

BOOK REVIEW NOTES

COMPETITION LAW ENFORCEMENT IN THE BRICS AND IN DEVELOPING COUNTRIES: LEGAL AND ECONOMIC ASPECTS*

NATALYA MOSUNOVA,

University of East Anglia (Norwich, UK)

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It is undeniable that the issues surrounding enforcement of competition law in the BRICS countries are receiving considerable attention from competition law scholars considering the scale of the economies of the BRICS countries and the fact that very little has been said on either the policies or the problems of enforcement in these jurisdictions. The book “Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects” edited by Frederic Jenny and Yannis Katsoulacos is a timely contribution to the debates on competition policy, the enforcement of the relatively new competition laws, the role and application of economic analysis in law enforcement procedures and other factors of policy-making in the named jurisdictions.

The book should, however, be read critically as the papers are based on presentations at the 2014 and 2015 CRESSE conferences and present original research, rather than being just review papers.

The editors divide the chapters into two main categories. The first category covers a variety of enforcement issues while the second one examines specifically the role of economic analysis and evidence in competition law enforcement. The papers in

* Reviewed book: *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (F. Jenny & Y. Katsoulacos (eds.), Cham: Springer, 2016).

the first category on institutional design, public interest, competition authorities' objectives, procedural fairness, procurement procedures and compulsory licensing may be of particular interest to practising lawyers and academics of law and political studies. The chapters covering economic analysis and economic evidence seem to be addressed to a broader audience as they not only employ econometric methodology but also examine the lessons on the use of this evidence in regulation.

Overall, sometimes it is not easy to find patterns of enforcement, narrative plots and selection criteria for comparison and analysis of jurisdictions although the book presents a number of genuinely original research papers and offers valuable insights into the enforcement of competition law in jurisdictions that have not yet been examined as thoroughly as the EU or common law countries.

From the beginning, I felt that the book attempts to cover too broad a range of issues for one volume: abuse of dominance and bid-rigging; institutional issues and enforcement of laws; anti-cartel regimes and certain indicators of effectiveness of competition; regulation of public procurement in certain countries and the role of public interest. This excessively broad approach can be also observed in the geographical distribution and classification of the countries in question. Reading the book, I struggled to find a justification for this approach and felt that the chosen methodology does not address the issues. For example, in his chapter "The Institutional Design of Competition Authorities: Debates and Trends" Frederic Jenny examines the goals, functions and organisation of competition authorities in Australia, Norway, Germany, Hungary, Iceland, Ireland, Korea, Switzerland, New Zealand, the USA. The employment of comparison is a great tool if it is used to highlight the peculiarities of the policies in the investigated countries rather than just to inform a reader about regimes having nothing in common either with the BRICS or developing countries.

Then, although it is difficult to investigate all the most typical areas of competition law including horizontal agreements and hard-core cartels; issues of dominance including abuse of dominance with all sorts of market powers and the control of concertation (M&A) in one volume, I felt that none of the questions chosen by editors are examined for all BRICS or developing countries, what makes the content quite fragmented. For example, in terms of anti-cartel policies, the reviewed book comprises chapters on the relation between Brazil's procurement procedure and bid-rigging; some success stories of South Africa's anti-cartel enforcement and the economic paper on cartel damages in a few developing countries only. Issues of Russia's anti-cartel regime are barely touched on. Some statistics on cartel cases in Russia can be found in the chapter "Economic Analysis in Competition Law Enforcement in Russia: Empirical Evidence Based on Data of Judicial Reviews" by Svetlana Avdasheva, Yannis Katsoulacos, Svetlana Golovanova and Dina Tsyulina however virtually nothing is said about the anti-cartel policies in India and China. The chapter "Cartel Damages to the Economy: An Assessment for Developing Countries" written by economists

Marc Ivaldi, Frederic Jenny and Aleksandra Khimich examines economic damage of cartels for Brazil, Russia, South Africa and a number of developing countries, but again India and China are completely out of the scope of this paper as well.

However, despite the fragmented nature of the contents, the majority of the texts are informative, well-written and thought-provoking. For instance, the later paper of Marc Ivaldi, Frederic Jenny and Aleksandra Khimich may be of particular interest for Russia's practitioners and enforcers. Researchers found that economic damage from cartels already detected in developing countries is substantial, and the average ratio between penalties and excess profits in developing countries remains extremely low (19%) compared to the U.S. level (57%) and even the EU level (26%). This may have implications for reconsidering fines policies in anti-cartel regimes in developing countries and some of BRICS jurisdictions.

Then, Rafael Pinho de Morais' in his paper "Antitrust and Compulsory Licensing in BRICS and Developing Countries" examines policies of all BRICS countries in regard of pharmaceutical markets. The balance between competition law and IP rights remains one of the most debatable areas of antitrust enforcement and this chapter outlines the concerns of this confrontation and seeks criteria for the consistent interventions of competition law in the area of intellectual property rights.

Despite the fact that some results should be treated with caution due to differences in the methods of researchers, those who look into the use of economic evidence in antitrust can benefit from the quite consistent analysis of the issue in the volume. Tembinkosi Bonakele examines the use of economic evidence in competition enforcement in general and gives a special emphasis to the case of South Africa; Eduardo Pontual Ribeiro reviews experience of economic analysis in antitrust cases in Brazil, Geeta Gouri in India and Svetlana Avdasheva with Yannis Katsoulacos, Svetlana Golovanova and Dina Tsyulina in Russia.

Regarding competition policies in particular countries, the most complete coverage in the book is provided for Brazil and South Africa. In addition to the economic analysis in antitrust cases, overview of compulsory licensing and cartel damage, Cesar Mattos examines procurement procedures in Brazil and concludes on risks of auctions in the Brazilian context and Dimas Mateus Fazio with Simone Maciel Cuiabano and Luiz Alberto Esteves share their findings on the application of a hypothetical monopoly test to particular Brazilian markets. Regrettably, the book does not pay much attention to the institutional issues and Brazil's success story of reforming enforcement institutions is out of its scope.

South Africa's researchers contribute to the debate on anti-cartel enforcement with their analysis of the remarkable cartel cases and the assessment of public interest for the purposes of competition law.

While China plays a great role on the global markets, its enforcement of competition law remains a mystery to international scholars and practitioners. Unfortunately, the chapter on enforcement of China's competition law does not

answer the question of consistency of Chinese competition law enforcement with principles universally applied in other jurisdictions because it only looks at it in the narrow aspect of the compliance of competition laws with Chinese administrative laws. This results in the obvious conclusion that there is no inconsistency between two branches of laws in one jurisdiction.

Overall, these two small criticisms – on the criteria for selection of papers and consequently some inconsistencies in analysis of particular issues for the claimed jurisdictions should not detract the reader from the informative, well-written and thought-provoking texts. By all accounts, the book “Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects” is one of the very first attempts to address the enforcement in the jurisdictions that have recently adopted competition laws and as such is an enjoyable read providing “food for thought” and enriching the literature in this field.

Information about the author

Natalya Mosunova (Norwich, UK) – PhD Candidate, LL.M., MPH, Centre for Competition Policy, University of East Anglia (Centre for Competition Policy, University of East Anglia, Norwich Research Park, Norwich, Norfolk NR4 7TJ, UK; e-mail: n.mosunova@uea.ac.uk).