdiction between the commission and NCAs, there are a number of issues for further discussion: (a) cases which affect more than one member State, but whose effects may differ in degree between States; (b) cases in which one or more of the affected member States does not have national competition law and/or agency; (c) cases that are not easily identifiable in terms of their geographic coverage; and (d) ways and means of exchange of information, advocacy and joint training opportunities.

**Box 1. COMESA – cement sector<sup>18</sup>**

Within the COMESA region, cement is a very important input in the construction industry. The cement industry has been subject to price fixing, market allocation and other cartel activities all over the world. Between 1997 and 2001, Lafarge Cement Company of France was present only in Kenya and Cameroon, but was strengthened by acquiring other cement plants in South Africa, Uganda and Zimbabwe. In 2001, there was a move towards amalgamation of the cement business in the region. Lafarge wanted to extend its operations to Zambia, Malawi and the United Republic of Tanzania by taking over the existing cement companies. The Zambia Competition Commission evaluated the takeover and approved it with conditions. Other countries may not have evaluated the takeovers due to legislative or institutional constraints. This case could have been reviewed comprehensively by the COMESA Competition Commission since it has cross-border effects.

**3. East African Community**

28. EAC is a regional intergovernmental organization established in 2000. Article 21 of the protocol establishes the East African Customs Union and prohibits “any practice that adversely affects free trade... which has as its objective or effect, the prevention, restriction or distortion of competition within the Community”.<sup>19</sup> The same article emphasizes that the competition provisions of the protocol will be implemented in accordance with EAC competition policy and law. The Competition policy document (CP) adopted by the EAC refers to the principle of supranationality and states that the EAC competition policy will preside over national competition policies of member States in matters with a community dimension. The CP further introduces the principle of subsidiarity and covers both cross-border restraints and those from outside the EAC. Anticompetitive practices with a national dimension will be handled by member States. The EAC competition regime will be similar to that of COMESA in this respect.

29. The East African Legislative Assembly passed the EAC Competition Bill in May 2007. It will become law once it is approved by the presidents of all member States. EAC has a set of established institutions, which include the Council of Ministers, the Coordinating Committee of Permanent Secretaries, various sectoral committees, the East African Court of Justice, the East African Legislative Assembly and the secretariat. In addition, the Competition Bill envisages setting up an EAC Competition Committee with sufficient powers to enforce community competition law. The committee will have competence to investigate and impose sanctions and remedies. The enforcement of decisions taken at the community level requires the necessary institutions in member States. This is a major concern in

<sup>18</sup> Lipimile and Gachuri (2005): 382.

<sup>19</sup> Available at [www.eac.int/EAC\\_CuctomsUnionProtocol.pdf](http://www.eac.int/EAC_CuctomsUnionProtocol.pdf).

EAC since Burundi, Rwanda and Uganda do not yet have national competition laws and agencies.

#### **4. Southern African Customs Union**

30. SACU, established in 1910, is the world's oldest customs union. The 2002 revised SACU Agreement came into force July 2004. The revised agreement recognizes the different levels of economic development of member States and the need for their integration into the global economy. It states that the implementation of the earlier agreement was hampered by a lack of common policies and institutions.

31. Articles 40 and 41 of the SACU Agreement deal with cooperation in competition enforcement and on unfair trade practices, respectively. This is one of the areas identified in the agreement for the development of common policies. A workshop for SACU member States organized in 2004 with the assistance of UNCTAD recommended that a report on a framework for possible competition policy enforcement cooperation and an annex on unfair trade practices be prepared. An UNCTAD report<sup>20</sup> was prepared at the request of SACU member States, which outlined the mechanisms which could be adopted to operationalize articles 40 and 41 of the agreement. As a follow-up to this report, UNCTAD is preparing two reports: (a) a cooperation mechanism agreement on competition policy enforcement and (b) an annex on unfair trade practices. These reports are scheduled for discussions between member States during the first half of 2008.

32. The SACU arrangement does not provide for a supranational competition framework. Member States are expected to cooperate in enforcing competition policies. Therefore, the bulk of the jurisdiction is on NCAs. This calls for member States to have competition laws and operating competition agencies.

33. The cooperation mechanism will be handled at the SACU secretariat level through the existing institutions, including dispute settlement. In this respect, the SACU secretariat has some competence assigned to it. The annex on unfair trade practices is expected to handle cross-border trade issues. The mechanism will be overseen by the SACU secretariat, thus granting it jurisdiction over these matters. One of the main challenges to consensus-building within SACU is the differing interests of member States due to their diversities in economic and social development.

34. Overlapping membership at the SADC level and also bilateral agreements between some members of SACU and other organizations, for example the South Africa/European Union Trade Agreement, which has competition provisions, could complicate the implementation of articles 40 and 41.

#### **5. Southern African Development Community**

35. SADC was established in August 1992 with the signing of the declaration and treaty which transformed it from a loose alliance of nine States known as the Southern African Development Coordinating Conference (SADCC) of 1980. The signing of the SADC Treaty gave the organization a legal character.

36. The SADC Treaty does not have provisions on competition. However, article 25 of the SADC Trade Protocol requires member States to adopt comprehensive trade development measures within the community which prohibit unfair trade practices and promote competition. The procedure of how to implement article 25 is

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<sup>20</sup> Mathis J (2005). The South African Customs Union (SACU): a regional cooperation framework on competition policy and unfair trade practices (UNCTAD/DITC/CLP/2005/3).



not provided. It is envisaged that SADC would issue guidance to member States on how to proceed in this aspect. Recent discussions within SADC membership during a ministerial conference in April 2007 and a follow-up meeting during the SADC Special Trade Negotiating Forum Meeting in September 2007 reveal that the move is towards developing a cooperating mechanism as opposed to supranational structure.

37. SADC members also intend to include consumer policy issues in the proposed mechanism. The proposal is to establish a standing committee at the secretariat level to deal with both competition and consumer policy issues. The committee shall coordinate all matters pertaining to the proposed cooperation mechanism, including but not limited to identifying the areas of cooperation on competition and consumer matters, capacity-building and training matters, exchange of information, and international cooperation.

38. Concerning competence allocation, in the absence of a structure outlining how responsibilities will be shared, it is difficult to know how much cooperation is actually possible. Another problematic area is the fact that, for cooperation to be effective in such a case, all participating members need to have competition laws and effective enforcement mechanisms.

## **6. West African Economic and Monetary Union**

39. WAEMU was established by the Dakar Treaty in 1994. The treaty provides for a regional competition regime. WAEMU has two fundamental principles, the precedence of community law over national law and the direct and immediate applicability of community law.<sup>21</sup> Member States are required to make the necessary adjustments in their national laws to comply with the community law according to WAEMU's supranational character.

40. Articles 88–90 of the Dakar Treaty contain provisions on competition. Article 90 attributes competence to the commission of the union to apply competition rules subject to the control of the Court of Justice. The court has jurisdiction to rule on all decisions issued and fines imposed by the commission. For the implementation of these rules, WAEMU adopted regulations in 2002 on anticompetitive practices, procedures governing cartels and abuse of dominant position, and State aid. A directive on cooperation between the commission and the NCAs for the application of community competition law was adopted.

41. After the adoption of these instruments, the commission was endowed with the necessary tools to enjoy exclusive competence to implement community competition law. The Court of Justice decided that articles 88–90 of the Dakar Treaty pertained to the exclusive competence of the union and that member States could not exercise shared or concurrent competences in the area of competition.<sup>22</sup> However, member States are involved in the decision-making process through the Advisory Committee on Competition, composed of representatives of member States. The commission shall consult the committee before taking a decision on a competition case. However, the opinion of the committee does not bind the commission.

42. The WAEMU Court of Justice endorsed the Commission's opinion that member States should not enact laws based on article 88, whereas they may prohibit by national law those practices which are not considered by the community

<sup>21</sup> Article 6 of WAEMU Treaty.

<sup>22</sup> Decision No. 003/2000, 27 June 2000, relating to the interpretation of article 88, 89 and 90 of the UEMOA Treaty: Competition rules "in" Coier De Justice De LUEMOA "Recueil de la jurisprudence de la cour," pg. 119–132.

law, such as restrictive commercial practices and unfair competition.<sup>23</sup> However, Bakhoum (2006) identifies the risk of simultaneous application of community competition law and national competition law in certain cases.<sup>24</sup> Restrictive commercial practices – such as refusal to supply or resale price maintenance – may involve abuse of dominance, which is covered by the community law. In such cases, it may be difficult to determine whether the national or the regional competition authority has the competence.

43. Member States with an NCA could decide on competition cases before the entry into force of the community regulations on competition on 1 January 2003. Before 2002, competition authorities in Senegal and Côte d'Ivoire handled a number of competition cases. However, the Government in Senegal identified six cases from 2003 to 2006 on cartels and abuse of dominance, which were not handled by either the National Competition Commission or the WAEMU Commission.<sup>25</sup> UNCTAD peer review points out that, in Senegal, the exclusive competence of the WAEMU Commission is perceived as “an obstacle to the emerging work in this area of both the Ministry of Trade and the Competition Commission”.<sup>26</sup> It further notes that, in Côte d'Ivoire, despite a relatively large number of cases between 1994 and 2001, there have not been any since then. The WAEMU Commission has examined one merger case since 2001.<sup>27</sup> The response of Burkina Faso to the UNCTAD survey points out two factors which delayed the implementation of the community legislation. One is the psychological difficulty in accepting the court's opinion rendering exclusive competence to the WAEMU Commission. The second factor is the amendment which needs to be done to adapt national legislation to community legislation.

44. Issues for further consideration on the competition law enforcement mechanism of WAEMU are as follows:

- (a) The WAEMU Commission has exclusive competence on any anticompetitive practice taking place in any member State(s) within the union, regardless of their impact on the community market or trade between member States. UNCTAD peer review states that distinction could be made between the competence of the community authorities and NCAs;
- (b) Bakhoum points out that community institutions are not easily accessible by parties affected by anticompetitive practices. This may impede the detection and resolution of anticompetitive practices in member States;
- (c) The workload of the WAEMU Commission is bound to increase due to expanded jurisdiction on both national and regional cases. This will eventually lead to delays in enforcement and an increase in procedural costs;
- (d) UNCTAD peer review refers to the importance of reorganization of national institutions to be able to handle community-related work and having an independent authority as a contact point for WAEMU institutions.

## B. Europe

45. The competition regime of the European Union is the only functioning regional model in the world with a supranational competition authority. The European Commission has the power to implement articles 81–86 under the Treaty

<sup>23</sup> UNCTAD peer review.

<sup>24</sup> Bakhoum M (2006). Delimitation and exercise of competence between the West African Economic and Monetary Union (WAEMU) and its member States in competition policy. *World Competition* 29(4): 653–682.

<sup>25</sup> UNCTAD peer review.

<sup>26</sup> UNCTAD peer review, p.25.

<sup>27</sup> UNCTAD peer review, p.23-24.

of Rome. Articles 81 and 82 cover restrictive agreements, concerted practices and abuse of dominance within the common market. The commission has competence in dealing with anticompetitive practices affecting trade between member States. NCAs also have jurisdiction to enforce articles 81 and 82. NCAs may terminate an infringement, order interim measures and accept commitments or impose fines.

46. Before the reforms undertaken in 2004, there was a voluntary notification of agreements to the commission. Firms can benefit from an exemption from prohibitions under article 81(3) of the treaty. The commission was the competent authority to apply the article. However, the commission was flooded with notifications on vertical restraints, reducing the resources available to examine horizontal agreements, which are more likely to be anticompetitive.<sup>28</sup> This was one of the factors leading to reforms within the European Union. The commission also cited the ineffectiveness of the notification system to detect hard-core cartels and the excessive administrative burden on undertakings as the main reasons for reforms.<sup>29</sup>

47. Regulation 1/2003, which entered into force on 1 May 2004, introduced changes that attribute competence to NCAs and national courts to enforce article 81(3). Where NCAs and national courts apply national competition law to anticompetitive practices affecting trade between member States, they are also required to apply articles 81 and 82. Initially, there were concerns about the ability of national courts to adequately assess cases due to limited experience and to the economic analyses required.<sup>30</sup>

48. The European Commission Merger Regulation<sup>31</sup> (ECMR) defines mergers meeting certain turnover thresholds as having a community dimension.<sup>32</sup> The commission has exclusive jurisdiction on such concentrations. NCAs apply national competition laws to review mergers without a community dimension. ECMR introduces a referral system, where a merger without a community dimension, which can be reviewed under merger regulations of at least three member States, may be referred to the commission by undertakings involved.<sup>33</sup> Member States may request the commission to examine mergers affecting trade between member States and threatens competition within their territory.<sup>34</sup> Article 9 states that the commission may refer a notified merger to a member State in case it significantly affects competition in a “distinct market” within that member State.<sup>35</sup> Under article 4(4), undertakings may request the commission to refer the case to the relevant member State.

49. The European Union’s response to the UNCTAD survey reveals that the rules on case allocation<sup>36</sup> and cooperation mechanisms established under regulation 1/2003<sup>37</sup> prevent forum shopping between the commission and NCAs and between different NCAs. On merger control, the possibility of using pre-notification referral

<sup>28</sup> Jenny F and Horna PM (2005). Modernization of the European system of competition law enforcement: lessons for other regional groupings. In *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (UNCTAD/DITC/CLP/2005/1): 285–331.

<sup>29</sup> Budzinski O and Christiansen A (2005). Competence Allocation in the EU competition policy system as an interest-driven process. 28 February. Available at SSRN: [ssrn.com/abstract=682303](https://ssrn.com/abstract=682303).

<sup>30</sup> Lenaerts K and Gerard D (2004). Decentralization of EC competition law enforcement: judges in the frontline. *World Competition* 27(3): 313–349.

<sup>31</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 (ECMR), OJ L24 29.01.2004.

<sup>32</sup> Article 1 ECMR.

<sup>33</sup> Article 4(5) of ECMR.

<sup>34</sup> Article 22 of ECMR.

<sup>35</sup> Article 9 of ECMR.

<sup>36</sup> Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101/43 27.4.2004.

<sup>37</sup> Article 11.

rules by merging parties to engage in forum shopping was cited. However, close contacts between the commission and NCAs help the authorities to address this problem.

50. Regulation 1/2003 provides for close cooperation and consultation between the commission, NCAs and the courts to ensure uniform application of competition rules.<sup>38</sup> NCAs and national courts can consult the commission on cases involving the application of community law. The commission and the NCAs share information and evidence pertaining to cases involving article 81 and 82. Regulation 1/2003 further states that neither national courts nor NCAs can take decisions conflicting with the decision adopted or being considered by the commission.<sup>39</sup>

51. National courts may review NCA decisions on the basis of both national competition law and articles 81 and 82. NCAs and the commission may also submit written/oral comments to national courts on the application of articles 81 and 82. However, national courts do not have to accept the commission's view. Court decisions on articles 81 and 82 are forwarded to the commission after the parties have been notified.

52. The European Court of Justice (ECJ) has unlimited jurisdiction over decisions of the commission on imposition of fines. ECJ may cancel/reduce/increase the fine imposed. Pursuant to article 234 of the treaty, national courts, while implementing articles 81 and 82, may request ECJ to provide preliminary rulings on interpretation of these articles. The Court of First Instance is responsible for direct actions brought against the commission by persons on the application of competition rules to undertakings.

53. The European Competition Network (ECN) was introduced as "a forum for discussion and cooperation... to ensure both an effective division of work and an effective and consistent application of European Commission competition rules".<sup>40</sup> the European Union's response to the UNCTAD survey provides that cooperation among the commission and NCAs takes place at various levels. Important competition policy issues are discussed at the political level in meetings held among the Director General of Competition in the Commission and heads of NCAs. Experiences and know-how are exchanged during plenary meetings of the commission and NCAs.

54. Another arrangement in Europe is the Agreement on the European Economic Area, which applies to 27 European Union member States, Iceland, Liechtenstein and Norway. Articles 56 and 57 in part IV, chapter 1 of the treaty, which deals with competition issues, provide for competence sharing between the commission and the European Free Trade Association (EFTA) Surveillance Authority. In this arrangement, the "one-stop-shop" principle is applied, where either the commission or the authority and not both is competent to handle a case. Regarding the cases where trade between the European Union and one or more EFTA States is affected, jurisdiction sharing is determined on the basis of the 33 per cent turnover threshold for the enterprises involved.<sup>41</sup>

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<sup>38</sup> Article 15.

<sup>39</sup> Article 16.

<sup>40</sup> Commission Notice on Cooperation within the Network of Competition Authorities, OJ C 101, 27.04.2004.

<sup>41</sup> [http://www.eftasurv.int/fieldsofwork/fieldcompetition/compregrole/dbaFile547.html#Article\\_56\\_footnote](http://www.eftasurv.int/fieldsofwork/fieldcompetition/compregrole/dbaFile547.html#Article_56_footnote).

**Box 2. Merger of ENDESA and Gas Natural SDG SA<sup>42</sup>**

In 2005, the Spanish Competition Authority evaluated a takeover of ENDESA by Gas Natural SDG SA. Gas Natural and ENDESA were the dominant players in the gas and electricity markets, respectively. The takeover was also notified to the French, Italian and Portuguese competition authorities. The Italian and Portuguese authorities requested the European Commission to examine the case pursuant to article 2 of ECMR. Spanish competition authorities were opposed to this request. The commission did not accept to evaluate the takeover on the grounds that it did not have a community dimension.<sup>43</sup>

In the energy sector, the Spanish Competition Tribunal may issue an opinion on competition matters, whereas the National Energy Commission has wider responsibilities. The decision-making body in energy matters is the Council of Ministers. The tribunal issued an opinion blocking the takeover based on the fact that it would create a dominant firm in gas and electricity markets. The National Energy Commission issued a non-binding authorization for the takeover with conditions. The council decided to authorize the takeover on 3 February 2006, subject to conditions. This case is an example of determination of competence between national and community authorities. Such a case can be more complicated due to competence sharing between competition authorities and sector regulators.

55. Another interesting case is the adoption of the European Union Decision<sup>44</sup> on Microsoft in the form of an undertaking by the Croatia Competition Authority. Microsoft agreed to ensure nondiscriminatory disclosure of the relevant Windows Server Protocol specifications to all undertakings in the Croatian market on equal terms applicable to the undertakings within the European Union, and a nondiscriminatory provision of Windows XP and Windows Vista operating systems without Windows Media Player in all European Union languages at the same price. In this case, the Croatian NCA applied the European Union jurisdictional competence to implement the decision in its own territory despite its not being a member of the European Union. Microsoft agreed to enter into the undertaking.

**C. Latin America**

56. In Latin America, there are three active regional integration schemes with competition provisions: the Andean Community, the Southern Common Market (MERCOSUR) and the Central American Common Market (CACM). Both the Andean Community and MERCOSUR have competition provisions in their protocols, but implementation has been slow.

57. Several Central American countries (Costa Rica, El Salvador, Honduras, Guatemala and Nicaragua) have taken an initiative towards harmonization of competition rules. The Secretariat for Central American Economic Integration (SIECA) provides support to a working group on competition policy, which was established in May 2006. The discussions of the group are based on the Protocol of Guatemala signed in 1993 to establish and consolidate economic integration in this subregion. There are other types of agreements, such as on monopolies and State enterprises in NAFTA, and those with the European Union, which contain competition provisions.

<sup>42</sup> UNCTAD (2007). *Recent Important Cases Involving More Than One Country* (TD/B/COM.2/CLP/62). Geneva. United Nations. 26 April.

<sup>43</sup> Article 1 of ECMR.

<sup>44</sup> 2007/53 EC of 24/03/2004 upheld by the judgement of the Court of First Instance of 17/09/2007.

## 1. Andean Community

58. The Andean Community approved decision 608 on Rules for the Protection and Promotion of Competition in the Community in March 2005, which applies to anticompetitive practices and abuse of dominance. Article 5 of decision 608 covers:

- (a) Anticompetitive practices occurring and having effects within the territory of one or more member States, except those which originate from and affect only one country; and
- (b) Anticompetitive practices originating from a non-community country and affecting two or more community members.

59. This implies that the community law can only be applied in cases where two or more countries are involved. National competition authorities have jurisdiction over all other cases.

60. The Andean Community secretariat is the investigative arm of the community. Investigations are carried out jointly by regional and designated national authorities under the supervision of the Andean Community. The Committee on the Protection of Free Competition is the adjudicative arm of the Andean Community, and is composed of high-level representatives from member States. The judicial arm of the community is the Andean Community Tribunal of Justice. The secretariat prepares the case report, which is then made available to the parties and members of the committee for recommendations. The final decision is made by the secretariat. Sanctions and remedies are executed in the member State where the enterprise is located or where the effects of the practice are felt.

61. On competence allocation, both national and community institutions have responsibilities. In member States where there is no competition law, the designated authority assumes jurisdiction on the enforcement of community law. In Bolivia and Ecuador, where there is no competition law, decision 608 applies. The Ministry of Trade and Exports of Bolivia and the Ministry of Industry and Competitiveness in Ecuador are the designated authorities.

62. The implementation of decision 608 has encountered various difficulties, including the inability of national authorities to implement the decisions of the Andean Community secretariat and to introduce the necessary changes in order to adapt to the community law. The secretariat would also need to establish a proper structure with adequate and specialized human resources capable of implementing the decision and working in coordination with national authorities. The Andean Community's response to the UNCTAD survey points out the inadequate dissemination of decision 608, making it difficult for affected parties to apply it.

## 2. MERCOSUR

63. MERCOSUR was established in 1991 by the Treaty of Asuncion. In 1996, the Fortaleza Protocol for Protection of Competition was adopted. The protocol envisages having a common competition policy in the region and prohibits concerted practices which restrict or distort competition and affect trade between member States. All member States except Paraguay have a competition law. The protocol does not provide for a supranational authority, but encourages member States to establish autonomous competition authorities.

64. The protocol enforcement organs are the MERCOSUR Trade Commission and the Committee for the Protection of Competition. The commission has adjudicative functions while the committee carries out case investigations and evaluation. The case procedure starts with the filing of an allegation by affected parties before the respective NCA, which makes the preliminary determination on the case as to

whether it has a regional dimension or not. If so, the case is forwarded to the committee for a second determination. If the case violates the protocol, the committee recommends sanctions/remedies to the commission. The commission re-evaluates the case to confirm whether the practice violates the protocol and issues the final decision in form of a directive.

65. NCAs are responsible for the enforcement of sanctions and/or remedies. In case of conflict in enforcement between national legislations and the protocol, the latter prevails. This is due to the primacy given to international treaties by member States' laws.<sup>45</sup> Negotiations on the protocol are still under way. As the protocol has only been ratified by Brazil and Paraguay, it is only applicable in these countries. The main difficulties encountered in developing a competition law for MERCOSUR relate to lack of economic integration, competition culture and coordination between public and private sector.

#### D. CARICOM

66. The Revised Treaty of Chaguaramas of 2001 established the Caribbean Community (CARICOM) and the CARICOM Single Market Economy (CSME). This was a step towards deepening regional economic integration in order to achieve sustainable development, based on, among others, "competitiveness, and coordinated economic and foreign policies".<sup>46</sup>

67. Chapter 8 of the Revised Treaty deals with CARICOM competition and consumer policies. Article 169 states that "the goal of the Community Competition Policy shall be to ensure that the benefits of the establishment of the CSME are not frustrated by anticompetitive business practices". It stipulates that for the goal to be achieved, the objective of promoting and maintaining competition and enhancing economic efficiency should be upheld. Anticompetitive conduct, which prevents, restricts or distorts competition or which constitutes abuse of dominance, is prohibited. Promotion of consumer interests is also envisaged.<sup>47</sup>

68. Article 171 of the treaty establishes a Community Competition Commission, which is an integral part of the CSME and is responsible for the enforcement of competition provisions. The commission has a supranational character and will oversee cross-border competition issues. The treaty encourages member States to enact national competition laws. Article 173 sets out the functions of the commission, which include identification of anticompetitive conduct with cross-border effects, determination of case investigations, ruling and compliance follow-up.

69. The commission was inaugurated on 19 January 2008 in Paramaribo, Suriname. As the newly established commission starts its job, it is important to note that the following member States do not yet have competition laws: Belize, Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, and Saint Vincent and the Grenadines. However, most of the countries are from the Eastern Caribbean region and are members of Organization of Eastern Caribbean States (OECS), which is moving towards establishing a subregional competition commission to act as an NCA for its members.

70. OECS, which is a subset of CARICOM, came into being in 1981 with the signing of the Treaty of Basseterre. Its objective is to promote cooperation among its members by assisting them to "maximize the benefits from their collective

<sup>45</sup> Murilo Otavio Lubambo de Melo (2007). *Defesa de Concorrência no Mercosul: entraves e soluções normativas*. In *Boletim Latinoamericano de Competencia*. No. 23. September: 20.

<sup>46</sup> [www.jis.gov.jm/special\\_sections/CARICOMNew/revisedtreaty.pdf](http://www.jis.gov.jm/special_sections/CARICOMNew/revisedtreaty.pdf).

<sup>47</sup> *Ibid.*

space” and to promote economic integration into the global economy. The justification is that these States are too small in size to stand on their own in the midst of the wave of globalization and liberalization.

71. On competence allocation, the CARICOM Competition Commission has jurisdiction over cases with cross-border effects. However, the treaty allows for cooperation between the community body and the authorities of member States. Member States are required to enact competition legislation and establish competition authorities to ensure that the determination of the commission is enforceable in their jurisdictions. The dividing line of when a case should go to the commission or when it should be handled at the national level is not very clear.

72. The interplay between the proposed OECS Competition Commission and the CARICOM Competition Commission needs to be examined. If OECS would act as a national competition authority for its members, there are issues to be looked at in terms of whether OECS members would still be required to establish their NCAs as stipulated by the CARICOM Treaty. Problems may arise when non-OECS enterprises bring complaints to CARICOM that a conduct emanating from one of the OECS members is hurting their business. Would OECS act as an added bureaucracy for or as a shortcut to resolving such a case? Or how would OECS member States know that there is a problem in their market without having an NCA dealing with competition issues?

73. Another challenge which may affect enforcement of both the CARICOM and OECS competition laws is the lack of sufficient resources. UNCTAD survey responses from Jamaica and Barbados allude to this fact. For those countries in CARICOM which do not have competition authorities, would their priority be to channel resources to the regional body or to establish national institutions? OECS countries are also members of CARICOM, and are expected to fund the two regional bodies, and that may create problems, given the resource constraint. The foreseeable savings for the two bodies would be in the adjudicative arm if all cases are handled through the CARICOM Court of Justice, as suggested in the OECS Competition Commission proposal.

### **Box 3. CARICOM – telecommunications sector**

In 2005, the Barbados Fair Trading Commission evaluated a merger in the telecommunications sector between Digicel and Cingular Wireless (now AT&T). Digicel was acquiring the assets and licenses of Cingular Wireless in at least five CARICOM member States. The Barbados Competition Act has no extraterritorial provisions and therefore the merger was evaluated only within the boundaries of Barbados.

A merger on such a scale would have been better addressed at the regional level by the CARICOM Competition Commission if operational to assess the impacts on CARICOM member States. The lack of competition legislation with merger control provisions in most member States at that time meant that the merger was assessed by the individual member States’ telecommunications authorities. Concerns and priorities of these agencies for the most part are not to ensure competition in the market, unlike those of competition agencies.

Currently, the CARICOM Treaty does not have merger provisions, but discussions by member States are under way to revise the treaty to include them.

*Source:* Responses of Barbados to the UNCTAD survey.



#### **IV. Issues for consideration**

74. After many regional groupings throughout the world have been reviewed, different issues have been raised for further consideration:

- (a) Lack of necessary legal and institutional frameworks to enforce the regional competition rules;
- (b) Lack of adequate financial and human resources for the enforcement of regional competition rules in most developing countries;
- (c) Overlapping membership, especially in Africa, and possible complications which may arise in the enforcement of competition rules; and
- (d) The possibility of additional costs and duplication of efforts in the Caribbean region, which may arise due to sharing of competences between the regional authority, the CARICOM Competition Commission, and the subregional competition authority for OECS countries.

75. Where the supranational competition authority has exclusive competence in dealing with anticompetitive practices, as in WAEMU, regardless of whether they are national or cross-border, sovereignty may become an issue for member States, especially those with competition laws and authorities.

## Comparative table

Regional groupings	Treaty/protocol competition provisions	Legal competition instruments	Institutional framework	In operation
<i>Africa</i>				
CEMAC	The Treaty Establishing CEMAC	Règlement 1/99/UEAC-CM-639 Règlement 4/99/UEAC-CM-639	Regional Competition Council	No
COMESA	Article 55 of the COMESA Treaty	COMESA Competition Regulations and Rules	COMESA Competition Commission	Partially
EAC	Article 21 of the EAC Protocol	East African Community Competition Bill	EAC Competition Committee (to be established)	No
SACU	Articles 40–41 of the SACU Agreement	Proposal for Cooperation Agreement (Article 40) Annex on Unfair Trade Practices (Article 41)	SACU Secretariat	No
SADC	Article 25 of the SADC Trade Protocol	Proposal for a cooperation mechanism	SADC Secretariat	No
WAEMU	Articles 88–90 of the WAEMU Treaty	Règlement 02/2002/CM/UEMOA Règlement 03/2002/CM/UEMOA Règlement 03/2002/CM/UEMOA Directive No.01/2002/CM/UEMOA	WAEMU Commission Advisory Committee	Yes
<i>Asia</i>				
ASEAN	n.a.	n.a.	n.a.	n.a.
APEC	n.a.	n.a.	n.a.	n.a.
<i>Europe</i>				
European Union	Articles 81–86 of the Rome Treaty	Council Regulation No. 1/2003 Council Regulation No. 139/2004	European Commission	Yes
<i>Latin America</i>				
Andean Community	AC Commission Decision 608	AC Commission Decision 608	Committee on the Protection of Free Competition	No
MERCOSUR	Articles 4 and 6 of the Fortaleza Protocol	Acuerdo sobre el Reglamento del Protocolo de Defensa de la Competencia del MERCOSUR	MERCOSUR Trade Commission Committee for the Protection of Competition	No
<i>The Caribbean</i>				
CARICOM	CARICOM Treaty	Chapter 8 of the Treaty of Chaguaramas	CARICOM Competition Commission	Partially
OECS	CARICOM Treaty Treaty of Basseterre	Chapter 8 of the Treaty of Chaguaramas	OECS Competition Commission (proposal)	No