

Development of authorities in (West) Africa – taking stock and key priorities for the future

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Points to discuss...

1 Context...

2 Complexification: institutional design

3 Enforcement and shortcomings

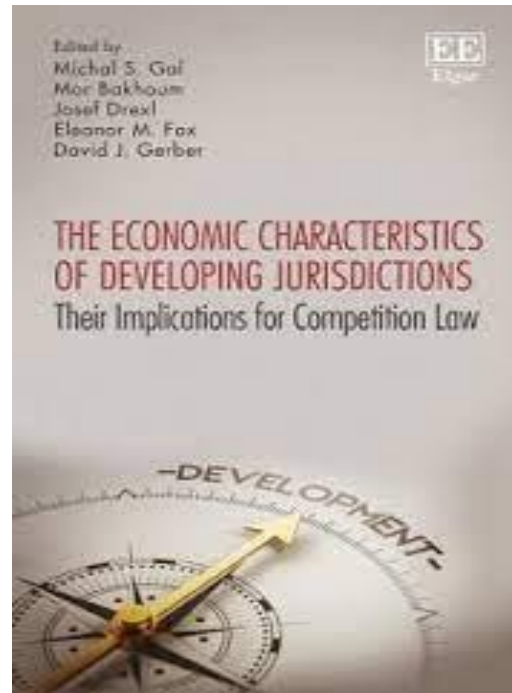
4 Priorities looking forwards...

- Coherence – AfCFTA : an opportunity or a threat?
- Digital markets

Starting point: informed divergence is needed in developing jurisdictions...

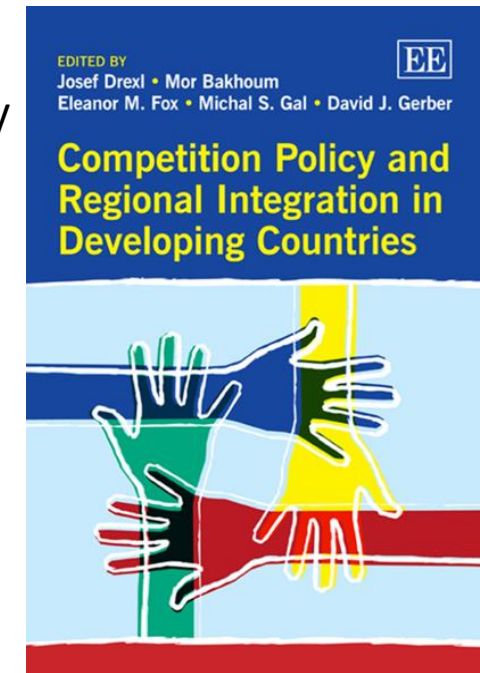
The economic characteristics of developing jurisdictions: their implications for competition law...

- Socio-economic context matter when designing competition policies



Competition policy and regional integration in developing countries...

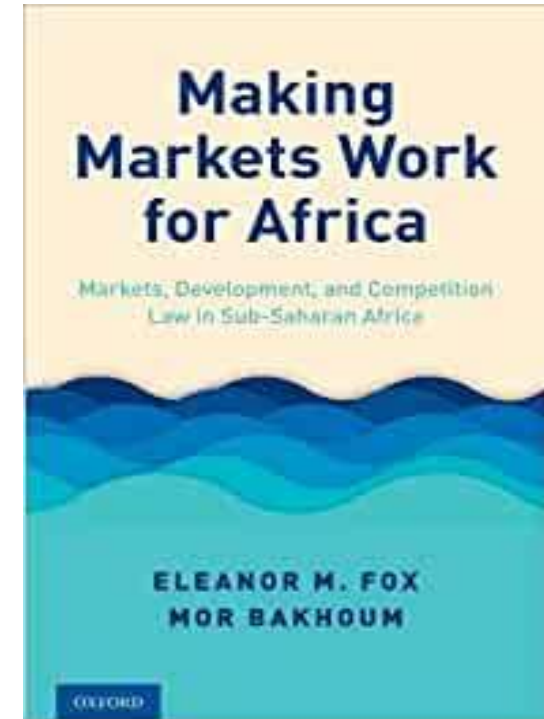
- COMESA
- WAEMU
- The Andean Community
- Caricom
- SADC
- ASEAN



Context...making markets work for Africa...

Approach and key findings

- **Three clusters:**
 - **West Africa, Eastern and Southern Africa, South Africa,** Regional arrangements
 - Socio economic context, law and case law and institutions..
- **Key findings:**
 - **Legacy of history:** economic and institutions inherited from are not supportive to market and CL
 - **Conceptual approach:** tension between efficiency and non economic objective (public interest)
 - **Price regulation** in West Africa...
 - Development and importance of the **regional dimension**
 - Differentiated enforcement records....



Context... Institutional framework in West Africa

Competition legislations

□ National level:

WAEMU member states:

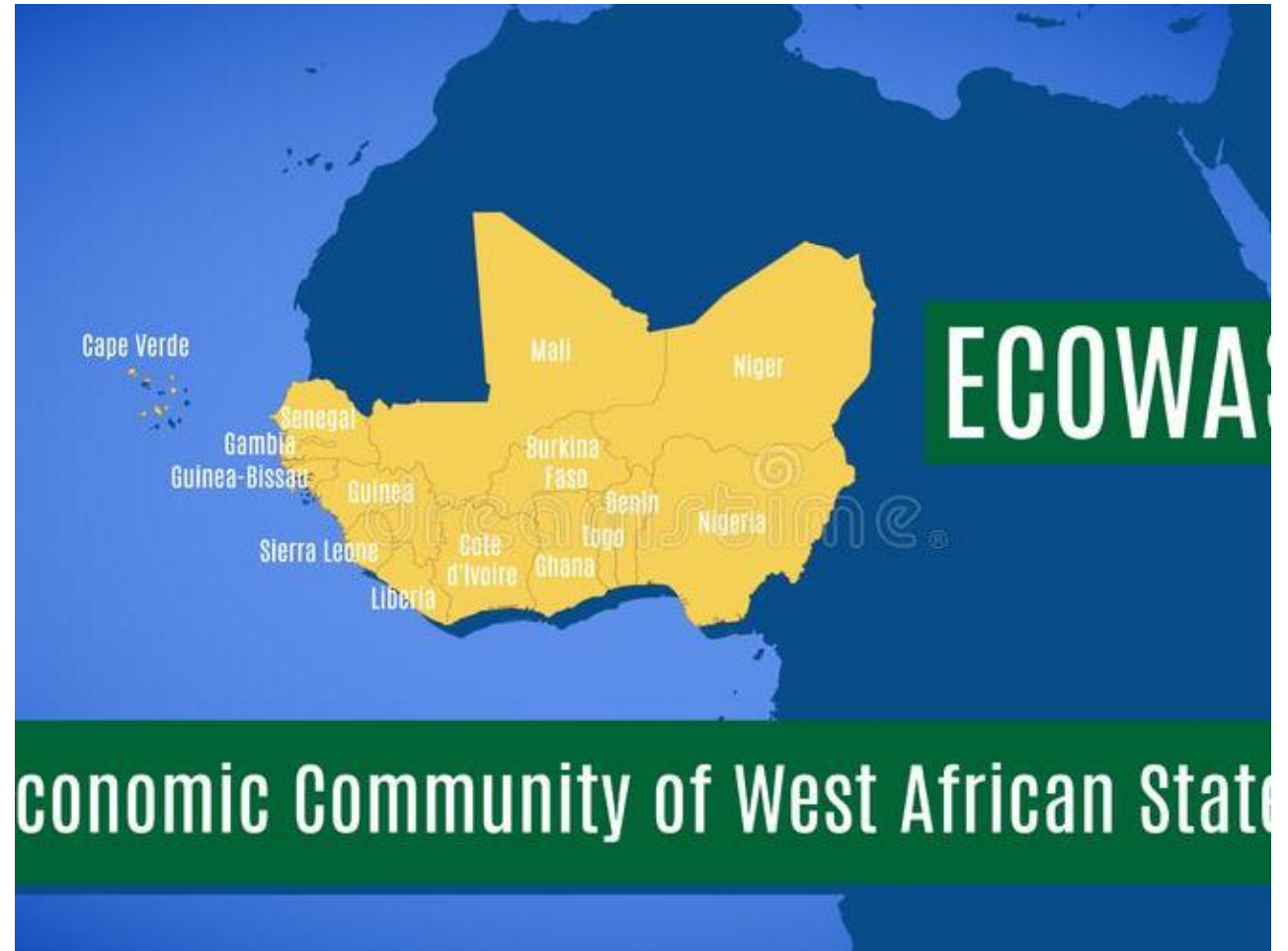
New CL: Bénin, le Burkina Faso, la Côte d'Ivoire, le Mali et le Niger

Revised CL: Sénégal, le Togo et la Guinée-Bissau

NB: in line with WAEMU centralized enforcement approach

□ Regional level:

- West African Economic and Monetary Union (WAEMU)
- Economic Community of West African States (ECOWAS)
- afCTA



Context... Institutional framework

A new player: Nigeria

- Economic lead of ECOWAS
- Important to control its national market
- Issue of the relationship with ECOWAS and WAEMU...
- Possible conflicts of jurisdiction

2 Complexification of the institutional design

Incoherencies at the regional level

WAEMU: centralized approach

- Centralization of the substantive law: cartels abuse of dominance mergers
- Exclusive jurisdiction of the WAEMU Commission to deal with cases
- Criteria of application of the regional law: effect on trade in the Union (not on trade between member states)....
- Collaboration on enforcement of national competition authorities

2 Complexification of the institutional design

Incoherence at the regional level

ECOWAS: centralized approach

- Regional competition law applicable to case that only affect trade between member states
- Member States have jurisdictions on national cases
- Possibility to have national CL and national competition authorities...

Important: all WEAMU countries are also member of ECOWAS...



CONSEQUENCES

2 Complexification of the institutional design

Different institutional designs and vertical coherence: diverging obligations on Member States

WAEMU: Member States shall refrain from enacting national competition law in the areas covered by the Community competition law (Agreements, abuses of dominant position, State Aid)

ECOWAS: Member States are encouraged to enact competition laws and to create national competition authorities.

Result: WAEMU Member States are under two contradictory obligations from the two regional competition laws

2 Complexification of the institutional design

Diverging institutional designs and horizontal coherence: the competing competences of two regional competition authorities

Consequences of two competing regional competition authorities (ERCA and the WAEMU Commission)

- Agreement cleared (exempted) by one authority and prohibited by another
- Standards for appreciation of a merger may be different....
- An abuse of dominant position allowed by one authority and prohibited by another
- **Legal uncertainty for companies:** which regional competition law to comply with?
- Which regional **competition authority to ask for clearance/exemption?**
- Risk of **double sanction** for one alleged anticompetitive practice

2 Complexification of the institutional design

- AfCFTA and its effect on regional design and enforcement adds another layer of complexity....
- Links between national, regional and continental levels...

Has already been discussed....

Solutions????

3 Enforcement and shortcomings

- **Starting point:** no enforcement power of national competition authorities (WAEMU)
- No enforcement records at the national level...
- **UEMOA:** No jurisdiction of national competition authorities
- **ECOWAS:** Still in the process of building its enforcement institutions – secondary legislation – Operation in 2019
- A number of reported potential cases at the national level
- Limited enforcement at the regional the regional level...

3 Enforcement and shortcomings

Cases decided at the regional level

Type of cases	Number of case
Merger	1
State aids and State complicit cases	2
Abuse of dominance	1
Cartels	0 (reported decision)

Total decided cases: 7 cases... since 2002.... With exclusive jurisdiction

Ongoing cases:

3 Enforcement and shortcomings

Limited enforcement records at the regional level... WAEMU

1 Focus State initiated anticompetitive practices

- Focus on enforcement has been on state initiated anticompetitive practices
- Delays in the decision making process within the Commission
- At least 10 cases related to state initiated anticompetitive practices
- Poor record given the characteristics of the markets and the involvement of the States in markets
- The regulations have been in force since 2002... 20 years...

3 Enforcement and shortcomings

Limited enforcement records at the regional level... WAEMU

2 Limited records on Cartels and abuse of dominance

- Very limited number of cases on cartels and abuse of dominance...
- Some cases are ongoing...
- Contrast with the number of reported cases that you potentially be anticompetitive...
- Distribution sector, telecommunication sector, cement sector (Sococim, Dangote, Ciment du Sahel...)
- National markets are left unmonitored... effects on the consumers...

3 Enforcement and shortcomings

Shortcomings....

- Issue of the institutional capacities of the regional authority: **staff, decision making process**
- Issue of the collaboration of national competition authorities: **resistance to centralization**
- Member states **reclaim and enforcement power...**
- Lack of clarity in the distribution of competences between regional competition authorities
- **Political interference: Bollore case...???** Retraction of the decision due to political pressure...

4 Priorities looking forwards...

Institutional dimension

- Consolidating the enforcement institutions at the national and regional levels (ECOWAS, WAEMU, Member States)
- Clarifying the distribution of competences national and regional level
- Clarifying the cooperation mechanisms:
 - ✓ **Horizontal level:** Between WAEMU and ECOWAS regional Competition authorities
 - ✓ **Vertical level:** regional competition authorities and national competition authorities

4 Priorities looking forwards...

Enforcement

- Focus on cartels and abuse of dominance – poor enforcement records on anticompetitive practices
- Dealing with anticompetitive practices at the national level
- International mergers affecting the continent...

4 Priorities looking forwards...

- The AfCFTA and national/regional enforcement: coherence in design

Issues/challenges to take into account

- ❑ **Pre-existing national and regional competition policies** across the continent...
- ❑ **Diversified regulations and institutional settings** at the national and regional level...
- ❑ **Issues of distribution of jurisdictions at the regional level...** (e.g. West Africa with WAEMU and its member states...)
- ❑ Issue of **differentiated level of competition culture** at the national and regional level..
- ❑ **Enforcements capacities are not the same in all jurisdictions** (strong enforcement in some jurisdictions, laws only in the books for others...)

4 Priorities looking forwards...

The AfCFTA and national/regional enforcement: coherence in design

Issues/challenges to take into account

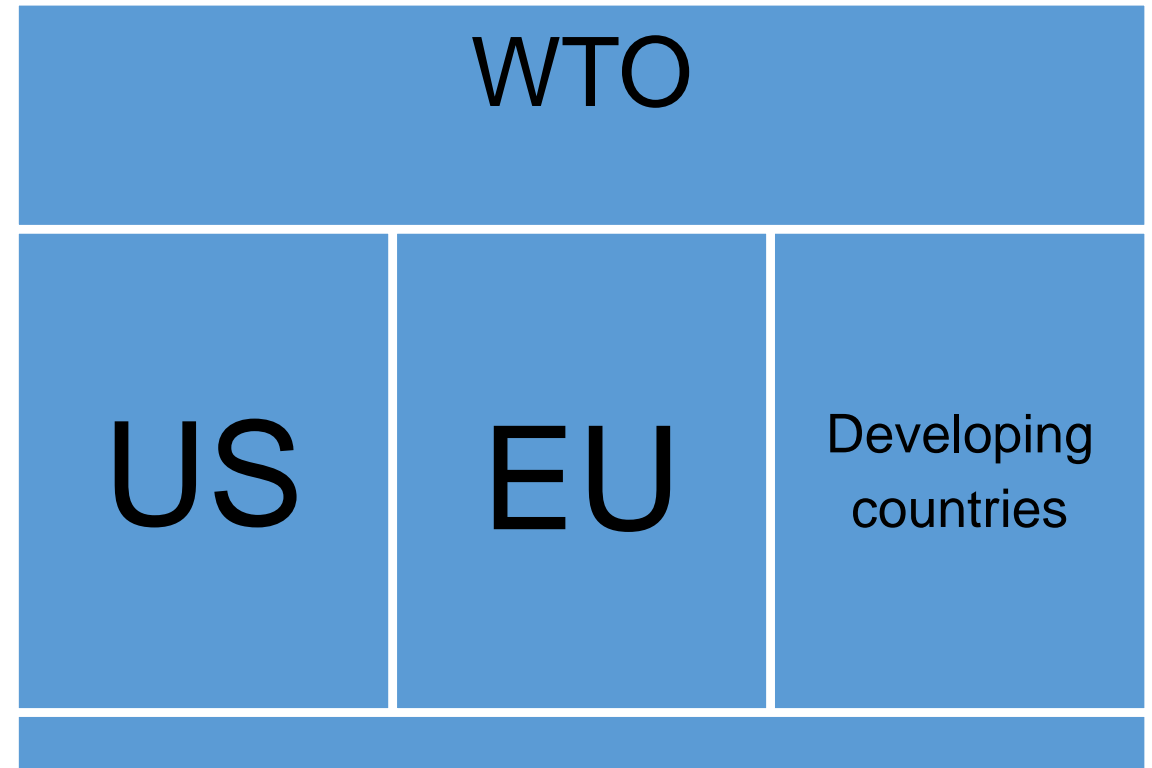
- ❑ Issue of the **willingness of the national/regional competition authorities to give up their enforcements powers** in favor of a «continental competition authority»
- ❑ Would a **continental competition framework** (authority???) **be able to address intra-african restraints of competition?**
- ❑ Would a continental competition framework (authority???) **be able to address international restrictions of competition (cartels, mergers...)**

4 Priorities looking forwards...

Coherence in design: the AfCFTA and national/regional enforcement

Learning from experience: WTO and competition global competition law

- ❑ EU proposal for a multilateral framework on competition law with WTO as the host.
- ❑ Proposal included principles of **transparency, non-discrimination and due process.**
- ❑ **Rules against cartels and abuse of dominance (e.g. requirement that national competition laws include provisions banning export cartels).**
- ❑ **A dispute resolution mechanism.**



4 Priorities looking forwards...

What can be learn from the experience for a global competition policy?

- A too ambitious project for a continental competition framework with rules on cartels, abuse of dominance, mergers and a continental competition authority would not be a right approach**
- A continental competition framework should build upon pre-existing national and regional frameworks...**
- A continental competition framework should only address issues that cannot be best dealt with at the regional/national level**
- Issue of ...acceptance and articulation between continental, regional and national enforcement**

As currently designed, the protocol would affect enforcement at the national and regional levels....

4 Priorities looking forwards...

Regulation/enforcement in digital markets

Economic perspectives of digitalization

❑ Digitalization and innovation in many sectors

- **Industrial sector:** (« industrie 4.0 ») (innovation in products and processes)
- **Commercial sector:** creation of new business models

❑ What is at stake for developing countries...

- Digitalization and international competitiveness
- **Creating business models that are applicable across sectors:** agriculture, health, education etc....
- **Developing «startups»** that could compete with multinational platforms
- **Need investments in infrastructures:** access to internet, telecommunications, energy...
- **Avoiding the “digital divide”**
- **Issue of «data colonialism»**

4 Priorities looking forwards...

Regulation/enforcement in digital markets

Legal/regulatory dimension of digitalization of markets (Drexl)

❑ Applicable law: are they suitable to digital markets?

- Laws regulating personal data: emerging in many jurisdictions....
- Competition law
 - ➔ How to deal with platforms
 - ➔ **Interface with other policies** (protection of personal data, démocratie) ➔ nouvelle **discussion sur les objectifs**
- **Propriété intellectuelle (PI)**
 - ➔ Rôle of data as essential facility...
 - ➔ **Providing IP protection to data?**
- **Droit privé**
 - ➔ **Importance of contract law in data sharing**
- **Nombreux instruments de régulation par secteurs**

❑ New regulatory approaches?

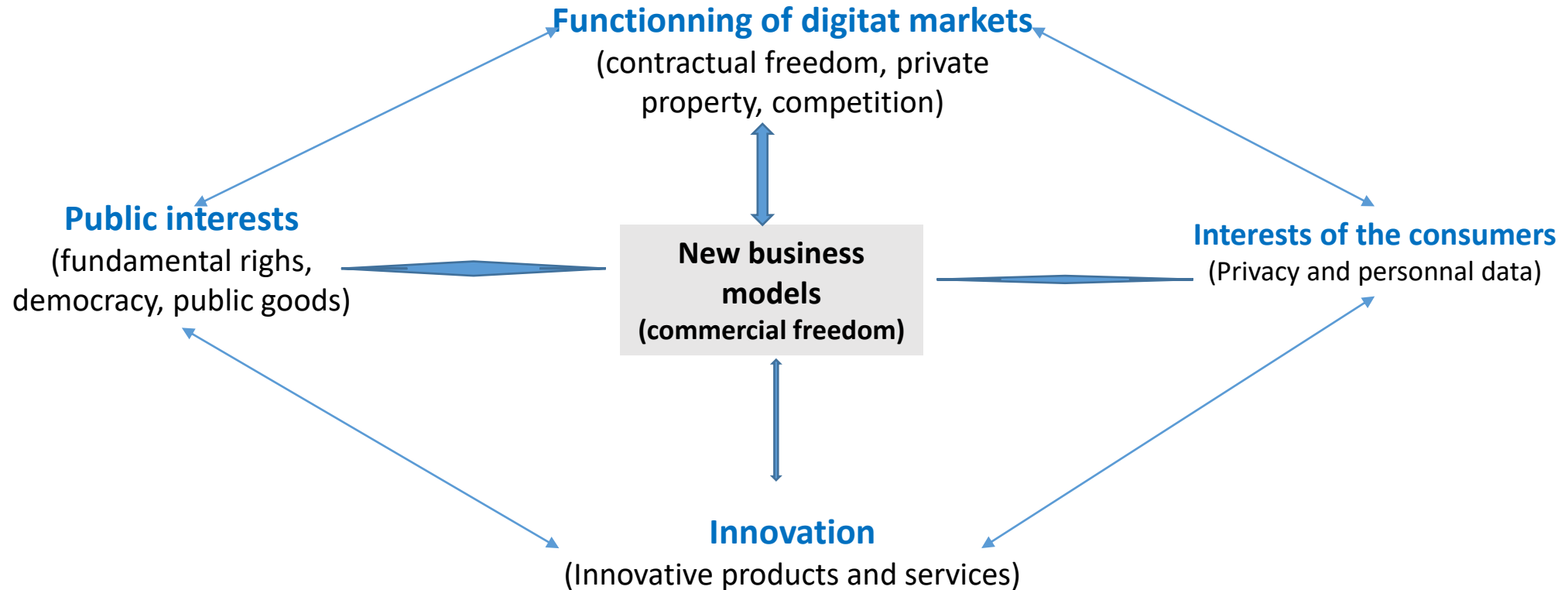
- **Regulatory perspective: Digital Markets Act**
- **Adapting current rules to digital markets...**

4 Priorities looking forwards...

Regulation/enforcement in digital markets

Regulatory theory of digitalization of markets (Josef Drexl)

Balancing different interests



4 Priorities looking forwards...

Regulation of the Data Economy in Emerging Economies

Shaping Data-Sharing Policies to Promote the Sustainable Development Goals

I. Hypothesis

The data economy has great potential for emerging economies to achieve sustainable development goals (SDGs). Leveraging this potential depends on correctly framing data-sharing policies.

II. Research Questions

- **Descriptive:**
 - What are the obstacles to data sharing in emerging economies?
 - What are the data-related business models emerging in these countries? To what extent are data-sharing approaches reflected in these business models?
 - Where does the attainment of SDGs depend on increased data sharing?
- **Comparative:**
 - What are the emerging policies and trends in different jurisdictions?
 - What kind of laws are adopted in the field of data sharing?
- **Evaluative:**
 - To what extent do existing rules and policies in the field of data sharing serve the SDGs?
 - How can they be adapted with specific focus on different subfields of regulations, such as B2G, B2B, PSI?



https://www.un.org/development/desa/pubs/2019/09/smart-farming-using-tech-to-boost-productivity-and-income-in-rural-areas-report.html

III. Methodology

- Develop a taxonomy of features relevant for data sharing in emerging economies
- Qualitative research using participatory formats
 - Workshops and outreach activity with local stakeholders from Latin America, Africa and South/South-East Asia
 - Further workshops focused on topical sub-fields, e.g., data sharing in B2B, B2G context
- Interdisciplinary research
 - Taking a holistic political-economy approach to study the functioning of data-related markets in the context of emerging economies

IV. Research Goals

- To define a holistic *normative* regulatory theory on promoting data sharing that responds to different interests and public interest goals in emerging economies
- To shape more targeted policies for data sharing in emerging economies
- To assist jurisdictions in the context of legal reforms

Team leader
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