Reflections on Making Markets Work for Africa and the Structure, Function and Challenges of Nigeria's new Anti-Trust Regulator

By:

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Introduction

Making Markets Work for Africa is a courageous attempt to bring order to the sparse and often chaotic studies of competition law and policy in Africa. The reader is immediately struck by the logical style of the authors followed by the skilful presentation of the often-esoteric issues of competition law across the different chapters of the book. The text also serves as a well-timed primer on African competition law which may be useful for the reform of existing competition regimes or the introduction of new ones.

The core thesis of the book is a simple but special one. It is that Africa needs more market but not the kind that simply works for powerful interests (p.2).

This is a sobering message for a continent whose vast resources are largely concentrated in the hands of a few not the many.

In advancing this thesis, Professor Fox and Dr Bakhoum adopt a rather panoramic approach which allows for a comparative study of the contours of Anti-trust regimes in over eight African countries, an analysis of the efficacy of regional cooperative arrangements and a forward-thinking proposal on the future of African Competition Law. The former aspect has informed this note which reflects on the contours of Nigeria's new anti-trust regime using ideas unveiled in Fox's and Bakhoum's seminal treatise. This note fulfils its objectives in two sections. The first provides a bit of background on the tortuous journey to a competition regime in Nigeria and the second considers the design, functions and challenges of Nigeria's new competition Agency, the Federal Competition and Consumer Protection Commission (FCCPC).

The Journey to a Consolidated Anti-Trust Regime in Nigeria

Early accounts suggest that Nigeria's search for a consolidated Competition regime began 17 years ago following a provocative speech by the then Chairman of the Nigerian Bureau of Public Enterprises, Mallam Nasiru El-Rufai. In that speech, El-Rufai called for the introduction of a 'competition regime' to guard against what he perceived as the destructive effects of 'foreign dumping' on local businesses.

What followed this rather emotive speech was hostility, dither and indecision at the legislative levels which stymied a number of attempts to pass a consolidated competition law in Nigeria. In the absence of such legislation, several government agencies were handed limited competition-related powers to keep the show on the road.

For instance, the Securities and Exchange Commission (SEC) was granted merger control powers by its enabling act, the Investment Securities Act 2007. This was also the case for the Nigerian Communications Commission (NCC) whose supervisory powers extended to competition-related matters within the Nigerian telecommunications sector.

This somewhat ‘staggered’ approach to competition supervision came to an end in February 2019 when the Federal Competition and Consumer Protection Act 2018 – a consolidated competition bill – was signed into law by President Muhammadu Buhari. The law replaced the previous sectorial approach with a blended regime for Anti-Trust regulation and supervision.

The Act’s notable features include the creation of a specialist Anti-trust agency with cross-sectoral regulatory and supervisory powers. The act also created a bespoke, adjudicative tribunal for competition-related matters and outlawed a number of market-distorting practices including the abuse of dominant positions, cartelisation, monopolies and the use of restrictive agreements.

Structure, Function and Challenges of Nigeria’s Anti-trust Regulator

Of particular import is Nigeria’s new Anti-trust agency, the Federal Competition and Consumer Protection Commission (FCCPC) which is operationalised as an ‘ integrated competition agency’ with cross-sectoral investigatory and enforcement powers. The agency’s statutory responsibilities include market enforcement, merger control and consumer protection.

In carrying out these undoubtedly crucial functions, the FCCPC is likely to be encumbered by three challenges: Regulatory capacity, Industry Capture. and Weak Enforcement. Notable capacity issues include the lack of technical expertise in competition law within Nigeria’s economic and professional space. This is likely to be exacerbated by data gaps and the complexities of policing market conduct in an economy with a large informal sector. These gaps may affect the ability of the commission to carry out its important responsibilities, at least, in the interim. In addressing the above challenges, the FCCPC should consider some of the ideas set out in Fox’s and Bakhoum’s book which includes the appointment of qualified staff, market familiarisation exercises and participation in key capacity building fora like the African Competition Forum (ACF) and the International Competition Network (ICN) (p. 22, 164, 201, 203, 262). The ACF and ICN, as Fox and Bakhoum argue, have been successful in scaling up the institutional competences of member organisations through their focus on peer learning, cross fertilisation, norm generation and benchmarking (p. 22, 164, 201, 203, 205). These are undoubtedly useful exercises for any

competition agency.

A further challenge for the FCCPC is the risk of ‘regulatory capture’. This occurs where private interests manipulate rules for their own benefit. This challenge is in no way isolated to Nigeria. Indeed, Fox and Bakhoum note in their seminal text that the risks of corruption and capture are present in markets across Africa (p. 45, 113, 262). This is equally true of developing countries beyond Africa where organised private interests have often entrenched their monopoly strongholds by influencing the design and administration of competition policy. In addressing the risks of capture, no efforts should be spared within the FCCPC. Key preventative steps include operational transparency and due process in the enforcement of the Competition Act (p.262). This should be supplemented by appropriate accountability mechanisms including strong parliamentary and judicial oversight.

The third and final challenge is the issue of weak enforcement. This is real in an economy like Nigeria with a poor record of norm implementation. The risk, therefore, is a business as usual approach under which laws are promulgated but seldom enforced. If the FCCPC is to earn its crust, it must proactively enforce the provisions of the Competition Act against businesses both big and small. In carrying out these activities, the FCCPC should bear in mind the hard lessons of poor enforcement within comparable regimes across Africa much of which is set out in Fox’s and Bakhoum’s text (p. 45, 85, 262). This might provide enough of a reality check of the true scale and importance of its work.

In conclusion, *Making Markets Work for Africa* lays the groundwork for appropriate market governance across Africa. Its contents are also a welcome addition to the growing debate on the democratisation of market structures across the world’s poorest continent. Professor Fox and Dr Bakhoum deserve significant credit for their efforts.

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