



Some Opening Words for The Special Issue

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1 Welcome to African Competition Policy

We all originate from Africa. It is our great pleasure to welcome home readers, competition family, editors and the rest of the *Review of Industrial Organization* team. We are honoured to pen the opening words of this African edition.

The fact that there is an issue that is dedicated to African competition policy is in itself a testament to the firm presence and growing influence of African competition policy in the world and hopefully a sign that more attention will turn to African competition policy in the future. It has been our long-held wish that the growth of competition policy in Africa warrants academic attention in the form of a publication of this nature. Our wish is that this publication will inspire the establishment of an internationally recognised permanent dedicated journal on African competition policy.

We purposefully say *African* competition policy—rather than competition policy in Africa—because competition policy on the African continent has taken on a distinctly African flavour since its inception. Rather than securing market efficiencies alone, it has become clear that African competition policy seeks to address a range of socio-economic ills—such as inequality, unemployment and poverty—as well.

There is, in our view, solid justification for this: All competition laws are underpinned by a political economy context. Let us recall a few features of the African economic profile: Africa has more than a billion in population and has the youngest population of all the continents of the world. It has the largest and most diverse mineral resources, and has the greatest agricultural potential of any continent. Most of Africa has adopted a free-market economy model—at least notionally.

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But most citizens are engaged in subsistence farming and informal markets. Much of the large industry is directed at the extraction of natural resources for exports to Europe and Asia, which retains largely the same features of the colonial economy. It imports most processed goods and services from multinationals. Huge portions of the population live in poverty; many are unemployed; and in South Africa—where there are relatively well-developed markets—inequality is the highest in the world, and the economy is highly concentrated.

Studies that have been conducted by competition agencies indicate that restrictions in competition is paid for by the poor consumers. According to Fox and Bakhoum (2019), Africa needs markets; but competition policy must ensure that markets work for the marginalised. This naturally is preceded by a review that demonstrates—although there are encouraging notable exceptions—that markets have not worked for the greater good of the population on the continent.

African markets are bound to grow. The establishment of the African Continental Free Trade Area (ACFTA), various industrialisation projects that are especially focused on infrastructure, and the likely demographic dividend in a continent coming from a low base, all point to Africa's being the next frontier of economic growth.

What then should the competition policy underpinning this growth be? To put it bluntly: Africa is jaded about the ability and incentive of unfettered market competition to equalise societies and so is seeking more direct measures—within competition policy—to achieve these outcomes.

Fox (1987), for one, predicted the coming of a new age of thinking about distribution economics 1987—more than 10 years before South Africa's modern competition regime came into existence. In it she distinguished between the traditional Chicago school of thought and a new coalition that was arising at the time. She described members of the Chicago school as those who commonly asserted their preference for freedom from government interference in the economy. "*They assume*" she wrote "*that competition in markets untouched by positive law is robust, that the natural tendency of firms is to be efficient and that the progressive, industrious entrepreneur is likely to succeed.* On the other hand, "*members of the New Coalition ... worry about private as well as government power, the coercion and exclusion of the weak by the powerful and the distribution of power and opportunity. They take seriously the imperfections of free market competition.*" Eleanor ended her piece with a strong endorsement for the new coalition's way of thinking and a prediction that their approach would more likely be the blueprint for the second century of antitrust that was to come.

The second century of antitrust has come, and Africa is the new coalition that Fox predicted.

However, the call for competition issues to respond to its context is receiving attention beyond our own continent. Many are looking at competition law to address the continuing concentration of wealth and widening inequality within and between countries, and the challenges that emanate from digital markets and sustainability issues. Competition authorities no longer have the luxury of a neat platform for application of competition policy, and these challenges are, of course, greater in developing countries that face numerous social and economic challenges.

In South Africa, the context is that of a highly unequal society in the world, with unemployment above 30%, and conditions further worsened by Covid-19. The profile of the South African economy was by design, and there is a determination to use all available instruments to turn it around. The vision of an economy that is owned and shared by her people in South Africa is at least as old as the anti-apartheid struggle.

Kenya's market-based economy is one of the largest and most developed in eastern and central Africa with a GDP of \$95 Billion. Kenya is a lower middle-income country, and is characterised by a diverse and dynamic economy and a growing middle class that is entrepreneurial in nature. Whereas economic inequality still exists in Kenya, like other African countries, the Government's interventions and initiatives—which are guided by progressive development blueprints such as the Vision 2030 and the Economic Recovery Strategy (which was developed to counter the impact of Covid-19)—has the purpose to foster an inclusive society and create competitive and functional markets for Kenyans.

It is noteworthy that African governments have substantially invested in business drivers and enablers such as improving road networks, ports, and energy and telecommunication infrastructure, among others. Additionally, there has been significant progress in terms of removing regulatory barriers nationally and regionally, and the solidification of constitutionalism and democracy. These developments have improved the investment climate across Africa. To supplement and complement these efforts, and address the aforementioned desire for a more inclusive society, there has been great effort at elevating competition law enforcement: as a critical catalyst for sustainable economic development. This is the desire of most African countries. Competition laws reflect this desire.

There have been notable achievements in the development of competition law on the continent: In our own countries—Kenya and South Africa—competition law is enjoying unprecedented success. Owing to the vision of our African forefathers, the intellectual contributions of our cherished colleagues in foreign jurisdictions, and the tireless efforts of local stakeholders in the government, the private sector and civil society, today South Africa and Kenya have established competition laws that are administered by autonomous and respected agencies. Our enforcement of competition law has become a source of refuge for consumers and small firms, and our cases have become a matter of public debate in the media and a subject of interest to the judiciary and other branches of government.

Africa as a whole has seen enormous growth in the development of competition policy and the establishment of competition regulators in recent years. According to the African Competition Forum (ACF)—a grouping of competition agencies that exists to support agencies and promote competition as a whole—in 2000 there were just 13 African jurisdictions with competition laws. ACF was launched in Nairobi in 2011 with Kenya as the first Chair, South Africa as Vice Chair and Senegal as Secretary. Today, in 2020, the ACF has 47 members. This growth in the number of national competition authorities over the last 20 years reflects the increasing influence of competition policy on the development agenda. The deepening of competition law through progressive enactment and application of laws has occasioned better functioning markets that have yielded competitively priced and innovative services and products.

Over and above national regulators, Africa has a number of regional competition regulators, including the West African Economic Monetary Union (WAEMU), the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), the Economic Community of West African States (ECOWAS) and the Economic and Monetary Community of Central Africa (CEMAC).

The biggest economies in Africa all have a competition statute: The latest to join has been Nigeria. The Federal Competition and Consumer Protection Bill was passed by the Nigerian parliament in December 2017, and the President assented to it in February 2019. The new law established a Commission and Tribunal and covered cartels, dominance, anti-competitive practices, and mergers—as well as consumer protection. The Nigerian Federal Competition and Consumer Protection Commission—which administers the new law—has since become fully operational. Nigeria joins many other African countries in achieving this milestone.

A further indicator of the growing influence of competition policy on the African continent can be seen in the proposed competition policy protocol of the African Continental Free Trade Area (ACFTA) agreement. The ACFTA agreement was signed on 21 March 2018, and this event signaled the commitment of policy makers and African leaders to regional integration. As part of the ACFTA Phase II negotiations, signatories to the ACFTA agreement are currently in discussions about the most appropriate competition policy protocol to adopt in support of the ACFTA's goals. Incorporating competition policy in the ACFTA agreement is necessary to mitigate cross-border harms to competition and also to promote competition as a means of achieving Africa's development goals.

Competition agencies must now—preferably under the mantle of the ACF—apply themselves to the various options of implementing the agreement, including critically considering the option of installing a supranational competition agency. Whichever prescription is eventually adopted needs to be singularly focused on fast-tracking integration efforts and boosting intra-Africa trade. This opportunity should not heighten barriers to trade, but dismantle them for the collective advancement of our economies.

Although the number of agencies that have been established over time is worth celebrating, the greater accomplishment—to which we now turn—is what the effective implementation of competition law has been able to achieve on the continent. First among these is the overall approach that African agencies have taken to crafting their respective competition laws. Each country has determined the unique purpose for which competition law is required in its jurisdiction and has, thereafter, drafted laws that are suited to achieve the intended outcomes.

In South Africa, for instance, we had a need to correct the economic imbalances of our racially segregated past and to promote economic inclusion. For this reason, South Africa's competition laws include provisions that allow firms that are owned by historically disadvantaged persons to be exempted from competition in defined circumstances. Merger regulation and other instruments are used to promote public interests such as employment and small and medium enterprises. This approach to implementation has translated to a focused prioritisation: concrete actions that are targeted at achieving equity and uplifting the marginalised.

In this regard, a World Bank (2016) study concluded that by tackling four cartels—in wheat, maize, poultry and pharmaceuticals (these are goods that amount to just over 15% of the consumption basket of the poorest 10% in South Africa)—the reduction in the overcharge in prices was estimated to have reduced overall poverty by at least 0.40% points. Some 202,000 individuals were made better off and lifted above the poverty line through the lower prices that followed the actions that were taken by the South African competition authorities against these four cartels. The savings put an additional 1.6% back into the pockets of the poorest 10% by raising their disposable income—as the World Bank’s (2016) report demonstrated.

In Kenya, ours was largely a command economy before and immediately after we gained independence in 1963. The economy was characterised by institutionalised price fixing of key commodities by the Government; this was a policy that was meant to spur the agriculture sector: a key GDP contributor.

However, we gradually pivoted toward a free market in the 1980 s, with the setting up and operationalisation of laws, policies and institutions supportive of a liberalised economy. The Government progressively tapped competition law and policy enforcement as a driver of economic growth and inclusivity, with the aim of addressing restrictive trade practices that were throttling economic growth by increasing the cost of doing business for incumbents and erecting barriers to entry for both local and international investors.

Kenya’s competition law was developed with the overarching objective of enhancing the welfare of Kenyans, through addressing anti-competitive businesses practices but also, uniquely, protecting consumer rights. Today, the Kenyan economy is largely service-sector driven: It is powered by an educated and enterprising human capital component that is mostly young. Additionally, Kenya’s vibrant Micro, Small, & Medium Enterprises (MSMEs) contribute about 40% to the GDP; the majority of these enterprises are in the informal sector.

The drafters of our competition law attended to our unique socio-economic circumstances in various ways: With regard to mergers and acquisition transactions, our two-pronged analysis approach—impact on competition, and public interest concerns—seeks to secure employment opportunities for Kenyans. Additionally, our purpose is to ensure that approved mergers do not negatively impact SMEs, but instead support them to gain access to and compete in international markets. This is enforced through conditions that are precedent to approval.

Similarly, transactions that enhance the ability of our national industries to compete more favourably in international markets are welcomed. In order to reduce Kenya’s trade deficit—which stood at \$9.1 billion in 2020—Kenya also allows exemptions that permit businesses to engage in conduct that would otherwise be considered anti-competitive—but for a specific period of time.

In Kenya, one notable intervention was in the telecommunication sector: The country’s leading Mobile Network Operator (MNO) unjustifiably ring-fenced its mobile money agents in exclusivity contracts, which prohibited them from doing business with competitor firms. This impeded competition, handicapped the agents from expanding, and—more importantly—limited customers’ choices. We (the Competition Authority) ordered the telecommunications firm to expunge the clauses, which permitted the agents—who are usually small business persons—freely to engage

other MNOs and grow their businesses. Today, 223,000 agents are serving an ever-increasing client base of over 66 million registered mobile money users. Additionally, we ordered a reduction of Unstructured Supplementary Service Data (USSD) costs from Kshs. 10.00 to Kshs.1.00. The country's 57 million registered phone users heavily rely on USSD to access various services on their mobile phones and, therefore, the price reduction had a direct and positive impact on their transaction costs.

In the agriculture sector, Kenya dismantled barriers to entry that restricted competition in the production and export of purple tea. Rules in the sector—which is dominated by black tea producers—blocked competitors from joining the market. Our intervention created over 2,000 jobs through the entry of five factories that produce purple tea. Additionally, farmers have diversified their black tea-dominated enterprises so as also to grow the specialty tea—which fetches over 70% more per kilo in the market.

A more recent and notable development is Kenya's move to enforce the law against undertakings that abuse their Buyer Power—or, as it is commonly described, Superior Bargaining Position. This was made possible through amendments to our competition laws to address emerging issues in the retail sector, which had come under strain; this negatively affected big retail entities and their SME suppliers. Today, Kenya is investigating Abuse of Buyer Power cases in many sectors, including insurance, to ensure that strong buyers do not take advantage of their position to disadvantage their suppliers. Kenya has also relied on these provisions to monitor and address challenges in the retail sector with the objective of ensuring unfettered supply of essential goods to our population during the Covid-19 pandemic.

Last, in September 2020, the Kenya Competition Authority moved to automate fully all of its technical processes, which include the filing of mergers and exemption applications as well as registering restrictive trade practices and consumer complaints. The permanent operational switch has resulted in significant savings for our stakeholders and ourselves—especially with regard to printing costs since we no longer accept manual filings of cases. We have also recorded an 80% reduction in printer maintenance and stationery costs by a similar percentage—a testament to our contribution to sustainable consumption.

Most international mergers now require notification in one or more jurisdictions in Africa. We also have regional collaboration in enforcement against cartels and have made strides in getting our agencies to continue normal operations through use of technology where necessary.

For all of our accomplishments—which are rightly highlighted in the pages of this *Review*—our work as competition agencies in developing countries is not done. If we are to see the day when our people are lifted from the scourge of poverty, unemployment, and inequality, African competition agencies must: (1) advocate for competition across the continent; (2) assist in developing the capacity of new and established agencies to carry out their respective mandates; and (3) contribute to the growing body of knowledge and academic research in this area.

Although the growth of competition policy on the continent has had great momentum in recent years, there are still African countries without competition laws or an active competition agency. Therefore, there is a greater scope for adoption of competition laws on our continent.

Additionally, as new agencies emerge, there is the need to equip them with the skills and tools to carry out their work effectively.

Finally, there is a strong need for African competition practitioners to contribute to the growing body of knowledge and academic research in competition policy. Competition policy in Africa can only be seen as credible if it addresses the concerns that plague African markets. If it doesn't, it will soon become irrelevant in the eyes of the public—which will leave other policy instruments to achieve desired outcomes.

There is currently a dearth of literature and academic resources that target competition policy in Africa in a comprehensive way. Improving on this would spread learning across the continent and embolden African competition practitioners to develop jurisprudence that is uniquely suited to African market conditions. In addition, a growing body of literature on African competition policy could bear influence on more established foreign jurisdictions and possibly encourage a new approach to old persistent market failures in more mature markets.

The future of African competition policy has never looked brighter. But competition policy—no matter how well it is crafted—is not an end in itself. It must be judged on its objectives, unique to its environment. As just two of the many competition agencies that are working towards these outcomes in Africa, we are encouraged by the enormous development that has already taken place in this area and remain confident that Africa is equal to the task of delivering equity and shared prosperity to all of its people.

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