Book Review
Including Africa in the Global Competition Law System

Eleanor M. Fox and Mor Bakhoum
Making Markets Work for Africa
Oxford University Press 2019
Reviewed by David J. Gerber

Making Markets Work for Africa: Markets, Development, and Competition Law in Sub-Saharan Africa\(^1\) describes and assesses African competition laws and competition law experience and relates that experience to the broader competition law world. In doing so, it goes a long way toward filling a major void in the literature on competition law in the world. Africa has played a limited role in discussions of transnational competition law.\(^2\) South Africa has received more attention,\(^3\) but analysis of its decisions and development remains limited. This inattention to competition law in the past is understandable. There have been few competition law cases outside of South Africa, and representatives from African countries are not prominent at international competition law meetings and conferences. Finally, African countries produce few studies of cross-border competition law. As a result, it is difficult to learn what is happening in the region, and it is rare to find searching analysis of the factors influencing decisions there.

Now, however, the lack of information and insight relating to competition law experience in Africa threatens to hinder business and international investment there. Africa has become an important player in international commerce. Moreover, the operation of markets has become an important issue in many African countries, and the value of competition law is more widely recognized.

Making Markets Work for Africa is, therefore, of enormous value. It fills many of these holes, supplying abundant information and careful reflections and analysis. The book is valuable for those interested in global competition law and in the legal and economic situation in Africa. Competition law can be an important tool for economic, social, and even political development anywhere. Yet it has remained largely unused in much of the world. Its potential benefits have not been widely available in Africa.\(^4\) Why have competition law’s benefits been so confined there and how can we expand its use without creating greater harms from its abuse?

It would be difficult to imagine two authors who could bring greater expertise to this subject. Eleanor Fox has been at the forefront of scholarship on the transnational aspects of competition law for decades. She has written extensively and insightfully not only on U.S. antitrust, but also on

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\(^1\) ELEANOR M. FOX & MOR BAKHOUM, MAKING MARKETS WORK FOR AFRICA (2019).

\(^2\) There are a few exceptions. See, e.g., COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES (Josef Drexel et al., eds. 2012) (collecting six articles on African competition 2012).

\(^3\) See, e.g., COMPETITION LAW AND ECONOMIC REGULATION IN SOUTHERN AFRICA (Jonathan Klaaren & Simon Roberts, eds. 2017); DAVID LEWIS, ENFORCING COMPETITION LAW IN SOUTH AFRICA: THIEVES AT THE DINNER TABLE (2013); PRECIOUS N. NELOVU, COMPETITION LAW IN SOUTH AFRICA (2018).

\(^4\) For an overview and discussion, see DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS AND GLOBALIZATION (2010).
the competition law of Europe, Latin America, and other regions. Moreover, she has long had a
deep interest in Africa and African development. Her co-author, Mor Bakhoum, is a native of
Senegal, West Africa. From his position as a research scholar and professor at the Max Planck
Institute in Munich, Germany, he taught and analyzed issues of competition law and intellectual
property law on the transnational level. He was commissioned by the West African Economic and
Monetary Union (WAEMU) to conduct a major study of the institutional structure of regional inte-
gration there. He has recently returned to teach in his home country.

In this brief review, I outline the book’s descriptive material, summarize its analysis, and iden-
tify its major conclusions. I also offer some comments that locate it in the literature and suggest
potential directions for future work in the area.

Contents

The book usefully describes individual African competition law regimes and regional integration
institutions and developments. It also describes the actions of regimes that have tried to imple-
ment their laws.

National Competition Law Regimes. The first section categorizes regimes according to
geographical region. This structure facilitates generalizations and comparisons that can help
readers to find and assess material from the covered countries. The regimes in each region share
at least some characteristics that reflect economic, climatic and geographic features that pre-
dominate in the area, as well as similarities in their colonial experiences. For each region, the book
provides general background about these shared characteristics.

It then includes for each regime relevant practical material, including references to statutes,
institutions, and other factors that may influence decisions there. Where the competition author-
ity has been active, it includes significant decisions and evaluates the authority’s enforcement and
compliance efforts, taking account of the obstacles the authority faces.

The three categories are West Africa, East and South Africa, and the Republic of South Africa.
For West Africa, the authors note the differences among the more stable and competition-friendly
countries (above all, Senegal) and those that tend to be unstable and to show little evidence of
competition or its development and protection (e.g., Guinea-Bissau). They note that countries in
the region have often used price controls, and some still do. The focus is on Senegal, which had
begun to take competition law seriously prior to the creation of WAEMU but has been stymied in
its efforts to develop its own competition law. This effort at regional integration preempted na-
tional authorities from applying their competition laws, and this has hampered competition law devel-
opment in the area. I discuss this project below. WAEMU is now considering eliminating its pre-
emption of enforcement by national authorities.

Eastern and Southern Africa also present a varied picture in which some countries (notably,
Kenya and Zambia) have developed their competition laws and enforcement policies in significant
ways. Other countries in the region, such as Tanzania, have also shown serious interest in com-
petition law development, although the prognosis for their efforts remains guarded.

South Africa inhabits a category of its own. Building on the well-developed bureaucratic sys-
tem and the relatively high levels of education that were already in place before independence,
the competition law institutions tend to be solid, well-staffed, and generally well-respected. As the
authors put it, the South African regime has developed “one of the most outstanding even path-
breaking [competition laws] in the developing world.”

Legislatures and officials have responded

5 Fox & Bakhoum, supra note 1, at 89.
to the obstacles to development in Africa. They have, for example, sought to be more inclusive of the varying interests in society. In South Africa, these efforts include providing protections for minority-owned businesses. It also been fortunate to have internationally prominent and articulate high officials, including David Lewis, long-time chair of the Competition Tribunal and a highly respected voice for developing country competition law concerns in international discussions. Accordingly, the authors cover this regime more extensively than others, including discussion of significant cases and commentary on the dynamics of the regime.

**Regional Integration.** Regional integration is often seen as central to prospects for competition law development in Africa. Accordingly, the authors carefully examine these integration efforts. Many believe that integration is necessary to enable small and resource-challenged competition law regimes of Africa to combat the power and resources of foreign firms. Foreign firms have often stymied the efforts of national competition authorities in the region to limit the firms’ influence. To mention one example, foreign firms often located distributorships and even manufactured in South Africa. They then distributed their products through distributors in neighboring countries. For years, these agreements included provisions that impeded development, such as requirements that national distributors relinquish any right to use information they gained in performance of the contract, and instead transfer their information to the South African firm. When destination countries complained, the foreign firms were in a position to threaten to supply consumers from another country. Only when the affected countries agreed to combine forces in resisting such agreements were they able to eliminate some of these provisions.  

Integration can enhance competition law development but it has proven to be more difficult than some imagine. This was best shown perhaps in West Africa where, as noted above, the regional cooperation agreement creating WAEMU included a provision that precluded member state competition authorities from enforcing their competition laws. This took away incentives for competition law development, stifling efforts in countries such as Senegal that had begun serious competition law enforcement. The result has been an almost complete lack of enforcement anywhere.  

COMESA (Common Market for East and South Africa) is a newer regional grouping to which the book dedicates more extensive treatment. Structured along the lines of the European integration institutions, it seems poised to become a significant competition law player. First, several of its members, especially Kenya and Zambia, have significant experience in developing and enforcing their national competition laws. And second, the initial and current head of the competition law project is George Lipimile. As head of the competition authority in Zambia, Lipimile applied his competition law successfully. He also has broad knowledge of competition law in other countries as well as international contacts that derive in part from several years in the competition office of UNCTAD in Geneva. Above all, he is by all accounts committed to the development of competition law in Africa. As the book points out, the organization faces extensive coordination hurdles among the members, but it also shows significant potential for development that can be valuable in other regional contexts.

**Overview and Recommendations.** The authors then step back to assess the material they have presented and make recommendations for improving competition law in Africa. Here they

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6 See Gerber, supra note 4, at 256–57.

7 For discussion, see Mor Bakhoum, Delimitation and Exercise of Competence Between West African Economic and Monetary Union (WAEMU), and Its Member States in Competition Policy, 29 World Competition 653 (2006).
look more broadly at the competition law situation in Africa and relate it to other competition law regimes. In this part, which they call “roadmaps,” they pose two key questions for African countries: “What is needed by the nations, what is needed for the world?”

One component of the roadmap is essentially comparative. It looks at African experience through the lenses of four “clusters” of regimes, using a typology based on stages of competition law development. The first three clusters include African regimes: least developed, somewhat more developed, and developing well. (South Africa is a category of its own.) The fourth cluster includes the more fully developed competition law regimes, especially the United States and Europe.

For each of the African clusters the authors assess the current situation and provide suggestions for further development. They ask three main questions: (1) “What market restraints and uses harm the nation and its peoples the most?” (2) “What are the available pathways for addressing these restraints?”; and (3) “What are the most significant limitations that might prevent the competition authority from successfully challenging the restraints and how do these practical limits influence the scope, perspective, and ambition of the developing country’s competition law?”

Surveys of decision makers and analysts from the countries involved might answer these questions, but useful surveys would be impractical in some African countries. Moreover, there is limited available literature from the countries themselves that might provide useful answers to the questions. Instead, the authors answer these questions on the basis of their own knowledge of competition law experience there. At this stage of African competition law development, these are the most valuable answers we can hope to get, and they are very valuable indeed—filled with insights into the issues and enriched by knowledge of competition law experience elsewhere.

The book then relates its description and analysis of national regimes to international developments. It argues that “synergistic alignment” with other countries could be of much value for African regimes. The authors envision an alignment in which African countries would not necessarily copy Western models but instead learn from them and choose which measures to adopt.

The authors emphasize that Africa confronts developmental obstacles that call for a competition law response that differs from the competition law approaches in more economically developed parts of the world. They point to transnational efforts to reduce differences among competition laws and see “synergistic alignment” as the appropriate basis for such alignment. They also identify, however, some of the basic issues in achieving such alignment.

In a final chapter titled “Better laws for Africa: Pro-development, Pro-inclusion, Pro-outsider,” the authors provide their recommendations for the development of African competition law. They argue that competition law in Africa should be adapted to African circumstances and specify the types of policies that they consider appropriate for those circumstances. Basically, as the heading indicates, the laws should be more development oriented, more inclusive, and more aimed at reducing inequality. For example, they emphasize the need for African countries to target not only private restraints on competition, but also action by the state itself. They call for exemptions that support the development of small- and medium-sized businesses without enabling powerful firms to prevent the development that the exemptions are intended to provide. Another example: they note the potential value of private competition litigation and suggest procedural rules supporting class actions by consumers.

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8 Fox & Bakhous, supra note 1, at 159–78.
9 Id. at 160.
10 Id. at 176–78.
Further Down The Road

The breadth of coverage of this book as well as its assessments and insights can be of great value for practitioners, administrators, and scholars. For those with a practical interest in the competition law situation in Africa today, it provides information about relevant statutes and cases (where available). It also provides insights into how the competition law regimes actually work, and the dynamics of decision making. Those whose interests include policy or academic analysis will also find value in insights and analysis from a perspective that combines decades of experience in competition law in many contexts with deep commitment to responding to the obstacles that African countries face.

Yet the book is more. It is a pioneering work that provides a foundation for further research. It is the first comprehensive attempt to make sense of the African competition law experience. As such, it raises issues and questions for future writers. I note here a few of those areas and issues for which the book can serve as an important foundation:

First, competition law experience will develop soon in at least some African jurisdictions, and as those competition laws are interpreted and applied by African institutions, scholars will be able to use the descriptive elements of the book to structure and assimilate the new material. For example, the categories used to describe and assess current experience are likely to be further refined, allowing the authors to refine the insights and assessments the book provides.

Second, based on this work, a clearer picture of the relevant developmental models and pathways is likely to emerge. Making Markets Work for Africa is not always clear about the development model the authors are using for their assessments. It may be too early in African development to do that now, but further contours will emerge from further experience with developmental goals.

Third, these experiences and insights can lead to more nuanced views of which compliance methods work best under which circumstances. The authors put in the foreground the importance of enforcement as a source of compliance. Undoubtedly, enforcement is important, but other forms of achieving compliance may be equally or more effective in some circumstances. As the authors note, there are often major obstacles to enforcement, and experience may reveal which compliance-inducement methods tend to work best under which circumstances. For example, teaching has been an important focus in some other competition law contexts, including Europe. Persuasion and negotiation have also been effective. Consensus-building may turn out to be a particularly useful compliance tool in the African context.

Finally, Fox and Bakhoum’s descriptions and analyses of African developments will provide the basis for comparisons with other competition law experiences, not only with the United States and Europe, but also with the many other countries that have faced similar issues.11 These enriched comparisons are likely to be valuable for all who deal with competition law issues. They will also provide the material necessary for social science analysis.

The authors provide scope, depth, and insights related to competition law in Africa. It will be valuable far into the future, not only for those viewing African competition law from the outside, but also as a mirror for African decision makers themselves.●

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