**NEW THINKING IN COMPETITION REGULATION: ADJUSTING LAW AND ENFORCEMENT TO ADDRESS CHALLENGES OF AFRICAN MARKETS**


**Abstract**

Competition Law is at a crossroads. Its traditional tools appear increasingly incapable of addressing market failures, questions are raised whether the treatment of mergers over the years has directly contributed to highly concentrated markets and accusations abound that the enforcement model has been unduly accommodative of market players. Brandeisian thought is on the comeback, finding favour over the Chicago School of thought and its consumer welfare standard. Some blame this standard for what they see as endorsement of under-enforcement and enablement of anticompetitive conduct. At the core of this discourse is an age-old question: what is the purpose of competition law and how best can it be achieved. Historical experience has shown that there are no right answers to that question. Jurisdictions have adjusted policy from time to time to aptly serve the needs of their economies and citizens. This paper argues that the current watershed presents African countries with an apt opportunity to rethink their enforcement paradigms and forge approaches that optimally serve their developing economies. It further argues that an approach with economic development as its overarching goal is most ideal for African markets where concentration, inequality and barriers to entry exclude many from economic pathways. Enforcement should be angled towards growth and sustenance of robust inclusive markets. Where appropriate, the law may be carefully expanded to directly address the exigencies of markets. An example of such expansion is the introduction of provisions that regulate abuse of buyer power, a step some jurisdictions have already taken.

This article presents a review of the issues at hand from a historical perspective, establishing that goals of competition law and policy have in the past been adjusted to serve pertinent needs of economies. It further inquires into the ideal goals of competition policy for a developing jurisdiction and uses the Kenyan experience to illustrate that introduction and enforcement of abuse of buyer power provisions can be leveraged to enhance usefulness of competition law for African countries.

## BACKGROUND

The world of competition enforcement is in a flux. Increasing economic concentration and modern technological innovations have led many to call for scrutiny of the existing laws and how they are applied to these changing times. A common thread in recent writing relates to the adequacy or otherwiswe of the law and the favoured enforcement model, to address the needs of contemporary markets.[1] Discourse at competition law forums reflects the same concerns. Examples of topics at recent and upcoming forums include "Are market economies and the consumer welfare standard being overwhelmed by national interests, politics or progressive forces and policies?"[2]; "Should competition authorities care about fairness and if so how?";[3] "The new regulatory landscape: How will the new regulations fit together and where does it leave competition law?"[4]; and "Competition law in the digital era: Adapting to the new environment".[5]

Essentially, the question at hand is one of the what the law should do, that is, the outcome that enforcement should be targeted at. At its most basic, the span of the divide is between the position that what the law should safeguard is the process of competition and the opposing argument that focus should be on the outcome of competition.[6] Process-focused theories emphasis is on the functioning of the market mechanism, preferring a fragmented market structure and dynamism. Outcome-focused conceptions are driven by the socially desirable distribution that competitive markets are presumed to yield. Market conduct that increases consumer welfare is sanctioned.

Yet another spectrum to the question is whether non-economic, public interest considerations have a place in competition law. This discussion acquired prominence with the increased adoption of competition law among developing jurisdictions, many of whom grapple with high levels of poverty and unemployment and whose economies are heavily reliant on small enterprises and the informal sector.

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[1] Some examples: Hovenkamp H, *The looming crisis in antitrust economics* Boston University Law Review 2021 Vol 101. See especially Part III: Attacking bigness or protecting consumers?; Marty F. *Is the Consumer Welfare Obsolete? A European Union Competition Law Perspective* GREDEG Working Papers 2020-13, Groupe de REcherche en Droit, Economie, Gestion (GREDEG CNRS), Université Côte d'Azur, France; Klovers K and Kulick R 2022 *Is Concentration Actually Increasing, or Are We Just Defining Markets More Narrowly?*; Lande, Robert H. and Zerbe, Richard O., *The Sherman Act is a No-Fault Monopolization Statute: A Textualist Demonstration* American University Law Review, Vol. 70, 2020; Krzepicki, Alexander and Wright, Joshua D. and Yun, John M., *The Impulse to Condemn the Strange: Assessing Big Data in Antitrust* (March 11, 2020). CPI Antitrust Chronicle, Vol. 2, No. 2, pp. 16-20, February 2020, George Mason Law & Economics Research Paper No. 20-07.

[2] Fordham's 49th Annual Conference on International Antitrust Law & Policy in September 2022. Among the notable speakers are EVP Margrethe Vestager EU Commissioner Competition, Jonathan Kanter Assistant Attorney General US Department of Justice and Lina Khan Chair Federal Trade Commission

[3] Fordham Competition Law Institute 45th Annual Conference On International Antitrust Law And Policy September 2018

[4] https://informaconnect.com/competition-law-digital-era/

[5] Above.

[6] Dunne N Competition Law and Economic Regulation: Making and Managing Markets (2015) 27-31.

The question of the normative baseline of competition law is not new. A review of the history of competition law in a number of pioneering countries reveals that jurisdictional needs have influenced interpretation and enforcement.[7] What may appear as novel concerns and new theories in reality have had shelf-lives in earlier seasons of the antitrust cycle.[8] Policy has undergone cyclical soul-searching and continues to do so, driven by the need for stability and coherence. For competition policy to be rational, an answer must be given to the question of the purpose of the law. Everything else follows from the answer given.[9]

Framing of goals is especially important for African countries, majority of which have fairly young law without the benefit of accumulated jurisprudence. Not to mention that when these countries adopted Western-inspired legislation, they ended up with the latest versions. Decades of evolution during which policy had been transformed to coincide with locally changing circumstances may have not have been factored in.[10] Furthermore, the laws are premised on existence of markets with large numbers of participants, fully rational economic agents and governments equipped with means to effect redistribution, which is rarely the case in most African jurisdictions.[11]

Developing countries are different in fundamental ways from those in the developed world and to be useful, competition policy and enforcement must correspond to these different concerns. This may call for reasoned expansion of the law to ensure comprehensive solutions to the challenges of local markets. It is in response to this that Kenya effected amendments to its Competition Act to incorporate abuse of buyer.[12]

The abuse of buyer power provisions of Competition Act No. 12 of 2010 are located at section 24A of the Act. Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya is prohibited.[13] The behaviour condemned is not the mere exploitation of existing market power but rather conduct or behaviour that deviates from what is 'normal' or 'fair' or 'undistorted' competition. An anticompetitive effect is not necessarily contemplated.

Thus far, the enforcement of the abuse of buyer power provisions of Kenya's Competition Act have been found to directly coincide with the, the most core being inclusive development. The

[7] Bhattacharjea A "Who Needs Antitrust? Or, Is Developing-Country Antitrust Different? A Historical-Comparative Analysis" in Sokol DD, Cheng TK and Lianos I (eds.) *Competition Law and Development* (2013) 53 and 54-60 for a historical comparative analysis.
[8] Crane DA "All I. Really Need to Know About Antitrust I Learned in 1912" 2015 (100) *Iowa Law Review* 2025 hereinafter Crane (2015) 100 *Iowa Law Review* 2025 at 2025-2026.
[9] Bork RH *The Antitrust Paradox: A Policy at War with Itself* (1978) 50.
[10] Waked DI "Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges" 2016 (12) *Journal of Law Economics and Policy* 193 at 217.
[11] Waked above at 218.
[12] Amendment Act No. 49 of 2016.
[13] Section 24A(1) Competition Act 2010 and penalty at section 24A(9).

overall object of Kenya's Competition Act is enhancement of the welfare of the people of Kenya by promoting and protecting effective competition to among other outcomes increase efficiency in production, distribution and supply of goods and services; maximize the efficient allocation of resources and create an environment conducive for investment, both foreign and local. These outcomes especially are directly contributed to by deterrence of abuse of buyer power.

## A LAW AT A CROSSROADS

The advent of the digital market place has presented a hitherto unanticipated challenge to the widely applied template of competition law enforcement. Competitive assessment in the digital economy is problematic and largely uncharted territory. For example, while traditionally we speak of market power, dominance or monopoly, for digital markets, even the language adopted is different. Here reference is to 'superior bargaining position',[14] 'uneven bargaining position'[15] 'strategic market status',[16] and gatekeepers.[17]

Jurisdictions have adopted varied measures to respond to the challenges of enforcement in this novel markets. A common intervention is via expansion of existing laws or creation of separate laws to support current competition statutes. Some examples include the European Union's Digital Markets Act, Australia's Competition and Consumer Protection News Media and Digital Platforms Mandatory Bargaining Code and the American Innovation and Choice Online Act.

The regulation of mergers is the subject of vibrant discourse. In the United States for instance, merger policy has become a classic campaign issue responsible for dissent through and beyond election cycles.[18] The contention has been that with regard to merger regulation, the pendulum has tended to o swing too far in favour of non-intervention. Mergers are allowed to proceed based on dubious economic arguments about entry, expansion, and efficiencies.[19]

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[14] Japan's "Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc 2019 and Korea - Fair Online Platform Intermediary Transactions Act (Online Platform Act) 2020.

[15] Australia's Competition and Consumer Protection News Media and Digital Platforms Mandatory Bargaining Code.

[16] See https://www.gov.uk/government/consultations/a-new-pro-competition-regime-for-digital-markets/consultation-document-html-version#part-2-the-digital-markets-unit accessed 18/08/2022.

[17] EU Digital Markets Act and the American Innovation and Choice Online Act.

[18] Kaplow L "On the Choice of Welfare Standards in Competition Law" in Zimmer D (ed.) *The Goals of Competition Law* (2012) 26. See comments by Senator Elizabeth Warren, calling for a return to 19th century approach to monopolies and mergers https://www.usnews.com/news/articles/2016-06-29/elizabeth-warren-calls-for-strong-executive-leadership-on-antitrust (accessed 18/08/2022).

[19] Hovenkamp H "Appraising Merger Efficiencies" (2017) 24 *George Mason Law Review* 703 at 715-717; Baker J and Shapiro C "Reinvigorating Horizontal Merger Enforcement" in Pitofsky R (ed.) *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust* (2008) 236.

The dominant view of enforcement policy today is that it exists to promote some version of economic welfare - either total or consumer welfare.[20] Most enforcement agencies apply the latter.[21] It is a view dedicated to the proposition that markets usually work by themselves to attain efficient results. Intervention must therefore be applied only when necessary to remedy a market anomaly that reduces consumer welfare. This model has been accused of being unduly accommodative of market players and overseeing the increasing concentration of markets.[22] Calls have been increasing for stronger antitrust enforcement as a means of revitalizing the economy. The calls by and large are for a return to stricter antitrust. Brandeisian theories in favour of atomic markets are enjoying a renaissance, driven by the opinion that enforcement today is out of sync with the economic realities of the populace.[23]

The history of interpretation and enforcement of competition laws has been marked by two levels of development, one progressive and the other cyclical, in roughly twenty to thirty year rotations.[24] Policy regimes have arisen, been revised and rearticulated, only to decline and be replaced.[25] What we see now is a continuation of that back and forth. The questions asked today have been asked and addressed in the past. This becomes evident with when one scrutinizes the history of antitrust in the United States. The current cross-roads gives African jurisdictions an ideal opportunity to rethink their enforcement paradigms and forge approaches that optimally serve their developing economies.

Like any other legal discipline, competition law is a social construct and stems from the domestic foundations and values of each jurisdiction. It is subsequently adjusted from time to time to coincide with the subtleties and political dynamics of the jurisdiction.[26] As a result, the objectives, approach and priorities of enforcement of the law cannot simply be juxtaposed from one economic space to another.

[20] Hovenkamp HJ "Antitrust Policy and Inequality of Wealth" (2017) *Faculty Scholarship at Penn Law*. 176 at 1 explains that total welfare refers to the aggregate value that an economy produces, without regard for way that gains or losses are distributed. Formally, 'consumer welfare' looks only at the surplus that goes to consumers, ignoring that which goes to sellers.
[21] Salop SC "Question: What is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard" 2010 22(3) *Loyola Consumer Law Review* 336.
[22] Pitofsky Conservative enforcement approach accused of being exceptionally generous to the private sector and where the pro-antitrust position always loses in Pitofsky (ed.) (2008) 5.
[23] Khan L "The New Brandeis Movement: America's Antimonopoly Debate" 2018 9(3) *Journal of European Competition Law and Practice* 131.
[24] Stucke M E., Reconsidering Competition Mississippi Law Journal, (81)107 at 108.
[25] Ramsey D *Antitrust and the Supreme Court* (2012) 107.
[26] '...[C]ompetition policy cannot be pursued in isolation, as an end in itself, without reference to the legal, economic, political and social context.' (1992) 11 *Commission(EC), XXIInd Report on Competition Policy* at 13. Also see Schauer F "The Social Construction of the Concept of Law: A Reply to Julie Dickson" 2005 25(3) *Oxford Journal of Legal Studies* 493 for the argument that concepts of law change over time and vary across cultures and this must be factored into interpretation of the law.

## HISTORICAL TRENDS IN ENFORCEMENT

Review of historical trends reveals that competition law policy has not only been the product of economic theorising, but also of the political economy. Competition legislation tends to be broad in scope, providing a legal framework for protection of competition but not the guidance as to exactly what that should mean.[27] This open grained character of the law has provided courts, agencies, economists, scholars and bureaucrats with a clean canvas on which to paint.[28] This reality applies across Western jurisdictions which have had competition law longer than elsewhere but is at its most evident in American antitrust. Further, it supports the proposition that competition law should be malleable enough to speak to jurisdictional exigencies.

The Sherman Act was a political tool from the get go, passed as an instrument with which to dismantle powerful corporations and prevent the amalgamation of economic power.[29] So much so that public sentiment made voting against it a risky choice for politicians with aspirations for re-election.[30] Though the law started off as a paper tiger, it picked up pace with the development of the *per se* rule in 1904.[31] When the courts established the rule of reason in 1911,[32] Congress responded by passing the Clayton and Federal Trade Acts in 1914 to to block what was seen as an apparent softening of the law. Two years earlier, Woodrow Wilson had won the 1912 elections on the ticket of firm antitrust and the two Acts were a follow through on his election agenda.[33] A period of reinvigorated antitrust enforcement followed, supported by the emergence of Brandeisian thought.[34]

Firm antitrust took a step back with the advent of the First World War.[35] Big Business was necessary for success in the War and so enforcers adopted a 'lite touch' approach. Courts heavily

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[27] Dunne N *Competition Law and Economic Regulation: Making and Managing Markets* (2015) 26.
[28] Sidak JG and Teece D "Dynamic Competition in Antitrust Law" 2019 *(5) Journal of Competition Law and Economics* 581 at 585; Stucke ME "Reconsidering Antitrust's Goals" (2012) 53 *Boston College Law Review* 551 at 609; Stucke ME "Behavioral Economists at the Gate: Antitrust in the Twenty-First Century" 2007 (38) *Loyola University of Chicago Law Journal* 513.. Fox EM "Against Goals" 2013 (81) *Fordham Law Review* 2157 at 2157. For a narrative on the Supreme Court justices and their jurisprudential leanings and influences on American politics and society see Schwartz B *A History of the Supreme Court* (1993).
[29] Ezrachi Ezrachi A "Sponge" 2016 (5) 49 *Journal of Antitrust Enforcement* 49 at 60.
[30] Orbach B "How Antitrust Lost Its Goal" 2013 (81) *Fordham Law Review* 2253 at 2258-2259.
[31] *Northern Securities Company v. United States Co*.193 U.S. 197 (1904) followed in 1911 by *Dr. Miles Medical Co. v. John D. Park & Sons.* 220 U.S. 373 (1911).
[32] *Standard Oil Co. of New Jersey v. United States* 221 U.S. 1 (1911). and *United States v. American Tobacco Company* 221 U.S. 106 (1911).
[33] Winerman M "The Origins of the FTC: Concentration, Cooperation, Control, and Competition" 2003(71) *Antitrust Law Journal* 1 at 3 and 4. The Clayton Bill was brought to the House by the House Committee on the Judiciary, chaired by Henry Clayton of Alabama to give effect to Wilson's objective of having legislation to define more clearly what conduct violated the antitrust laws. The House Committee on Commerce took the lead on the other of Wilson's objectives, creating a trade commission to provide guidance to business on compliance with the antitrust laws. See also Kolasky W "George Rublee and the Origins of the Federal Trade Commission" 2011 (26) 1 *Antitrust* 106 at 107. The Clayton Act went a step further than the Sherman Act declaring business practices conducive to the formation of monopolies or which result in their formation illegal.
[34] Crane DA "The Magna Carta of Free Enterprise" Really?" 2013 (99) *Iowa Law Review* 17 2025.
[35] Antitrust policy receded, one court decision after another narrowed down the agency's mandate Especially damaging was *Federal Trade Commission v. Eastman Kodak Co* 274 U.S. 619 (1927) with its finding that the FTC lacked power to order a divestiture to

relied on the rule of reason and treated market conduct permissively. As an example, a consolidation of most of the steel industry into one firm possessing 80 to 90 per cent of the market in some lines was found to not constitute a violation of the law.[36] Decisions on collusion and cooperation reflected similar tolerance.[37] This approach to enforcement was retained Post War.[38]

The next phase was precipitated by the Great Depression when policy was targeted at survival of struggling firms, sometimes from more efficient rivals.[39] Although price-fixing had already come to be treated as *per se* illegal,[40] the court in 1933 endorsed a cartel formed to avoid distress sales during the Depression.[41] Legislation was passed to support the policy position. An example is the Robinson-Patman Act (1936) intended to curtail national retailing chains expanding at the expense of smaller stores.[42] The fortunes of many small family owned businesses had been destroyed by the Depression and those still afloat were having a difficult time dealing with large chain stores from that weakened position.[43]

As the country began to move out of the Second World War, Brandeis' views on the dangers of bigness and the importance of protecting small firms experienced a resurgence.[44] The structure-conduct-performance paradigm which anchored the enforcement program that followed, aimed at reaffirming the primacy of competition, understood as rivalry.[45] The language of *per se* rules returned to court decisions. Horizontal price fixing agreements were held to be anticompetitive regardless of their actual effects,[46] as were tie-in arrangements[47] and vertical price fixing.[48] Courts

undo anticompetitive asset acquisitions. Crane (2010) *University of Michigan Public Law Working Paper No. 185* at 3. A study of the Wilson years is a study of the link between politics and economics, and antitrust per Viscusi et al. (2018) 207-208.

[36] In *United States v. United States Steel Corp*.,251 U.S. 417 (1920).

[37] *Board of Trade of the City of Chicago v. United States* 246 U.S. 231 (1918) upheld agreements to limit prices for after-hours trading, holding that evaluation of such restraints required a comprehensive inquiry into their history, purpose and effect; *United States v. Colgate & Co.* 250 U.S. 300 (1919) permitted producers to announce a favored distribution policy and refuse to deal with downstream firms that did not comply; and *Maple Flooring Manufacturers' Association v. United States*268 U.S. 563 (1925). took a benign view of arrangements for sharing price and output data among rivals..

[38] Ramsey D *Antitrust and the Supreme Court* (2012) 79 and Kovacic & Shapiro (2000) 14 *Journal of Economic Perspectives* at 47.

[39] Meese AJ "Competition Policy and The Great Depression: Lessons Learned and a New Way Forward" 2013 (23) 2 *Cornell Journal of Law and Public Policy* at 256.

[40] *United States v. Trans-Missouri Freight Association* 166 U.S. 290 (1897).

[41] *Appalachian Coals, Inc. v United States*, 288 U.S. 344 (1933).

[42] Essentially designed to prevent suppliers from benefiting one retail purchaser over another by price-discriminating. Yonezawa K, Gomez MI and Richards TJ "The Robinson-Patman Act and Vertical Relationship" 2020 (102) 1 *American Journal of Agricultural Economics* 329 at 330.

[43] Crane DA "The New Deal and the Institutionalists" Crane DA and Hovenkamp H (eds.) *The Making of Competition Policy: Legal and Economic Sources* (2013) 168.

[44] Crane DA "Rationales for Antitrust: Economics and other Bases" in Blair RD and Sokol DD (eds.) *The Oxford Handbook of International Antitrust Economics: Volume 1* (2015)13.

[45] Advanced by economists based in Harvard University Jones A, Sufrin B and Dunhe N *EU Competition Law: Text, Cases, and Materials* (2019) 22.

[46] *United States v. Socony-Vacuum Oil Co.*310 U.S. 150 (1940).

[47] *Northern Pacific R. Co. v. United States,* 356 U.S. 1 (1958) the court declared certain agreements to be of such pernicious effect on competition as to lack any redeeming virtue.

[48] *Albrecht v. Herald* 390 U.S. 145 (1968) and *Utah Pie Co. v. Continental Baking Co* 386 U.S. 685 (1967). Albrecht drew heavy criticism by economists for many whom maximum price fixing actually increases consumer welfare. Maximum price-setting is today evaluated under the rule of reason rather than a *per se* rule.

were more willing to find that dominant firms had acted improperly[49] in a nod to Brandeisian thought favouring a more interventionist antitrust to open up markets for participation by smaller players.[50] Courts and economists of this era tended to downplay efficiencies associated with large-scale enterprises, the stated purpose of antitrust being promotion of competition through protection of viable, small, locally owned business and maintenance of fragmented industries and markets.[51]

In 1948, the Federal Trade Commission issued a report predicting that giant corporations would soon take over the country and there was urgent need to "counter the rising tide of economic concentration in the American economy."[52] One hears this spoken of markets today. To counter this, the Celler-Kefauver Act was passed in 1950 expanding the Clayton Act to include vertical and conglomerate mergers to the list of possible antitrust violations whenever the effect would substantially lessen competition and tend to create a monopoly. It is also telling referred to as the Anti-Merger Act.[53]

The "incipiency" standard was used to outlaw not only acquisitions that would immediately create a monopoly or give the parties market power, but also those that had the potential to do so.[54] The standard was similarly used in industries deemed vulnerable to incipient monopoly. A "structural presumption" threshold beyond which mergers were presumptively illegal was effected.[55] The incipiency doctrine and the structural presumption are today echoed in the language of legislation such as the EU's Digital Markets Act and the proposed American Innovation and Choice Online Act where undertakings past established thresholds are characterized 'gate-keepers' in their respective markets.

Starting in the 1940s, economists and academics, mostly at Chicago University, presented studies putting to question many of the applications of the *per se* rule. They argued that market forces could effectively assume many of the roles otherwise ascribed to antitrust. This new

[49] In *United States v. Aluminum Co. of America* (ALCOA) 148 F.2d 416 (2d Cir. 1945) it did not matter how the firm had become a monopoly, the offence was simply becoming one.
[50] Any conduct by firms with market power, regardless of its effect on consumers was presumed illegal Piraino TA "Reconciling the Harvard and Chicago Schools: A New Antitrust Approach for the 21st Century" 2007 82 *Indiana Law Journal* 345 at 349.
[51] *Brown Shoe Co. v United States* 370 U.S. 294 (1962) at 344. The Supreme Court invalidated a merger that would have yielded a horizontal market share of 5 per cent and a vertical foreclosure of under 2 per cent.
[52] United States Federal Trade Commission *The Merger Movement: A Summary Report* (1948) 68.
[53] Lande RH "Resurrecting Incipiency: From Von's Grocery to Consumer Choice" 2001 (68) *Antitrust Law Journal* 875 hereinafter Lande (2001) 68 *Antitrust Law Journal,* at 879.
[54] *Brown Shoe wa*s the court's first statement of the "incipiency" doctrine 370 U.S. 294 (1962) at 276 to 277 of the judgment "To arrest this 'rising tide' toward concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on mergers.
[55] *United States v Philadelphia National Bank* 374 U. S. 321 (1963) at 363 "A merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects."

thought came to be referred to as Chicago antitrust. Robert Bork's 1978 book *The Antitrust Paradox: A Policy at War with Itself*[56] was a watershed. Bork put forth the consumer welfare standard, maintaining that what concerned Congress in passing the Sherman Act was that trusts and certain other business forms would acquire monopoly or market power and with it the ability to artificially raise prices and restrict output, thus harming the consumer.[57] To that extent, antitrust laws embodied only a concern for consumer welfare.[58]

When Ronald Reagan ran for the Presidency of the United States in 1980, he won on a mandate to shrink regulation, a policy direction that favoured development of the Chicago school approach with its "totality-of-the-circumstances approach".[59] It is this approach that is currently under question. Accusations against it include but are not limited to what critics see as acceptance of increased risks of concentration for the prospect of future efficiencies and innovation, thereby engineering years of stagnation in enforcement.

Today, the United States appears to be on the cusp of a direction shift in antitrust enforcement. Indications are that the new policy cycle will come with a broadening of the ends of competition law to include political, social, and ethical concerns.[60] In that event, law will have found its way back to enforcement that prioritises rivalry.

For the European Union, it was not efficiency first and neither is it, even today. Competition policy has been pursued with reference to the legal, economic, political and social context.[61] British anti-cartel laws began to be more strictly enforced only in the 1950s and even then with ample room for exemptions. Restrictive agreements could be defended on various public interest grounds, including protection of employment and exports.[62]

The current self-interrogation presents developing countries with a chance to appraise their own laws and enforcement. In any case, policy orientation can differ even with shared law and similar rules may yield different results.[63] African jurisdictions must look beyond the shared letter of the

[56] Bork RH *The Antitrust Paradox: A Policy at War with Itself* (1978).
[57] Bork above 73. This position initially asserted in Bork RH "Legislative Intent and the Policy of the Sherman Act" 1966 (9) *Journal of Law and Economics* 7 at 10 and 12 to 21.
[58] Bork above 91.
[59] Court of Appeal's judgment in U*nited States v. Baker Hughes, Inc* 908 F.2d 981 (D.C. Cir. 1990).
[60] Stucke argued in 2018 that going forward, antitrust scholarship will increasingly emphasize the normative foundations of competition law. Stucke (2018) *University of Tennessee Legal Studies Research Paper* No. 135 at 6.
[61] European Commission, XXIInd Report on Competition Policy 1992 at 13.
[62] Section 10 of the U.K. Restrictive Trade Practices Act of 1956.
[63] Waked DI "Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges" 2016 (12) *Journal of Law Economics and Policy 193-230;* Raslan AA "Public Policy Considerations in Competition Enforcement: Merger Control in South Africa" 2016 Centre for Law, Economics and Society (CLES) Research Paper Series 3/2016 at 1.

law to find the best-fit enforcement for their economies. One that takes into account the nature and needs of their economies and citizens.

## IDEAL COMPETITION LAW FOR DEVELOPING COUNTRIES (WHAT) AND CONTRIBUTION

The general consensus is that an effective competition policy backed by economy-wide enforcement is a key support to a working economy. There is, however, less agreement on what the objectives, priorities and breadth of enforcement should be. As an example, developing jurisdictions have long argued for organic goals that are respectful of political and economic context and which they say justifies consideration of non-efficiency-based objectives such as employment and survival of small businesses. Counterparts from developed jurisdictions rejoin that the questions to be answered in the realm of competition law are purely economic, pointing to the vague nature of non-economic values and difficulty in determining how to incorporate them into analysis.

As established above, competition law has been closely intertwined with its economic, social and political setting. It follows then, that it is impossible for each country's competition law to have exactly identical concerns. African countries differ in fundamental ways from jurisdictions in the developed world, which mandates competition policy goals that correspond effectively to those different concerns. The foremost need for these countries is inclusive, sustainable economic development and as such competition law enforcement should work in tandem with other policies to give effect to that aspiration.[64] Policy should engender competitive markets, taken to mean inclusive markets and effectiveness of the law can be measured from the perspective of ability of economic actors to enter and compete in markets.[65]

To achieve the above end, enforcement needs to prioritize improved participation in economic pathways. This is possible only where the law is equipped to tackle practices that hamper inclusivity.[66] The abuse of buyer power provisions in Kenya's competition law were passed with inclusivity in mind. Parliament was motivated by the need to safeguard sustainability of small and

[64] Bakhoum M "A Dual Language in Modern Competition Law? - Efficiency Approach versus Development Approach and Implications for Developing Countries" 2011 (34) 3 at 505.
[65] Budzinski O and Beigi MHA "Generating instead of protecting Competition" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition* (2015) 224. Fox E in OECD Imagine: Pro-Poor (er) Competition Law: The role of competition law and policy in helping to empower the poorer populations of the world. Roundtable on: The Impact of Cartels on the Poor" 2 July 2013 4.
[66] Gal MS and Fox EM "Drafting Competition Law for Developing Jurisdictions" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015) at 3-4.

medium enterprises, deepen the Authority's ability to intervene with all forms of unfair market practices, and enable it to act pre-emptively to deter abuse of buyer power. [67]

In Kenya, the enforcement of abuse of buyer power has supported MSME sustainability in a directly relevant manner. The Act precludes eight conducts which when engaged in by a party with buyer power qualify as abuse of buyer power.[68] The most pervasive of these has been delays in payment without justifiable reason in breach of agreed terms of payment, making up 66% of all conducts investigated in the two financial years between June 2019 and June 2021 and rising to 85% in the last financial year from June 2021 to June 2022.

The effect of delayed payments, is especially detrimental to SMEs which already struggle to access finance. Liquidity challenges caused by delay in payments eat into capacity for innovation thereby depressing dynamic efficiency and competitiveness, among other damaging consequences. In the year ending 2021, the Authority recovered delayed payments in the sum of KES. 2.25 billion (USD 18,814,281) owed to suppliers by the then largest supermarket chain in the country. In 2022, enforcement in the insurance sector, recovered the payment KES. 38 million (USD 318,000) owed to suppliers in the insurance sector. The supplier undertakings affected were mainly micro and small enterprises with between 7 and 20 employees. In the words of one player, delayed payments mean "delayed employee salaries and subsequent staff exits, overdue rent payments, lost business and frozen bank accounts".[69] Putting money back into pockets of these market players is critical to the Kenyan economy that is heavily reliant on MSME sustainability.

Yet another contribution of the Authority's enforcement of abuse of buyer power is related to employment. Kenya's MSME sector has shown rapid growth and is projected to contribute 50% of the country's GDP over the next 3 years.[70] The sector currently employs over 15 million people with 7 in every 10 people being employed by an MSME.[71] Enforcement of abuse of buyer power directly contributed to the retention by supplier undertakings of 1000 of their employees according to data submitted to the Authority by the sector association for motor repairers.[72]

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[67] Hansard 13/12/2010 43 – 46.
[68] Section 24A(5).
[69] Competition Authority of Kenya Ushindani Newsletter Vol. 9 June 2022 available at https://cak.go.ke/sites/default/files/2022-06/CAK%20Newsletter%20Issue%209.pdf accessed 17/08/2022.
[70] SNDBX Chief Executive Joram Mwinamo quoted in https://www.businessdailyafrica.com/bd/corporate/ Central Bank of Kenya National Economic Survey report **2020 Survey Report on MSME Access to Bank Credit** marketplace/kenyan-sme-to-contribute-50pc-of-gdp-in-next-three-years--3836534 accessed 17/08/2022.
[71] Above.
[72] Competition Authority of Kenya Ushindani Newsletter Vol. 9 June 2022 available at https://cak.go.ke/sites/default/files/2022-06/CAK%20Newsletter%20Issue%209.pdf accessed 17/08/2022

For African countries, efficient development is inclusive development. The understanding of "efficiency" in the developed world may be somewhat different from that in the developing world. Here, it is given a wider meaning to encompass a wider group being enabled to participate on their merits in the economic enterprise.[73] In the former, it may have the effect of preserving the freedom of firms with power. A complexity arises in cases where efficiency does not correspond with non-economic goals. In such cases, the enforcement agency must consider whether competition law is the best instrument or whether it would require undesirable trade-offs between efficiency and access to basic needs.[74]

Kenya's abuse of buyer power provisions are calculated to as far as possible prevent this eventuality. The Act keeps at the basic the instances where the Authority must intervene, prioritising amicable sector grown solutions that guide players to fair competition practices. The Authority may require industries and sectors, in which instances of abuse of buyer power are likely to occur, to develop a binding code of practice for publication to give it legal effect.[75] In 2020 June, following a year of engagement with sector associations, the Authority published the Retail Sector Code of Practice developed and agreed by both suppliers and buyers through their sector associations. The Code sets out Principles of Fair and Ethical Dealing that the players bind themselves to. It also provides a first tier dispute resolution mechanism, with the Authority coming in at the second tier. A codes of practice with oversight provided by the Authority enables players to meet half way so that where efficiency is a casualty, it is only through the consensus of the parties.

Unequal bargaining power means that suppliers have to accept onerous terms or suffer variation of contract terms mid-stream. Sometimes, parties operate without recorded contracts which places the supplier at the mercy of the buyer. The Act sets out a basic minimum for contracts, with five core compulsory terms. These are terms of payment; the payment date; the interest rate payable on late payment; the conditions for termination and variation of the contract with reasonable notice; and a mechanism for the resolution of disputes.[76] Authority has prepared template contracts for the retail sector and insurance sector. Players may adopt and vary the contracts as necessary and also present a reference point for parties.[77]

[73] Bakhoum M "The Informal Economy and Its Interface with Competition Law and Policy" in Gal MS, Bakhoum M, Drexl J, Fox EM and Gerber DJ (eds.) *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (2015).
[74] Bakhoum *World Competition Law and Economics Review* (2011) 34(3) 505.
[75] Section 24A(3).
[76] Section 24A(7).
[77] https://cak.go.ke/mandate/buyer-power/rules accessed 17/08/2022.

SMEs punch above their weight in developing countries and small business protection should guide enforcement. Abuse of buyer power provisions coincides with this recommendation. However, providing indiscriminate protection without any checks and balances to small players could be dangerous. The checks and balances present under Kenya's law are two layered. First, the Act is fairly clear on considerations that the Authority can consider in establishing abuse of buyer power, thus regulating the discretion of the agency.[78] Secondly, the Authority in 2022 refined its Buyer Power Guidelines, giving them detail on the matters that the Authority will take into account.[79] As proof of effectiveness of the two safeguards, the Authority has not been quick to make findings of abuse of buyer power. In the 2019-2020, the Authority found no liability in 41% of cases investigated, 47% of the cases in 2020-2021 and 24% in 2021-2022.

The Act enables the Authority when it establishes that an undertaking or a sector is facing or is likely to face incidences of abuse of buyer power to impose reporting and prudential requirements. This remedy is much lighter than the penal ones provided for at section 36 of the Act and focused on supporting undertakings to adopt fair competition in their engagement with smaller suppliers.

The Authority is also enabled to conduct sector surveillances to monitor the activities of sectors or undertaking with likelihood of incidences of abuse of buyer power. This enables pre-emptive enforcement which is more prudent than ex post intervention by which time is may be too late for the affected supplier. The surveillance of the retail sector in 2020 established that 3 large retailers were engaging in conducts in abuse of buyer power. Orders issued with bound timelines and monitoring by the Authority ensured that they were rectified.

## CONCLUSION

Competitive markets are the basic fundamental without which economic development cannot be achieved. Competition is linked to increased productivity levels and resultant growth, in both developed and developing countries. As such, effective regulation which facilitates and reinforces proper functioning of markets positively impacts economic performance. Adopting competition laws is a fundamental first step to higher competition intensities which generate increased growth. More important than adoption, however, is directed application, a call which African jurisdictions should heed to.

[78] Section 24A(4).
[79] Available at https://cak.go.ke/mandate/buyer-power/rules accessed 17/08/2022.