

The Spread of Competition Law and Policy in Africa: A Research Agenda

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Economic law – the focus of this new journal – has enabled and shaped the phenomenal, extremely dynamic, yet also highly uneven development of markets in Africa in recent years. It also is called upon to “govern” those markets and to ensure that individually rational behavior by economic actors produces outcomes that are beneficial for the people of Africa, as well as economically and ecologically sustainable.

This paper focuses on competition law as an area of economic law that has inspired particularly high hopes for ensuring that the benefits of a market economy are widely shared. Competition law seeks to encourage and safeguard competition in markets by making anti-competitive agreements and conduct illegal and to constrain economic power by punishing its abuse and by regulating mergers and acquisitions to reduce the risk of monopoly and oligopoly. We consider not just “black letter law” but also the public institutions needed

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to implement and enforce competition law such that it maintains and creates economic opportunities, as well as incentives for innovation, greater efficiency and lower prices. In doing so, we are cognizant of the inherently political and controversial character of competition law and its enforcement, because it entails the use of the power of the state to constrain and possibly redistribute private economic power.

Competition law used to be very uncommon in Africa, but in the last two to three decades has rapidly spread throughout most of the continent. We therefore first take stock of the status of competition laws and agencies at the national and – especially – at the regional level. Based on this overview of the history and current state of competition law and policy throughout Africa, as well as our review of the literature, we then set out a research agenda for better understanding the reality, promise, and limitations of competition law and policy in Africa. In doing so, we make the case for a multidisciplinary and indeed genuinely interdisciplinary approach to the study of competition law and policy, which incorporates political analysis along with legal and economic analysis.

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1. Introduction

Africa came to be regarded as the last frontier in the global economy in the 1990s (Moghalu 2014). This led to various efforts to integrate African markets, including several regional initiatives (O'Brien 2000; OECD 2018a). The resulting – on average phenomenal – economic growth, however, has been highly unevenly distributed across countries (Austin 2010; Hout and Salih 2019:esp. 60-75), as well as within countries; poverty and inequality still prevail in much of Africa (Hartzenberg 2013:147; Lundvall and Lema 2014:455; Heinrich Böll Stiftung 2014:5).

In this context, some have recommended turning to competition law and policy to “mak[e] markets work for [the people of] Africa” (Fox and Bakhoum 2019; see also Lewis 2013a; Ejemeyovwi et al 2019). This recommendation is underpinned by research suggesting that competition law and policy can help alleviate poverty and foster *inclusive growth* (Lipimile 2004; World Bank and OECD 2017).

African countries started to enact modern national-level competition laws in the late 1980s.¹ Gabon, Kenya, and South Africa enacted their first competition laws prior to 1990; others followed in the 1990s and 2000s. Today, most African countries have at least a competition law on the books; many also have established an agency to implement and enforce the law (Habimana 2016; Koop and Kessler (forthcoming)).

Remarkably, the adoption of competition laws in Africa has gone well beyond the national level. African countries have established five regional competition regimes (RCRs) with a supranational competition law, in addition to two RCRs that follow what we call the “confederate model:” committing their member states to the adoption of national competition laws and enforcement cooperation without establishing a common set of competition rules.

In this paper, we take stock of the spread of competition law and policy in Africa and set out a research agenda for better understanding the reality, promise and limitations of competition law and policy at the national and, especially, at the regional level.² In doing so, we make the case for a multi- and indeed

1 For a law to count as a competition law, we require it, following Bütte and Minhas (2015), to have at a minimum the declared purpose of safeguarding or fostering market competition and to prohibit cartels or cartel-like forms of collusion.

2 African countries are, at the time of writing, also negotiating a continental-level competition regime under the African Continental Free Trade Agreement, AfCFTA. See section 5.1 below.

genuinely interdisciplinary approach to the study of competition law and policy, which incorporates political analysis along with legal and economic analysis.

In section 2, we provide an overview of the enactment of national-level competition laws and the establishment of competition agencies throughout Africa. Based on the manifold differences that we observe across the competition regimes of Africa, we identify in section 3 important gaps in the existing scholarship, and lay out an agenda for research on national competition regimes in Africa. In section 4, we then sketch the history and the current status of Africa's seven regional competition regimes. In light of this, section 5 develops a research agenda for scholarship on regional competition regimes in Africa. The concluding section 6 reflects upon our findings and suggestions in light of the COVID-19 pandemic and technological changes that affect both the object and the practice of competition law and policy.

2. REGULATING COMPETITION AT THE NATIONAL LEVEL

At the national level, the evolution of competition law in Africa has resulted in four distinct outcomes, as shown in Figure 1.

- countries with a national competition law (but no agency);
- countries with both a national competition law and a competition agency;
- countries with no national competition law, but covered by a regional law; and
- countries with neither national nor (access to a) regional competition law.

2.a. Countries with Competition Laws

Canada was the first country in the world to enact a national-level modern competition law in 1889, followed by the United States in 1890. By 1990, there were still only some thirty jurisdictions with a competition law on the books. Since then, many more countries have adopted competition laws, especially in the developing world. After a truly global process of diffusion, there are now more than 140 jurisdictions with competition laws, mostly at the national but increasingly also at the regional level (Bütthe and Minhas 2015; Bradford and Chilton 2018; see also Bütthe 2018).

Table 1: Adoption of National-Level Competition Laws in Africa and Status Quo 2020

	pre-1990	1990-1999	2000-2009	2010-2019	Status 2020: No national competition law but part of RCR	Status 2020: No national nor regional competition law
Countries	Gabon, Kenya, South Africa (3)	Algeria, Tunisia, Burkina Faso, Cameroon, Cote D'Ivoire, Malawi, Mali, Niger, Senegal, Tanzania, Togo, Zambia, Zimbabwe (13)	Botswana, Cabo Verde, Djibouti, Egypt, Eswatin <i>(former Swaziland)</i> Ethiopia, Madagascar, Mauritania, Mauritius, Morocco, Namibia, Seychelles, Sudan, The Gambia (14)	Angola, Benin, Burundi, Chad, Comoros, Democratic Republic of Congo, Liberia, Libya, Mozambique, Nigeria, Rwanda (11)	Central African Republic, Congo Brazzaville, Equatorial Guinea, Eritrea, Ghana, Guinea, Guinea Bissau, Sierra Leone, Somalia, South Sudan, Uganda (11)	Lesotho, Sao Tomé and Principle (2)

Source: Authors' research.

As shown in Table 1, only three African countries – South Africa, Kenya and Gabon – enacted a competition law prior to 1990. The 1990s and 2000s then saw more than half of *Africa* enact national competition laws; nine more African countries enacted competition laws in the 2010s. As of early-mid 2020, 41 African countries (76%) have enacted a modern competition law.

Out of the 41 African countries with a national-level competition law, nine – Benin, Burundi, Comoros, Cabo Verde, the Democratic Republic of Congo, Libya, Mauritania, Mozambique and Niger – do not yet have an operational competition agency. And this seems to be not just a matter of a slight delay in the course of establishing a new competition regime: several of these countries have had their laws on the books for more than a decade now. Cabo Verde, for instance, enacted its competition law by Decree Law No. 53/2003 on 24 November 2003. UNCTAD (2007:37) noted delays due to budgetary and human resource constraints – which appear to have lasted a long time: Cabo Verde's Directorate-General for Industry and Trade and its Competition Council,

both envisioned in the law, are still not operational (Gonçalves 2019). In Mauritania, it has been 20 years since the law was enacted; in Burundi it has been 10 years.

2.b. Countries with an Operational Competition Regime (Law and Agency)

Enacting a competition law is only the first step. Its effective implementation and enforcement also require having a competition agency. As of early-mid 2020, 32 out of the 41 African countries with a competition law have also set up an operational competition agency at the national level. The existing agencies' capacity to implement and enforce their respective national laws, however, differs substantially. In part, the variation in implementation and enforcement may be simply a function of time, as establishing a resiliently effective agency can take two decades (Kovacic and Lopez-Galdos 2016), and many of the African competition regimes have only been established in the last few years.³ For the time being, in any case, capacity and effectiveness of the existing agencies vary substantially.

Notwithstanding this variation, the agencies also exhibit some common trends: Many African agencies have in recent year begun to focus more on cartel detection and enforcement – as well as competition advocacy and building a competition culture (Lewis 2013b; Kaira 2013; UNCTAD 2015). Toward that end, many agencies have sought to increase their analytical capabilities (especially for market analysis), as well as their capacity for cartel enforcement.

The example of Nigeria shows that such capacity-building can in fact occur quite quickly, if the agency has strong political support: After Nigeria's 2018 Federal Competition and Consumer Protection Act entered into force in 2019 (concluding a 17-year struggle over enacting a modern competition law), it led to the establishment of the epinymous Commission (FCCPC) later the same year – building on the earlier Consumer Protection Council but adding the competition agency function *de novo* (see Idigbe 2019). The FCCPC has already demonstrated its ability to function as the Nigerian antitrust/competition agency, even in the midst of the COVID-19 pandemic, by putting in place an electronic merger filing system and using market analyses to intervene against the sale of surgical masks at supra-competitive prices on the online marketplace/platform Jumui (FCCPC 2020).

3 Angola, for instance, established its Competition Regulatory Authority in January 2019 and has not yet gone much beyond accepting merger notifications (Pereira and Barreiros 2019). In fact, even the national competition agencies (NCAs) of South Africa, Kenya, Malawi, Ethiopia, Zambia and Zimbabwe, which are today considered the most advanced and effective, spent a disproportionate amount of time on merger reviews in their early years (O'Brien 2018).

A few African competition agencies (in Egypt, Ethiopia, South Africa, Tanzania and Zambia) have also started to use more aggressive investigative tools, most notably dawn raids, in cartel investigations (Aranze 2019; Baker McKenzie 2019, *passim*). The Namibian, Kenyan, South African, Mauritanian, and Zambian agencies have also adopted leniency programs to supplement the agency-initiated enforcement efforts. By all indications, however, only South Africa has operated an effective and successful leniency program so far (Lavoie 2010).

2.c. Countries with No Competition Law

13 African countries have no national competition law. The proximate reasons appear highly varied. In some cases, it appears to be the government's unwillingness to introduce a competition law (despite a recognized need for such laws), presumably because it would be detrimental to entrenched interests. In Ghana, Zakari and Adomako (2015) found that big firms dominate markets and often abuse their dominant position. More than 80% of the firms throughout Ghana, which participated in Zakari and Adomako's survey, reported a "need" for Ghana to have a competition regime; more than 70% of consumers similarly anticipated numerous benefits from the introduction of a competition regime (2015:44, 52-54). Responding to these demands, Ghana's government has promised to put forth a competition law for years (Craig 2019). But it has yet to introduce such legislation.

In other cases, draft laws have gotten stalled in the legislature. Uganda's Competition Bill has been pending in parliament for more than 15 years (Uganda Law Reform Commission 2004). In yet other countries, the government has invoked the need to educate the population about the benefits of a market economy and to establish a competition culture before passing a law (Harris 2001; Denters and Gazzni 2017).

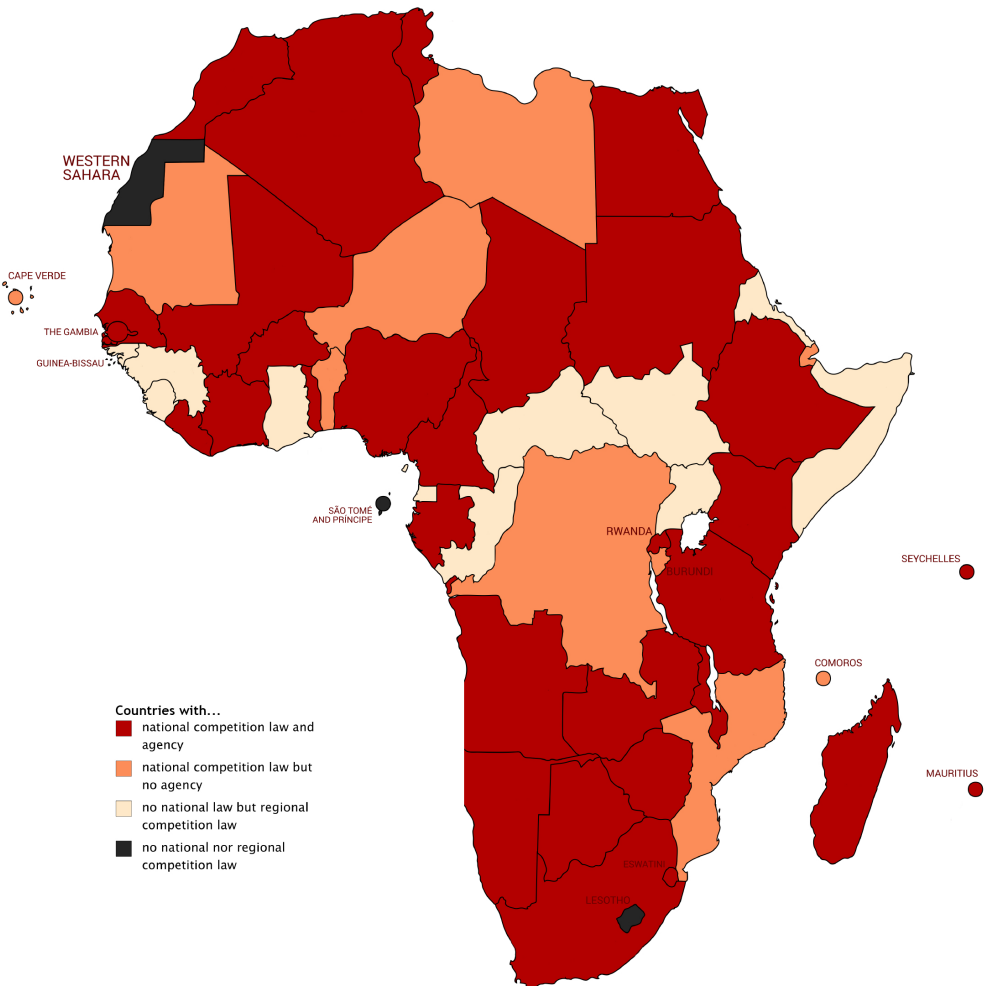
Some of the countries without a national competition law (as we have defined it) have industry-specific laws and competition regulators. To return to the example of Ghana, mergers for banking, mining and telecommunication require approval by sectoral regulators, and the 2005 National Petroleum Act even criminalizes cartel conduct in the downstream petroleum market. Yet, without a broader mandate to safeguard market competition throughout the national economy, these sectoral regulators tend to be ineffective and rarely address the anti-competitive structures and conduct that have the greatest effect on the population (Zakari and Adomoko 2015).

13 African countries currently have no national competition law. Remarkably, however, 11 of them are members of a regional body with common competition

rules for its members. Those supranational rules could in principle serve as a substitute for the missing national-level laws, as discussed in section 2.D below.

Only 2 African countries (and the Western Sahara, whose jurisdictional status is disputed) have neither a national law nor are they covered by the supranational rules of a regional competition regime. Sao Tomé and Príncipe is not a member of any RCR; and Lesotho is a member (only) of SACU and SADC, the two RCRs without a regional competition law (as discussed in section 4).

Figure 1
Current Status of African Countries' Competition Regimes (July 2020)



2.d. Countries with No Competition Law but Part of a Regional Competition Regime with a Competition Law

11 African countries without a national competition law are members of one or more of the five African RCRs that have adopted competition laws at the supranational level: the Central African Economic and Monetary Union (CEMAC); Economic Community for the West African States (ECOWAS); West African Economic and Monetary Union (WAEMU); Common Market for Eastern and Southern Africa (COMESA); and the East African Community (EAC). All five took the initial decision to do so at a time when the majority of their member states did not yet have a national competition law, though some, such as EAC and ECOWAS, delayed the implementation with the express objective to first strengthen the “competition culture” in the member states and allow more of them to adopt national competition laws. This raises a number of interesting and important questions about the effect of membership in regional competition regimes on national competition law and policy, discussed in section 5 below.

3. AN AGENDA FOR RESEARCH ON NATIONAL COMPETITION REGIMES IN AFRICA

In light of the varied state of national competition regimes in Africa, sketched above, we highlight several issues for future research. We submit that these questions are important both for scholars trying to better understand the evolution and current practice of competition law and policy, as well as practitioners wondering what the future of competition law and policy in Africa might look like.

3.a. To Have or Not to Have a Competition Law

Statistical panel analyses of the adoption of competition laws, which include at least some African countries, yield valuable insights into conducive conditions for enacting a modern competition law at the national level (Kronthaler and Stephan 2007; Parakkal 2011; Büthe and Minhas 2015; Weymouth 2016). Any particular instance of adopting such a law, however, is bound to involve intense conflicts, as any competition law and policy that is more than just declamatory politics (or expected to be meaningless due to widespread corruption) is a threat to entrenched rent-seekers (Aydin and Büthe 2016; Büthe 2018). Yet, detailed studies of the legislative history and the broader political struggles exist only for a few African countries (e.g., Youssef and Chahir 2019). Such studies would need to examine not just the reasons for the enactment of a competition law, where this was the ultimate outcome, but also the

reasons for the sometimes massive delays (e.g., 15 years in the case of Gabon; 10 years in Madagascar), as well as the reasons for the defeat of often repeated attempts to pass such a law. Particularly clearly lacking are analyses of the endogenous, domestic drivers of the (non)adoption of competition law in African countries, such as economic ideology and political-economic institutions. As Fox and Bakhoum (2019:12) note, existing accounts of African competition regimes too often invoke external pressures without equally considering those domestic factors (see, e.g., Li 2017). This is not a minor omission, shown by studies that take domestic factors seriously. Manhare's analysis of the SADC countries, for instance, finds that even though in some cases "economic pressure from donors" played a major role, in several SADC countries "the government's [endogenously motivated] program of liberalization" and "studies [of the] practices of private businesses" played a much more important role (2012:58). The omission of domestic politics in other accounts of competition law adoption thus seems akin to omitted variable bias.

Beyond promising insights into specific African countries' national competition regimes, filling these gaps in the literature would also be valuable for understanding the politics of competition law and policy more generally. Existing accounts from Africa and elsewhere suggest that *not* having a competition law is by no means just a matter of missing the conducive conditions generally found in countries that ended up enacting such a law (Emmert et al 2005; Forslid et al 2011). Incumbents seem to have a range of options available to them to stop the adoption (or implementation and enforcement) of pro-competition laws and policies. To provide insights into the steps that are necessary to prevent such obstruction requires understanding more fully the practices that lead to non-adoption. Given that Africa still has 17 countries that have (so far) not adopted a national competition law – despite internal demand and external incentives – in-depth analyses of African cases promise additional insight into whether (or to what extent) the politics of preventing a competition law are simply the inverse of the politics of bringing about the adoption of such a law.

3.b. Implementation and Enforcement

If empirical research on the adoption of national competition laws in Africa seems scarce, in-depth studies of the implementation and enforcement of those laws is much rarer still. With the exception of the South African competition regime (e.g., Ramburuth and Roberts 2009; Bleazard 2013; Davis and Granville 2013; Lewis 2013b; Klareen et al 2017), African countries' competition laws and policies have received

little sustained scholarly attention. This analytical scarcity is especially severer for the competition regimes in West Africa (Fox and Bakhoun 2019, esp. 6575).⁴

A key issue here are the drivers of (and the impediments to) the establishment of a competition agency. The determinants of the political independence of such agencies are similarly under-researched. In addition, we need more detailed analyses to identify and understand the specific measures taken to implement and enforce African countries' competition laws – including the various ways in which they gather data, analyze markets, conduct investigations, and possibly try to incentivize customers, suppliers, and competitors (and in the case of leniency programs: co-conspirators) to alert the competition regulators to anti-competitive agreements and conduct. Such analyses should ultimately also allow for an assessment of the relative effectiveness of those various measures, including comparatively across jurisdictions – which, however, would require competition regulators to agree upon a set of common standards and practices on how to measure and report what they do. Bringing scholars and practitioners together in forging such an agreement would be a major step forward toward an analytically sound, more “evidence-informed” (Bowers and Testa 2019) competition law and policy.

3.c. The Evolution of National Competition Regimes

Competition law, once enacted, does not necessarily remain static. The same applies *a fortiori* for competition policy. Numerous African countries have by now amended or even replaced their initial competition laws, presumably strengthening the institutional framework for competition regulation (Bowman 2018). Just as democratic consolidation (or decay) is theoretically distinct from democratization and may require different explanations (Schedler 1998; Solomon and Liebenberg 2000; Moehler and Lindberg 2007; Svolik 2008), the evolution and institutional development of competition laws, agencies, and policies should be theorized and empirically examined as distinct from the initial decision(s) to establish them.

A related promising direction for future research is to examine the extent to which competition law and policy have changed – or maybe *should* change – in light of changing priorities (UNCTAD 2010). Particularly important here is the ongoing debate over the features, which competition regimes might need to have, to serve the interests and reflect the political and socio-economic context of African countries (e.g., Fox 2000; Mehta 2006; Kronthaler 2007; Bakhoun 2011;

⁴ Koop and Kessler (forthcoming) include numerous African countries in their global analysis of competition agency independence, as do some analyses of the consequences of competition law and policy (e.g., Büthe and Cheng 2017), but none of them examine African competition regimes specifically.

Lewis 2013a; Gal 2015; Bonakele 2019). Does competition law for African – or more generally for developing – countries need to be built on distinct normative foundations? How we answer this question has immediate implications for policy priorities, as evident in Bhattacharjea’s recommendation that agencies focus on “competition issues in sectors that directly impinge on the well-being of the poor, in particular essential consumer goods, agriculture, and health care” (2013:35).

In light of the critiques of “legal transplants” (Berkowitz, Pistor, and Richard 2003) that are ill-suited to “addressing particular challenges within their local economies” (Chisoro and Landani 2019), much of this debate takes on a strongly normative tone. The question often immediately becomes: *Should* competition law and policy incorporate goals such as alleviating poverty, enhancing equality, and economic development (or even prioritize them over traditional goals such as safeguarding the contestability of markets) to be “fit” for the “purpose” of African countries (Shahein 2012; Aydin and Büthe 2016; Strunz 2018)? Or as Fox and Bakhoun (2019) put it: What would African competition laws look like if they were guided by these goals?⁵ The actual introduction of unconventional principles, criteria and procedures into some African countries’ competition laws – concerning competitive pricing, profitability, the viability of SMEs, and abuse of dominance – allows shifting the focus to empirical research, which can inform the normative debate by examining how effective such measures are in achieving more inclusive development and what other consequences they might have.⁶

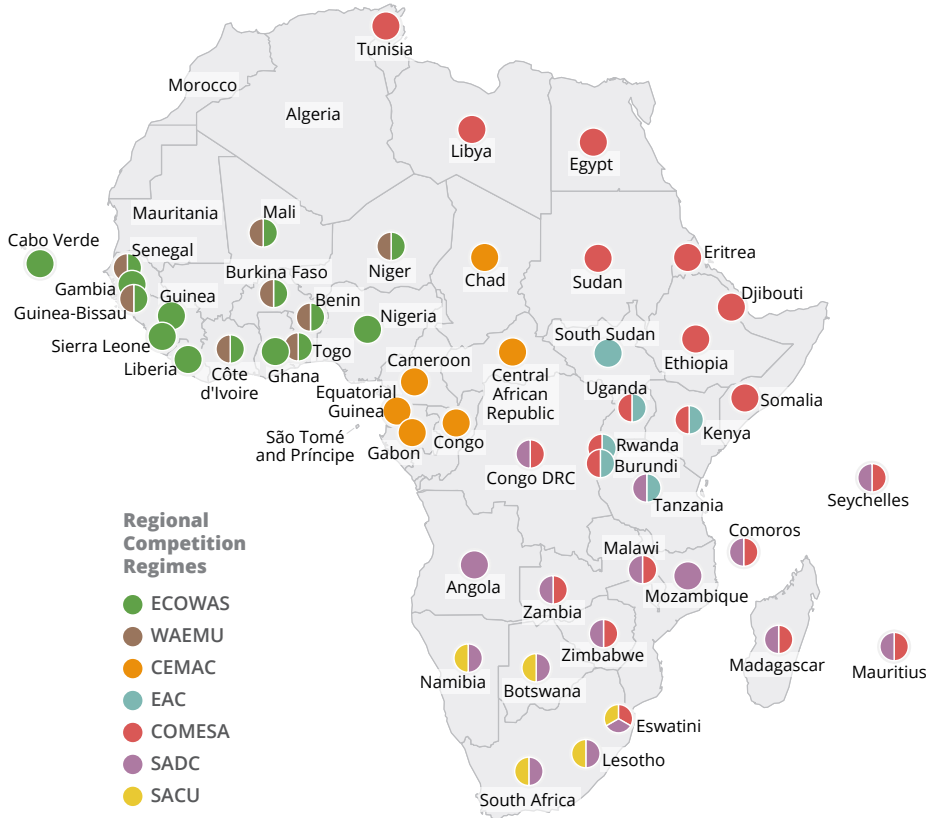
4. REGULATING COMPETITION AT THE REGIONAL LEVEL

4.a. Complex Web of African Regional Regimes

The most remarkable feature of competition law and policy in Africa, we submit, is the number and density of regional competition regimes (RCRs), summarized in Figure 2. Of the ten regional bodies in the world with supranational competition laws and agencies, five are in Africa (OECD 2018b:6). In addition, two African regional bodies have established regional regimes for competition law and policy cooperation on what we call the “confederate” model.

⁵ See also Büthe and Kigwiru 2019.

⁶ Several such measure have in recent years been introduced into the national competition law of South Africa (see Shahein 2012:57; Mncube and Angwenya 2017; Madge-Wyld 2019); another example is the new Nigerian competition law’s Section 74(2), which criminalizes abuse of dominance (see Steyn 2019). Naturally, such research should also (but not only!) examine unintended consequences about which critics have raised concerns (Oxenham et al 2019, Connor 2019, Katsoulacos and Jenny 2019).

Figure 2 The Complex Web of African Regional Competition Regimes

In this section, we offer a sketch of the seven African regional competition regimes shown in Figure 2, distinguishing between the RCR with and without a regional competition law. In section 5, we then lay out an agenda for research on regional competition regimes.

4.b. The Confederate Regional Competition Regimes

What we call the confederate model of regional competition regulation – also sometimes called the “cooperative,” voluntary or “soft law” model – does not involve creating or adopting a common regional competition law for the regional body. Rather, it involves “only” a commitment by the member states to adopt national-level competition laws and to cooperate with each other in enforcement. The role of the regional body is to provide an institutional platform for such cooperation. A closer look at the two African regional regimes that have adopted a confederate model of an RCR suggests

that this comparatively modest agenda has had a notable impact, though it is not without its challenges (Mamhare 2012; Roberts et al 2017).

4.b.i. The Southern African Customs Union (SACU)

Established in 1910, SACU is among the oldest customs union in the world. It has five member states (all of whom are also members of SADC, discussed below): South Africa, Botswana, Eswatin (formerly Swaziland), Lesotho, and Namibia. The foundation of the SACU competition regime are Articles 40 and 41 of the 2002 SACU Agreement, which replaced earlier versions of the agreement without similar provisions. These articles do not establish a regional competition law. Rather, Article 40(8) of the SACU agreement requires member states to adopt a competition law and policy at the national level and to cooperate with each other in the enforcement of such laws.⁷ Moreover, Part 8 of the 2002 Agreement highlights competition policy and unfair trade practices, along with agriculture and industrial development, as the four areas of common policies.

At the time, South Africa was the only SACU member state with a national competition law (UNCTAD 2005). Today, all SACU member states except for Lesotho have national competition laws. There are very few studies of the SACU competition regime (Ayayee 2012) and, to the best of our knowledge, no studies of competition law enforcement cooperation among SACU member states.

4.b.ii. The Southern African Development Community (SADC)

SADC was established in 1992 to promote regional integration and today has sixteen member states including the SACU members (see Figure 1). Competition provisions were added as part of the 1996 Protocol on Trade, which came into force in 2000. Section 25 of the Protocol requires Member States to implement measures that prohibit unfair business practices and hinder competition in the community (SADC 2000). Mamhare (2012:6165) suggests that SADC adopted such a confederate regional model because very few SADC member countries at the time had operational competition regimes. And it was expected that once all the countries adopted national competition laws and developed a competition culture, SADC would adopt a regional competition law.

⁷ In addition, in 2006, SACU entered into a cooperation agreement with the European Free Trade Association (EFTA). The SACU-EFTA agreement recognizes in Article 15 the need to eliminate anticompetitive conduct that would hinder the enforcement of the agreement (Dabbah 2010:389).

The first part seems to have worked. By 2009, when SADC adopted its Declaration on Competition and Consumer Policies to implement Section 25 of the Protocol on Trade, the number of SADC member countries with competition laws had increasing from five to eleven.⁸ Angola, Comoros, the Democratic Republic of Congo, and Mozambique additionally established competition laws after the Declaration was adopted. At the same time, after another decade of occasional re-affirmations of their shared understanding and commitment to competition law and policy, long-standing member state Lesotho remains without a national competition law. The originally envisioned transformation of the confederate SADC competition regime into a supranational regime also has not yet materialized.

4.c. Regional Regimes with Binding Supranational Competition Laws

Five other regional bodies in Africa have created RCRs with supranational competition laws and (at least the beginnings of) regional enforcement reminiscent of the EU model. We briefly discuss each of these RCRs in the order in which they established regional authorities.

4.c.i. The West African Economic and Monetary Union (WAEMU)

WAEMU was established through the 1994 Treaty of Dakar among the francophone West African states of Benin, Burkina Faso, Côte d'Ivoire, Mali, Niger, Senegal, and Togo, joined in 1997 by Portuguese-speaking Guinea Bissau.

WAEMU included competition provisions in Articles 88, 89 and 90 of its founding Treaty. To implement those provisions, WAEMU adopted in 2002 its regional competition rules, which came into force in 2003. The WAEMU competition rules cover state aid, anti-competitive conduct, cartels and abuse of a dominant position, but not mergers. To implement and enforce those rules, the WAEMU Commission in 2007 created the Directorate of Competition under the Department of the Regional Market Trade, Competition and Cooperation (also known as the WAEMU Competition

8 SADC at the same time established a committee to boost advocacy. Recent scholarship from various parts of the world suggests that, for recently established agencies, competition advocacy can be a particularly important activity to establish themselves and gain political support, potentially resulting in significant reductions in anti-competitive conduct independent of law enforcement; see (Clark 2005; Fels and Ng 2013; Glanz and Büthe 2016; Jenny 2012; Kovacic 2006; Serebrisky 2003; Aydin and Büthe 2016). Accordingly and in line with Kariuki and Roberts' call for African countries to build their own competition cultures (2015:166), the African Competition Forum (ACF), an association of African competition agencies, as well as the NCAs of Kenya, Zambia, South Africa and Namibia provides technical and other support to recently established African agencies to strengthen their capabilities for deepening competition culture and creating awareness.

Commission; see Molestina 2019). A key focus of the Competition Commission have been member state governments' policies that restrain and distort competition – often to a greater extent than private measures.⁹ As of 2018, Fox and Bakhoum report (2019:145-149), the WAEMU Commission had concluded only three enforcement actions with publicly recorded decision; one of them appears to have been a cartel case.

In 1994, Niger was the only WAEMU member state that had a national competition law; no others WAEMU member state had such a law on the books. By now, all but Guinea Bissau have by now enacted national competition laws (and established competition agencies).

WAEMU is the only RCR in the world that has established a centralized, hierarchical model, under which its competition rules enjoy supremacy and direct effect, and the member state agencies (NCAs) play a subordinate role in the enforcement of those rules, primarily assisting the WAEMU Competition Commission in its investigations and inquiries. The NCAs participate in the decision making through the Advisory Committee on Competition, whose advice, however, is not binding on the WAEMU Commission.

This centralized, hierarchical model was controversial between the WAEMU Commission and the member states from the beginning (Bakhoum 2006; Molestina 2019:5961). It is not specified in the Dakar Treaty, but was ultimately achieved only once the WAEMU Court of Justice granted the Commission exclusive (rather than shared) jurisdiction in competition matters, which it saw as supposedly required to prevent jurisdictional conflicts (Bakhoum and Molestina 2012). The hierarchical model, however, has not prevented conflicts nor low-level contestation; it has made member state agencies reluctant to collaborate and has prompted measures to circumvent the regional competition law (Bakhoum and Molestina 2012:99). Concerns that the contested subordination of national laws and agencies ultimately undermines the effectiveness of both the national and the regional competition regimes have prompted both UNCTAD (2007) and the World Bank (2018) to call upon WAEMU to review its model and delegate or share more competences with member state NCAs.

4.c.ii. The Common Market for Eastern and Southern Africa (COMESA)

COMESA is comprised of 21 member states: Burundi, Comoros, Congo, Djibouti, Egypt, Eritrea, Ethiopia, Libya, Kenya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tunisia, Uganda, Zambia and Zimbabwe.¹⁰

⁹ For a general discussion of state constraints on competition, see Fox and Healey 2014.

¹⁰ COMESA's membership has fluctuated considerably over the years; Somalia and Tunisia are the newest member states. It is a successor to the 1981 Preferential Trade Agreement of Eastern and Southern Africa.

The COMESA competition regime is embedded in Article 55 of its founding 1994 Treaty, which prohibits any conduct that would undermine free trade, including specifically any agreement that seeks to distort, restrict and prevent competition within the common market. At the time, only Kenya and Zambia had a national competition law on the books and only Kenya had an enforcement agency (Lipimile 2012). As of early-mid 2020, all but four COMESA member states (Uganda, Djibouti, Eritrea and Somalia) have national competition laws.

In order to give practical meaning to Article 55, the COMESA Council in 2004 enacted the original COMESA Competition Regulations. The Regulation put in place the regional competition regime, including its norms, institutional framework, and the allocation of competence between the COMESA Competition Commission (CCC) and the NCAs. The Regulations prohibit cartels, concerted practices, and abuse of dominance (but not state aid); they also empower the CCC to review and regulate mergers that meet a regional dimension test.

Although the legal framework has been in place since 2004, the CCC only commenced its operations in January 2013 (Angwenyi 2013). In the seven years since then, it has become the most experienced of the African RCR agencies (Gachuri 2019; Kigwiru 2020a), especially with respect to merger reviews (of which it has handled more than 240 as of the end of 2019). In recent years, the CCC has started to engage in analysis, advocacy and enforcement beyond mergers.¹¹ In its first non-merger action on its own initiative, in 2015, it launched a market analysis of the grocery retail market, resulting eventually in a report released in November 2019 (Tzarevski 2019). It also has started to investigate alleged anti-competitive behavior in the common market, as illustrated by its investigation of the Coca-Cola distribution agreements in Ethiopia and Comoros (Aranze 2018).

4.c.iii. The Central African Economic and Monetary Union (CEMAC)

CEMAC, established in 1994 as a customs and monetary union for central African countries, has six-member states: Cameroon, the Central African Republic, Chad, the Republic of the Congo, Equatorial Guinea and Gabon – none

11 The CCC initially had jurisdiction over all mergers with a regional dimension – with a threshold of zero. This exacerbated jurisdictional conflicts between the CCC and some of the NCAs and became extremely cumbersome, with merger reviews effectively tying up virtually all of the CCC's resources. The CCC reviewed its merger regime and introduced merger thresholds in 2014. This has not completely resolved the jurisdictional conflicts, but put COMESA in a more promising position to overcome some of the key challenges that have impeded the work of the CCC in the early years (Kekesi 2018).

of which is a member of any other RCR. CEMAC did not include competition provisions in its founding 1994 Treaty. Instead, the CEMAC Competition regime was created by two later additions: the 1999 CEMAC Regulations on Anti-Competitive Business Practices (as amended in 2005)¹² and the 1999 Regulations on Trade Practices Affecting Trade Between Member States.¹³ These regulations cover anti-competitive agreements, abuse of dominance, mergers, and state aid.

CEMAC has adopted a decentralised model of enforcement. Initially, the CEMAC Regional Council of Competition was tasked with implementing the 1999 Regulations; the 2005 Amendments granted this power to the CEMAC Competition Commission (Both 2018:175). However, the Council retained some of its investigative and advisory functions, creating jurisdictional conflicts within (Both 2018:185). Also, Gal and Wassmer warn that the CEMAC Competition Commission operates on an ad hoc basis (as cases arise), which “creates instability and lack of confidence in the new regional institution” (2012:311).

The CEMAC Competition Commission declared itself ready to receive notifications of mergers with a regional dimension in 2016. We have been unable to find public information about the outcome of CEMAC enforcement actions in merger or anti-competitive conduct cases, if any. The development of national competition laws has also been poor. Only three countries – Cameroon, Gabon, and the Democratic Republic of Congo – have competition laws, and only Cameroon has a functioning competition agency.

4.c.iv. The East African Community (EAC)

The EAC has six member states: Kenya, Uganda, Tanzania, Rwanda, Burundi and South Sudan.¹⁴ It was established in 2000 as a customs union and became a common market in 2010 (Gastorn and Wanyama 2017). The EAC regional competition regime is indirectly based on the EAC founding treaty, whose Article 75(1)(i) obliges the member states to adopt a Customs Union Protocol, which is required to include competition provisions. The EAC Council of Ministers took up the issue of developing a competition policy in 2004, and in 2006 EAC enacted the Competition Act, which applies to all sectors and all economic activities within the community, provided that they have

12 Regulation No. 1/99-UEAC-CM-639) of 15 June 1999 as Amended by Regulation No.12/05-UEAC-639) U-CM-SE of 25 June 2005).

13 Regulation No. 4/99-UEAC-CM-639 of 18 August 1999.

14 Only Kenya, Tanzania and Uganda signed the original 1999 agreement, which entered into force in 2000; Rwanda and Burundi acceded in 2007; South Sudan in 2016.

cross-border effects. It was supplemented in 2010 by the EAC Competition Regulations, setting out procedural mechanism for the implementation and enforcement of the Act.

The 2006 EAC Competition Act covers restrictive trade practices, abuse of market dominance, mergers, and subsidies, as well as public procurement and consumer welfare. The 2006 Act also provides for the establishment of the EAC Competition Authority (EACCA) to implement and enforce the Act. It was not until 2010, however, that the EAC Competition Regulations were adopted to give effect to the EAC Competition Act in accordance with its Section 49, and in light of a lack of funding and political will, the EACCA was only able to commence its operations in 2018 (Karanja-Ng'ang'a 2017:434). Moreover, during its initial five years, the EACCA is to operate on an ad hoc basis. To date, it has focused on investigating restrictive trade practices and abuse of dominance; it is also engaging in advocacy, sector studies, and market inquiries in order to enhance competition culture; it is not yet accepting merger notifications (Anyanzwa 2018).

Article 44 of the EAC Competition Act gives the EAC exclusive original jurisdiction to determine any violations of competition law under the Act; it assigns to the EACCA supremacy in community-level competition matters, such that its decisions are legally binding upon the member state NCAs and national courts (Karanja-Ng'ang'a 2017).¹⁵ At the same time, the NCAs have primary jurisdiction over competition cases within their territories and are not required to apply the EAC competition law at the national level (but they are required to refer any case or dispute within the scope of the EAC Competition Act to the EACCA).

The EAC also faces an extremely diverse set of member states. Kenya and Tanzania, alone among the EAC member states, have fully functioning national competition regimes (Karanja-Ng'ang'a 2017; Kigwiru 2017; CAK 2019). Burundi and Rwanda have competition laws on the books, but their competition agencies are not yet operational; in Rwanda, the competition law is temporarily enforced by the Ministry of Trade. South Sudan and Uganda have yet to enact a competition law, though they have drafts pending before their respective parliaments. Burundi, Kenya, Rwanda and Uganda moreover have overlapping memberships with COMESA, while Tanzania is also a member of SADC.

4.c.v. The Economic Community of West African States (ECOWAS)

ECOWAS is a regional group of 15 West African states, established in 1975. It includes the eight mainly francophone countries of WAEMU along with the six anglophone

¹⁵ Binda (2017:103114) attributes this explicit assignment of competences to conscious learning from COMESA, since the EAC member states except South Sudan and Tanzania are also members of COMESA.

countries of the West African Monetary Zone (WAMZ; Gambia, Ghana, Guinea, Liberia, Nigeria, and Sierra Leone), and Portuguese-speaking Cape Verde.¹⁶

The ECOWAS competition regime is based on the 2008 Community Competition Rules and the Modalities of their Application. These “ECOWAS Competition Rules” cover prohibited agreements and practices, abuse of dominant position, mergers, and state aid. The implementation and enforcement of the Competition Rules is assigned to the ECOWAS Competition Authority, which was finally launched in 2019, making ECOWAS the youngest of the African competition regimes with a regional authority. Staff appointments are still ongoing, and publicly available information, as well as not-for-attribution interviews suggest that no investigations have been undertaken yet, as the ECOWAS Competition Authority has, for the time being, focused on fostering a stronger competition culture.

Once the Competition Authority is fully operational, ECOWAS envisions an allocation of competences where the ECOWAS Authority investigates cases at the regional level, while the member state NCAs investigate cases at the national level (supporting the regional investigations locally upon request).

Several ECOWAS member states have adopted national-level competition laws for the first time in recent years, most recently Liberia in 2016 and Nigeria in 2019. However, one WAEMU country (Sierra Leone; see Ngom 2011) and three WAMZ countries (Ghana, Guinea, and Guinea Bissau) still do not have national competition laws. And some ECOWAS member states, including Liberia, have a competition law but no functioning authority yet.

5. AN AGENDA FOR RESEARCH ON REGIONAL COMPETITION REGIMES IN AFRICA

Our stocktaking of the development of regional competition regimes in Africa suggests several important foci for future research.

5.a. Origins and Evolution of RCRs

Few studies so far examine the origins or the evolution of the African regional competition regimes. Existing accounts mostly emphasize that the African regional competition regimes were founded as explicit complements to the regional economic

¹⁶ Mauritania, a founding member in 1975, left ECOWAS in 2000. Cape Verde joined in 1977; all other current members are original founding members of ECOWAS. WAEMU has its own competition regime, discussed below, but WAEMU countries are subject to ECOWAS competition regime, too.

integration efforts (Gal 2010; Drexel 2012; Heimler and Jenny 2013; IMF 2019:23). At a time of already increasing concerns over the power of international cartels (Connor 2001), economic integration risked making the cartel problem worse. And given that most national competition regimes in Africa were at the time still weak or non-existent – and efforts to build a global competition regime into the World Trade Organization (WTO) seemed to have failed – a regional approach to competition regulation was appealing to many (Heimler and Jenny 2013:183; Elhiraika 2016). Moreover, regional trade agreements create larger markets, making it more likely that anti-competitive conduct will transcend national borders as existing international cartels break into these newly attractive markets (Both 2015) or newly competing firms from the now-integrated markets have incentives to avoid actual competition by entering into anti-competitive agreements (Büthe 2014; 2018; for an early warning about cartels undercutting free trade, see Edwards 1944). Such concerns suggest that a key reason for establishing RCRs in Africa was that doing so offered an opportunity for African countries to pool resources and thus gain the ability to jointly defend their interests more effectively – both against global cartels and against transnational anti-competitive forces from within Africa (Gal 2010; Papadopoulos 2010).

Accounts emphasizing factors related to trade integration seem theoretically sound and a natural fit to explain competition regimes based on regional bodies devoted to increased economic integration (see esp. Damro 2006; Büthe 2014; 2018). So far, however, we lack thorough empirical studies of the origins of the African regional regimes. Such analyses would also need to take seriously alternative explanations that take seriously political-economic conflicts concerning competition law and policy and concerning any shift of authority from the national to the regional level.¹⁷

One source of possible alternative explanations might be the substantial literature on the origins of national competition laws and agencies (see Büthe and Minhas (2015) and Aydin and Büthe (2016) for recent reviews), though as noted above, the literature on national competition regimes in Africa is actually quite sparse. It also is not clear to what extent explanations for the adoption of competition laws at the national level can be readily extended to the regional level, especially if the regional body includes some countries with and others without a national competition law and policy. Research on the origins of the European (EU) and other regional competition regimes (Allen 1977; McGowan and Wilks 1995; Gerber 1998; Büthe

17 Notable exceptions in the literature on African RCRs, which take political contestation of shifting authority to the supranational level seriously, are Mwasha (2011) and Milej (2015).

2007; Cini and McGowan 2009; Seidel 2009) might in fact be more informative than research on national regimes. One particularly important question in this context is to what extent the (existence or specific features of) national competition laws and agencies affect the chances and the characteristics of regional regimes (Papadopoulos 2010). We therefore see great promise in comparative regional research.

The evolution of the (mostly still rather young) regional competition regimes is another issue that will become increasingly important for future research. All of the questions noted above (in section 3.3) also arise here – although the answers might need to differ.

Finally, the African RCRs are established under the auspices of regional economic communities that are now the “pillars” of the new pan-African regional integration process. Some have suggested that the continental competition regime, envisioned under the African Continental Free Trade Agreement (AfCFTA), will be particularly helpful to countries without national competition regimes or access to regional competition regimes (e.g., UNCTAD 2019:XV). It is currently still too early for an assessment of these claims, but the effect of the regional regimes on the ongoing negotiations over a continental competition policy for the AfCFTA Area (see Kigwiru 2019a; 2020a; Gachuiru 2019), as well as the consequences of such an AfCFTA competition regime for the regional regimes, are promising foci for future research.

5.b. Conflict of Laws

The co-existence of a regional legal regime and national legal regimes creates the potential for a conflict of laws whenever the laws and/or the underlying principles differ (Basedow *et al* 2012).¹⁸ For instance, while the EAC Competition Act (in Part V) restricts government subsidies, the competition laws of some EAC members states, such as Kenya, do not. The complex web of national and regional competition regimes in Africa provides ideal opportunities for examining what happens (empirically) and what should happen (normatively) when competition laws are established at the regional or supranational level, which at least partly conflict with the national competition laws within the same region.

In addition, the multiple, partly overlapping regional regimes in Africa create the potential for conflict of laws between regional legal regimes. For example, COMESA member states Burundi, Kenya, Rwanda, and Uganda are also members of the EAC (which also includes non-COMESA states South Sudan and Tanzania,

¹⁸ On differences between international and domestic conflict of laws generally, see Michaels and Whytock 2017.

whereas COMESA also includes 15 other member states that are not part of the EAC). The situation of COMESA vis-à-vis SADC is even more complex: The Democratic Republic of the Congo, Madagascar, Malawi, Mauritius, the Seychelles, Swaziland, Zambia and Zimbabwe are member states of both COMESA and SADC; Burundi, Comoros, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Rwanda, Sudan, and Uganda are members of COMESA, only; Angola, Botswana, Lesotho, Mozambique, Namibia, South Africa, and Tanzania are members of SADC, only. These different overlapping arrangements, while they can be frustrating for practitioners, promise to give scholars of African competition laws analytical leverage to better understand conflict-of-laws issues than would be possible anywhere else in the world.

In addition to the empirical questions, scholars of African RCRs might explicitly take up the normative question of how the problems arising from conflicting laws *should* be overcome, yielding policy recommendations grounded in theoretical and empirical analyses.

5.c. Jurisdictional Conflicts

Moving from issues that might be resolved by strictly legal analysis to issues that require political as much legal and/or law & economics analysis, we note that the co-existence of a regional legal regime and national legal regimes also creates the potential for jurisdictional conflicts, which might occur over authority for implementation and enforcement, *even when the applicable laws do not differ or are compatible* (Wagener and Upfold 2012). For instance, all WAEMU member states are also members of ECOWAS. Which regional authority has jurisdiction when cases have a “regional dimension” under both regimes? Answering this question is especially difficult since ECOWAS operates in accordance with the decentralized model, allocating some competencies to member countries’ NCAs (including the enforcement and hence interpretation of certain ECOWAS regional competition provisions), whereas NCAs under WAEMU only play a subordinated, supporting role.

The often ambiguous allocation of competences between a regional body and the member states’ NCAs is another key source of jurisdictional conflicts in Africa. A recent study by the OECD (2018b:7) identifies four models of the allocation of competences, which differ especially with regard to the roles of regional and national agencies in investigations and subsequent decisions in antitrust enforcement. As shown in Table 2, one or more African RCRs fit three of the four models.

Table 2: OECD Regional Competition Law Enforcement Models

Regional Competition Model	RCAs corresponding to that model
"Regional referee" model	CAN, MERCOSUR
"Two-tier" model	CARICOM, CEMAC, EAC, EAEU, ECOWAS
"Joint enforcement" model	COMESA, EFTA, EU
"One-tier regional state" model	WAEMU

Source: OECD 2018b: 8. CAN = Comunidad Andina; CARICOM = Caribbean Community; EAEU = Eurasian Economic Union; EFTA = European Free Trade Association; MERCOSUR = Mercado Común del Sur

In the Regional Referee model, the NCAs investigate regional competition cases and report to the RCA, which coordinate regional competition cases and makes the final decision. The NCAs do not apply or enforce the regional competition provisions to their domestic markets. No African RCR with a regional law fits this model.

In a Two-Tier model, the RCA and NCAs each have exclusive jurisdiction on regional and national matters respectively. In Africa, the CEMAC, EAC and ECOWAS competition regimes fit this model. Member states are required to establish national competition regimes, but regional competition provisions do not automatically apply within the domestic market. As a consequence, a country like Uganda, having no national competition law, has no obligation to apply the EAC competition law within its market, either.

In the Joint Enforcement model, which COMESA, EFTA, and the EU have adopted, both the RCA and NCA enforce the regional competition law, which has direct effect within each member state. Institutionalized coordination supports this joint model. The objective is to enhance coherence. Given this model, COMESA competition law applies in Uganda, Eritrea, Somalia and Djibouti by virtue of their membership in COMESA.

In the One-Tier Regional State model, not only has the regional law supremacy, the RCA has the prerogative from agenda-setting and the launch of investigations at both the national and regional level to making final decision. It thus exercises centralized power; the NCAs play "only" a supportive role. WAEMU is the only region in the world that has adopted this model.

In addition to analyzing the conditions under which jurisdictional conflicts are more or less likely, research on jurisdictional conflicts might examine the key

obstacles to (and conducive conditions for) overcoming such conflicts.¹⁹ Here, conflicts between the regional and national regimes are surely a key issue, but conflicts between regional regimes also need to be examined, as several of the African RCRs have the potential to become what Connor (2015) has called “rest of the world enforcement powers” due to the increased presence of large international companies in African markets through trade and inward investments (Schwarz 2017). The coexistence of partly overlapping or nested legal regimes with the potential for jurisdictional conflicts, even in the absence of divergence in laws, here again promises to make analyses of the African competition regimes particularly insightful.

5.d. Promise and Limits of Regional Competition Law in the Absence of National Law

As noted above, all of the African RCRs were set up when some (and sometimes the majority) of the member states did not yet have competition laws (see, e.g., Oppong 2008). While this scenario is not unique,²⁰ it provides opportunities to better understand the potential and limits of such an arrangement. One way to think about it may be as a special case of conflict of laws: When, for instance, Eritrea, and Uganda remain without a national competition law 25 years after COMESA set out to create a regional competition regime, 15 years after it drew up a regional supranational law, and 7 years after it set up a functioning agency to implement and enforce that law, they may be seen as having made a conscious decision that they prefer national legal institutions to differ from the regional one.

The coexistence of a regional competition law with the absence of a national competition law in several member states, however, is not just interesting as a special case of conflict of laws, but also a *sui generis* important phenomenon, which raises generally important questions. Does the absence of a national law undermine the regional law? How can the goals of competition law and policy be advanced when a regional competition law coincides with the absence of

19 An interesting recent example of a compromise, which might be generalizable, is how Kenya and COMESA settled their jurisdictional conflict regarding merger review, whereby the Competition Authority of Kenya (CAK) accepts that COMESA review takes precedence, but merging parties with Kenyan commercial activities must inform the CAK.

20 When the first regional competition law was drawn up for the European Coal and Steel Community in 1951/52, none of the six member states had a functioning competition law at the national level. By the time the more comprehensive competition regime for the European Economic Community (the predecessor of today’s European Union, EU) came into force in 1957, France had adopted a such a law and Germany did so virtually in parallel; Italy and the Benelux countries were still without such a law at the national level (Dumez and Jeunemaitre 1996; Büthe 2007).

national laws in some of the member states? And as discussed below, does the regional law make the adoption of a national law in those member states more or less likely? The variation in competition law arrangements make the study of African competition regimes particularly promising for addressing these questions.

5.e. Regional Competition Agencies in the Absence of National Agencies

While getting a competition law “on-the-books” can be challenging enough, enforcement and more broadly implementation are often even more challenging for developing countries (Gal 2009; Mehta and Evenett 2009; Rodriguez and Menon 2010; Schatan 2012; Molestina 2019; Horna 2020; Koop and Kessler (forthcoming)). One reason is the often very limited state capacity and weak tradition of regulatory and judicial independence – which we would expect to be particularly crucial when agency officials and judges are asked to hold politically and economically powerful individuals and companies accountable or constrain their (ab)use of their power (see Aydin and Büthe 2016). And indeed, we have identified multiple African countries where the adoption of a national competition law has—at least so far—not been followed by the establishment of a(n operational) competition agency.²¹ An important line of research on African competition regimes will therefore ask: How can the goals of competition law and policy be advanced by a supranational competition agency when there is no such agency (or only a substantially less powerful/less independent agency) at the national level in some or all of the jurisdictions that are part of the regional regime?

5.f. Pros and Cons of the Supranational vs. the Confederate Model of RCRs

The parallel existence of two models of RCRs have prompted a lively discussion about their relative strengths and weaknesses. As Gal and Wassmer (2012:317) have pointed out, “the lower the level of cooperation, the lower the potential benefits, but possibly also the lower the obstacles to its adoption and enforcement” – echoed by Both’s (2018:173) warning that “the adoption of an overly ambitious binding cooperation agreement may lead to inadequate enforcement and thereby risk damaging the reputation of both the regional and national institutions, and reduce the trust between the parties.” At the same time, as Geradin (2004) points out, the effectiveness of the confederate model for addressing cross-border anti-competitive conduct depends to a much greater

21 Here again we see parallels with the early years of the EU competition regime, underscoring the potential of comparative research.

extent on all the member states' political will to cooperate without fear or favor (see also Geingos 2005; Shumba 2015).

Another key issue is whether (or under what conditions) the one or the other regional regime is more conducive to fostering the adoption of suitable national competition laws in member states previously lacking such laws and more generally to fostering effective, public interest-oriented competition regimes. Specifically, some scholars have argued that enacting a competition law at the regional level before it is well established at the national level (as inherently happens when an RCR with a supranational law includes countries without a national competition law) may stunt the development of indigenous competition law and policy, whereas joining a confederate-type RCR is helpful because it provides an incentive for national competitions law to be adopted (Denters and Gazzni 2017).

The many African countries where a competition law was introduced via a regional body of either type prior to the adoption of a national competition law provides a wealth of opportunities to study in depth how this sequencing affected the balance of support for (and opposition to) the adoption of a national competition regime (as well as the contents of the laws and features of the agency and policy subsequently established, if so). Equally important will be negative cases, such as Lesotho, which, despite being a member state of both SACU and SADC, has so far not adopted a competition law.²² Examining the political economy of competition law adoption in a case like Lesotho should allow us to learn why the incentives of these confederate RCRs have proven insufficient and how Lesotho's experience compares to countries without a national law under an RCR with a supranational law.

The diversity of competition regulation in Africa might also offer insights into other consequences of sequencing. Insofar as establishing a competition regime at a particular level requires overcoming the resistance of entrenched interests at that level, adopting a competition regime should be politically easier for a country nested within an existing regional regime or for a regional body with national competition regimes already existing in the countries the constitute the regional body (Kaira 2017). At the same time, if the issues that need to be addressed differ (and if hence the needed statutory or procedural provisions differ), previously establishing a competition regime at a different level of aggregation might be an impediment to developing effective, public interest-oriented competition regimes.

22 Cambodia similarly has refrained from adopting a national law within the Association of Southeast Asian Nations (ASEAN) confederate-type competition regime (Ong 2018).

6. CONCLUSION: AFRICAN COMPETITION LAW AND POLICY FIT FOR A POST-COVID-19 DIGITAL WORLD

Markets throughout Africa have developed in highly dynamic ways in recent years. Economic law has enabled and shaped this process; it also is called upon to “govern” it, not least by ensuring that individually rational behavior produces outcomes that are also socially beneficial, as well as economically and ecologically sustainable. To advance our understanding of how competition law shapes the operation of markets in Africa, we have in this paper taken stock of competition law and policy in Africa and sketched a research agenda both at the national level (in section 3) and at the regional level (in section 5), highlighting unique research opportunities, especially with regard to the development of regional competition regimes, where Africa exhibits extraordinary diversity.

In this conclusion, we want to note two recent developments that raise further, new questions for research. The first is the COVID-19 pandemic and its aftermath. The second is technological change, especially the increasing importance of digital goods and services.

6.a. Competition Law and Policy and Open Economies Post Corona

The COVID-19 pandemic has not spared Africa. As in other parts of the world, the pandemic not only threatens our physical well-being but also affects economic life. In many Western countries, it has led to a clamoring for suspending competition laws or at least their enforcement, especially where those laws prohibit government subsidies; similar tendencies appear to be underway in African countries but are barely even getting traced or analyzed (Kigwiru 2020b).

Moreover, the pandemic has sparked a new debate over prioritizing *domestic* production of “essential” goods and service over reliance on the market mechanisms to source goods and services most efficiently. While adopting a broader human security framework (instead of the traditional, narrow military security framework) to guide exemptions from the market allocation of goods and services may well be justified, law & economics as well as political economy scholarship has often shown that such exemptions are prone to abuse by producers seeking protection from foreign competitors and/or opportunities to extract rents from domestic consumers or from the public sector (e.g., Sinnaeve 2001; Thee 2002; Gilmore et al 2007; McGinnis 2014). This is a particularly important concern at the current stage of the development of markets and economic law in Africa. Just a few years ago, major multinationals and *de facto* monopolists *from outside Africa* were considered most likely to have and abuse

market power in African markets. Recent studies have shown, however, that the most consequential de facto monopolies in Africa are no longer all foreign-owned, and it is now increasingly *African* firms (including state-owned enterprises as well as private enterprises from within the same regionally integrated market) that are dominating African markets (Maritz 2018; Ovia 2018; Tyce 2019). Under these circumstances, suspending competition rules in ways that restrict foreign competition may actually increase market power within African markets and reduce domestic and regional supply. Scholars of competition law and policy here can make important contributions by scrutinizing any such (proposed) exemptions to examine the extent to which they (can be expected to) improve preparedness for future crises and the extent to which they merely benefit already dominant African firms at the expense of consumers and to the detriment of their African/domestic (as well as foreign) competitors.

6.b. Competition Law and Policy in the Era of Digital Disruptions

Technological change is increasingly transforming the landscape of competition law and policy. Among the people of Africa, 1 in every 5 now has access to the internet, with Kenya and Liberia leading with more than 80% penetration (Mahler et al 2019). And while African online search and social media is still dominated by the global giants Amazon, Apple, Facebook, and Google (Osiakwan 2016; DW 2019; Goga et al 2019; UNCTAD 2019:2), the mobile money ecosystem in Africa is now increasingly African-owned and indigenous transformative technologies are emerging in many places in Africa (Mbiti 2016; Makina 2017; GSMA 2019). The introduction of these services, along with new e-commerce opportunities is disrupting conventional markets (Kigwiru 2019a). This digital transformation of markets opens up important new opportunities for policy-relevant research, as digital markets create not just new opportunities for economic growth but also new forms of (abuses of) market power and new winner-take-all dynamics, which risk making markets less contestable.

Technology is also directly transforming the practices of competition regulators. To be sure, the digital revolution has arrived very unevenly. Some African competition agencies' quite literally still struggle to keep their phones working; others to keep their insecure websites from getting hacked. It is easy to see why they might primarily see risks in new technologies. Yet, there are also indications that digital technologies might allow African countries to "leapfrog" and achieve rapid advances in competition advocacy and law enforcement. While some promising new tools, such as the computer-assisted system for detection of bid-rigging in public procurement ("BRIAS"), developed by the South Korean competition agency (Cho and Bütthe 2020), might not yet be

suitable for most African agencies due to the “big data” analytics required, many other technological innovations are readily usable in many African countries. The gamification of competition economics 101, for instance, or even just smartphone apps that convey a basic understanding of how markets work and why it harms consumers and citizens if some are allowed to manipulate those markets, can help build a broad-based competition culture. Apps that allow consumers to report suspicions of coordinated price movement can help enforcers detect cartels and collusion. Some African agencies have been at the forefront of developing such apps (see, e.g., ICN and World Bank 2016).

Last but not least, competition agencies that had integrated digital technologies into their work, such as Kenya, South Africa and the newly established Nigerian NCA, have been able to continue merger reviews and even enforcement actions during COVID-19-induced lockdowns – while otherwise comparable NCAs, such as Botswana’s, have had to close down for extended periods of time (Kigwiru 2020b).

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