

Competition Law Prescriptions and Competitive Outcomes

Insights from Southern and East Africa

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8.1 INTRODUCTION

Competition law has been vigorously promoted around the world with the adoption of competition laws being much remarked upon. There have been important debates, led by Eleanor Fox, on different models and possible convergence.¹ In East and Southern Africa, most countries have adopted competition laws in the past twenty years. There has also been a push to adopt guidelines for merger evaluation, restrictive practices (including cartels) and abuse of dominance. These have generally been done by ‘international experts’ and provide a picture of broad convergence on paper, albeit with the playing out of USA and EU differences, depending on the funding and the expert.

However, there has been relatively little comparative analysis of the interplay of policies and competition in practice as compared with the establishment of institutions and adoption of guidelines. Indeed, the latter have often been seen as outcomes in their own right. This chapter seeks to understand how competitive markets evolve and the challenges for competition authorities in nurturing this evolution.

There is a broad consensus that we want to foster competition which is based on investing in productive capacity and creating products responsive to consumers’ preferences. We want markets which are open to participants and reward effort and creativity, while recognising that economies of scale and scope, and the size and duration of investments required for research and development, mean large firms are critical to economies. What is the role for competition law here?

In enforcement, we seek to distinguish beneficial from harmful conduct, with the laws specifying how these effects should be distinguished in only the broadest terms. The tests aim to weigh the probability and costs of type 1 and type 2 errors, where type 1 errors are false positives (finding harm where there is none), and type 2 errors are

¹ See, for example, E. Fox, ‘Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries’, in J. Drexel et al. (eds.), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar, 2012).

the failure to identify, sanction and deter harmful conduct where it *is* taking place. It is trite to observe that the probability and costs of these errors vary with country conditions. For example, higher barriers to entry mean the costs of under-enforcement are higher. The obvious implication is that countries should not necessarily have the same standards and onus in applying even identical legal provisions. In this context, the USA and the EU are far outliers in terms of their market characteristics being, by comparison with almost all other jurisdictions, incredibly large markets. They are outliers in many other ways also, such as in the history of their institutions and development of their laws. For example, the mandatory treble damages in the USA has very substantial implications for the balancing of possible under and over enforcement.

Most developing countries have, however, faced a transplant of laws, no matter what has been done to 'localise' them in appearance. It is natural to draw on experience from other places. The challenge is to craft a market-oriented approach to economic development which takes into account the real characteristics of these economies.

For African economies with which I am concerned here, these characteristics include the high levels of inequality along with the rapid growth since around the year 2000.

It is important to articulate and give effect to competitive markets which support the building of local productive capacities and wider participation. If this cannot be done then competition law and the authorities will be sidelined. They will risk being viewed as irrelevant, something put in place simply to keep donors happy while the policy action happens elsewhere. Alternatively, the rules may simply be bypassed through corruption to skew market outcomes and secure opportunities.²

This chapter draws on a range of research done in recent years in East and Southern Africa to consider the nature and extent of competition in practice, and the role, if any, played by competition law and policy. It starts with analysis of two commodities, cement and fertiliser, which can be considered the 'bread and butter' of competition enforcement. These are relatively homogeneous products with concentrated markets and high incentives for firms to collude. Indeed, cartels in Southern Africa in cement and fertiliser have been uncovered by competition authorities. Second, I draw on work at the other end of the spectrum in innovative markets for services in telecommunications and finance described under the heading of mobile money. East Africa, specifically Kenya and Tanzania, are global leaders in the development of these services. Network effects favour the first-mover implying it can become dominant and wield substantial market power. Third, I reflect on work relating to barriers to entry in South Africa. The chapter draws

² This is arguably what has been happening in South Africa. See Public Protector of South Africa, *State of Capture* (2016).

on the insights from these three areas to identify the main elements of a forward-looking agenda.

8.2 COMPETITION IN COMMODITIES: FERTILISER AND CEMENT

Fertiliser and cement are important commodities in their own right. Fertiliser is the main input for commercial agriculture, and cement is critical for the expansion of housing and infrastructure. These sectors are central to most African countries' growth. The nature of competition issues in these markets point to important challenges for competition law enforcement in African countries.

8.2.1 Fertiliser³

There are three main plant nutrients provided by fertilisers, namely nitrogen, potassium (in the form of potash) and phosphate. A few main forms of fertiliser dominate world trade and production. Nitrogenous fertilisers are the most important with the main product being urea. This is produced in large, energy-intensive industrial plants. Other ammonia-based nitrogenous fertilisers also require cheap energy and large-scale production such as calcium ammonium nitrate and diammonium phosphate (DAP). These are normally produced where there are sources of natural gas. Phosphate and potash are mineral products with production depending on the naturally occurring endowment.

The only substantial producer of fertiliser in Southern and East Africa is South Africa. It is a producer of both ammonium nitrate-based fertilisers and phosphate fertiliser.⁴ It is still a large net importer of nitrogenous fertilisers, mainly in the form of urea. The market demand in Southern and East African countries is thus met largely by importers. On the face of it, this means that barriers to the entry of new (import) suppliers should be low. However, the scale required for economic shipping, and the logistics and transport infrastructure for local distribution, mean that in practice there are only a few major suppliers in each country. Markets may still be contestable, where a deviation from cost-reflective prices will see a new entrant readily able to take advantage of the opportunity presented.

In practice, it appears as if outcomes have been far from competitive. And, the high prices of fertiliser, and its importance for agricultural production, have led

³ This section draws primarily from P. Neube, S. Roberts and T. Vilakazi, 'Study of Competition in the Road Freight Sector in the SADC Region – Case Study of Fertilizer Transport and Trading in Zambia, Tanzania and Malawi', CCRED Working Paper 3/2015; P. Neube, S. Roberts and T. Vilakazi, 'Regulation and Rivalry in Transport and Supply in the Fertilizer Industry in Malawi, Tanzania and Zambia', in S. Roberts (ed.), *Competition in Africa* (HSRC Press, 2016).

⁴ Minjingu in Kenya is a small producer of phosphate fertiliser. Other producers of fertilisers are blenders from imported fertiliser components rather than manufacturers.

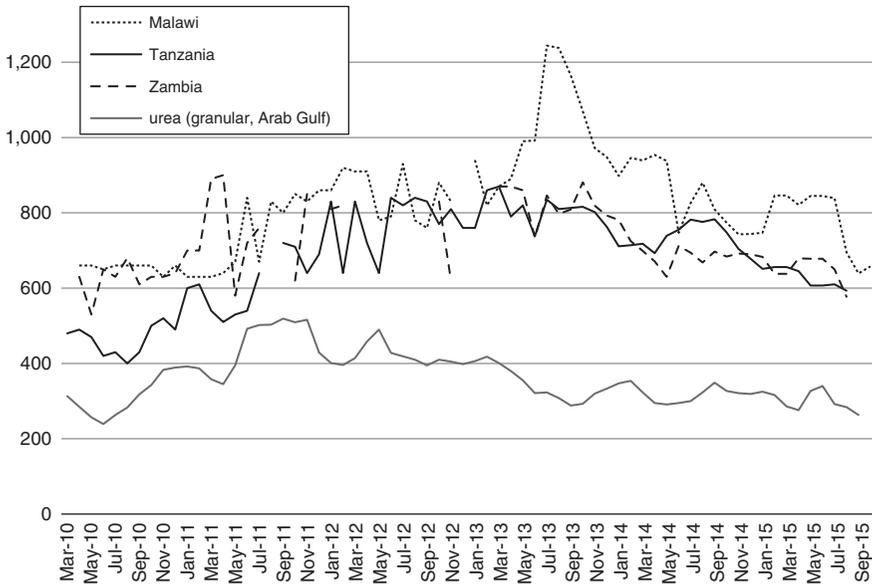


FIGURE 8.1 Urea prices (average \$/ton retail across countries)

Source: Amitsa and World Bank

governments and donors to subsidise fertiliser supply through an array of programmes.

Fertiliser has cost substantially more in African countries than benchmark world prices.⁵ Here we reflect the prices for the nitrogenous fertiliser product of urea on a free-on-board (fob) basis in the Arab Gulf with the average retail prices in Malawi, Zambia and Tanzania (Figure 8.1).⁶ The Arab Gulf prices are most relevant for actual supplies to these countries through the ports of Dar es Salaam (in Tanzania) and Durban (in South Africa), however, the prices are similar to those quoted for shipments from the Black Sea and from the USA, prices which are available to farmers in Eastern Europe and North America, with overland transport costs added.

In 2010, prices in Tanzania were around \$100/t more than in the Arab Gulf, while prices in Malawi and Zambia were around \$200/t to \$300/t more, or roughly double the fob prices. From 2011 the gap increased substantially although the direct costs of sea and land transport have not increased. It appears as if the increase in prices initially tracked international prices, but when international prices came down, the local prices remained at higher levels. It meant that in 2012 through to 2014 prices in all three countries were around \$400/t more than the fob prices and, in the case of Malawi, for some of the time prices were substantially higher.

⁵ World Bank, *Boosting Competition in African Markets* (World Bank, 2016).

⁶ A very similar picture is given by diammonium phosphate (DAP) prices. Urea and DAP are the two most important products in these countries.

Are the prices the result of uncompetitive markets? Almost certainly. Are they the result of anticompetitive conduct? Not necessarily so.

As a landlocked importing country, prices in Zambia would be expected to be higher than coastal countries such as Tanzania, and similar to prices in its neighbour, Malawi. This is what is observed in 2010. In the later years, however, we see prices in Zambia which are in line with, or lower, than those in Tanzania. There has been cartel conduct which was uncovered in Zambia in 2012.⁷ The lower prices in 2014 and 2015 are also a result of a new entrant and changes in the procurement processes to supply the government's farmer support programme. Prices in Zambia, however, remained around \$300/t higher than the international benchmark in 2015.

Against the Zambian prices, those in Malawi and Tanzania certainly do not seem competitive but no cartel conduct has been identified. A competitive cost build-up suggests that in 2014 sea freight should have been no more than \$50/t with offloading, port charges, storage, bagging and an importer margin adding another \$80/t at most.⁸ This means that the cost price ex-warehouse for bagged fertiliser should have been around \$130/t above the fob price. Inland transport to important agricultural producing areas were estimated at \$50/t while retailer margins and other costs should at most contribute another \$110/t meaning a retail price of some \$160/t above the ex-warehouse price.⁹ This took into account actual costs of transport, given the existing inefficiencies, as well as reported margins. Observed prices in Tanzania were some \$100-\$150/t (around 20 per cent) higher than the price calculated from cost and margin build-ups.

A number of factors underpin the higher prices in Tanzania. A combination of restrictions on transport, storage and trading have supported incumbents. In addition, the fertiliser subsidy programme had been increased in value to provide an effective floor price above the competitive price level. In terms of the overall market, a few large firms dominate fertiliser supply in Tanzania, led by Yara. Control of offloading and bagging facilities at the port are critical also. High levels of concentration have gone along with high prices and margins in fertiliser trading after accounting for transport costs.

In Malawi fertiliser prices have been approximately \$200/ton higher than in Zambia, which can be explained by a combination of factors, including high domestic transport rates and fertiliser price distortions caused by the subsidy programme. Domestic transport rates in Malawi are between \$0.13 and \$0.14 per ton per kilometre, around double what rates should be.¹⁰ Part of this is due to higher costs

⁷ www.zambia-weekly.com/media/zambia_weekly_2013_-_wk_38.pdf. See also Competition and Consumer Protection Commission (CCPC) of Zambia, *Competition and Consumer Protection News* (April–June 2013) 6.

⁸ Ncube et al., 'Study of Competition'; Ncube et al., 'Regulation and Rivalry'.

⁹ Ncube et al., 'Study of Competition', table 5.

¹⁰ T. Vilakazi and A. Paelo, 'Understanding Intra-Regional Transport: Competition in Road Transportation between Malawi, Mozambique, South Africa, Zambia, and Zimbabwe', UNU-WIDER Working Paper 2017/46.

and the substantial lack of return loads within Malawi. It also appears that local associations have a strong hold over transport in the country.

The uncompetitive markets are therefore due to a combination of factors. While anticompetitive conduct is likely to be part of the picture it is not clear how effective enforcement by national authorities can be. In addition to the cartel identified in Zambia, two further cartels which impacted on these countries highlight the challenges. The South African Competition Commission uncovered a cartel in nitrogenous fertiliser between Sasol, Omnia and Yara which ran until the mid 2000s.¹¹ Various bodies were used by market participants to coordinate the sharing of information which had the effect of increasing transparency and the ability to monitor competitor behaviour (and possible deviations from the arrangement) in the market. These bodies included the Nitrogen Balance Committee (NBC), the Import Planning Committee (IPC), the Export Club and Fertiliser Society of South Africa of which the main members were the primary fertiliser companies.¹² By monitoring domestic market shares, as well as exports and imports of products, members could track market shares and the behaviour of competitors given the highly concentrated nature of the market. It is also important to note that there was an agreement on how list prices would be determined, through adding on agreed costs to the international benchmark prices to get local prices in different regions. It is highly likely that the arrangements affected other countries in Southern Africa, although it is difficult to see how their national authorities could have addressed them.

Fertiliser prices in African countries have also been affected by global arrangements in potash and phosphates, which are important alongside nitrogenous fertilisers such as urea. The arrangements include two export cartels which dominate the world potash market.¹³ Between them, Canada and Russia account for 80 per cent of global potash reserves, with the three largest North American potash producers operating in the Canpotex joint marketing organisation and the three largest Russian and Belarusian potash producers in the BPC joint venture. Mark-ups from the international collusion in potash supply have been estimated for 2008 to 2012 at around 50 per cent to 63 per cent.¹⁴

¹¹ G. Makhaya and S. Roberts, 'Expectations and outcomes – Considering Competition and Corporate Power in South Africa Under Democracy', *Review of African Political Economy* (2013) 138 556–71. The consent and settlement agreement between the Competition Commission and Sasol Chemical Industries Ltd relating to the cartel conduct was confirmed by the Competition Tribunal in June 2009.

¹² See R. Das Nair and L. Mncube, 'The Role of Information Exchange in Facilitating Collusion: Insights from Selected Cases', in K. Moodaliyar and S. Roberts (eds.), *The Development of Competition Law and Economics in South Africa* (HSRC Press, 2012).

¹³ World Bank, *Boosting Competition*.

¹⁴ F. Jenny, 'Export Cartels in Primary Products: The Potash Case in Perspective', in S. Evenett and F. Jenny (eds.), *Trade, Competition and the Pricing of Commodities* (CEPR, 2012); H. Gnutzmann and P. Spiewanowski, 'Did the Fertilizer Cartel Cause the Food Crisis?', *Beiträge zur Jahrestagung des Vereins für Socialpolitik 2016: Demographischer Wandel – Session: International Trade and Development*, No. A19-V2.

In phosphates, PhosChem is a USA Webb-Pomerene export cartel whose members include PotashCorp and Mosaic which are also members of Canpotex.¹⁵ The other major source of phosphate fertiliser is OCP of Morocco which is a government-owned monopoly over phosphate mining in that country. Over three-quarters of global reserves of phosphate rock are located in Morocco and the Western Sahara.

8.2.2 Cement

Cement is the product perhaps most often associated with cartel conduct around the world. In Southern and East Africa, as in developing countries more generally, the local producers are affiliated with or are subsidiaries of large multinationals, of which the most significant are Lafarge and Holcim (now merged), and Heidelberg Cement. These companies have a history of collusive arrangements between them in several country markets globally.¹⁶ These firms also have multi-market contacts across many countries in Africa.¹⁷

Very different ex-factory prices have been observed in a six-country study across Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia over the period 2004 to 2012.¹⁸ In countries in the Southern African Customs Union (SACU) there had been a cartel prosecuted in South Africa of the four producers which had operated through the industry association until 2009. In the East African Community (which includes Kenya and Tanzania) there is a similar association, the East African Cement Producers Association. Prices in Zambia were the highest of all the countries and had a single dominant firm, Lafarge, until 2015.

In 2015 and 2016 prices came down in all of the countries as new entrants brought more competitively priced product to market. The most important entrant with plants across several countries including South Africa, Zambia and Tanzania is Dangote Cement. In Kenya, there have been several entrants since 2011, including National Cement and Savannah Cement. In Namibia, Ohorongo entered soon after the ending of the SACU cartel, starting operations in 2010. The entrants reduced prices to around \$5.50/bag in Kenya in 2015, a reduction of \$2.50 or 30 per cent.¹⁹ The entry of Dangote in Zambia saw prices falling to below \$6 in 2015, 40 per cent lower than the prevailing levels in 2009 to 2012. In South Africa prices reduced to \$4.50 with the starting of supplies by Sephaku Cement (in which Dangote is the

¹⁵ World Bank, *Boosting Competition*.

¹⁶ J. M. Connor, 'Price-Fixing Overcharges: Revised 3rd edition', Working Paper (2014).

¹⁷ World Bank, *Boosting Competition*.

¹⁸ As in figure 2 from T. Amunkete et al., 'Regional Cartels and Competition in the Cement Industry across Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia', in S. Roberts (ed.), *Competition in Africa* (HSRC Press, 2016).

¹⁹ www.businessdailyafrica.com/Cement-and-steel-manufacturers-cut-retail-prices/-/539546/2631942/-/foyracs/-/index.html

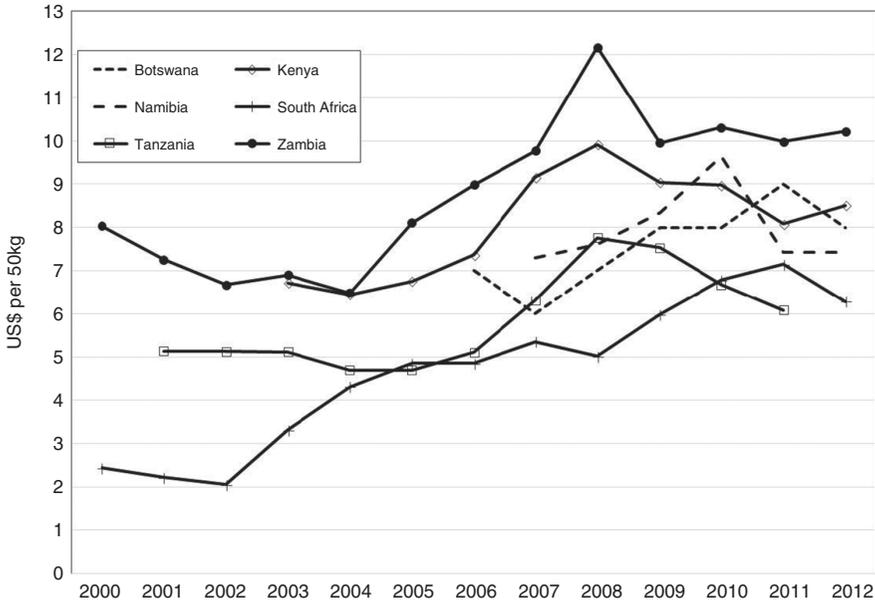


FIGURE 8.2 Estimated ex-factory cement prices, 50 kg bag, US\$

Sources: as in T. Amunkete et al., 'Regional Cartels and Competition in the Cement Industry across Botswana, Kenya, Namibia, South Africa, Tanzania and Zambia', in S. Roberts (ed.), *Competition in Africa* (HSRC Press, 2016). Averages computed by researchers from data obtained from companies and national statistics. Note: Kenya and Tanzania data from respective National Bureau of Statistics (per tonne prices converted to per 50 kg and thus exclude bagging costs). South Africa data for 2008 to 2012 was extended to earlier years using the producer price index for ordinary and extended cement. Calculated in US\$ using average annual exchange rates.

major investor), a further 25 per cent reduction from the 2012 levels after the cement cartel.²⁰

There are three main implications from the experience of the cement industry. First, as also illustrated by fertiliser, cartels are likely to operate at a regional level. In the SACU cement cartel some countries with relatively small cement markets were effectively allocated to a single producer. Viewed from the perspective of the country it appears to be a single dominant firm and supra-competitive pricing would appear to be unilateral conduct, in the form of excessive pricing. It is not possible to tell whether the single substantial Zambian producer was the result of market division arrangements. What is clear is that none of the other regional producers entered Zambia and only when Dangote entered did prices drop substantially to

²⁰ T. Vilakazi and S. Roberts, 'Cartels as "Fraud"? Collusion in Southern Africa in Fertilizer and Cement', *Review of African Political Economy* (2018).

levels in line with what appear to be competitive levels (of around \$4–\$6/bag on an ex-factory basis).

Second, as competitive rivalry or cartel arrangements operate across countries, trade restrictions can be used to effectively allocate markets. Firms can lobby to protect small local markets and to raise entry barriers using national champion type arguments while the government is unaware that this may be simply reinforcing a regional cartel arrangement. Trade flows can also be used to monitor market shares. The SACU cartel used monthly sales data to monitor adherence to the market division arrangement which was an agreement on market shares for the whole SACU market. Sales volumes by regions within South Africa and the other countries in SACU were used by firms to be able to identify where they were gaining or losing sales in order to continually adjust to meet the targeted shares. List prices were transparent and effectively set by the lead firm. The agreement on market shares meant there was no competition in terms of discounting from these list prices to win customers. The only aspect which may be observed by the competition authority of a country is the information exchange and, unless the scope of the geographic market over which arrangement operates is correctly identified, the stability in market shares will not even be observed.

Third, there can be very substantial benefits from entry by ‘outsider’ firms rather than entry or expansion by those across the border in a neighbouring market. However, the economies of scale combined with the need to secure critical inputs, in particular, limestone and energy, mean that expansions in output are more likely to come from insiders than outsiders. The limestone deposits for Sephaku’s plant in South Africa were only secured as the ‘use-it-or-lose-it’ provision in the mining laws meant it came up for sale.²¹ Exclusive supply arrangements for extenders such as fly ash from coal fired power stations can also weaken the ability of entrants to be efficient low-cost producers. Industrial policies may therefore be required to create competition, which becomes easier as economies grow, as long as the temptation to simply support the expansion of incumbent(s) is resisted.

8.2.3 *Summary*

The examples of fertiliser and cement illustrate that cartel enforcement is very difficult at a national and even a regional level where the arrangements are international in nature. In addition, the available margins and rents to be earned mean that there is a strong incentive for businesses to lobby for rules and regulations which bolster their position and keep out rivals.

While we can decry corruption and rent-seeking, it is naive to do so without recognising the globally concentrated nature of the industry and the ability for large

²¹ Amunkete et al., ‘Regional Cartels’.

suppliers to control markets. Lobbying governments is simply one tool in their arsenal for maintaining control.

More importantly, enforcement is likely to be limited in its impact where there are range of other restrictions on competitive markets. The competition agenda also effectively overlaps with a regional trade agenda where trade restrictions are the result of lobbying by firms to divide markets. The competition agenda must in addition be an industrial policy agenda if competitive markets and investment in increased local production are to go hand in hand.

8.3 COMPETITIVE DYNAMISM IN NETWORK INDUSTRIES: THE CASE OF MOBILE MONEY

Mobile money refers to mobile telecommunications network operators (MNOs) offering money transfer services, payments and banking services, including through partnerships with banks. The rapid growth of mobile money has led to dramatic improvements in financial inclusion.²² For example, in Kenya and Tanzania, which have led the way in Africa, financial inclusion measured by the ability to access banking services, including through mobile money facilities, covered the great majority of adults in 2015.²³ Uganda has followed closely behind its East African neighbours.²⁴ Zimbabwe has also seen a rapid take-up of mobile money services.²⁵ I draw on these country experiences to consider the implications for a constructive competition and development agenda.

Allowing MNOs to offer money transfer services has substituted for the transfer of physical cash between people such as where urban wage earners are seeking to transfer funds to family members in rural areas. Where there is latent demand due to basic infrastructure deficits, light regulation (not requiring licensed banks to manage the transfers, but simply trust accounts in which funds are held against the mobile wallets) and the growth of an agent network hand in hand with subscribers, then mobile money has achieved critical mass, takeoff and explosive growth.²⁶

²² J. Aron, “Leapfrogging”: A Survey of the Nature and Economic Implications of Mobile Money”, Centre for the Study of African Economies Working Paper (2015).

²³ R. Macmillan, K. Lloyd and S. Roberts, ‘A Comparative Study of Competition Dynamics in Mobile Money Markets across Tanzania, Uganda and Zimbabwe: Synthesis Report’, report for Bill and Melinda Gates Foundation (2016); J. Blechman, ‘Mobile Credit in Kenya and Tanzania: Emerging Regulatory Challenges in Consumer Protection, Credit Reporting and Use of Customer Transactional Data’, *African Journal of Information and Communication* (2016) 17, 61–88; R. Mazer and P. Rowan, ‘Competition in Mobile Financial Services: Lessons from Kenya and Tanzania’, *African Journal of Information and Communication* (2016) 17, 39–60.

²⁴ R. Macmillan, A. Paelo and T. Paremoer, ‘The “Evolution” of Regulation in Uganda’s Mobile Money Sector’, *African Journal of Information and Communication* (2016) 17, 89–110.

²⁵ G. Robb and T. Vilakazi, ‘Mobile Payments Markets in Kenya, Tanzania and Zimbabwe: A Comparative Study of Competitive Dynamics and Outcomes’, *African Journal of Information and Communications* (2016) 17, 9–38.

²⁶ D. Evans and A. Pirchio, ‘An Empirical Examination of Why Mobile Money Schemes Ignite in Some Developing Countries But Flounder in Most’, Coase-Sandor Institute for Law and Economics Working Paper No 723 (2015).

The services have evolved from simply transfers to payments, and to mobile banking where subscribers have access to deposit and loan facilities with potentially very substantial benefits, for example, to small-scale farmers in accessing credit.

There are substantial network effects in mobile money services. The more users there are, the more valuable the service is. And it is necessary to secure a critical mass of agents to provide a sufficiently ubiquitous service to attract customers, but also a critical mass of customers to generate commissions necessary to attract agents to come on board.

The dynamic and innovative services raise a number of competition and regulatory issues. The services do not exist in the first place unless the regulatory regime is permissive.²⁷ As new services, it was not possible to predict in advance how rapidly they would evolve. The M-Pesa product of Safaricom in Kenya was piloted with development funding as a small test case and the rapid take-up was unanticipated. The services straddle different regulatory regimes, most obviously financial services and telecommunications. In some countries, the central bank has played a lead role while in others it has been the telecommunications authority. There is a range of competition issues which has seen competition enforcement actions in Kenya and Zimbabwe by the respective competition authorities. The issues are complex as they involve balancing network regulation concerns of investment and access, as well as prudential considerations relating to the payments and banking systems.

The initial investments by providers to build a network leverage off the MNOs' existing network and agents who sell airtime. There is also a need to raise awareness and encourage uptake to ensure a critical mass of subscribers for the network to be attractive. The first mover bears a greater share of these costs and reaps competitive advantages from being in pole position. At the same time, dominance and substantial market power in mobile money can reinforce a dominant position in mobile telecommunications. For example, in Kenya while Safaricom's mobile money market share measured in terms of subscribers was around 77 per cent in 2015, in terms of active users its share is above 95 per cent.²⁸ The lack of interoperability meant that to use mobile money required being on the Safaricom network raising concerns for competition in mobile telecommunications more broadly than just mobile money.

There are a range of restrictive arrangements which can protect the investments made by the incumbent but also enable it to entrench its position.²⁹

²⁷ M. Bourreau and T. Valletti, 'Enabling Digital Financial Inclusion through Improvements in Competition and Interoperability: What Works and What Doesn't?', CGD Policy Paper 065 (Center for Global Development, Washington, DC, 2015).

²⁸ This is corroborated by 99 per cent of active mobile money account users reporting using Safaricom M-Pesa in 2014, where 'Active' means accounts used within the previous ninety days (Intermedia, 'Kenya. Digital Pathways to Financial Inclusion 2014 Survey Report' (2015); Mazer and Rowan, 'Competition in Mobile Financial Services').

²⁹ Robb and Vilakazi, 'Mobile Payments Markets in Kenya'; MacMillan, Paolo and Paremoer, 2016; Mazer and Rowan, 'Competition in Mobile Financial Services'.

The first set of issues is agent exclusivity. An agent network is crucial as it enables cash-in and cash-out by users. While exclusivity supports investment in building a network by the lead operator, it also undermines rivals' ability to compete as the ideal agents are existing retailers. The systems typically remain independent meaning that there is no free-riding on the investment in the physical equipment itself. Tanzania prohibited agent exclusivity in 2010, two years after the launch of mobile money. The removal of agent exclusivity came later in Kenya, Uganda and Zimbabwe, in each case after legal and regulatory proceedings relating to possible anticompetitive conduct by the incumbents.

The second set of issues relate to access. The initial growth of mobile money transfer has been for the is unbanked. However, the rapid growth in these countries has meant that mobile money services soon overlapped with those who are banked. In addition, banks can use the mobile money subscriber base to extend branchless banking services. This means banks can provide access to their services through a mobile platform, typically using unstructured supplementary service data (USSD). However, the MNOs control USSD. MNOs can simply refuse to provide this access or can charge such high prices that it is unattractive. This has been the case in a number of countries, including Kenya, Uganda and Zimbabwe.

The incentive of the incumbent MNO is to block those offering services which do, or may, compete with the MNOs' mobile financial services offering. This stifles creativity and responsiveness to the needs of different groups of consumers as the incumbent MNO seeks to keep everything under its umbrella. By comparison, where there is rivalry between MNOs they are incentivised to offer reasonable terms to attract customers, as in Tanzania. USSD pricing and access has been an issue in each of the countries except Tanzania. In Uganda, private litigation was brought against the incumbent.³⁰ In Kenya and Zimbabwe, the competition authorities have engaged with it.³¹ A lack of transparency further hinders competition through increasing search costs and making comparability more difficult.³²

Countries have also had different experiences with interoperability, which is the third set of competition issues. In Tanzania interoperability arrangements have been negotiated bilaterally under the firm encouragement of the central bank.³³ In the other countries there has been no interoperability between mobile money networks and transactions can only be made on-net. Non-members of the network are treated as if they had no mobile money account at all. The harm to competition from the absence of interoperability is greatest where the market is highly skewed in favour of

³⁰ Macmillan, Paolo and Paremoer, "Evolution" of Regulation'.

³¹ Robb and Vilakazi, 'Mobile Payments Markets in Kenya'.

³² Mazer and Rowan, 'Competition in Mobile Financial Services'.

³³ J. Blechman, F. Odhiambo and S. Roberts, 'Competition Dynamics in Mobile Money Markets in Tanzania', CCREd Working Paper 2017/22.

a dominant firm. This is also where it is very unlikely that interoperability will be agreed without regulatory intervention.

The fourth set of issues relate to the importance of data on credit records. A critical consideration in the mobile credit offering is ability to evaluate risk. Information from money transfers is an important source of data on subscribers' behaviour which can be used in mobile credit extension, which is typically in the form of small short-term loans.³⁴ In turn, an individual's track-record built-up from mobile credit is a valuable source of information for credit worthiness for longer-term loans. But, the credit record is controlled by the mobile money service provider and, as of 2016, is not shared with credit bureaus in Tanzania and Kenya.³⁵ This is possible due to a regulatory patchwork in Kenya and Tanzania with many gaps with respect to provisions and their enforcement.

How should the challenges of this field be addressed when it straddles telecommunications, financial services, competition and consumer protection? A nuanced approach is required to making judgements which take into account challenges in prudential regulation of the financial system, economic regulation to address market failures and consumer protection.³⁶ It bears repeating that privileging the existing prudential regulations and placing banks ahead of MNOs in the provision of services stifles their development at birth.³⁷ All of the countries here have chosen not to go down that path.

The countries demonstrate quite different approaches to the balancing of the concerns. However, all are grappling with the challenges recognising the economic value of the services and the need to support their growth. In Tanzania Kenya, Tanzania, Uganda and Zimbabwe all have similarly high levels of mobile money adoption but different market structures. In Kenya and Zimbabwe, the emergence of overwhelmingly dominant firms has seen the competition authorities take action while in Uganda there has been private enforcement. In mobile money transfer (MMT) services, extended agent exclusivity and lack of interoperability appear to have further bolstered the lead of incumbents in Zimbabwe and Uganda, while there is no interoperability and little effective rivalry in Kenya even after the ending of agent exclusivity. *Ex poste* enforcement has meant that a single dominant mobile money provider is reinforcing its dominance in telecoms and enforcers find themselves grappling with very powerful interests. The leading MNOs in Uganda, Kenya and Zimbabwe also appear to seek to retain greater control over aggregators' ability to innovate on their mobile money platforms than in Tanzania.

Tanzania by comparison has had effective rivalry in mobile telecommunications and has adopted a 'test and learn' approach to mobile money which has

³⁴ Blechman, 'Mobile Credit in Kenya and Tanzania'.

³⁵ *Ibid.*

³⁶ Blechman, 'Mobile Credit in Kenya and Tanzania'; Mazer and Rowan, 'Competition in Mobile Financial Services'.

³⁷ Evans and Pirchio, 'Empirical Examination'.

been fostered by the central bank through engagement. Expectations were set in broad terms with early interventions regarding agent exclusivity and to promote interoperability which were not, in fact, binding. Participants recognised the objectives and believed that other steps would be taken if necessary. Competition was nurtured by the broad rules for the services. Active competition between the MNOs for improved MMT services also appears to have driven greater cooperation of the MNOs with the banks, such as to facilitate transfers between bank accounts and mobile wallets, and with independent third parties (aggregators) in developing innovative services. Maintaining competition *in* the market through ongoing engagement has in fact been more effective than allowing competition *for* the market and *ex post* enforcement.

8.4 BARRIERS TO ENTRY

The third set of issues and one which goes beyond the standard prescriptions for competition enforcement is that of barriers to entry by local firms. Barriers to entry are typically part of an initial market analysis by competition authorities, following on from market definition as part of the consideration of whether there is substantial market power. Reducing barriers may be part of the advocacy efforts of a competition authority, especially targeted at regulations and government policies which harm competition. However, understanding the barriers to the entry and growth of effective competitors is also important for understanding why markets are configured in the way that they are and how this might be changed to foster the kind of rivalry we seek, namely one which encourages investments in capabilities. If we care about the identity of market participants and care about whether indigenous firms can compete and not just multinationals then this is something to consider when evaluating entry barriers.

An assessment of barriers to entry is critical for the correct balance between the risks of over and under enforcement and is one reason why countries should adopt different standards.³⁸ Barriers are higher in the context of market failures, including imperfect information. Along with economies of scale and scope, they provide the context for strategic behaviour by dominant firms. For example, if there is little consumer switching because of imperfect information and brand loyalty then the contestable market will be smaller and a dominant firm can more effectively employ retroactive rebates to further undermine rivals. Financial markets which are relatively underdeveloped also raise the likelihood of exclusionary strategies. In smaller less developed markets, as characterise most developing countries, this is all the more important.³⁹

³⁸ See D. Evans, 'Why Different Jurisdictions Do Not (and Should Not) Adopt the Same Antitrust Rules' (2009) 10(1) *Chicago Journal of International Law* 161–88.

³⁹ P. Brusick and S. Evenett, 'Should Developing Countries Worry about Abuse of Dominance?' (2008) 269 *Wisconsin Law Review* 274–77.

A very narrow view can be taken of what constitutes entry barriers as being the costs that an entrant has to incur which were not incurred by the incumbent.⁴⁰ This, however, allows for substantial incumbent advantages where the incumbent was able to recoup its investment costs while the prospective rival incurring the same costs is likely to be deterred, including because of possible strategic behaviour by the incumbent. In other words, incumbency advantages can be ‘locked in’. Some sunk costs and network effects are exogenous, incurred due to the nature of the product and the set-up costs required to produce at minimum efficient scale. Other sunk costs are influenced by the incumbent such as the level of spending on advertising.⁴¹

A series of studies in South Africa assessed entry barriers in practice through examining the experience of entrants in a number of selected markets. These markets are telecommunications, agro-processing, supermarkets, banking, renewable energy supply, airlines, fuel distribution, beer and mobile money.⁴² The markets were selected based on their importance in the economy as well as those where there had been entry.⁴³ The main types of barriers to entry identified are as follows.

8.4.1 Routes to Market, Consumer Behaviour and Switching Costs

The experiences of firms highlighted the importance of being able to reach consumers – physically as well as importantly through building the profile and positioning which induces consumers to switch. Behavioural economics has identified the many ways and reasons for consumer inertia.⁴⁴ This follows earlier literature on the justifications for advertising which can be a very large and sunk cost.⁴⁵ Related to consumer behaviour and advertising are the costs associated with packaging, promotions and display.

⁴⁰ See D. Carlton and J. Perloff (2004) *Modern Industrial Organisation* (Harper Collins, 2004), following G. Stigler, *The Organization of Industry* (University of Chicago Press, 1968).

⁴¹ J. Church and J. Ware, *Industrial Organisation: A Strategic Approach* (McGraw Hill, 2000).

⁴² The studies are: G. Makhaya and N. Nhundu, ‘Competition, Barriers to Entry and Inclusive Growth: Retail Banking Capitec Case Study’, CCRED Working Paper 2015/12; R. Hawthorne, P. Mondliwa, T. Paremoer and G. Robb, ‘Competition Barriers to Entry and Inclusive Growth: Telecommunications Sector Study’, CCRED Working Paper 2016/2; R. das Nair and C. Dube, ‘Competition, Barriers to Entry and Inclusive Growth: Case Study on Fruit n Veg City’, CCRED Working Paper 2016/7; C. Matumba and P. Mondliwa, ‘Competition, Barriers to Entry and Inclusive Growth: Soweto Gold Case Study’, CCRED Working Paper 2015/11; G. Montmasson-Clair and R das Nair, ‘The Importance of Effective Economic Regulation for inclusive Growth: Lessons from South Africa’s Renewable Energy Programmes’, CCRED Working Paper 2015/10; P. M. Ncube, T. Nkhonjera, T. Paremoer and T. Zengeni, ‘Competition, Barriers to Entry and Inclusive Growth: Agro-processing’, CCRED Working Paper 2016/3; A. Paelo, G. Robb and T. Vilakazi, ‘Study on Barriers to Entry in Liquid Fuel Distribution in South Africa’, CCRED Working Paper 2014/13.

⁴³ See www.competition.org.za/barriers-to-entry

⁴⁴ See J. Mehta (ed.), *Behavioural Economics in Competition and Consumer Policy* (University of East Anglia, Centre for Competition Policy, 2013).

⁴⁵ Church and Ware, *Industrial Organisation*.

Retail and distribution arrangements are obviously important for consumer goods, where they quite literally shape the routes to market for products. For producers of consumer goods such as food products, the costs of packaging, advertising and display and the ability to access the major supermarkets is an important consideration.⁴⁶ There are a number of practices which make it difficult for smaller brands to establish a presence, including category management practices of supermarkets where the organisation of a set of products in the supermarket is handed over to a lead supplier.

The example of beer, as a consumer product, highlighted the advertising and promotional costs required to establish a brand and the scale economies associated with advertising expenditure which does not increase proportionate to sales but is necessary to establish the product in the market.⁴⁷ Beer also has to be in fridges/coolers in taverns and bars, and on draught (on the bar top), for consumers to buy it. The same applies to other products, such as soft drinks, as well as more broadly to display space in outlets. Exclusive arrangements typically in place mean that small rivals are shut-out from a large number of outlets. In some countries competition enforcement has addressed this, however, the South African Act requires demonstrating a *substantial* lessening or prevention of competition which has been interpreted as showing that there would have been lower prices and higher quantity supplied in the market in the absence of the conduct. Small rivals can often not prove their product would be cheaper and there would be more supply to the market as a whole, while large firms claim their conduct aids the efficiency and lowers costs in their own supply chain.

For supermarkets there are also questions of entry barriers. The study of supermarkets⁴⁸ highlighted the importance of location in appealing to consumers. Transport costs and time can be reinforced by habit and convenience which means consumers gravitate to shopping malls. In South Africa, exclusive leases have blocked rival supermarkets as well as grocers, bakeries and butcheries from shopping malls. Such leases are a straightforward block to entrants in accessing potential markets and mean they have to look at alternative and inferior locations. The justification for exclusive leases is that they support investment in shopping malls as they ensure an anchor tenant. This applies in some locations and for a period, but not to support the ubiquitous practice for durations that last decades. It is also not clear that it justifies outright exclusivity as opposed to long-term leases for prime space in a given mall.

In many important services network effects mean there are natural first-mover advantages as consumers value the number of members a network has. This is reinforced where investment is required in the extension of network infrastructure

⁴⁶ Neube et al., 'Regulation and Rivalry'.

⁴⁷ Matumba and Mondliwa, 'Competition, Barriers to Entry and Inclusive Growth'.

⁴⁸ R. das Nair and S. Chisoro-Dube, 'Growth and Strategies of Large, Lead Firms – Supermarkets', CCRED Working Paper 8/2017, University of Johannesburg.

such as ATMs and branches in banking and mobile phone masts in telecommunications. Regulation to ensure interoperability and the terms on which this happens is critical for there to be effective competition in such industries.

Banking services require people being able to obtain cash and make payments and the study of Capitec's entry⁴⁹ found branches and an ATM network remain critical in South Africa. However, allowing cash back at point-of-sale (supermarket tills), as has been possible for a number of years, means an ATM network can be bypassed while mobile payments opens up opportunities to use more cost-effective solutions and points the way to substantially cheaper 'branchless banking' models. Switching costs are also significant and consumers do not readily switch to rivals even where they may be offering cheaper prices and better products and services. Consumers find it difficult to compare bank charges and services across banks, and banks spend large amounts on advertising their brand simply to establish and maintain their reputation.

The entrant, Capitec bank, first attracted customers to micro-loans, while customers retained their own bank account if they were already banked. Customers were only converted to also use banking services once becoming familiar with Capitec through the loans. It took over ten years for Capitec to be an effective rival and, in many respects, it appears to be the exception that proves the rule. It had a banking licence from its parent, it benefitted from the reputation of its main owner and it had a base of micro-loan clients. Even with all of these advantages it struggled for a long time to gain a foothold.

There are also substantial network effects and switching obstacles in telecommunications. This is reinforced by large promotions and advertising expenditures which arguably obscure rather than assist in understanding the range of options of offer. Customer inertia can be compounded in mobile telecommunications by network operators which can make the switching process difficult and inconvenient even while number portability has been enforced. This has been compounded by a range of strategies such as on-net discounts which firms can use to lock-in the network effects which operate in telecoms.⁵⁰

In electricity supply, access to market has been an important obstacle for renewable energy independent power producers who require access to the grid to be able to sell the power generated.⁵¹ There have been concerns around Eskom's incentives to undermine independent generators which led independent power producers to seek guarantees from National Treasury. These concerns appear to have been born out over time.

⁴⁹ Makhaya and Nhundu, 'Competition, Barriers to Entry and Inclusive Growth'.

⁵⁰ Hawthorne et al., 'Competition Barriers to Entry and Inclusive Growth'.

⁵¹ Montmasson-Clair and das Nair, 'Importance of Effective Economic Regulation'; G. Montmasson-Clair, 'Commissioning Renewable Energy: A Review of South Africa's Regulatory and Procurement Experience', *Journal of Economics and Financial Sciences* (special issue, 2014) 7.

The case studies all emphasise the importance of routes to reach consumers for entrants to be effective competitors and the challenges that they face in this regard.

8.4.2 *Scale Economies, Vertical Integration, Learning Effects and Access to Patient Finance*

Economies of scale and scope may not be entry barriers as a firm can enter at a size which reaches minimum efficient scale if it can raise the finance to do so. However, financial market imperfections handicap entrants who are potentially efficient competitors with a strong proposed offering, not yet proven, and yet little finance of their own. Scale and scope effects further mean that strategies can be employed by incumbents to undermine the rival's access to segments of market demand such as to ensure the rival operates at below installed capacity, so raising its average costs. Larger rivals, such as multinationals, are better placed than smaller local firms.

Economies of scale were highlighted as important across the studies. The effects are obviously very large in mobile telecommunications and retail banking. In supermarkets, there are large-scale effects in distribution, in particular, the investment in distribution centres. In manufacturing activities such as dairy, poultry and beer, there are economies of scale in processing and packaging facilities. In poultry, these effects are greatest in breeding and abattoirs which means independent broiler producers may be subject to market power at different levels of the value chain. In dairy production, the processing of value-added products necessary to diversify away from being reliant only on commodity milk production requires larger-scale investments (in powdered milk, yoghurts and cheese).

It is important to appreciate that building competitive capabilities is more than simply attaining minimum efficient scale and also involves a learning-by-doing process. This refers to the range of internal practices and knowledge which need to be developed to operate efficiently. It is also necessary to take into account the building of external relationships for supply. These are not necessarily barriers in their own right but reinforce existing advantages of incumbents and provide opportunities for them to undermine entrants.

For example, in poultry, the systems and flow of production (from breeding stock at great-grandparent, grandparent and parent levels, through to broilers) means it takes three years or more to become competitive. The incremental building of capabilities by the brewing entrant Soweto Gold highlights a similar need for 'patient' finance to support the growth of brewing, packaging and distribution over a number of years. Industrial policies and long-term development finance are required to support the development of productive capabilities. Across the studies the duration required to build-up the business was a feature.

Supplier and customer relationships come up against the vertical integration of incumbents emphasised in a number of the case studies. An entrant at just one level of

the supply chain is reliant on their integrated rivals for key inputs and/or key markets. Again, this provides incumbents with a potential lever over entrants and smaller rivals to undermine them. Alternatively, the rival has to enter simultaneously at the different levels as a vertically integrated operator, significantly increasing the entry costs.

In telecommunications, the failure to implement local loop unbundling mean rivals to Telkom in delivering fixed line services, such as ‘value-added network services’ (VANS), have been dependent on the incumbent and main rival.⁵² The slow-moving former state-owned fixed line company has undermined entrepreneurial activity across a range of these services. Long-running competition cases have slowly unlocked parts of these activities. Similarly, the integration from generation through transmission and distribution of the state-owned supplier has proved a major obstacle to independent power producers. While there may be good arguments in theory for integration, in practice, it has undermined investment in alternative sources of generation. A separated state-owned transmission and distribution system could act in the public interest to support upstream investment in generation of renewable energy.

The existence of critical infrastructure and facilities, along with network effects, are rationales for regulation to ensure competition. Regulation can, however, itself can be a barrier, such as where onerous licencing conditions block entry. For example, banking regulations in South Africa have prevented the growth of mobile money transfer by mobile network operators. Ineffective regulation has also played an important part such as where network access should be opened up through regulation.

8.4.3 *Summary*

The way the economy works in terms of microeconomic outcomes is the product of many small decisions and some big ones. There are also ‘non-decisions’, where the established trajectory continues because no decisions are taken to change its direction. The studies of barriers to entry to the economy highlight the range of often mutually reinforcing microeconomic factors which stack-up to block greater participation in the economy by people as entrepreneurs/producers. For example, finance is often highlighted as the main block to new businesses and, indeed, the sunk investments required to get commercially viable enterprises off the ground means finance obviously matters. But, providing development finance without addressing the other barriers to effective entry is likely to be a waste of money.

The studies also point to the importance of entry by outsiders and indicate what is at stake if entrants are blocked or undermined. Several studies considered where incumbents have substantial unilateral market power while others have found that entry barriers have shielded a small group of ‘insiders’ from competition who can

⁵² Hawthorne et al., ‘Competition Barriers to Entry and Inclusive Growth’.

tacitly coordinate. The studies suggest gains from entry in lower consumer prices of similar orders of magnitude to cartel mark-up calculations (of 15 per cent–25 per cent).⁵³ In services (banking, telecoms) which are at the core of economic activity the mark-ups imply very wide-ranging effects on economic participation. While changes to bring more competition have brought improvements, the point is that the magnitude involved could have been achieved earlier and point in the direction in which much wider impacts can be realised.

8.5 AN AGENDA TO FOSTER COMPETITIVE MARKETS

A productive and inclusive economy which rewards effort, innovation and creativity requires a constructive approach to competition. It can be understood in terms of fairness, as has been part of the mandate of the Korean Fair Trade Commission.⁵⁴ The approach adopted is explained by Kyu-Uck Lee⁵⁵ who observed the following regarding competition law and policy in Korea at the time:

Competition is the basic rule of the game in the economy. Nevertheless, if the outcome of competition is to be accepted by the society at large, the process of competition itself must not only be free but also conform to a social norm, explicit or implicit. In other words, it must also be fair. Otherwise, the freedom to compete loses its intrinsic value. Fair competition must go in tandem with free competition. These two concepts embody one and the same value.

The intrinsic value of the freedom to compete implies evaluating the competitive market mechanism in terms of its accomplishments in promoting individual freedoms (to produce, develop productive capabilities, and make autonomous choices), as opposed to the conventional welfarist framework of assessment.⁵⁶ In the context of African development this means opportunities for the citizens of the countries. The identity of the market participants matters. As noted by Fox, this approach is, however, outside the antitrust mainstream and means that consumers may bear the costs of support for participation by local producers, at least when looked at in the partial terms of individual products and markets rather than holistically.⁵⁷

The qualification is critical. While apparent market distortions may undermine static allocative efficiency in terms of consumers decisions, they may well be required to improve the direction of resources to investments for the development of productive capabilities (such as in the presence of technology spill-overs, or learning-by-doing

⁵³ Connor, 'Price-Fixing Overcharges'.

⁵⁴ E. Fox, 'We Protect Competition, You Protect Competitors' (2003)26(2) *World Competition* 149–65.

⁵⁵ A. Kyu-Uck Lee, "Fairness" Interpretation of Competition Policy with Special Reference to Korea's Laws', in *The Symposium in Commemoration of the 50th Anniversary of the Founding of the Fair Trade Commission in Japan, Competition Policy for the 21st Century* (KFTC 1997).

⁵⁶ A. Sen, 'Markets and Freedoms: Achievements and Limitations of the Market Mechanism in Promoting Individual Freedoms' (1993) *Oxford Economic Papers*, 45

⁵⁷ Fox, 'Competition, Development and Regional Integration'.

effects). In other words, following Khan (2012),⁵⁸ we are concerned not simply with the governance framework for markets, but what the markets generate, namely whether they foster growth-promoting competition. It is not about 'getting prices right' but about building dynamic comparative advantages.⁵⁹ In the context of African countries, this is about the incentives and opportunities for investments in improved production capabilities to achieve technological catching-up.⁶⁰

The three areas examined in this chapter question the standard competition prescriptions and indicate that there is a number of key considerations for an agenda to foster such competition in developing countries, such as the African economies in which the case studies examined here are located.

First, it is very difficult for developing countries to enforce against international cartels due the difficulties in obtaining information.⁶¹ And, even when cartel conduct is identified, more competitive outcomes do not necessarily result. The coordinated arrangements can effectively be maintained through trade and industrial policies shaped by lobbying by individual firms to protect their rents and/or by tacit arrangements.

Second, there can be substantial gains from the entry of new producers who are 'outsiders'. The entry of Dangote and others into cement production in countries across Africa has dramatically reduced prices. A narrow enforcement agenda against cartelisation in cement could not achieve this outcome but instead appears to have stimulated increasingly sophisticated ways of coordinating through information exchange. The gains from entry indicate that industrial policies which support investments at scale by new suppliers of products such as cement and fertiliser need to be distinguished from those that protect incumbents.

Third, the mobile money experience demonstrates how the balance can be struck by regulators and competition authorities to ensure innovative new markets evolve. In particular, the Tanzanian experience illustrates a 'test and learn' approach where expectations and principles are communicated to the lead firms, including the importance of ensuring markets will be open to new participants in future. Complex issues such as network effects can be addressed and rules evolved to ensure dynamic rivalry. Rather than the common criticism that institutions are weak and so governments should not intervene, there is instead institutional 'learning-by-doing' underway from the interventions.

Fourth, the different and mutually reinforcing nature of barriers to entry needs to be understood. For example, addressing market failures in access to finance is unlikely to support effective competitors while other obstacles such as with routes

⁵⁸ M. Khan, 'Governance and Growth Challenges for Africa', in A. Noman et al. (eds.), *Good Growth and Governance in Africa: Rethinking Development Strategies* (Oxford University Press, 2012).

⁵⁹ A. Amsden, 'Asia's Next Giant' (Oxford University Press, 1989).

⁶⁰ Khan, 'Governance and Growth Challenges'.

⁶¹ E. Fox, 'International Antitrust and the Doha Dome' (2003) 43 *Virginia Journal of International Law* 911.

to market and obstacles to consumer switching remain unaddressed. A critical insight is that interventions need to be on a number of fronts. Just as the barriers have a combined effect, so addressing one area in isolation will make little difference.

Fifth, while regulation perhaps naturally favours incumbents given the information asymmetries, vertically integrated incumbents can also 'self-regulate' their sector. And, potential rivals will struggle to plausibly show the costs of their exclusion. Competition policy therefore needs to imagine alternatives. One source of this is through international comparisons in order to learn from other countries' experiences. Government policies are important in opening up sectors to wider participation including through assistance enabling new firms to compete with incumbents who have often inherited advantageous positions.⁶²

There are a number of rules which determine how markets work. These can tip the balance in favour of one side or the other. In this chapter, I have argued that a proactive policy to generate competition is needed. We should ask ourselves whether the competition law regime is 'fit for purpose', with reference in particular to nurturing performance-based competition through investment in productive capabilities. In some cases, regulations blocking entry can be removed, in others, proactive regulation *for* competition may be required given market failures and intrinsic obstacles. It is also critical to distinguish between industrial policies that result from lobbying for protection of incumbents from industrial policies which support new rivals, the adoption and adaptation of improved technologies, and spur productivity improvements. Simplistic arguments which pit industrial policy against competition policy miss the fact that the embedded economic structures of countries reflect earlier favouring of some interests over others.

The comparative analysis highlights the importance of learning, in incremental and iterative processes, and maintaining an openness to different ideas and contributions. Advice and technical support can be a valuable part of this process, but not a 'cookbook' or ideal-type models being transplanted.

⁶² O. Budzinski and M. Beigi, 'Generating Instead of Protecting Competition', in M. Gal et al. (eds.), *The Economic Characteristics of Developing Jurisdictions* (Edward Elgar, 2015).