CPI Columns

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An Africa-Focused Competition Performance Index

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An Africa-Focused Competition Performance Index

By Oluwatobi Ogundele[1]

Introduction

When we consider international collaboration on competition issues, as well as comparative assessments of the performance of competition authorities globally, it should be noted that competition authorities in developed countries have had a head start in antitrust law enforcement compared to newer regimes in Africa. Only 13 countries in Africa had competition laws in place by the year 2000. By 2015 this number had increased to 32, with 25 jurisdictions in Africa having operational competition authorities [1]. African agencies are younger entrants to the competition law playing field, and looking for ways to meaningfully gauge the performance of these agencies is a valid inquiry. While existing indices such as the Global Competition Review (GCR) and Bertelsmann Transformation Index (BTI) provide benchmarking reports, data, and analyses on antitrust enforcement from around the globe, their coverage of Africa is limited. Developing a performance index for competition policy implementation in Africa would have to strike a balance in how a comparative approach to law enforcement is assessed in sophisticated versus less sophisticated or younger jurisdictions.

The international community has only recently begun questioning the increased consideration of non-competition factors typically employed in African competition agencies. The concern seems to be that the efficacy of tests utilized in merger reviews, along with an excessive focus on non-traditional competition tests in African jurisdictions leads to lengthy enforcement processes and a non-consistent application of antitrust law [8]. For African competition agencies, public-interest objectives, such as enhanced participation by SMEs and historically disadvantaged individuals or enhanced employment, dominate the otherwise standard benchmarks for the implementation of competition policy [8].

While the international competition community seeks to gauge the level of compliance of less sophisticated or newer African competition regimes, gauging the strength of these agencies is an important first step towards ascertaining whether or not these nascent jurisdictions have the capability – whether they are 'healthy' enough – to be compliant. An Africa-focused competition performance index can extend the measurement of antitrust performance in existing indices and form the basis for modus operandi comparisons within and outside Africa,

Why an index for competition policy implementation in Africa?

An index allows measurements and comparisons to be based on a set of perspicuous indicators and /or objective data points. For example, the World Economic Forum's Global Competitiveness Index assesses countries' ability to foster economic prosperity and productivity. The index captures indicators such as the ease of access to loans, transport infrastructure, corruption levels, and strength of the banking system [2]. Likewise, the World Bank's Ease of Doing Business Score ranks countries on business regulation performance with indicators such as ease of access to electricity, access to property, paying taxes, and others [3]. Lastly, the Global Multidimensional Poverty Index (MPI) measures poverty and deprivation using indicators of education, standards of living, and access to healthcare to compare the levels of deprivation which people experience in their daily lives across 41 countries [4]. Like these other indices, a competition index generally measures the health and performance of a competition authority, the implementation of the country's competition law, and the state of competition in the specific markets. An Africa-focused competition performance index [ACPI for the purpose of this article] can provide a means of assessing Africa's antitrust

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performance through the extension of existing indices and lay the groundwork for exceptional regional competition policy implementation in Africa. While competition law enforcement in Africa has experienced noticeable growth from South Africa to Kenya and Zambia and newer competition authorities in Angola and Nigeria, having a mechanism that measures competition authorities' outcomes on enforcement, but also the general condition of competition authorities, is vital. Knowing the state of competition authorities' autonomy, advocacy efforts, resource availability, and information and data systems is an unavoidable requirement for any attempts to further improve the enforcement performance of these institutions.

Given the continent's late foray into antitrust law, the peculiarity of African markets, and the fact that Africa cannot always be compared to other areas around the world, especially in the area of competition law, an ACPI would be extremely valuable. The index could sensitize African competition authorities as to their own performance in enforcement of competition law and modus operandi, compared to their peers. This would provide the opportunity for laggards to catch up in fulfilling their mandate and fast-track the development and implementation of competition policy in Africa. Additionally, continent-wide initiatives such as the African Continental Free Trade Area (AfCFTA) agreement's Competition Protocol would have solid evidence-based insights on not only the state of competition in African markets, but on the capability of competition authorities.

In addition to the numerous benefits of creating an ACPI or suitable analogue for African competition agencies, such an index would conceivably provide a meaningful baseline for subject-matter conversations and advanced research on unique approaches to competition enforcement that take into account the strengths and weaknesses of various jurisdictions and competition regimes. While gauging the efficacy of universally accepted competition tests, the ACPI presents the opportunity to contemplate alternative standards or benchmarks for certain aspects of competition enforcement, and to consider whether existing benchmarks are still valid in ascertaining whether or not nascent African jurisdictions can meet the required level of efficacy in the eyes of the international community.

How to: Indicators, metrics and stakeholders

If a competition-enforcement index such as the ACPI were to be developed, how would the responsible parties on the African continent go about it? A good place to start is a review of existing antitrust-related indices and associated indicators, i.e., subject-matter specific indicators as opposed to more generalized public governance indices. Currently existing specialized indices and sources of antitrust-related data are the Global Competition Review (GCR), the Bertelsmann Transformation Index (BTI), and the OECD Competition reports. The GCR provides benchmarking reports, data, and analysis on antitrust law and policy enforcement from around the globe. BTI measures transformations in governance, politics, and the economy and includes "competition policy effectiveness" as an indicator for economic transformation. The OECD Competition reports provide information on the state of competition policy design and practice in OECD countries. Additionally, industry reports and peer reviewed research papers are good sources of information. This can be supported through collaboration with various university research centers or similar higher-education institutions. Competition experts tied to business schools with established industrial organization and antitrust expertise would also be valuable in building an ACPI.

Since the focus of such an index would be to facilitate cross-country comparisons across African competition authorities, the knowledge base provided by existent indices may prove to be insufficient. This is because existing indices like the GCR and BTI have a global focus, and are mostly aimed at measuring the outcomes of enforcement activities. What African competition authorities require is comprehensive information to enhance competition policy adoption. A properly constructed index could reveal what successful African competition authorities are doing and how they are doing it, rather than only presenting enforcement outcomes.

Indicators

In a previous conference paper written in 2015, we systematically review institutional mechanisms for successful competition policy implementation in developing countries. The paper identified and ranked the most common and recurring institutional mechanisms (IMs) or indicators in the literature for successful competition policy implementation [5]. This list can be considered in the development of the ACPI**:**

- *Autonomy of the competition authority: This indicator include metrics that measure autonomy. Measuring metrics of independence in decision making such as how the Commissioner of Competition is appointed, how other staff of the competition authority are recruited, and budgetary oversight and reporting in the organisation such as which Department or Ministry the authority reports to, if any [9,10, 11].*
- *Independent & effective judiciary system*
- *Competition advocacy, awareness & education*
- *Resource availability & use (human, administrative e.g., IT networks and financial): Metrics that measure operational resource availability would comprise this indicator. This would be in terms of the number of qualified staff and the adequacy of the authority's budget. It would also consider whether the necessary technology, hardware and software is available to ensure that operational staff can successfully perform required tasks. Metrics such as total staff size, percentage of staff that are competition lawyers and economists, staff turnover, percentage of the authority's budget dedicated to enforcement work and court proceedings, IT capacity and the presence of a data or digital competition analytics/intelligence unit can make up this indicator.*
- *Capacity competence development*
- *Experience and knowledge-sharing mechanisms*
- *Coordination and dependency among relevant agencies /institutions & stakeholders*
- *Impact of competition policy on other policies*
- *Situation analysis and market monitoring mechanisms*
- *Transparent processes and systems*
- *Regional collaboration of competition authorities*
- *Existence of effective competition policy*
- *Competition research development*
- *Effective & efficient enforcement mechanisms*
- *Accountability*
- *Role & influence of sectoral regulators*

Metrics

While a quantitative approach is ideal for the development of an index such as the proposed ACPI, qualitative data and other descriptors that may be less objective than quantifiable measurements can nonetheless supplement the information competition authorities provide. The BTI uses a Likert scale (1-10) to rate the existence of an 'independent' competition authority, which considers factors like membership of the International Competition Network (ICN) and the transparency and legal certainty of judicial decisions in a country. However, these basic market economy characteristics are only a start, and are unable to completely measure the overall health of a competition authority [6]. Hence the need for a comprehensive set of metrics that can be built from the IMs above. This can be supported by statistically rigorous approaches, which are simple to implement for index calculations. A tool such as the European Union's Competence Center on Composite Indicators and Scoreboards (COIN) can be utilized [7].

Stakeholders

There are three main stakeholder categories that can be involved in the development and maintenance of the ACPI. They are: National competition authorities, regional competition regulators, and other African institutions. National competition authorities would be involved in the periodic completion of questionnaires sent to them by coordinating African institutions, such as AfCFTA and the Economic Commission for Africa (ECA), for yearly updates of the index.

Once established, the index can be maintained by regional competition regulators. Regulators such as the Common Market for Eastern and Southern Africa (COMESA), ECOWAS Regional Competition Authority (ERCA), the Economic and Monetary Community of Central Africa (CEMAC), the West African Economic Monetary Union (WAEMU) and East African Competition Authority (EACA), can house the ACPI's output and make competition authorities' ratings digitally available.

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