Reflections on Fox and Bakhoum's Making Markets Work for Africa (OUP, 2019)

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Market-based economic development has in many countries of sub-Saharan Africa taken off at breakneck speed in the past 15-20 years – after many decades of stagnation and setbacks. The rapid diffusion of wireless telecommunications technology, a powerful contemporary illustration of what Gerschenkron (1962) in his famous study of 19th century Europe called "leap-frog development," has through its ICT infrastructure enabled the indigenous formation of national and regional markets that until recently were literally unthinkable, such as the financial market made possible by the M-Pesa app, developed by Kenyan engineers (Asongu 2013; Aker and Mbiti 2010; Mbiti and Weil 2016; though cf. Chikalipah 2017). Rwanda, meanwhile, became a hub for drone technology development – spurred in part by regulatory gaps that eventually proved problematic but illustrating that even landlocked, small, sub-Saharan African countries can be an important node in the development of

cutting edge commercial technologies (Krieger, Wolf and Reuter 2018:20ff and www.africandroneforum.org). Just as important as these prestigious developments are the many small economic opportunities created for industrious, entrepreneurial people in a wide range of sectors, including in agriculture – in countries where often more than half the population depends on farming for much of its livelihood.

Unfortunately, however, the reality of this hope-inspiring development still lags far behind its promise, undermined by high poverty levels and poor governance in the region. In many African countries, Fox and Bakhoum observe, the benefits of the market economy accrue highly disproportionately to established elites, because entrenched, economically and politically powerful actors manipulate those markets, denying access and opportunity to possible competitors: In Sub-Saharan Africa, "restrains that subvert the market keep the powerful powerful, and keep the markets from working for the people" [xix]. It is this observation that motivates Fox and Bakhoum's book-length inquiry into "how competition law expertise and perspective" may be used to increase "the chance[s] to participate in" the market and "enrich the lives of the people, especially the poorer population" [xvii].

Toward this end, the carefully researched yet highly accessible book includes a comparative analysis of 17 sub-Saharan African countries' competition laws and policies, going beyond an analysis of the black-letter law to also examine the great variance in enforcement and more generally in implementation. As the book illustrates, Africa is not just a great place to gain a better understanding of how markets work, it may also be the most exciting place for macro- and micro-level studies of the governance of markets through competition law and policy: The 54 countries (and now six regional bodies) of Sub-Saharan African have, in the realm of competition law and policy, in recent years been exceptionally dynamic in establishing competition laws and/or agencies not only at the national level (in many cases for the first time) but also for five of the six(!) partly overlapping regional bodies in Africa. While some of the regional jurisdictions in Africa have started to receive scholarly attention (Bakhoum and Molestina 2011; Lipimile 2011; Mamhare 2011; Ngom 2011; Angwenyi 2013; Chisanga*et al.*2014; Mbongwe*et al.*2014; Molestina 2019), the book stands out for also offering for the first time a comparison of several

African regional regimes, focusing especially on WAEMU and ECOWAS, including their interactions with each other and with the national competition regimes of the member states.[1] In the remainder of this review, we seek to highlight a few of the book's important, original insights and contribution, offer some critical reflections on the research design, and sketch an agenda for further research.

Original Insights and Important Contributions

The book makes numerous valuable, important contributions to our knowledge and understanding of competition law and policy in Africa. We highlight four.

First, Fox and Bakhoum contextualize competition law by describing (in chapters 2 and 3) the structure and other key characteristic of markets in numerous African countries, including the economic and political history of those countries and their markets, as well as the legacies of colonization and decolonization – and by highlighting more broadly the economic challenges and needs of the people of Africa. This analysis leads them to ask whether the standard competition law (and policy) developed in advanced industrialized economies is the "right one for the poor, resource starved developing countries with weak markets and high barriers to entry and only a handful of officials armed to enforce the law against well-resourced opponents" [8]. In doing so, they challenge competition agencies at both the national and the regional levels to (re)consider what the goals of their competition laws are and should be.

Second, considering the markets and people of Africa as having different needs – they need, above all, development and economic inclusiveness – Fox and Bakhoum ask: "What would competition law look like if it were written by Africans for Africa […] and [for] pro-outsider, pro-inclusive development… ?" [180]. Their answer is: It would focus on the most harmful restraints and the most pressing needs of people that are poor and without power [185-194]. And lest such arguments might be dismissed as unrealistic, they provide examples of competition laws and agencies addressing "debilitating state and [private] trade restraints," and competition authorities indeed "making a difference" [164].

Third, Fox and Bakhoum do not just put forth a normative argument but also provide positive analyses of several African countries' competition laws, noting distinctive features that are not found in neither the U.S. nor the European tradition. For example , they highlight the prohibition against the abuse of bargaining power in lopsided commercial relationships ("Abuse of Economic Dependence" [35f]), even where such bargaining power is not grounded in monopolistic or generally market-dominating economic position of the power-wielding economic actor – which has been a common feature of several West African competition laws since the 1990s.

Fourth and relatedly, the book examines how Sub-Saharan African countries, despite enforcement challenges, have used competition law and policy tool to make the markets work for the poor people. Fox and Bakhoum offer numerous specific examples of competition agencies in Africa pursuing/choosing cases that make a real difference in the daily lives of a large number of people, including many poor people, e.g., by focusing on markets for basic consumer goods, when cartels or abuse of market power by private or public actors keeps prices for such goods artificially high (e.g., in chapter 5 on South Africa).

Critiques

Fox and Bakhoum analyze in some depth the competition law and policy of 17 African countries: the 8 member states of the West African Economic and Monetary Union (WAEMU) with their French or Portuguese colonial legacies, 8 Central and Eastern African countries with mostly British colonial legacies (Botswana, Kenya, Malawi, Mauritius, Namibia, Tanzania, Zambia, Zimbabwe) and South Africa, to which the book devotes a separate, richly insightful chapter – plus the five partly overlapping regional competition regimes. In just over two hundred concise pages, they provide a wealth of information about, and insights into, these African competition regimes. At the same time, the lack of an explicit rationale for selecting these countries and more systematic comparisons within and across the chapters limits our ability to draw firm conclusions about what is distinctive about competition law and policy in Africa and to distinguish between systematic and idiosyncratic findings.

For instance, while the lack of a national-level competition law in Guinea Bissau

is clearly noteworthy [24f], it is hard to assess the consequences of not having a national law in the context of a preeminent regional law without an explicit comparison with other WAEMU member states that had prior national laws. The section on Senegal offers an implicit comparison, but Senegal clearly differs from Guinea Bissau on many dimensions, as the authors note.

Likewise, when Fox and Bakhoum suggest that they have restricted the analysis to countries that "have a functioning competition law in place" [xxi n1], it raises the question whether the findings are bound to be inferentially biased because analyses of the adoption of competition laws (Kronthaler and Stephan 2007; Parakkal 2011; Weymouth 2016; Büthe and Minhas 2019)suggest that such countries systematically differ from countries that do not. We would have liked to see the authors consider these inferential challenges in their research design or address them explicitly in their analysis.

Similar questions about case selection arise when Fox and Bakhoum discuss the challenges that will arise for regional competition law enforcement when the ECOWAS competition regime becomes operational, given the partially overlapping membership of ECOWAS and WAEMU. This analysis is very insightful and contributes to our knowledge of multi-level regulatory systems in Africa at a time when negotiations about a continental competition policy for sub-Saharan Africa are underway in the context of ACFTA. However, jurisdictional conflicts between WAEMU and ECOWAS are yet to occur, whereas the Competition Commissions of COMESA, EAC, and SADC have already had to address jurisdictional conflicts given their partly overlapping member states. COMESA has also had to address jurisdictional conflicts with its Member States – most prominently in 2013, when Kenya invoked jurisdiction over a merger meeting the regional dimension test of COMESA – which prompted COMESA to amend its regulations, setting out merger thresholds (above zero) for the first time. The authors' focus on the ECOWAS-WAEMU case also seems to have caused them to overlook the already existing COMESA–EAC–SADC discussions over setting up a tripartite cooperation mechanism as a way to address the issue of jurisdictional conflict.

An Agenda for Future Research

It is the hallmark of great scholarship that, in addition to answering interesting and important questions, it also raises a number of new ones. As Max Weber suggested a century ago (1919), it is what makes advances in scientific understanding possible. Focused on practically useful policy recommendations – which tend to be more effective when presented without too many caveats about the tentative, inherently somewhat uncertain nature of scientific knowledge – Fox and Bakhoum do not lay out a research agenda in their concluding chapter, as more typical academic books often do. But they do so implicitly. Reflecting on their book, we see at least issues that future research should address to further advance our understanding of competition law and policy in Africa.

In chapter 2, the book offers a very brief, broad brush overview of the development of modern competition law and policy since the late 19thcentury, subtitled "The View from Above." It is a view from far above and hence – inevitably – leaves out much nuance. Scholars specializing in U.S. antitrust, EU competition law, and the history of international trade institutions may reasonably object to various aspects of their depiction, but as background information for Fox and Bakhoum's analysis of the development of competition law and policy in numerous countries of sub-Saharan Africa, it works well enough. However, the omission of almost all political conflict over the adoption of competition law and its enforcement from this brief history of competition law and policy, might falsely give the impression that – in advanced industrialized countries – putting in place effective competition policies and establishing meritocratic, independent agencies was easy. It wasn't. Fights over principles as well as specific cases consumed many of the early years in European countries and North America alike. The German adoption of a competition law in 1957 [p.10], grounded in the principles of the "ordo-liberal" Freiburg School (Großmann-Doerth 1933; Eucken 1934; Böhm, Eucken, and Großmann-Doerth 1936), while in retrospect critically important for the development of European competition law and policy (Böhm 1961; Koslowski 2000; Leucht 2009; Gormsen 2010), was at no point assured during the seven-year fight for such a law. And by the end of that fight, the purest believers in competition law and policy as means for safeguarding economic and political democracy appeared, at least initially, more marginalized than ascendant at both the German and European level, despite having "won" the fight. That the

early years of competition law and policy have in many African countries been messy, marked by sometimes intense conflicts, including fierce resistance of entrenched economic and political elites, therefore is much less a-typical than it might appear from the seemingly smooth success of developed countries' competition regimes. Our first recommendation for future research therefore is that much could be gained from detailed, explicitly comparative work on the early years of national and regional competition regimes. Such research should take seriously the inherently conflictual and hence political nature of establishing a form of market governance that involve using the power of the state and the law to constrain the excessive accumulation and (ab)use of market power.

Second, one of the book's notable strengths is that it calls attention to the regional competition regimes of which sub-Saharan Africa – uniquely – has several. Fox and Bakhoum focus, however, on WAEMU [142-152] which, as they show, has hindered the enforcement of competition law and policy within its region through preemption of national competition laws. Future work should examine in greater depth the full set of regional institutions, some of which, such as COMESA and SADC, appear to have developed quite differently.[2] When the SADC and COMESA competition rules were adopted, only a few members had competition regimes. However, as of summer 2019, numerous member countries had well-functioning and proactive competition regimes, e.g., South Africa and Kenya. The development of (and interactions between) Africa's regional competition regimes is a promising issue for future research.

Finally, Fox and Bakhoum point out that it is often public laws and regulations – and other governmental measures to protect the privileges of economic elites – that most undermine the effectiveness of competition law and act as barriers to market entry in African countries. To address this problem, agencies need to engage in competition *advocacy* rather than law enforcement (Glanz and Büthe 2016). Fox and Bakhoum point out that the government and state-owned enterprises are often excluded from the applicability of competition law [182 n5] and they note the efforts of the African Competition Forum to enhance advocacy [154], but advocacy surely warrants more sustained attention from scholars and African competition policy practitioners alike.

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[1] In addition, in Part 3, Fox and Bakhoum turn from analyses to recommendations for African countries' competition law and policy, building on previous work suggesting that the specific focus of competition law and policy should differ depending on country's level of economic development, because developing countries' needs differ – as well as what fostering market competition can accomplish (Evenett 2005; Fox 2011; Sokol, Cheng, and Lianos 2013; Gal*et al.*2015; Büthe and Aydin 2016). Here, the authors distinguish four stages of development and specify for each of them what a "pro-development, pro-poor" or "pro-outsider" competition law would look like. These prescriptions, building on their joint and separate prior work, are sure to receive much well-deserved attention from others; we therefore consciously refrain from focusing on them here.

[2] SADC has so far adopted a soft law approach to competition law convergence; by 2020 it seeks to adopt a hard law approach like its counterparts COMESA and EAC.

References

Aker, Jenny C., and Isaac M. Mbiti. 2010. "Mobile Phones and Economic Development in Africa." *Journal of Economic Perspectives* vol.24 no.3 (Summer): 207-232.

Angwenyi, Vincent N. 2013. *Competition Law and Regional Integration: The Common Market for Eastern and Southern Africa (COMESA)*.

Intellectual Property Law Center (MIPLC), Ludwig-Maximilans-Universität, München, Munich.

Asongu, Simplice A. 2013. "How Has Mobile Phone Penetration Stimulated Financial Development in Africa?" *Journal of African Business*vol.14 no.1 (April): 7-18.

Bakhoum, Mor, and Julia Molestina. 2011. "Institutional Coherence and Effectiveness of a Regional Competition Policy: The Case of the West African Economic and Monetary Union." In *Competition Policy and Regional Integration in Developing Countries*, edited by Josef Drexl*, et al.* Cheltenham, UK: Edward Elgar: 89-115.

Böhm, Franz. 1961. "Democracy and Economic Power." In *Cartel and Monopoly in Modern Law*. Karlsruhe: Verlag C. F. Müller: 25-45.

Böhm, Franz, Walter Eucken, and Hans Großmann-Doerth. 1936. "The Ordo Manifesto of 1936." In *The Making of Competition Policy: Legal and Economic Sources*, edited by Daniel A. Crane and Herbert Hovenkamp. New York: Oxford University Press: 254-264.

Büthe, Tim, and Umut Aydin, eds. 2016. *Success and Limts of Competition Law and Policy in Developing Countries*. Durham, NC: *Law and Contemporary Problems* symposium issue vol.79 no.4.

Büthe, Tim, and Shahryar Minhas. 2019. "The Global Diffusion of Competition Laws: A Spatial Analysis." Paper presented at George Washington University Law School, 4 September 2019 (first presented at the 6th Meeting of the UNCTAD Research Partnership Platform in the context of the 7th United Nations Conference to Review the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, Geneva, 10 July 2015).

Chikalipah, Sydney. 2017. "What Determines Financial Inclusion in Sub-Saharan Africa?" *African Journal of Economic and Management Studies* vol.8 no.1 (2017, special issue on 'Financial Services in Africa', edited by Daniel Makina): 8-18.

Chisanga, Brian*, et al.* 2014. "Competition in the Regional Sugar Sector: The Cases of Kenya, South Africa, Tanzania and Zambia." Paper presented at the pre-ICN Conference, 22 April 2014.

Eucken, Walter. 1934. *Kapitaltheoretische Untersuchungen*.

Jena: Gustav Fischer Verlag. Evenett, Simon J. 2005. "What is the Relationship between Competition Law and Policy and Economic Development." In *Competition Policy and Development in Asia*, edited by Douglas H. Brooks and Simon J. Evenett. London: Palgrave,: 1-26.

Fox, Eleanor M. 2011. "Competition, Development, and Regional Integration: In Search of a Competition Law Fit for Developing Countries." In *Competition Policy and Regional Integration in Developing Countries*, edited by Josef Drexl*, et al.* Cheltenham, UK: Edward Elgar: 273-290.

Gal, Michal S.*, et al.*, eds. 2015. *Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*. Cheltenham, UK–Northampton, MA: Edward Elgar.

Gerschenkron, Alexander. 1962. "Economic Backwardness in Historical Perspective." In *Economic Backwardnes in Historical Perspective: Essays*. Cambridge: Harvard University Press: 5-30.

Glanz, Rachel, and Tim Büthe. 2016. "Competition Advocacy as an Anti-Rent-Seeking Policy? An Empirical Analysis." In *Pursuing Competition and Regulatory Reforms for Achieving Sustainable Development Goals (Papers and Proceedings from the 4th Biennial CUTS/CIRC Competition, Regulation & Development Conference)*, edited by Rijit Sengupta. Jaipur (India): CUTS International: 51-72.

Gormsen, Liza Lovdahl. 2010. *A Principled Approach to Abuse of Dominance in European Competition Law*. Cambridge: Cambridge University Press.

Großmann-Doerth, Hans. 1933. *Selbstgeschaffenes Recht der Wirtschaft und staatliches Recht: Antrittsvorlesung vom 11. Mai 1933*.

Freiburg i. Br.: Wagner'sche Universitätsbuchhandlung. Koslowski, Peter, ed. 2000. *The Theory of Capitalism in the German Economic Tradition: Historism,*

Ordo-Liberalism, Critical Theory, and Solidarism. Berlin: Springer-Verlag.

Krieger, Zvika, Harrison Wolf, and Timothy Reuter. 2018. *Advanced Drone Operations Toolkit: Accelerating the Drone Revolution*. Geneva: World Economic Forum.

Kronthaler, Franz, and Johannes Stephan. 2007. "Factors Accounting for the Enactment of a Competition Law: An Empirical Analysis." *The Antitrust Bulletin* vol.52 no.2 (Summer): 137-168.

Leucht, Brigitte. 2009. "Transatlantic Policy Networks in the Creation of the First European Antitrust Law: Mediating Between American Anti-Trust and German Ordo-Liberalism." In *The History of the European Union: Origins of a Trans- and Supranational Polity, 1950-1972*, edited by Wolfram Kaiser, Brigitte Leucht and Morten Rasmussen. New York – London: Routledge: 56-73.

Lipimile, George K. 2011. "The COMESA Regional Competition Regulations." In *Competition Policy and Regional Integration in Developing Countries*, edited by Josef Drexl*, et al.* Cheltenham, UK: Edward Elgar: 205-228.

Mamhare, Galdmore. 2011. "Southern African Development Community (SADC) Regional Competition Policy." In *Competition Policy and Regional Integration in Developing Countries*, edited by Josef Drexl*, et al.* Cheltenham, UK: Edward Elgar: 56-65.

Mbiti, Isaac M., and David N. Weil. 2016. "Mobile Banking: The Impact of M-Pesa in Kenya." In *African Successes, Volume III: Modernization and Development*, edited by Sebastian Edwards, Simon Johnson and David N. Weil. Chicago: University of Chicago Press for the National Bureau of Economic Research: 247-293.

Mbongwe, Thabiso*, et al.* 2014. "Understanding Competition at the Regional Level: An Assessment of Competitive Dynamics in the Cement Industry across Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia." *African Competition Forum Report*(22 April 2014).

Molestina, Julia. 2019. *Regional Competition Law Enforcement in Developing Countries*. Berlin – New York: Springer Verlag.

Ngom, Mbissane. 2011. "Regional Integration and Competition Policy in the Economic Community of West African States (ECOWAS) Region." In *Competition Policy and Regional Integration in Developing Countries*, edited by Josef Drexl*, et al.* Cheltenham, UK: Edward Elgar: 116-133.

Parakkal, Raju. 2011. "Political Characteristics and Competition Law Enactment: A Cross-Country Empirical Analysis." *Antitrust Bulletin* vol.56 no.3 (Fall): 609-629.

Sokol, D. Daniel, Thomas K. Cheng, and Ioannis Lianos, eds. 2013. *Competition Law and Development*. Stanford, CA: Stanford University Press.

Weber, Max. 1919. "Wissenschaft als Beruf." In *Max Weber: Schriften zur Wissenschaftslehre*, edited by Michael Sukale. Stuttgart: Philipp Reclam junior, 1991: 237-273.

Weymouth, Stephen. 2016. "Competition Politics: Interest Groups, Democracy, and Antitrust Reform in Developing Countries." *Antitrust Bulletin* vol. 61 no.2 (June): 296-316.

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