

Competition Policy for the New Era: Insights from the BRICS Countries

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Author post-print (accepted) deposited by Coventry University's Repository

Original citation & hyperlink:

Darr, A 2018, 'Competition Policy for the New Era: Insights from the BRICS Countries' European Competition and Regulatory Law Review , vol. 2, no. 3, pp. 237-240.
<https://dx.doi.org/10.21552/core/2018/3/12>

DOI 10.21552/core/2018/3/12

ISSN 2510-3148

Publisher: Lexxion

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Competition Policy for the New Era: insights from the BRICS Countries

by Tembinkosi Bonakale, Eleanor Fox and Liberty Mncube (eds)

Oxford University Press 2017; 270 pp.

£ 70.00; Hardcover

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Do developing countries mostly experience old competition problems or do they also experience new ones? And even when developing countries experience old problems do they do so in new ways? Are the perceptions of competition and solutions for competition problems generally accepted and prevalent in the developed world, adequate for and beneficial to developing countries? Or do developing countries require their own unique approach to addressing their particular competition concerns?

The volume edited by Tembinkosi Bonakale, Eleanor M. Fox and Liberty Mncube combines the regulatory experience of Bonakale and McNube as Commissioner and Chief Economist of the Competition Commission of South Africa respectively and Fox's extensive experience of competition in the developing world. It asks these and related questions to bring an invaluable insight into competition challenges faced by BRICS and developing countries and offers solutions for these challenges which are not only practical but also anchored in sound competition theory.

The 14 chapters in the volume address different aspects of competition: the first two, attempt to reset the goals of competition policy from a developing country perspective whilst the next three make a convincing case for a BRICS competition agenda and policy and its value to the Global Competition Law Project. The remaining nine chapters focus on issues in competition enforcement, ranging from the fight against cartels, the economics of competition sanctioning, appropriate remedies, barriers to entry and their implications for competition and economic equality. This last group of chapters also includes a number of comparative studies (of BRICS countries inter se, BRICS countries with the EU and US and other G-20 countries) and country studies focusing on competition issues in Brazil and China.

The success of the volume lies in its collation of a range of perspectives drawn from law and economics academics from across jurisdictions. Amongst them, Joseph Stiglitz and Eleanor Fox explore possible theoretical bases for a competition policy that addresses BRICS and developing country concerns; Ioannis Lianos and Alexey Ivanov make a compelling case for a BRICS Competition Law Platform; Joseph Harrington explores the challenges of fighting cartels; Yannis Katsoulacos and Eleni Metsiou discuss sanctioning strategies; Svetlana Avdasheva and Tatiana Radochenko provide an interesting insight into the observable and un-observable effects of 'conduct remedies' in BRICS countries; Simon Roberts explores linkages between barriers to entry and economic inequality from a South African perspective and Wing Xianlin discusses anti-monopoly issues in China.

The volume also provides insight into competition policy from the regulators' perspective. However, amongst BRICS competition regulators, the Competition Commission of South Africa features most prominently with Tembikonsi Bonakele urging a BRICS competition agenda; Liberty McNube, Thulani Mandiriza and Michelle Viljoen discussing 'creative competition remedies' in South Africa, and Yongama Njisane and Hardin Rathisusu advocating for including public interest considerations in balancing foreign direct investment and economic efficiency in cross-border mergers. The volume features one contribution from Brazil's Administrative Council for Economic Defense (CADE) in which Marcio de Oliveira Junior and Paulo Burnier da Silveira suggest tools for improved competition enforcement in Brazil and another from independent economic

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consultants in which Richard Murgatroyd, Yan Yu and Innes Barnardt examine excessive pricing regulation in BRICS countries.

A key theme that runs through almost the entire volume is the need to expand the goals of competition policy so that it takes into account the social cost and impact of competition rather than just its ability to create efficiency. Stiglitz and Fox draw upon competition theory to make a compelling case for revisiting competition policy not only in BRICS countries but also throughout the developing world. Whilst Stiglitz is of the view that there is a nexus between market power and inequality and that policies that aim to reduce market power can also be employed to reduce inequality, Fox argues that it is not necessary to abandon antitrust efficiency to achieve the progress goals of developing countries. She argues that it is erroneous to think that competition law and efficiency trample upon human values and calls for extra-competition, public interest measures to enable the world's poor to participate more fully in markets.

Bonakale and Lianos discuss ways of developing cooperation amongst BRICS countries particularly on competition issues with a public interest dimension. Bonakale calls for the formation of technical working groups and research groups of competition academics for enhancing cooperation amongst BRICS countries in enforcement actions and mergers. Lianos draws upon diffusion theory to navigate the complex territory between the need for convergence in competition policy and the importance of maintaining diversity and plurality of competition regimes. He calls for a participatory deliberative space, which is both distinctive and true to its citizens, and in which different jurisdictions have the space to express their competition concerns. He also introduces various topics, which whilst missing from mainstream competition discussions, are likely to be of concern to BRICS and developing countries.

Ivanov notes that over time competition law has become increasingly technocratic and divorced from the political realities in which it operates. He draws upon international law to suggest a global competition order which models itself on international principles, taking into account both the political complexities and exigencies of global value chains created by development in technologies, rather than merely replicating the technical approach of national competition regimes.

Whilst the discussion of sanctions in the chapters by Joseph Harrington and Yannis Katsoulacos and Eleni Metsiou is largely neutral on the issue of public interest, the question once again occupies centre stage with respect to remedies. Svetlana Avdasheva and Tatiana Radochenko contextualise remedies in a pan-BRICS perspective and provide an interesting insight into the observable and un-observable effects of 'conduct remedies' as employed in BRICS countries. Liberty McNube, Thulani Mandiriza and Michelle Viljoen, focus more exclusively on the public interest conduct remedies imposed by the Competition Commission of South Africa in the Walmart/Massmart merger and the Pioneer Foods consent order. Interestingly, whilst Avdasheva and Radochenko argue for the need for caution and restraint in applying conduct remedies, McNube, Mandiriza and Viljoen appreciate their 'creativity' in accommodating public interest considerations whilst still upholding the aims of competition law.

The significance of public interest is also evident in Yongama Njisane and Hardin Rathisusu's very interesting comparative study of G-20 countries in which they endorse McNube, Mandiriza and Viljoen's finding that linking public interest goals with those of competition is likely to result in a process that is not only more transparent but also yields more effective outcomes. In the same vein, in his chapter on barriers to entry and competition policy, Simon Roberts draws upon economists Atkinson, Baker, Salop and Sen to call for competition policy to consider distribution issues more explicitly. He examines different types of barriers to entry existing in South African markets (including network effects, switching costs, vertical integration), and suggests that policy interventions be simultaneously aimed at a number of fronts as they are mutually reinforcing. He is of the view that given that barriers have a cumulative effect, addressing one area in isolation from the rest is not likely to make a difference to market competitiveness.

The last three chapters in the volume move somewhat away from the focus on public interest considerations. The chapter by Xianlin identifies areas that need attention for a meaningful enforcement of China's Anti-Monopoly Law, including the need to find a suitable breakthrough industry, for coordination between industrial and competition policy in China and for the coordinated development of anti-monopoly and intellectual property rights. Oliveira and Salveira focus on Guidelines as potential tools for promotion of competition enforcement in Brazil and draw upon CADE's experience with guidelines on leniency, settlement agreements, mergers and gun jumping etc. in this regard. Independent economists, Murgatroyd, Yu and Barnardt provide an economic framework for analysing excessive pricing, and although they purport to examine excessive pricing regulation in BRICS countries, they focus on enforcement trends in South Africa and China only.

It is perhaps a corollary of its focus on public interest that the volume ultimately reads as a discussion of different aspects of the South African competition policy. Whilst this is understandable given South Africa's leadership in public interest in competition policy it detracts from the aim of the volume to provide a truly comparative analysis of competition policy in BRICS countries. Amongst the BRICS countries, India is particularly conspicuous by its absence: not only are there no Indian examples in any of the discussions but also the otherwise impressive list of contributors does not feature any Indian competition law scholars.

Despite this shortcoming, the result is a volume with diverse, insightful and practical contributions of eminent academics, regulators and experts. *Competition Policy for the New Era* is likely to be of interest not only to competition academics and practitioners exploring the possibility and mechanisms of using competition policy and law to arrive at more equitable solutions for the economic problems of developing countries, but also to staunch adherents of the Chicago School albeit perhaps as an uncomfortable harbinger of the shape of competition law to come as it spreads across the developing world.