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COMPETITION COMMITTEE

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Global Forum on Competition

REGIONAL COMPETITION AGREEMENTS: BENEFITS AND CHALLENGES

- Background note by the Secretariat -

29 September 2018

This document was prepared by the OECD Secretariat to serve as a background note for Session III at the 17th Global Forum on Competition on 29-30 November 2018.

The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries.

More documentation related to this discussion can be found at: oe.cd/rca.

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Table of contents

Regional Competition Agreements: Benefits and Challenges - Background note by the Secretariat .......................................................... 3

1. Introduction .......................................................................................................................... 4

1.1. Background .................................................................................................................. 4
1.2. Scope and outline of the paper .................................................................................. 4

2. Regional Competition Agreements .................................................................................. 5

3. Different approaches for regional competition frameworks .......................................... 7

3.1. Different approaches for regional competition frameworks .......................................... 7
3.1.1. “Regional referee” model ....................................................................................... 8
3.1.2. “Two-tier” model .................................................................................................. 10
3.1.3. “Joint enforcement” model .................................................................................... 12
3.1.4. “One-tier” model .................................................................................................. 13
3.2. Level of activity of different approaches .................................................................. 14

4. Benefits and challenges of regional competition frameworks ........................................ 14

4.1. Benefits ....................................................................................................................... 15
4.1.1. Addressing the enforcement resource constraints ................................................ 15
4.1.2. Strengthening Competition Culture ........................................................................ 15
4.1.3. Reducing enforcement capability constraints .......................................................... 15
4.1.4. Keep national governments in check ......................................................................... 16
4.2. Challenges ................................................................................................................... 16
4.2.1. Profound differences between the participating Member States ............................ 16
4.2.2. (Sub)optimal level of integration ............................................................................ 17
4.2.3. Geographically overlapping RCAs .......................................................................... 17
4.2.4. Required legal actions on national level to incorporate specifically the provisions of the RCA ........................................................................ 18

5. Conclusion ....................................................................................................................... 18

Endnotes .................................................................................................................................. 20

Bibliography .......................................................................................................................... 26

Tables

Table 1. RCAs that have adopted regional competition provisions and have established a RCAut ....... 6
Table 2. Grouping of the RCAs, based on the division of powers between national and RCAuts ........ 8
Regional Competition Agreements: Benefits and Challenges

- Background note by the Secretariat*

Over the past decades, numerous countries have embarked on a path to regional integration, as regional integration is widely recognised to bring several benefits, including the enhancement or acceleration of economic growth. Since regional integration is often combined with trade and investment liberalisation, competition law and policy becomes crucial, as benefits of trade and investment liberalisation should not be compromised by cross-border anti-competitive practices and be appropriated by private undertakings by means of their unlawful conducts.

In this regard, Regional Competition Agreements (RCAs) bear significant potential for both developed and developing jurisdictions. Among other things, they can promote convergence in competition laws and instruments, ensure effective and efficient cross-border enforcement, and/or support young authorities in their efforts to create a competition framework coherent with international standards.

However, notwithstanding the potential benefits, serious obstacles to the success of RCAs can undermine the harvesting these benefits. The paper looks at the 11 RCAs in the world between three or more jurisdictions that are located in the same geographic region, have adopted regional competition provisions, and established a regional competition authority ("RCAut"). It examines some of their main benefits and challenges and analyses the different possible approaches. Regardless of the system that a region decides to implement, it is important that regional integration and centralisation of competition enforcement does not become an end in itself. Instead, it is important to leave room for diversity and sufficient policy autonomy. Moreover, as can be illustrated through the case of the EU, developing a regional competition regime takes time.

* This paper was written by Wouter Meester, with comments from Antonio Capobianco, Acting Head of the OECD Competition Division.
1. Introduction

1.1. Background

1. The international and regional integration of markets for goods and services continues apace. Over the past decades, numerous countries have embarked on a path to regional integration, as regional integration is widely recognised to bring several benefits, including the enhancement or acceleration of economic growth.

2. Since regional integration is often combined with trade and investment liberalisation, competition law and policy becomes crucial, as benefits of trade and investment liberalisation should not be compromised by cross-border anti-competitive practices and be appropriated by private undertakings by means of their unlawful conducts.

3. In light of the benefits brought by enhanced competition, we have seen an increasing global reach of competition law and policy in the last 25 years. The number of jurisdictions with competition law increased by more than 600% in between 1990 and 2015, from fewer than 20 to about 125.1

4. The increasing proliferation of competition law and policy at national level has created a need for effective regional co-operation on competition, which over the years has resulted in a number of Regional Competition Agreements (“RCAs”).

5. RCAs have great potential as they provide a platform, which, for instance, enables regional convergence or spurs the adoption of competition laws in the region or their improvement over time, facilitates regional information exchanges for the enforcement of cross-border competition cases or builds capacity for younger authorities. However, many countries and regions have encountered obstacles that prevent them from reaping the (full) benefits from these agreements.

1.2. Scope and outline of the paper

6. This paper looks at existing RCAs between three or more jurisdictions (so excluding bilateral agreements2) that are located in the same geographic region, have adopted regional competition provisions, and established a regional competition authority (“RCAut”). These RCAs generally offer deeper levels of integration and a higher degree of co-operation on competition enforcement than bilateral agreements. They also generate scale economies in enforcement, which are particularly important for developing and emerging economies.3

7. This also means that regional frameworks that somehow address competition, for instance by facilitating international co-operation or fostering regional harmonisation of competition laws, but have not developed regional competition provisions and established a RCAut, are excluded from the scope of this paper.4

8. Instead of providing a detailed description of all the regional frameworks under study, this paper will focus on their main characteristics, drawing on the inventory that has been developed (which serves as an annex to this background note and can be found in a separate document).

9. The paper is structured as follows: chapter two briefly elaborates on the role and different forms of RCAs. Chapter three explains in more detail the specific characteristics of the RCAs that are part of the analysis, using four regional models in which the division of powers between National Competition Authorities (“NCAs”) and RCAuts changes. Chapter four describes some of the main benefits and challenges of RCAs, and chapter five concludes.
2. Regional Competition Agreements

10. An important reason for international and regional economic integration is that it is expected to foster trade among the integrating countries, thereby supporting economic growth. However, lowering trade barriers through regional economic integration – for instance by means of the creation of a free-trade area, a customs union, a common market or economic union – goes hand in hand with the necessity to protect competition in these newly created regional markets.

11. When competition expands from a national to a regional level, competition law and policy is needed to ensure that the benefits of trade and investment liberalisation are not compromised by cross-border anti-competitive practices. For instance, companies in the region may choose to form an international cartel (e.g., in the form of market sharing or price-fixing) or a dominant undertaking established in one Member State may choose to carry out abusive practices (e.g., denying access to an essential facility or adopting a predatory pricing conduct) in order to discourage market entry by undertakings based in other Member States.

12. There are different ways in which regions can formally co-operate in the field of competition law and policy. Jurisdictions within a region can for instance choose between bilateral or multilateral agreements, and between agreements that are specific to competition law or those that also include other policy areas. All of these agreements can be called RCAs.

13. In practice, RCAs take different forms and show a greatly varying degree of regional co-operation and convergence, depending on the objectives they intend to achieve. One of the most common forms of reaching a RCA between three or more jurisdictions consists of including competition-related provisions (“CRPs”) within regional trade agreements (“RTAs”). The number and importance of trade agreements has progressed rapidly since early 1990s, and, additionally, competition law and policy has become increasingly prevalent and important in these RTAs.

14. Table 1 lists the 11 RCAs that are part of our analysis, all of which are a result of a RTA between its Member States.
Table 1. RCAs that have adopted regional competition provisions and have established a RCAu

<table>
<thead>
<tr>
<th>Region</th>
<th>Member States</th>
</tr>
</thead>
<tbody>
<tr>
<td>CAN</td>
<td>Andean Community: Bolivia, Colombia, Ecuador, and Peru</td>
</tr>
<tr>
<td>CARICOM¹</td>
<td>Caribbean Community: Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Lucia, Saint Kitts and Nevis, Saint Vincent and the Grenadines, Suriname, Trinidad and Tobago</td>
</tr>
<tr>
<td>CEMAC</td>
<td>Central African Economic and Monetary Community: Cameroon, the Central African Republic, Chad, Equatorial Guinea, Gabon, the Republic of the Congo</td>
</tr>
<tr>
<td>COMESA</td>
<td>Common Market for Eastern and Southern Africa: Burundi, the Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Tunisia, Somalia, Uganda, Zambia, Zimbabwe</td>
</tr>
<tr>
<td>EAC (CAE)</td>
<td>East African Community: Burundi, Kenya, Rwanda, South Sudan, United Republic of Tanzania, Uganda</td>
</tr>
<tr>
<td>EAEU</td>
<td>Eurasian Economic Union: Armenia, Belarus, Kazakhstan, Kyrgyzstan, Russia</td>
</tr>
<tr>
<td>ECOWAS (CEDEAO)</td>
<td>Economic Union of West African States: Benin, Burkina Faso, Cape Verde, Ivory Coast, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, Togo</td>
</tr>
<tr>
<td>EFTA</td>
<td>European Free Trade Association: Iceland, Liechtenstein, Norway, Switzerland (Switzerland is an EFTA member but it is not part of the EEA)</td>
</tr>
<tr>
<td>EU</td>
<td>European Union: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom</td>
</tr>
<tr>
<td>MERCOSUR (MERCOSUL)</td>
<td>Southern Common Market: Argentina, Brazil, Paraguay, Uruguay, Venezuela²</td>
</tr>
<tr>
<td>WAEMU (UEMOA)²</td>
<td>West African Economic and Monetary Union: Benin, Burkina Faso, Ivory Coast, Guinea Bissau, Mali, Niger, Senegal, Togo</td>
</tr>
</tbody>
</table>

Notes:
1. N.B. The CARICOM Competition Commission does not have jurisdiction over the entire CARICOM. Instead, it has jurisdiction over markets of the CARICOM Single Market and Economy (CSME), which excludes The Bahamas.
2. Venezuela, although being a full member, has been suspended since 1 December 2016.
3. WAEMU is one of the two sub-regional bloc in ECOWAS – all members states of WAEMU are also Member States of ECOWAS.
Source: OECD analysis

15. All of these 11 RCAs explicitly mention competition provisions to be essential for regional integration. In practice, however, many differences exist in their implementation. There is some evidence that suggests that the deeper the level of regional economic integration parties aim to achieve, the more detailed and far-reaching the competition provisions that are included in the respective agreement.⁹

16. An inventory has been developed that includes relevant competition provisions from the regional competition frameworks, highlighting the main specificities of each RCA. This inventory can be found in a separate document and serves as an annex to this background note. The next chapter will elaborate and compare the different approaches of the RCAs in Table 1.
3. Different approaches for regional competition frameworks

3.1. Different approaches for regional competition frameworks

17. A number of factors can influence the development of a regional competition law and policy, including, but not limited to, the level of economic development of the Member States, the (absence of) national competition regimes and the (desired) extent and type of regional integration. Local circumstances such as historical legacy and legal systems of the member countries can also play a significant role.

18. In order to try and capture similar and unique features of the 11 RCAs in the inventory, we have included in the inventory regional characteristics (Member States, population, level of regional integration), an overview of the institutional designs, the roles and powers of the national and RCAuts and the coverage of the regional competition provisions (substantive provisions).

19. In describing and comparing the different regional approaches, we have identified four “regional models”. As the effectiveness of a regional competition policy depends considerably on the institutions that are in charge of the enforcement of competition law, we have identified the different models based on how powers are allocated between NCAs and RCAuts.

20. Although in all 11 RCAs the RCAut has territorial jurisdiction in competition cases with a regional dimension (“regional cases”, e.g. cases that affect trade between Member States), differences between the RCAs exist in terms of (i) what authority has the investigative powers (national/regional), and (ii) what authority has decision-making powers. With regards to decision-making powers, one can distinguish between systems where (a) NCAs have jurisdiction over a case with national dimension (“national cases”, e.g. cases that originate and have an effect in one Member State) – potentially under national law –, while the RCAut has jurisdiction over cross-border cases; (b) both RCAuts and NCAs can apply regional competition provisions concurrently; and (c) RCAuts have the power to decide on both regional and national cases, while the NCAs have no decision-making power.

21. The regional models are described in more detail below, in order of increasing level of integration. Within each model, clearly several differences remain as regards the regional approaches since every individual RCA has its own specificities and nuances. For instance, in some RCAs, regional provisions are directly applicable in Member States, whilst in others the applicability of regional legislation needs a national act transposing the regional provisions in the national legal order.

1 “Regional referee” model – the RCAut has exclusive original jurisdiction on regional cases and coordinates investigations undertaken at national level. This means that:

   a The investigation of a potential competition infringement with regional dimension is conducted by the competent NCAs, although the final decision is taken by the RCAut.

   b NCAs have exclusive original jurisdiction on national cases; and

   c NCAs cannot enforce regional provisions.
2 “Two-tier” model – there are two independently operating levels: for regional cases the RCAut has exclusive original jurisdiction and conducts the investigation and decides on the case, while for national cases the NCA has exclusive original jurisdiction and conducts the investigation and decides on the case.

a The investigation of a competition infringement with regional dimension is conducted and decided at regional level by the RCAut.

b National cases are decided at national level by the competent NCAs; and

c NCAs cannot enforce regional provisions.

3 “Joint enforcement” model – Both national and regional authorities apply regional competition provisions in their respective competition cases (national and regional cases).

a The investigation of a competition infringement with regional dimension can be conducted at national level by the NCAs and at regional level by the RCAut. There may be mechanisms to allocate competence at the most appropriate level.

b National competition cases are decided on national level by the competent NCAs;

c Both NCAs and RCAuts can (or must) enforce regional provisions.

4 “One-tier” model” – The RCAut investigates and takes decisions on national and regional competition cases, while the NCAs play a merely supportive role.

a The investigation of a potential competition infringement with regional dimension is conducted at regional level by the RCAut.

b National competition cases are decided by the RCAut; and

c NCAs cannot enforce regional provisions.

22. If we use the these regional models, we can group the RCAs as follows:

<table>
<thead>
<tr>
<th>Regional competition model</th>
<th>RCAs</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Regional referee” model</td>
<td>CAN, MERCOSUR</td>
</tr>
<tr>
<td>“Two-tier” model</td>
<td>CARICOM, CEMAC, EAC, EAEU, ECOWAS</td>
</tr>
<tr>
<td>“Joint enforcement” model</td>
<td>COMESA, EFTA, EU</td>
</tr>
<tr>
<td>“One-tier regional state” model</td>
<td>WAEMU</td>
</tr>
</tbody>
</table>

Source: OECD analysis

23. Below, we will elaborate on the different models, while explaining some of the differences between the regions within one model.

3.1.1. “Regional referee” model

24. In this model, the NCAs are in principle responsible for investigations in potential cross-border competition infringements. The RCAut coordinates the investigation in regional cases and takes the final decision. Regional provisions are not directly applicable in the Member States and NCAs cannot enforce regional provisions.

25. The following RCAs fall into this category: CAN, MERCOSUR.
26. In the Andean Community, the institutions responsible for the enforcement of the regional competition provisions\(^{11}\) are the Andean Community General Secretariat (SG CAN) and the Andean Committee for Defence of Competition. The latter body is an advisory group formed by representatives of all the competition authorities of the Member States, which provides SG CAN with its opinion on competition cases.\(^{12}\)

27. SG CAN has exclusive original jurisdiction in cases of potential cross-border anti-competitive practices. The territorial scope of the regional provisions includes “conducts in (i) the territory of one or more Member States, whose actual effects occur in one or more Member States, except when the origin and effect occur in a single Member State, and (ii) the territory of a country that is not a member of the Andean Community and whose actual effects occur in two or more Member States. All other situations are governed by the national legislations of the respective Member States.”\(^{13}\)

28. SG CAN is responsible for potential cross-border anti-competitive conduct, but the investigation is conducted by the NCAs. After initiating an investigation, SG CAN requests the NCAs\(^{14}\) to carry out the investigation in the affected Member States. SG CAN, jointly with the competent NCAs, develop an “Investigation Plan”\(^{15}\) and they will constantly coordinate during the investigation. After the investigation, the NCAs report back to SG CAN within a time limit, presenting the results of the investigation, and SG CAN will then decide. Where it deems necessary, it is possible for SG CAN to conduct its own investigation.

29. Regional provisions in the Andean Community are directly applicable in Member States,\(^{16}\) but NCAs cannot enforce regional legislation. The power to enforce interim or final decisions adopted by SG CAN lies with the governments of the Member States.

30. A noteworthy element of the regional provisions (notably ’Decision 608’\(^{17}\)) is that Bolivia can apply the regional provisions in cases that fall outside the scope of the aforementioned decision, (national cases). This ability results from a transitory period that was enacted by Decision 608 in 2005, during which both Ecuador and Bolivia could directly apply the regional competition provisions in a domestic setting, until the enactment of their own national competition law.\(^{18}\) This option of the regional framework, also known as the ‘downloading’ option,\(^{19}\) is still valid as Bolivia is currently the only country in the Andean Community without a national competition law.\(^{20}\)

31. The regional provisions include provisions on anti-competitive agreements and abuse of dominance (and therefore exclude provisions on mergers and state-aid/competitive neutrality).

**MERCOSUR**

32. In the Southern Common Market, the Committee for the Defence of Competition, together with the Trade Commission of the MERCOSUR,\(^{21}\) is responsible for applying the regional competition provisions and has exclusive original jurisdiction in cases of potential cross-border anti-competitive practices.\(^{22}\) It is “an organ of intergovernmental nature” and composed of the NCAs of each Member State.

33. The NCAs\(^{23}\) shall initiate an investigation, either ex officio or following a complaint by a concerned party, and present to the Committee for the Defence of Competition a “preliminary technical assessment”. Following the preliminary assessment, the Committee will initiate an investigation, ad referendum of the Trade Commission, or
shelve the case. As such, the Committee is not authorised to conduct its own investigations but relies on the assessment of the NCAs.

34. Once investigations are finalised, the appropriate NCA sends a report to the Committee for the Defence of Competition, which then decides whether the practice in question is an infringement of the regional competition provisions and, if so, determines any applicable sanctions or corrective measures.24

35. Competition decisions of the regional institutions are not directly enforceable as Member States are required to take the necessary measures to apply decisions in their domestic legal system. The application of the preventive measure or fine shall be applied by the NCA of the Member State in the territory of which the defendant is domiciled.

36. The regional provisions apply to anti-competitive agreements and abuse of dominance (and therefore exclude provisions on mergers and state-aid/competitive neutrality). However, so far there has not been any infringement decision taken at the regional level.

3.1.2. “Two-tier” model

37. In this model, there are two levels operating almost in parallel: the RCAut has the exclusive original jurisdiction in regional cases and the NCAs maintain exclusive original jurisdiction in national cases. Moreover, in national cases, the NCAs cannot apply regional competition provisions.

38. The following RCAs fall into this category: CARICOM, CEMAC, EAC, EAEU, ECOWAS.

CARICOM

39. In the Caribbean Community, the CARICOM Competition Commission is responsible for the enforcement of the regional competition provisions.25 Moreover, the Council for Trade and Economic Development (COTED) plays an important role, as it is authorised to develop and establish “appropriate policies and rules of competition within the Community, including special rules for particular sectors.”

40. The Member States that have established a NCA26 have exclusive original jurisdiction in national cases, while the CARICOM Competition Commission has exclusive original jurisdiction in the event of potential cross-border anti-competitive conduct. When the CARICOM Competition Commission has reason to believe that there is a regional case, it shall request the NCAs to undertake a preliminary examination of the business conduct of the enterprise. After the NCA has reported its findings, the CARICOM Competition Commission and the NCAs consult one another to determine and agree on who has the competence to investigate. The regional provisions are not directly enforceable in the Member States, as Member States are required to enact legislation to ensure that determinations of the Commission are enforceable in their jurisdictions. The enforcement of decisions adopted by CARICOM Competition Commission shall be the responsibility of the governments of the Member Countries.

41. The regional provisions apply to anti-competitive agreements and abuse of dominance (and therefore exclude provisions on mergers and state-aid/competitive neutrality).
CEMAC

42. The CEMAC Executive Secretariat is responsible for the implementation of the regional competition provisions in the Central African Economic and Monetary Community. Until 2005, the CEMAC Regional Council of Competition was the main competent body for the enforcement of regional competition provisions, but in 2005 the CEMAC Competition Commission was created to advise the CEMAC Executive Secretariat on all competition issues. As a result, the CEMAC Regional Council of Competition became a consultative body that provides an advisory opinion to the CEMAC Competition Commission on any competition case. The CEMAC Executive Secretariat has the exclusive original jurisdiction in regional cases and NCAs retain exclusive competence in cases that do not have a regional dimension.

43. CEMAC regulations (including the CEMAC Competition Regulations) are “binding in their entirety and directly applicable in all Member States.” Moreover, CEMAC decisions are “mandatory in all their elements for the recipients.” So far, there is no public record of any infringement decision taken by the CEMAC Competition Commission.

44. The regional provisions apply to anti-competitive agreements, abuse of dominance, mergers and state-aid/competitive neutrality.

EAC

45. In the East African Community, the EAC Competition Act gives the EAC Competition Authority (“EACCA”) exclusive original jurisdiction in the determination of violations of the EAC Competition Act, i.e. anti-competitive behaviour that has cross-border effects. This means that NCAs in Member States will not have the jurisdiction to enforce regional competition provisions and the jurisdiction of NCAs is limited to enforcement of their own national laws. The enforcement authorities of Member States are also obliged to enforce the decisions made by the EACCA.

46. The EACCA has started operations in early 2018 and is responsible for the investigation of regional cases for which Member States will provide the requested information.

47. The regional provisions include provisions on anti-competitive agreements, abuse of dominance, mergers and state-aid/competitive neutrality.

EAEU

48. In the Eurasian Economic Union, the regional competition provisions are enforced by the Eurasian Economic Commission. Within the Eurasian Economic Commission, a Minister of Competition and Antitrust Regulation supervises two departments within the Commission: the Department for Antimonopoly Regulation and the Department for Competition and Public Procurement Policy.

49. The Eurasian Economic Commission has exclusive original jurisdiction over cross-border anti-competitive practices, while NCAs have exclusive jurisdiction over cases that do not have a regional dimension. A potential cross-border competition infringement can be brought to the attention of the Commission. The Commission considers the application and prepares a decision (i) to investigate a potential violation of the regional competition provisions, (ii) to transfer the application to the NCA in the concerned Member State, or (iii) return the application.
50. The regional provisions provide that the national competition laws of the Member States have to be adjusted to comply with the regional ones.

51. The regional provisions apply to provisions on anti-competitive agreements, abuse of dominance and mergers.\textsuperscript{34}

**ECOWAS**

52. In the Economic Union of West African States, the ECOWAS Regional Competition Authority ("ERCA") is made responsible for enforcement of the regional competition provisions.\textsuperscript{35} It was established in 2008 but only launched on 12 July 2018 (hosted by Gambia). Furthermore, a Consultative Competition Committee, composed of two competition experts from each Member State, has also been established. The ERCA was launched in 2018\textsuperscript{36}, so it is yet unknown what the exact role of the Consultative Competition Committee will be.

53. While national cases are to be investigated by NCAs, the investigation of a regional case shall be performed by the RCAut. Where necessary, the RCAut can request the support or input from NCAs. Decisions of the Authority that entail pecuniary obligations on individuals and or corporate bodies, are binding and enforcement of ERCA decisions shall be applied by the national authority appointed by the Government of each Member State.

54. The regional provisions apply to provisions on anti-competitive agreements, abuse of dominance, mergers and state-aid/competitive neutrality.

3.1.3. "Joint enforcement" model

55. In this model, while RCAuts enforce regional competition provisions, NCAs enforce both national and regional competition provisions in their national cases for which the NCAs still have the jurisdiction. By empowering NCAs to also apply regional provisions alongside (and at the same time as) national provisions, this approach aims to ensure coherence in the application of competition provisions in general, irrespective of which authority enforces it (national/regional). NCAs are required to follow regional case law, adding another dimension to the level of regional integration.

56. The following RCAs fall into this category: COMESA, EFTA, EU.

**COMESA**

57. The authority responsible for the implementation of the regional competition provisions\textsuperscript{37} in the Common Market for Eastern and Southern Africa is the COMESA Competition Commission. It conducts investigations of cross-border anti-competitive cases, co-operating where necessary with the NCAs\textsuperscript{38} of the Member States. At the request of the RCAut, NCAs can be requested to support or undertake an investigation in their respective country.

58. The regional provisions imply that NCAs could – with the exception of merger control – apply these regional provisions. According to the COMESA Competition Rules, the authorities of the Member States shall remain competent to apply Article 16(1) and Article 18 of the Regulations [anticompetitive agreements and abuses of dominance, respectively], as long as the Commission has not (i) decided that there are no grounds for action under Article 16 (1) or Article 18, (ii) taken a decision to order the termination of an infringement, or (iii) decided that the provisions of Article 16 are not applicable.\textsuperscript{39}
59. With regards to merger control, Member States that request to deal with a merger notified to the CCC, apply their national competition laws.\textsuperscript{40}

60. The regional provisions apply to provisions on anti-competitive agreements, abuse of dominance, mergers and state-aid/competitive neutrality.

\textit{EFTA}

61. For three out of the four Member States of European Free Trade Association, the regional competition provisions\textsuperscript{41} are enforced directly by the EFTA Surveillance Authority (ESA).\textsuperscript{42} The EFTA regional competition framework is strictly based on and interrelated with the EU system. Due to the interrelation between EFTA and the EU, they are very similar and in many aspects even identical.

62. When a case has appreciable implications for competition in the EU as well, it is handled primarily by the European Commission.\textsuperscript{43} The ESA investigates cases that have an effect on trade between EFTA states and to this aim has the same investigative powers as the EC.

63. The regional provisions include provisions on anti-competitive agreements, abuse of dominance, mergers and state-aid/competitive neutrality.

\textit{EU}

64. Within the European Union, the enforcement of regional competition provisions has significantly developed over the past decades. Currently, the European Commission – and in particular the Directorate-General for Competition (DG COMP) – together with the NCAs\textsuperscript{44}, directly enforces EU competition provisions.\textsuperscript{45} Since 2004, the Commission and the NCA form the European Competition Network (ECN), a framework able to ensure close co-operation among ECN members in the application of European competition rules and capable of providing for an allocation of cases according to the principle of the best suited authority to bring to an end an infringement.\textsuperscript{46}

65. In principle, the Commission investigates cases that affect trade in more than three Member States or which are closely related to other aspects of EU law or raise novel competition issues. The Commission shall inform NCAs of any investigation in their jurisdiction, and NCAs shall assist the Commission where required.

66. The regional provisions include provisions on anti-competitive agreements, abuse of dominance, mergers and state-aid/competitive neutrality.

3.1.4. \textit{“One-tier” model}

67. This model is the most centralised model, as the RCAut enjoys the exclusive competence in anti competitive practices, both in national and regional cases. The investigation of competition cases is in principle led by the RCAut, with the NCAs playing a supporting role.

68. There is one RCA that falls into this category: WAEMU

\textit{WAEMU}

69. The WAEMU Commission is the executive body of the region, and is responsible for the application of the regional competition provisions.\textsuperscript{47} The Directorate of Competition, which is part of the Department of the Regional Market Trade, Competition...
and Cooperation in the WAEMU Commission, is the competent body, also known as the
WAEMU Competition Commission.

70. The WAEMU Competition Commission has exclusive jurisdiction over
competition provisions in the union. The NCAs\(^48\) have to fulfil certain co-operative
functions. Firstly, the WAEMU Competition Commission has to inform the NCAs about
ongoing or envisaged investigations in the Member States. The NCA then has to assist the
Commission during these investigations and inquiries in the Member States. Furthermore,
the NCAs are involved in the decision making process through the advisory Committee on
Competition, which comprises two officials per Member State and has the competence to
give an opinion on pending cases. The Committee’s opinion does not bind the Commission.

71. It is noteworthy that the Treaty of Dakar does not explicitly centralise the
competition law competences. It was an opinion of the WAEMU Court of Justice that
decided on an exclusive jurisdiction of the Union (after Member States defended their
domestic right to legislate on competition matters)\(^49\). The Court of Justice stated in this
opinion that the Union has the exclusive competence to adopt regulations on agreements,
abuse of dominant position and state aid\(^50\).

72. The regional provisions include provisions apply to anti-competitive agreements,
abuse of dominance and state-aid/competitive neutrality. There are no specific provisions
for merger control. Instead, merger control is carried out by means of the rules on
agreements or abuses of dominance, providing the possibility for undertakings to request a
“negative clearing” (providing approval for the merger).

3.2. Level of activity of different approaches

73. Apart from the model that is being, or has been, developed in each of the 11 regions,
the extent to which RCAuts are enforcing the regional provisions in practice differs
substantially across the regions. This is due to a certain extent to the amount of time since
these RCAuts have been created.

74. In Africa for instance, ECOWAS and EAC have not yet enforced the regional
provisions to date. Both RCAuts were established earlier this year. Similarly, for CEMAC
there is no public record of any infringement decision taken by the CEMAC Competition
Commission at the regional level. In Latin America, a similar problem exists. While the
RCAuts in CARICOM and MERCOSUR have not taken any decisions to date, the limited
number of precedents\(^51\) on the application of the Andean competition regime is also argued
to be one of CAN’s major issues\(^52\).

75. In the case of COMESA, which is the most active RCAut in Africa, the focus from
the start has been the handling of merger cases. In 2016, it had already handled more than
100 cases, and it is slowly focusing on competition cases related to conduct of market
participants\(^53\).

4. Benefits and challenges of regional competition frameworks

76. It is commonly accepted that RCAs bear significant potential benefits for
participating jurisdictions, especially for smaller and developing countries. Regional
competition policy may limit anti-competitive behaviour that forms an impediment to intra-
regional trade, thereby jeopardising regional integration and economic development. In
addition, there is a number of specific benefits that has been identified when emerging or
developing economies establish a regional competition framework that includes regional competition provisions and a RCAut.54

77. Below we will discuss some of the potential benefits and challenges, using where possible the 11 RCAs as practical examples.

4.1. Benefits

4.1.1. Addressing the enforcement resource constraints

78. Creating regional competition provisions, and a RCAut in charge of enforcing it, may reduce the problem of resource constraints for smaller agencies, both financial and technical, by achieving economies of scale in their enforcement activities. Since resource constraints often result from wider macro-economic conditions, this is a problem of many of the emerging or developing countries. Examples are CAN55, CARICOM56, CEMAC, COMESA and WAEMU.57

79. Within CARICOM, a selected number of Member States with smaller economies tried to overcome the problem of limited resources by founding the Organisation of Eastern Caribbean States (OECS)58 in 1981, with the aim of establishing a full economic union. Within CARICOM, all Member States are required to have a national competition regime, as a result of which OECS drafted a Competition Bill in 2013, that aims to adopt regional competition provisions for the entire OECS sub-region and establish a RCAut for deciding on all cases across the sub-region and representing the entire region at the CARICOM level.59

80. The establishment of a RCAut does not provide, however, for a “silver bullet” to solve the resource constraint issue. Even though a RCAut enables pooling of scarce resources, it is not immune from resource constraints or the lack of independence and flexibility that NCAs often face.60

4.1.2. Strengthening Competition Culture

81. A factor that is related to (or one of the reasons for) the often scarce resources is the weakness of the competition culture. Most consumers in WAEMU countries, for example, prefer similar prices for competing products, in order to make choices easier, over lower but different prices.61 Moreover, half or more of the Member States in CARICOM, CEMAC and ECOWAS do not have a national competition law, while even more do not have a NCA. The lack of a competition culture has also been identified as one of the reasons for the very limited regional competition cases in the Andean Community.62 The lack of a competition culture, leading to under-enforcement of the competition laws, could be mitigated by the establishment of a RCA. A RCA may spur the adoption of competition laws in the region, contributing to a competition culture, as well as can create economies of scale in educational and in advocacy activities.

4.1.3. Reducing enforcement capability constraints

82. Individual countries are often constrained in their capability to enforce their national competition laws in practice with regard to cross-border cases, even in the absence of resource constraints. Gal has identified five main obstacles63:

- Difficulties collecting evidence in cross-border competition cases. A RCA creates the opportunity to better collect and exchange information. Many of the RCAs under study in this paper have provisions on exchanging information, albeit mostly focused on exchanging information between the RCA and NCAs.
(while for instance in the case of the EU, NCAs can also exchange information, including confidential information).

- Lack of a credible threat. A RCA creates leverage for smaller economies, and makes more powerful and effective enforcement possible. Where a country may be more dependent on a multinational firm (e.g. in terms of employment, trade) than vice versa, a RCA can create critical mass and thereby create a critical threat for the competition provisions. CARICOM is a good example in this regard.64

- Deterrence may require cumulative sanctions, i.e. cover the entire area where a competition infringement occurred (instead of multiple sanctions for the same infringement). Cumulative sanctions can be more easily applied and enforced through a RCA.

- Difficulty to impose a penalty. A RCA may alleviate the problem that NCAs have when they want to sanction a company that is located elsewhere. Similarly, it could be argued that an effective remedy may need to be region-wide.65

- Overcome limitations of existing national authorities. A RCA may be an effective way to overcome deep-rooted limitations of existing authorities, including corruption, inefficiency, bureaucratic obstacles or distrust towards the current authorities.

4.1.4. Keep national governments in check

Where many of the potential benefits focus on barriers imposed by the private sector, some national governments try to protect their national companies from external competition. RCAs can help keep national governments in check regarding state-imposed barriers, or serve as a better counterbalance against strong pressure groups trying to exert influence on policy makers. Creating a level playing field for all firms may in turn foster foreign direct investment in the medium or long term.

4.2. Challenges

All RCAs try to achieve (some of) the abovementioned benefits, but it is commonly stated that although most of the examples of regional competition policy are in some sort or form “inspired” by the EU model, they have not been as successful as the EU.66

Many challenges exist when or after a RCA is developed.

4.2.1. Profound differences between the participating Member States

The implementation of regional competition provisions can be hindered largely by the differences that exist between Member States. Differences that can have an impact include:

- Different levels of economic development – in most regions there are some Member States that are much more developed or have more available resources than others. This leads to the risk that the competition provisions are developed in a way that favours (or at a minimum does not disfavour) the more developed Member State (or “economic leader”).
• Different legal systems – some Member States use a common law system, while others have implemented a civil law system. The cohabitation of legal systems can be difficult to reconcile.

• Historical legacy and linguistic diversity – colonial heritage has left a significant footprint in some African and Latin American regions, leading to deeper linkages and a shared identity among those with a similar colonial past and cultural heritage, and less connection between those with a different one (even though they can be neighbouring countries). Historical legacy can also lead to different nuances when it comes to main competition concerns – for instance in countries where concentrations of capital were historically in the hands of a few, the main competition concerns are dominance issues.57

87. Regions where the above has played a significant role include ECOWAS68 and CARICOM69.

4.2.2. (Sub)optimal level of integration

88. Benefits for the participating member countries are generally assumed to be (potentially) higher when the level of co-operation is higher.70 This would imply that when looking at the four identified regional competition models, the one-tier model is the one offering the highest benefits (the model that pursues maximum integration). However, using the case of WAEMU, it can be the case that there is “too much” integration.

89. WAEMU has, as described above in the explanation of the regional approach of WAEMU, adopted a centralised approach to its competition policy. Following an interpretation of the WAEMU Court of Justice, the WAEMU Commission enjoys exclusive decision-making power in dealing with anti-competitive practices, both national and regional, assigning to national authorities a supporting or co-operating role (with the WAEMU Commission).

90. This has not always led to the desired outcomes.71 The centralisation of jurisdiction on competition matters has led to the decline of national initiative, resulting in less domestic competition law activities, has had a negative impact on the diffusion of the competition culture in the Member States and impeded the potential development of national expertise.72

91. Moreover, as a result of the centralised approach, Member States have been reluctant to adapt domestic laws to the community law, notwithstanding their obligation to do so, because they fail to see the usefulness of doing so in light of the deprivation of their power.

92. Finally, the collaboration between NCAs and the RCAut has proven ineffective, as a result of (i) the resistance of NCAs to the centralised approach and (ii) the institutional weaknesses of NCAs.73

93. It is hard to say in general if there is a sort of “optimal” level of integration. However, it seems that there needs to be some room for national autonomy.74 This depends however on other factors, such as the number of Member States and their diversity.75

4.2.3. Geographically overlapping RCAs

94. In Africa, there are numerous regional agreements and organisations, with some countries being members of up to 14 regional organisations at the same time.76 This overlap-phenomenon also plays a role with regard to RCAs, which generates difficulties when countries are member of more than one RCA, and those RCAs have different approaches.
95. For instance, in the case of Western Africa, all Member States of WAEMU are also Member States of ECOWAS. However, as we have seen above, both apply a very different model with regards to regional competition provisions. WAEMU applies a one-tier model, with no decision-making powers for the NCAs, while ECOWAS applies a two-tier model where NCAs are competent to decide on national cases. This can be difficult to reconcile for countries that are member of both, in a sense that this may create confusion as to who has competence, who should handle a case or even differences in interpretation or conclusions.

96. The same is true for EAC and CEMAC, which partly overlap with COMESA.

4.2.4. Required legal actions on national level to incorporate specifically the provisions of the RCA

97. Competition provisions in (or related to) a RTA often require further action on the part of the Member States, be it the necessary ramification of the regional legislation and/or the amendment of domestic legislation to incorporate the provisions of the RTA/RCA. For instance, national competition legislation may not have any provision that allows for investigations to be conducted at the request of an external body, even though the regional competition provisions provide for the obligation upon a NCA to conduct a (preliminary) investigation on request from the RCAut.

98. These steps at national level can make enforcement of regional competition provisions more difficult, as is the case for instance in CARICOM, EAC and WAEMU. For instance, in the EAC, there are jurisdictional conflicts between the EAC competition provisions and the national competition provisions leading to disharmony and enforcement hurdles. Similarly, amendments to the EAC competition legislation that would bring regional harmony have been delayed by national governments.77

99. In the Andean Community, the regional provisions provided for the possibility for Bolivia and Ecuador to directly enforce the Decision 608/2005 in the absence of a national competition law.

5. Conclusion

100. In the past few decades, increased regional integration has led to a significant increase in RCAs. When designing a RCA, different approaches are possible. In this paper, we have provided an overview of the approaches of the 11 existing RCAs in the world that have simultaneously adopted regional competition provisions and established a RCAut.

101. Most of the RCAs have mirrored (elements of) the EU competition model, especially in relation to its substantive provisions. However, notwithstanding the potential benefits of a RCA, the EU and EFTA seem to be the only real successful regional framework to date in terms of enforcement results.

102. We have addressed some of the challenges that contribute to the fact that most of the regional competition frameworks are not (yet) successful. Regardless of the system that a region decides to implement, it is important that regional integration and centralisation of competition enforcement does not become an end in itself. Instead, it is important to leave room for diversity and sufficient policy autonomy.
103. Moreover, developing a regional competition regime takes time. As the EU experience has shown, after the introduction of Council Regulation 17/1962, it took forty years before the EU implemented Regulation 1/2003 that replaced the old centralised regime, with a new decentralised one, thus realising the so called ‘parallel application model’. This allows NCAs applying both EU and national competition rules in parallel to anti-competitive conducts affecting trade between Member States and provided for an allocation of cases (and a one-stop-shop system) which seeks to guarantee that only well-placed authorities investigate cases.

104. In terms of the earlier mentioned regional models, the EU went thus from a “two-tier” model to a “joint-enforcement” model. This shows that, regional competition approaches can (and sometimes should) change to follow developments within the region.
Endnotes


2 The OECD has provided an inventory of provisions included in international co-operation MoUs between competition agencies in 2016 (http://www.oecd.org/da/competition/inventory-competition-agency-mous.htm) and an inventory of international (intergovernmental) co-operation agreements on competition in 2015 (http://www.oecd.org/da/competition/inventory-competition-agreements.htm).


4 Examples of such regional frameworks are the Australia and New Zealand Closer Economic Relations (ANZCERTA), Asia-Pacific Economic Cooperation (APEC), Association of Southeast Asian Nations (ASEAN), Organisation of Eastern Caribbean States (OECS), Nordic Alliance, North American Free Trade Agreement (NAFTA) and Southern African Development Community (SADC).


6 Both defines four levels of regional economic integration: (a) free trade areas (i.e. FTA – elimination of customs to intraregional trade, (b) customs union (FTA + common external tariffs), (c) common market (customs union + free movement of factors of production) and (d) economic union (common market + common currency and tax harmonisation). See Both, G. D. (2018). ‘Models of Regional Cooperation in Competition Law and Policy from Around the World; Lessons for the ASEAN Region’, In “The Regionalisation of Competition Law and Policy within the ASEAN Economic Community”, Ong, B. (Ed.), (pp. 165-209). Cambridge: Cambridge University Press.


8 A recent mapping exercise found that out of 216 free trade agreements they reviewed, a substantial majority (88 percent) address competition-related issues in one form or another. (Laprévote François-Charles, Sven Frisch, and Burcu Can (2015), Competition Policy within the Context of Free Trade Agreements, E15Initiative, Geneva: International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum.). Moreover, the Regional Trade Agreements Information System (RTA-IS) by the WTO (http://rtais.wto.org/ui/PublicMaintainRTAHome.aspx) indicates that 190 out of 306 regional trade agreements include competition as main topic (last accessed on 15 October 2018). The database contains information on only those agreements that either have been notified, or for which an early announcement has been made, to the WTO.


10 See also Bakhoun, M. and J. Molestina (2012). ‘Institutional coherence and effectiveness of a regional competition policy: the case of the West African Economic and Monetary Union


12 Conclusions or recommendations of this Committee are not binding on the General Secretariat. However, the Secretariat must expressly state the reasons of any departure from the recommendations of the Committee.

13 See article 5 of Decision 608.

14 Member States that have established a NCA are Colombia, Ecuador and Peru.

15 This plan includes, among others, the type of actions to be taken, the economic agents to whom such actions will be directed and the elements and characteristics of the conduct.

16 See in this regard Cubillos, A., J.S. Pachón, and C.M. López-Cárdenas (2014). Los principios de primacía y eficacia directa del derecho comunitario andino: conceptualización, desarrollo y aplicación. Revista Jurídicas, 11 (2), 148-169. See also the Pre-Judicial interpretation of the Court of Justice of the Andean Community (Case 472-IP-16 of 1 October 2018), requested by the Supreme Court of Bolivia, on the interpretation by Bolivia of article 49 of Decision 608. A Pre-Judicial interpretation is a mechanism by which Andean Community member countries can request guidance from the Court of Justice of the Andean Community in relation to specific points of Andean Community law.


18 See Article 49 of Decision 608 for Bolivia, as well as Article 1 of Decision 616 (of 15 July 2005) for Ecuador.


20 Even though Supreme Decree 29519 of 2008 regulates competition and consumer protection in Bolivia, this is not considered a national competition law per international standards (see M. A. Umana (2018). ‘Regional Competition Arrangements: The Case of Latin American and the Caribbean’. Forthcoming paper prepared for this background note’s-session, i.e. Session III at the 17th Global Forum on Competition on 29-30 November 2018). Consequently, the Court of Justice of the Andean Community argues that Bolivia can apply Decision 608, following article 49 in Decision 608. See the Pre-Judicial interpretation of the Court of Justice of the Andean Community, Proceso 472-IP-16 of 1 October 2018, supra n.16.

21 The Trade Commission of the MERCOSUR is one of the three decision making bodies that was established by the founding Treaty of Asuncion. The decisions of the Committee for the Defence of Competition are taken ad referendum of the Trade Commission of MERCOSUR.


23 All of the Member States, i.e. Argentina, Brazil, Paraguay and Uruguay.
For this, the Committee must reach consensus among all the NCAs. Otherwise, the Trade Commission must determine the sanctions and measures, if applicable, through a Directive.

The Revised Treaty of Chaguaramas (RTC), Chapter 8 (articles 168 to 183) (2001).

Barbados, Guyana, Jamaica and Trinidad and Tobago.


See Article 21 of the Addendum to the CEMAC Treaty relating to the institutional and legal system of the Community.

Idem.


The countries that established a NCA are Kenya and Tanzania. In Burundi the establishment of the national competition agency is awaiting approval while in Rwanda the national competition agency was approved and gazetted by Parliament.


It needs to be noted that merger control is an exclusive competence of Member States and not of the regional authority.

The ECOWAS Revised Treaty (2010), Supplementary Act A/SA.1/06/08 (Adopting Community Competition Rules and the Modalities of Their Application Within ECOWAS), Act A/SA.2/12/08 of 12.08.2008 (Establishment, Functions and Functioning of the ECOWAS Regional Competition Authority), Amendment Act A/SA.4/07/13 (amendment of A/SA.2/12/08) and Supplementary Act A/SA.2/06/08 (Establishment, Functioning of the Regional Competition Authority for ECOWAS).


The countries with a NCA are Egypt, Ethiopia, Kenya, Madagascar, Malawi, Mauritius, Seychelles, Swaziland, Tunisia, Zambia and Zimbabwe.

See article 39(3) of the COMESA Competition Rules: “As long as the Commission has not initiated any procedure under Rules 32, 33 or 36, the authorities of the Member States shall remain competent to apply Article 16(1) and Article 18 [anticompetitive agreements and abuses of dominance, respectively] of the Regulations in accordance with Article 7 of the Regulations [the functions of the Commission]; [...]”.
It is still somewhat uncertain how the application of regional provisions by NCAs will be operationalised. The decisions by the COMESA Competition Commission have so far mainly focused on merger control (more than 100 merger decisions have been taken since 2013, see http://www.comesacompetition.org/?page_id=639), and in those cases the NCAs apply their national laws. However, the COMESA Competition Commission has taken two decisions on anti-competitive business practices (in 2016) and has published a number of notices of the commencement of an investigation into anti-competitive business practices in 2017 and 2018 (see http://www.comesacompetition.org/?page_id=335).

The EEA Agreement (EEA competition provisions - Articles 53 to 64), Annex XIV and XV to the EEA Agreement, Protocol 21-24, 26, 27, Co-operation within the EFTA Network of Competition Authorities, Notice on the co-operation between the EFTA Surveillance Authority and the courts of the EFTA States in the application of Articles 53 and 54 of the EEA Agreement and the The Surveillance and Court Agreement.

ESA is competent in enforcing competition law in Iceland, Liechtenstein, and Norway. It does not have jurisdiction in Switzerland. Switzerland, although being an EFTA member, is not part of the EEA.

The European Commission (DG COMP), together with the NCAs of the European Union, enforces competition laws in the EEA.

All EU Member States have established a NCA.


In addition, the Commission consults an Advisory Committee on Restrictive Practices and Dominant Positions, composed of representatives of the competition authorities of the Member States.


Countries with a NCA are Burkina Faso, Ivory Coast, Mali and Senegal.

Opinion 03/2000/CJ/UEMOA.

Opinion 03/2000/CJ/UEMOA states that articles 88, 89 and 90 of the WAEMU Treaty enshrine an exclusive competence of the Union. Member States are only entitled to take decisions pertaining to criminal law aimed at sanctioning anticompetitive practices, breaches of the laws on market transparency and competition regulation.

After the adoption of Decision 608 in 2005, one case led to a decision (resolution 1855), in June 2016, that found inadmissible a request for an investigation into a possible cartel within the entire Andean Community. Another case involved a decision (resolution 1935), in June 2017, of the SG CAN deeming as unfounded an investigation request filed by two companies against a third company for allegedly incurring in an abuse of dominance. A third case (case 78-IP-2018) involved a leniency case in 2018, for which, while the community investigation was still ongoing, SG CAN issued a recommendation in March 2018 to the General Secretariat to impose fines on the investigated parties for incurring in price fixing in the Andean soft paper market.


55 See Cortázar, supra n.52.


57 See Fox, supra n.54.

58 Member States of OECS are Antigua and Barbuda, Dominica, Grenada, Montserrat, Saint Kitts and Nevis, Saint Lucia and Saint Vincent and the Grenadines.

59 See Both, supra n.6.

60 See also Bakhoum and Molestina, supra n.10.

61 See Gal, supra n.54.

62 See Cortázar, supra n.52.

63 Idem.

64 See Stewart, supra n.56.

65 See Fox, supra n. 54


67 See also Stewart, supra n.56 for more details on the Caribbean.


69 See Stewart, supra n.56.

70 See Gal and Wassmer, supra n.54.

71 Idem.

72 Idem. Bakhoum and Molestina comment that even though the implementation of the regional provisions led to the abovementioned consequences, it had to be acknowledged that activity and knowledge were already limited in most NCAs before the regional provisions entered into force.

This is demonstrated by the decentralisation introduced in the EU with the Reg. 1/2003.

See Bakhoum and Molestina, supra n.10.

See for instance an interactive mapping of African regional organisations and countries’ memberships (http://ecdpm.org/talking-points/regional-organisations-africa-mapping-multiple-memberships/).


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