Book Review of Fox and Bakhoum: Making Markets Work for Africa (OUP, 2019)

By:

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September 17, 2019

There is a small but growing literature focused on African competition law and policy. We have five chapters including one co-authored by Mor Bakhoum in Drexl et al., Competition Policy and Regional Integration in Developing Countries (2012) (a volume to which Eleanor Fox also contributed) as well as Moodaliyar & Roberts, The Development of Competition Law and Economics in South Africa (2012) and Roberts, Competition in Africa: Insights from Key Industries (2016). Recent additions include Klaaren, Roberts, and Valodia, Competition Law and Economic Regulation: Addressing Market Power in Southern Africa (2017) and *Competition and Regulation for Inclusive Growth in Southern Africa* (2019). Probably the best story-telling is in the memoir by David Lewis, Thieves at the Dinner Table: Enforcing the Competition Act, a Personal Account (2012). Such a list does not include journal articles nor the growing body of works focused on elaborating the competition law

jurisprudence in national jurisdictions such as Kenya (Mey,Competition Law in Kenya, 2017) and Zimbabwe (Mucheche, Competition Law in Zimbabwe, 2018). Assiduous Afronomics readers could certainly add to this list (please do!).

Eleanor Fox and Mor Bakhoum's Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa (Oxford University Press, 2019) is very much part of this literature. Their prior work noted above on the theory and practice of regional free trade agreements in developing countries and in particular the West African Economic and Monetary Union (WAEMU) has clearly led them to this current collaborative Africa-framed research. To take just one further example, Bakhoum's Revue internationale de droit economique article on the key topic of concurrent jurisdiction is part of the conceptual lead-up to this work.

Arguably, Fox and Bakhoum's *Making Markets Work for Africa* does more than take part in this literature, it helps bring it into focus, crystallizing its insights and articulating a number of its internal debates. Perhaps this assessment should be nuanced a bit. Despite their extensive footnotes and their admirable collaborative scholarship and drive to work from and with African sources (for instance with the Quarterly Competition Review produced by CCRED), the book is focused more on the policy problem than on the existing literature about the problem. This is not a book about books; it is a book about identifying a complex economic situation with challenges and opportunities and charting and driving a particular line in favour of a better life for Africa's population.

This book is the first sustained and nearly-comprehensive full length treatment of competition law and policy in contemporary Africa. Its focus is on the countries and regions of sub-Saharan Africa – thus not including for detailed attention the economies of North Africa. If you are looking for an informed and expert dive into the competition law in an African jurisdiction you are in luck for several countries: Senegal, Ivory Coast, Mali, Kenya, Namibia, Botswana, Zambia, Tanzania, Zimbabwe, Mauritius, Malawi and South Africa.

This breadth across the African continent is a large part of the value proposition of this work. The book should pave the way for the development of a new field within African international economic law -- African competition law.

The book very much has the regional economic communities of Africa as well as its nation-states in its scope. Two specific points Fox & Bakhoum make regarding African experiences of regional integration are worth mentioning here. First, they tell the story of how the West African Economic and Monetary Union (WAEMU) has "preempted member states' domestic competition laws, and [how] it has not filled this void with regional or local enforcement." (32-33). Established in 1994, WAEMU enacted a regional competition law in 2002 and set up an office within the WAEMU Commission for competition matters in 2007. Since this regional law's jurisdiction extends even to cases affecting only national markets with no cross-border trade, Fox and Bakhoum note "there is little room for the states to enforce their own national competition policies." While an institutional reform process was launched in 2011, it lost momentum a few years later. (142-150).

Second, Fox & Bakhoum relate how the Common Market for Eastern and Southern Africa (COMESA) Competition Commission dealt with several megamergers with large and deep effects on the economies of the member states in the fields of cement, seeds, and fertilizer. (136-139). The merger between the two firms of Holcim and Lafarge created the largest cement producer in Africa (and globally) and one active in twelve of the member states of COMESA. The Commission cleared their merger without conditions in a two-page decision on 18 November 2014. The analysis consisted of a single sentence: "The CID established that the transaction without conditions would not frustrate the single market objective of the Treaty in that it does not have an appreciable effect on trade between Member States." Fox and Bakhoum make their point regarding this kid-gloves treatment in the following three sentences: "Perhaps the authority believed that, if these two market leaders were not competing in a national market, their merger could not affect cross-border trade and there could be no competition problem. But if these two dominant cement producers were not competition in a national African market, that *was* the problem (emphasis in the original). The big cement producers in Africa are suspected of strategic allocation of national markets." (138).

Beyond its crystallization of the policy problematic and its Africa-wide focus on competition law and policy, *Making Markets Work in Africa* adds a further point not generally seen in the literature – a clear and empirical focus on the

interrelationship of trade and competition. Even though this is a book about competition law and policy, it is important to say trade and competition and not competition and trade. As Fox and Bakhoum observe, "[m]ost regional organizations are motivated by benefits in trade (lower trade barriers), not competition (freedom from private firm restraints). … The competition project must fit within the tade mandate, not vice versa." (121-122). Still, it is the combination of the two that holds most promise: "One of the most dramatic contributions a common market can make is integrating the trade and competition disciplines. This is because a huge share of the barriers that encumber African markets and keep them from working for the people are a combination of state restraints (dealt with by trade law or its internal market counterpoint – free movement law) and private restraints (dealt with by competition law). … The integration of trade and competition disciplines is underdeveloped in general in the world and is an area of opportunity waiting to be taken in Africa in the African common markets." (122).

There are two particular nuances to this book that should be appreciated by new readers to the work of Fox and Bakhoum. The first is their attention to the enforcement and implementation of competition law and policy. In a mode similar to the work of James Gathii (*African Regional Trade Agreements as Legal Regimes*, 2011)) on African trade regimes, Fox and Bakhoum engage in sociolegal enquiry – they want to know how regimes are actually working – or not working as the case may be. For instance, their conclusion regarding West Africa is direct and to the point: "It is a striking fact that there is virtually no competition law enforcement in French West Africa and no merger control law." (39). This brings out one of the senses of the book's title "Making Markets Work" – for Fox and Bakhoum, setting up rules and watching market participants interact does not lead to a working market. For markets to work, the rules must not only be set but be enforced. It equally appears to be a concern with the capacity for enforcement through a set of competition institutions – rather than the cast of the competition law and rules themselves – that determines the interesting argument Fox and Bakhoum make in Chapter 7 opposing a hedge-hog like "strong view of convergence to 'international standards' based on efficiency and consumer welfare." (169).

The second nuance is their attention to marginalized populations and political

economy. In their words, the thesis of the book is “Africa needs more ‘market’ but not the kind that simply works for powerful interests. It needs markets governed by rules that control the power of the powerful and unleash the talents and energies of the masses of people long left out of the economic enterprise.” (xix). Those last seven words can easily be read concurrently in national and global frames. Fox and Bakhoum should be commended for asking the key questions: “What would the competition law look like if it were written by Africans for Africa, and by Africans who are not the elite? What would a pro-outsider, pro-inclusive development anti-trust policy value?” (180). For Fox and Bakhoum, such a policy “would value a free and open marketplace without privilege or favor. This set of values is especially critical for nations and market players without economic power and especially for those populations in societies ruled by a few privileged families or firms or by autocrats. Clogging the channels with privileged actors especially hurts the outsider and keeps the poor poor. It reinforces a two-tiered economy and can constantly increase the wealth and inequality gap.” (180).

Regarding trade and competition, the publication of Making Markets Work comes at an important time. In May 2019, the African Continental Free Trade Agreement (AfCFTA) came into force and in July Nigeria signed the agreement, making it nearly comprehensive across Africa, at least at signature level. AfCFTA has a Phase II set of negotiations which appear likely to begin in earnest in the next several months and which cover competition, intellectual property, and investment protocols.

Making Markets Work shows that the work of enforcing market regulation and encouraging and protecting competitiveness in African markets will not wait for continent-wide negotiations to be concluded. The business of building the capacity of market regulators and thickening the rules of the competition game is happening right now across the regions of West, Eastern and Southern Africa. That project may be built upon and ought to be improved in a number of respects in order to improve the welfare and the economics prospects and participation of the majority of Africa’s population. Fox and Bakhoum have done well to chart these developments at a global time full of both challenge and hope.

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