Competition law and policy as a tool for development: a review of Making Markets Work for Africa: Markets, Development, and Competition Law in sub-Saharan Africa by Eleanor Fox and Mor Bakhoum

By:

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Introduction

Prior to the recent commencement of the Agreement Establishing the African Continental Free Trade Area, (AfCFTA), there was no region-wide competition treaty in Africa. Concerted efforts have been invested in uniting broader political, economic and legal policies at sub-Saharan Africa level except for

competition law and policy. Granted, the broader political, economic and legal order ought to lay the foundation for a harmonized competition law and policy dispensation. Eleanor Fox and Mor Bakhoum seem to be alive to this reality in their work, *Making Markets Work for Africa: Markets, Development, and Competition law in sub-Saharan Africa*. Their work brings together the historical, political, economic and legal underpinnings anchoring competition law and policy in today's sub-Saharan Africa. They do not stop at that. They focus on the legal texts, institutional set-up and performance, and effects of sub-regional regimes on competition law and policy implementation.

Fox and Bakhoum's fairly broad analysis focusing on West, East, and Southern African countries brings to fore the real challenges at play in Africa. It is a fragmented, stratified yet at times vertically united legal and policy landscape. While they observe the need for convergence of competition law at the continental or regional level, they note the different states of developmental progress among sub-Saharan African countries hence concede the need for the fragmented approach. From the outset, I laud their seminal work for its successful documentation of sub-Saharan Africa's unique competition law and policy statuses.

Multi-pronged approaches

The work disabuses its readers from the temptation to paint the situation in sub-Saharan Africa with one brush of homogeneity. Ironically, their choice of the book title arguably falls victim to this temptation. A glimpse at the title likely tempts one to think the book gives the singular solution to the competition law and policy question for sub-Saharan Africa. However, reading through one quickly discovers that the work voices the diverse sub-Saharan African problems and to some extent, possible supervening solutions. One is soon confronted with the fragmented and multi-pronged approaches that competition law and policy adherents in sub-Saharan Africa have to grapple and contend with. For instance, the authors impressively discuss the intriguing intra-institutional legal war in South Africa pitting the Competition Commission, the Competition Tribunal, and the Court of Appeal on a collision. The discussion demonstrates an authoritative and knowledgeable Court of Appeal that flexes its muscles in judicially activist manner so as to guide the Competition Commission and the Tribunal on the right road in the journey of competition

law and policy enforcement. Then again, a docile Common Market for Eastern and Southern Africa (COMESA) Competition Commission is called out for its capacity constraints which has seen it approve all mergers that have knocked upon its doors.

Political context

Additionally and most impressively, Fox and Bakhoum take time to interrogate the political contexts in which most of the competition authorities operate in their jurisdictions. It becomes evident that political stability has a proportional relationship to economic progress which in turn occasions advanced competition law and policy implementation. One significant phenomenon but less evident in the book, is the relationship between the colonial legacies and later Bretton Wood institutions' lobbying on the one part, and the competition law and policy implementation in these jurisdictions, on the other part.

Role of competition law and policy

The reader's mind is consistently occupied with the question what is the singular role of competition law and policy is. Does the answer reside in the title – making markets work in Africa? The authors painstakingly scan numerous cases across respective jurisdictions, with a pro-developmental lens. The results are mixed up with some case laws failing to pass muster in instances where the singular objective of competition law and policy function remains unarticulated. For instance, the South African Competition Tribunal observation, "our job in merger control is not to make the world a better place, only to prevent it from becoming worse as a result of a specific transaction"[1] throws public interest out of the window in favor of a narrow, restricted function.[2] On other hand, the authors cite with disapproval the excessive reliance of competition authorities on the state apparatuses which they suggest would undermine the authorities' decisional independence. A pressing yet unanswered question is whether competition law implementation should run in sync with state control. The authors appear to suggest borrowing from best practice that competition authorities ought to maintain a high degree of independence from the state. Their argument must be understood in light of the large presence of state owned enterprises in the market for which these competition authorities stand to regulate.

Overlapping mandate and regionalism

Arguably, one way of fettering the inevitability of state control is to support a regionalist approach. The authors capture sub-Sahara Africa's chequered past with regionalism. The COMESA Competition Commission is recognized as being most vibrant yet lacking in capacity. The fact that COMESA Competition Commission has previously approved mergers that its peer institutions either rejected or approved conditionally leaves a lot to be desired. The deleterious consequences of the West African Economic and Monetary Union (WAEMU) which saw the defanging of national competition authorities among the francophone nations is yet another slap on the face of regionalism. Yet the softer regionalist approaches such as the African Competition Network receive resounding endorsement for their successful contributions. Ultimately, the authors appear inclined towards empowered regional competition authorities. This is further augmented by their observation that anti-competition challenges invariably manifest with cross-border signatures. The sugar and poultry cartels in Zambia and its neighbors stand out to illustrate the phenomena.

Lacking inter-agency communication and collegiality

The authors' work demonstrates non-communication among different industrial sectors. One gets the feeling that industries, at best pay lip service to competition law, or at worst ignore competition law. Two cases are worth mention. In Kenya, the efforts by Little Cab to lobby the legislature to introduce price floors are a clear affront to competition law. It is wonderful that the Kenyan Competition Authority together with Uber successfully defeated such efforts. The second example is seen in the Insurance Association of Malawi's recommended premium rates for members' use which action was tantamount to engaging in a cartel. Incidentally, the association was responding to advice from the Registrar of Financial Institutions keen to save insurance companies from liquidity constraints. This is an instance of sacrificing Malawi competition law at the altar of keeping insurance companies afloat. One would think things would have panned out differently had the Registrar of Financial Institutions had a coffee with the Malawi Competition Authority officials.

Conclusion

The authors do an excellent job in mainstreaming the competition law and policy discourse at a sub-Saharan Africa level. Some injustice is occasioned by their decision to overlook the Republic of Nigeria although its membership of ECOWAS is noted. Their discussion fails to conclusively make a case for one institutional design over the others perhaps leaving room for innovative designs. One significant phenomenon but less evident in the book, is the relationship..." The authors possibly have the AFCFTA in mind as they call for an international regime that at the very least embraces convergence in terms of common principles and procedures.

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[1] In this case, the Tribunal continued to observe that their narrow construction of its jurisdiction has not always been appreciated by some intervenors who often sought remedies whose ambition lay beyond its purpose.

[2] http://www.saflii.org/za/cases/ZACT/2011/42.html. para 32.

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