

Regulating US Big Tech Companies beyond Local Markets: Building African Digital Markets (a Theoretical Perspective)*

I. Introduction

This paper is the first – theory-setting – building block of a broader project on the challenges the transition to an algorithmic society poses in a developmental context. The aim of the overall project is to unearth the day-to-day enforcement hurdles algorithmic and data-driven business models create for developing countries and their economic regulators in particular. To that end, we focus on competition and sectoral regulators in Africa as the units for an upcoming empirical analysis.¹

An initial inventory of existing literature shows that challenges exist at several levels in a spatial sense – the lack of experience with big tech at national level, the lack of coordination between budding Regional Competition Regimes (RCR)² in Africa and the lack of a world competition regulator in the aftermath of the failed attempt to designate the WTO as such. Additionally, there is a temporal mismatch between the levels of advancement in enforcement against big tech, with the EU being far ahead from the US, and Africa still lagging even further behind.

Given the above context, the current paper discusses several theoretical approaches for the study, contextualization and normative interpretation of the above and further developments that subsequent empirical work will reveal. The main problem we explore in this paper is the issue of divergence, which we then approach through several legal tools allowing for coherence. More specifically, we theoretically explore the opportunities and limitations for cohering by legal means through 1) legal emulation from the most experienced enforcer (the EU or US) or 2) through ‘home-grown’ digital-competition-building exercise within the auspices of African RCRs or the forthcoming Protocol on Competition Policy to the African Continental Free Trade Agreement (AfCFTA).

* This paper forms part of the project ‘Regulating US-Based Big Tech Beyond Local Markets: Antitrust for Africa’, managed by Velloh Kigwiru and Zlatina Georgieva and receiving the funding of the Economic Security Project, sub-chapter ‘Antimonopoly’: <https://economicsecurityproject.org/>.

¹ Focusing on antitrust agencies in their role of enforcers of competition law is justified for numerous reasons summarized in Koop and Lodge (2014), [here](#). Also, the centrality of independent agencies in creating an economic order fitting societal preferences is emphasized by the ordoliberal agenda we propose. See the writings of Eucken as discussed by Deutscher/Makris (2016).

² The following regional competition regimes exist in Africa: ECOWAS, EAC, COMESA, SADC, WAEMU, SACU, ECCAS. Most are based on the goal of trade liberalization and some also have competition/antitrust regimes.

The setup of this paper is as follows: we firstly inventory the advent of digital markets on a global scale and outline the complexities of the phenomenon that create particular challenges for developing countries. We continue by zooming into the African continent and exploring the need for a coordinated response to digitalization that competition-and-development scholars are unanimously calling for.³ The options to arrive at such a response are then discussed at the level of theory: namely, we explore options for legal transplantation of rules for regulating digital markets and nuance this option by using the literature on policy diffusion in social sciences.⁴ At the other extreme, we also explore the possibility for an entirely home-grown regulatory solution.⁵

Finally, we critically compare-and-contrast the abovementioned theoretical approaches and propose a middle-of-the road, third solution: namely, seeking inspiration for an African home-grown digital regulation regime in past experiences of European economic integration and the ordoliberal school of thought in particular. More specifically, we build on the ideas of van der Vijver⁶ regarding the fit between ordoliberalism and development. We aim to show how this school of thought also echoes current sentiments on how digital markets should be regulated, as expressed in the ‘hipster antitrust’ (neo-Brandeis) movement recently coined in the US by Dr. Lina Khan and Prof. Tim Wu.⁷ In this sense, stepping on prior literature, we also broaden its reach to the context of digital markets and show how Africa can profit from and build upon an uncanny alignment between historical EU ideas on economic order (ordoliberalism) and current US antitrust thought regarding digital markets (neo-Brandisianism). This perspective also challenges temporality and spatiality in conceptualizing the development of (global) economic/antitrust regulation, by marrying theoretical approaches more than 90 years and – quite literally – an ocean apart.

II. Digital markets and development

Accounts on digitalization and e-commerce in the early 1990’s and early 2000’s were largely optimistic about the ability of these markets to deliver more competition and development. Writing in 2003, Cernat argued that ‘except a few cases in which increasing returns to scale are important, the Internet

³ Fox (2022), Ismail (2018), Klaaren (2021), Kigwiru (2020). Waked (2016) calls for intra-African convergence of competition laws more generally.

⁴ Börzel (2012), Simmons (2006), Twining (2004, 2005).

⁵ Fox (2022), at fn. 74.

⁶ Van der Vijver (2019).

⁷ Khan (2017); Wu (2018).

is expected to bring the economy closer to the theoretical model of perfect competition'.⁸ However, he does acknowledge that an unregulated Internet space at a global level might lead to more and more varied anti-competitive practices. When one reads current literature on digital markets, the reality of the second option envisioned by Cernat becomes painfully clear. Economic research invariably confronts the modern student of economic regulation with the terms 'two-sidedness', 'tipping',⁹ 'network effects'¹⁰ and 'data troves'¹¹ that are all important for understanding how digital structures are different from traditional, 'brick-and-mortar' markets. With the risk of oversimplification of the above literature, the upshot for the purposes of this article is that competitive processes tend to get more easily displaced by market power/monopolistic tendencies where a market exhibits one or more of the above features. While not inevitable, power on markets that tip becomes entrenched¹² and is often so sticky that it necessitates a regulatory response, be it in the form of antitrust (current preferred solution in the US) or ex-ante regulation (current preferred solution in the EU).¹³

The question for this work is how the above discussion could translate to the African context. While the narratives in the Global North have crystallized to the matter of whether we need to impose ex-ante regulation or ex-post competition rules to (often US-based) digital giants, the questions in the Global South are much broader and run deeper in the fabric of market building. In order to give a preliminary inventory of the main hurdles for African digital development, we survey the literature that converges on several main problems that have been identified as either internal or external to the African context.

Among the internal challenges, the following consistently come to the fore in relevant literature: 1) lack or underdevelopment of physical infrastructure for digital communication;¹⁴ 2) lack or underdevelopment of advertising markets;¹⁵ 3) need for institutional infrastructure and human capital

⁸ Cernat (2003).

⁹ On two-sidedness and tipping, see more generally the work of Filistrucci.

¹⁰ Argenton and Prüfer (2012).

¹¹ Graef and Prüfer (2018).

¹² J Prüfer, 'Competition Policy and Data Sharing on Data-driven Markets: Steps Towards Legal Implementation' Project Commissioned by the Friedrich Ebert Stiftung (2018-2020).

¹³ While the US is still deliberating on whether an antitrust solution is sufficient to reign in digital giants, the EU adopted an ex-ante enforcement regime. See the [recently published in the OJ](#) Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

¹⁴ Hodge and Buthelezi (2019); Friederichi et al (2020); Rosotto et al (2018).

¹⁵ Rosotto et al (2018).

to fight corrupt and concentrated market structures in (predominantly) small economies;¹⁶ 4) need for aligned goals/objectives of antitrust enforcement (at the level of RCRs and/or the AfCTFA);¹⁷ 5) need for adoption of a coherent trade and competition policy at either (or both) of the abovementioned fora.¹⁸ We briefly speak to each of these challenges and their inter-relatedness according to surveyed literature. The bottom-line is that taken together, the above hurdles point to problems that are not specific to digital markets per sé, which signals the need for a holistic approach to (digital) market-economy-building in Africa. When it comes to physical infrastructures enabling digital communication, it has long been recognized in scholarship that even if a country is open to trade, this does not inject competition in the non-tradable sector, comprising telecoms, energy, construction, distribution.¹⁹ Hence, specific regulatory policy to encourage roll-out is needed and can possibly be integrated within the mix of responsibilities of an independent (competition) regulator.²⁰ Secondly, a competition regulator in a market-building endeavor (such as the AfCTA but also the EU) needs to be equally aware of both the competition and trade aspect of the free flow of the factors of production and optimize its enforcement to prevent both private and public barriers to trade.²¹ Hence, there is no trade without competition and no competition without trade. Thirdly, the goals of competition regimes should be optimized and aligned with these principles, but not to the exclusion of other important and context-specific objectives that might serve to build both economic and institutional resilience (we elaborate on this argument pioneered by E. Fox in Section III). In the long run, the above strategy should boost underperforming markets (i.e. advertising) and possibly build a healthier societal fabric. At this juncture, it needs to be emphasized that the above arguments are based on largely theoretical work and need further empirical backing.

When it comes to external challenges, one of the main problems identified by scholars is the unfortunate demise of the envisioned global competition regime at the level of the WTO during the Doha round of negotiations.²² As expressed by Fox, now more than ever, when markets are becoming increasingly digitally interconnected, it is important to have a regulator of (digital) transactions on a global scale – one who can tear down both public (trade) and private (competition) barriers to exchange.²³ However, current accounts on the possibility for re-kindling the idea of incorporation of a

¹⁶ Lipimile and Dawar (2020); Ukponu et al (2022); Nicolini (2019).

¹⁷ Fox (2012, 2016, 2017, 2020, 2022); Hodge and Buthelezi (2019).

¹⁸ Waked (2016), Lipimile and Dawar (2020).

¹⁹ Mateus (2010).

²⁰ Dahlman et al (2016).

²¹ Waked (2016), 199.

²² Fox (2022); Sucker and Klaaren (2021).

²³ This argument was put forward already in the early 2000's by Cernat (2003).

competition chapter within the WTO are rather skeptical; importantly, they point to the lack of leadership by a key player – the US.²⁴ Hence, the ongoing negotiation of the Competition Protocol to the AfCFTA is crucial to a potential ‘turning of the tide’ when it comes to the position of Africa in enforcing on global (digital) markets. Granted, there are valuable national initiatives and digital market studies undertaken by leading African competition enforcers,²⁵ but they alone are not enough. As stipulated by Fox, a multilateral solution at least regarding core antitrust issues is to be preferred, while the details on digital markets could be left to subsequent networked discussions in high-level expert groups.²⁶

When it comes to problems and challenges, it also merits observing that the above-delineated internal and external issues have a clear spatial and temporal ethnocentric bias that expresses itself in lack of alignment between Global North standards (rule-setters) and Global South realities (rule-followers).²⁷ All of the above issues are expressed from the position of an observer situated in the Global North, demanding change to fit his/her own conceptualization of what a ‘correct’ economic order constitutes. For this reason, what is much needed are empirical accounts that are to provide further texture to the abovementioned problems and to discover new ones.²⁸

Beyond the North-South bias in the expression of the above issues, another matter stands out: except for the first two problems identified above, none is digital-markets-specific. All other challenges speak to the need for structural and general enhancement of markets and the institutions that regulate them in Africa. Hence, a holistic approach to markets with clear objective(s) is needed if Africa is to compete on a global digital plane. However, it is important that this holistic approach is not or not exclusively based on Western values and conceptions of market ordering. We come back to this idea in Section IV below.

Finally, if resolution of the above matters is delayed, scholars have expressed ‘a common concern’ that ‘network effects and critical mass considerations have the potential to skew competition in favor

²⁴ Lacey (2020).

²⁵ See, for instance, the Online Intermediation Platforms Market Inquiry (OIPMI) by the Competition Commission of South Africa.

²⁶ Fox (2022).

²⁷ Specifically for e-commerce, Cernat (2003) also identifies a ‘home-bias’.

²⁸ There are some early attempts at empirical work on the matter of digital markets in the African context. See, for instance, Friederici et al, ‘Digital Entrepreneurship in Africa’ (2020, MIT). Still, much empirical work is yet to be done as recognized by Akinkugbe (2021).

of foreign platforms' where nascent African businesses are still trying to gain market share.²⁹ The same authors also point out that a way to circumvent the foreign domination trap would be for digital business models to capitalize on cultural differences that make digital goods and services particularly suitable to their context. In other words, much like its (digital) market regulation that we discuss below, Africa needs to develop 'own flavor' digital business models. This opportunity can be read in the context of the Internet being open by design and in this sense able to 'provide an opportunity to enhance inclusion in markets, which has been lacking to date.'³⁰

III. A way forward? Transplants vs home-grown solutions

III. a) Context Matters

In order for the above desiderata to obtain, the processes through which they can take place need to be identified, compared and contrasted, always in light of local context. That context matters has been recognized by legal comparativists³¹ and social scientists alike.³² This postulate has been aptly exemplified by Federal Trade Commission attorney Davidson during his time in Indonesia as follows:

In furtherance of my goals while in Indonesia, I conducted classes for the Indonesian commission staff on competition concepts. Early in these sessions, I asked the members of the class to raise their hands if they favored free markets and competition. Out of the thirty-five or so individuals who were attending that day, two to three hands were raised.³³

This same sentiment is also expressed in more recent accounts of African authors.³⁴ Therein, globalization and its push for market integration, on the one hand, and sovereignty, on the other, are seen as irreconcilable pillars necessitating a call for re-definition of national values and identities. Transposing these insights into the (digital) competition domain, one comes to a concept aptly coined

²⁹ Rosotto et al (2018).

³⁰ Hodge and Buthelezi (2019).

³¹ See the accounts of comparatist Pierre Legrand.

³² Simmons (2006), Börzel (2012), who work within the field of policy diffusion.

³³ Davidson (2005).

³⁴ Ukponu (2022).

by Fox: namely, ‘outsider antitrust’.³⁵ Prof. Fox dubs regimes of antitrust as ‘outsider’ when they are non-inclusive and only subservient to imported neoclassical notions of ‘efficiency’, which has a chilling effect when one wants to consider broader goals beyond narrowly defined economic gains. Prof. Fox therefore proposes integrating the economic underpinnings of antitrust with sustainable development (SDGs) or other appropriate societal goals, in order to create ‘insider antitrust’ fit for the demands of each specific society. In particular, when discussing the SDGs, she argues ‘the goals do not identify markets as a source of dignity, empowerment and sustainable personal and economic development, nor do they identify freeing up markets as a way to reach the goals. They should.’³⁶ In this way, the economic core of antitrust is not lost, while the policy becomes more inclusive at the same time.

A good example in that respect is given by Bakhom,³⁷ who recounts that in South Africa, the concept of ‘public interest’ is taken into consideration in merger cases. This is consistent with the nation’s commitment to the goal of inclusive development, which is a core part of the edifice of South African antitrust policy. The ‘public interest’ in this sense can be broadly construed – it can include possible job losses due to a merger, the elimination of a Small and Medium Enterprise (SME), or even a threat to national security post-merger. In the same vein, Bakhom reports that the Chinese antitrust authority MOFCOM considers ‘state security’ as a criterion in its decisions. Hence, the inclusion of broader standards within these jurisdictions’ antitrust regimes allows them to marry strict economic logic and societal goals and thus become more reflective of societal context.

Whether such an approach is desirable, however, is a matter on which there is no unanimity. On the one hand, including societal goals within (digital) market design is commendable and reflective of a democratic consensus built in within markets,³⁸ on the other hand, scholars argue against multiple goals of antitrust enforcement especially for inexperienced and/or small economy jurisdictions as this might lead to confusion and inconsistent enforcement.³⁹ The tension between these contradictory viewpoints are somewhat lessened by the fact that – when it comes to digital markets – the status-

³⁵ Fox (2017).

³⁶ Ibid.

³⁷ Bakhom (2011). For a more elaborate argument on the same point, see Fox/Bakhom (2019)

³⁸ This is also what the ordoliberal school of thought postulates through its core concept ‘an economic constitution’.

³⁹ Gal (2003). Mateus (2010) goes even further by arguing that below a certain threshold of institutional development, a country should be precluded from adopting competition laws as they will do more harm than good.

quo is still very much in flux both in the Global North and the Global South. Hence, there is no sufficient experience to prescribe a ‘magic pill’ that works. This, in turn, gives room for experimentation and/or amalgamation.

Relatedly, as will be argued below, when we discuss system design for digital markets regulation in Africa, one does not have to subscribe to either a strict ‘legal transplants’ approach or a ‘home-grown’ regime approach. A marriage of the two – much like Fox’s ‘insider antitrust’ – is possible. Such a union can be achieved through adoption of the ideas of the ordoliberal school of thought, to which we turn in Section IV. Before that, however, the core theories, on which dispersal of African digital policy could rely will be discussed – namely, ‘legal transplants’ and ‘home grown’ legal solutions. At the outset, it is important to mention these are static theories that do not take account of the developing nature of (global) legal orders. Hence, they naturally exhibit limitations when applied to dynamic issues such as digital markets and their potential regulation in a developmental context.

III. b) Legal Transplants

According to Twining, ‘the literature on transplantation or reception of law can be traced back to the work of Tarde, Maine, and Weber’⁴⁰ and was developed as a reaction to the 19th century view that evolutionary laws governed human progress, with the inevitable convergence of ideas as an ultimate result. As a counterpoint, many scholars of the ‘legal transplants’ tradition emphasized on the importance of culture and context for the development of legal rules and systems, the underlying assumption being that convergence is never fully possible due to differences in context. However, without questioning the merit of this argument, Twining criticizes the school with being overly theoretical, vague and unable to develop into a research tradition.⁴¹ He instead commends (and recommends) the ‘sister’ school in political science and sociology – policy diffusion. Policy diffusion, according to Twining, is a tradition interested in the underlying causes and effects of rule diffusion; in this sense, it is particularly apt to show us under what conditions diffusion is likely or unlikely to occur. Hence, studying the object of our interest – digital policy development in Africa – through a policy diffusion theoretical lens can give us answers in that vein.

⁴⁰ Twining (2005).

⁴¹ Twining (2004).

Given that the current paper is purely theoretical, we hereby limit ourselves to discussion of the types of policy diffusion identified in political science and sociological literature. We also chart out the outcomes with respect to African digital policy development we would theoretically expect on the basis of each diffusion type. It is also important to mention that, while earlier diffusion theorists categorized the types of diffusion as discrete, mutually exclusive models,⁴² more current accounts postulate that diffusion of a single phenomenon can take several, if not all forms of diffusion as listed below.⁴³ The key determinant as to whether an amalgam of policy diffusion types will materialize is whether the interests of the rule exporter and rule importer are aligned or not. In case they are not, an amalgam of diffusion types is expected to be observed. Given that the African continent and the potential exporters of digital market rules (the EU and US to a lesser extent) are definitely not aligned in their interests, we start from the premise we could observe multiple diffusion types. Which are they? Simmons developed 4 ideal types of diffusion,⁴⁴ later expanded and refined by further scholarship.⁴⁵ For the purposes of this article, we stick to the ideal typology that identifies the following categories: coercion, competition, learning and emulation. We hereby briefly delve on each one and apply it to digital markets' policy diffusion on the African continent.

Coercion is a vertical process and often plays out between a powerful and a less powerful actor. However, according to Börzel,⁴⁶ coercion cannot happen when there is no mechanism through which the more powerful, 'exporting' actor can enforce compliance with his rule. To the extent that there is no global competition or trade regime currently available for tracing or inducing compliance, direct coercion is unlikely in our view.

An alternative type of diffusion is competition, which is defined as a strategy/race between equals to export their respective rule. In this sense, one would expect to see competition between equally digitally developed jurisdictions, such as the EU and the US. This theory would thus predict that Africa would once more fall between the cracks of global rule-setting for digital market regulation that will again be dominated by the EU and the US. The EU, having just adopted its Digital Markets Act, is in a prime position to effectively diffuse its rules through the *competition* mechanism. Hence, it is of

⁴² Simmons (2006).

⁴³ Morin and Gold (2014). Whether diffusion takes one or many forms depends on whether the interests of the exporter and importer of a certain rule are symmetric or asymmetric. In the former case, emulation is the only likely outcome. In the latter case, all types of diffusion can take place.

⁴⁴ Simmons (2006).

⁴⁵ Morin and Gold (2014); Börzel (2016).

⁴⁶ Ibid.

pivotal importance that the African continent makes use of its current negotiations of a Competition Protocol under the AfCFTA in order to get ahead regarding its digital rule-making portfolio.

Another model of diffusion that relies on a rather soft method of communication is *learning*. Learning happens by adapting worldviews on the basis of observation of successful policy models. In this process, central are epistemic communities and the exchange of ideas and experiences within them. To the extent that the WTO could have positioned itself as a norm-entrepreneur on digital markets (had it acquired an antitrust competency during the Doha round of negotiations), this is a missed opportunity. Currently, the only norm entrepreneur in the sense of having a clear vision on digital markets regulation is the EU, possibly acting within the auspices of the ICN (International Competition Network). However, what is important for learning is that ‘actors learn from others with whom they have similar characteristics’.⁴⁷ Hence, the EU might not be the ideal candidate to learn from for the African continent. If we however look within the African continent more closely, a possible norm entrepreneur in disguise can be South Africa and its competition authority, which has been very active in its digital policymaking.⁴⁸ An additional advantage this authority has is that the goals of its competition regime – among which inclusiveness and openness in a broad sense – align well with the vision of digital markets regulation as currently formulated in the EU (there, the term used to echo openness of markets is ‘contestability’).⁴⁹ Hence, should learning be at play in the diffusion of digital markets regulation in Africa, we expect the South African Competition Commission to play a key – or even a leading – role.

The final type of policy diffusion as outlined by Simmons is *emulation*. Whereas conventional logic-of-development arguments suggest that countries will adopt certain programs when they are developmentally ready for them, this type of diffusion postulates that countries embrace new norms for symbolic reasons, even when they cannot begin to put them into practice. Here, the willingness to ‘look good’ in the international community is leading, even if certain emulated rules do not fit local needs or context. Emulation can explain why competition rules sometimes remain unenforced in a developmental context and is certainly highly problematic if it becomes a mechanism for diffusion of digital market rules as well. If we are to observe this mechanism of diffusion, it would mean that rules on digital markets will be adopted only to remain ‘law on the books’. This would not only be

⁴⁷ Aydin (2010).

⁴⁸ See, for instance, the Online Intermediation Platforms Market Inquiry (OIPMI).

⁴⁹ Digital Markets Act (see fn 13).

unfortunate, but also dangerous, given that – similarly to the coercion scenario – Africa will risk falling between the cracks of global developments on the matter.⁵⁰

In conclusion, the theoretical expectations derived from the above-described models, are rather bleak if one takes the perspective of the African continent. Emulation, competition and coercion models would imply the obsolescence of the African voice in global digital market rule-making, while learning could potentially develop into a coherent strategy under the aegis of South Africa. As Prof. Fox reiterates on multiple occasions,⁵¹ it is important for African jurisdictions to 1) develop a voice and 2) speak with one voice when it comes to their preferences of global market ordering. This statement is made in the context of ‘pure’ antitrust matters but applies with full force to digital market issues as well. Hence, we proceed to presenting another theoretical account that could cater for a mechanism, through which Africa can develop a voice – namely, a home-grown solution to digital markets regulation.

III.c) Home-Grown Solutions

Although less coherently embedded within a specific school of thought, the ‘grass-roots’ or ‘home-grown’ regime as coined by Prof. Fox in the context of antitrust regime adoption by developing countries, offers a grand promise for tailor-made solutions.⁵² Much like comparative work on legal transplants, here context matters to a great extent – it actually drives the process of regime adoption but also capacity building more generally.⁵³ In her work on grass-roots methods for competition convergence,⁵⁴ Prof. Fox puts inclusive development at the center stage and argues that it consists in: ‘empowerment of the people to participate in the economy of the community and perhaps beyond, implying open markets free of artificial restraints; opportunity and mobility of the people as participatory and creative economic actors; and, reciprocally, access of the people as buyers and consumers of goods and services at a price near cost.’⁵⁵

⁵⁰ In a variation of emulation – spurred emulation – Lenz stipulates that adopted rules will be actively enforced, in an amalgam between learning and coercion. See Lenz (2012).

⁵¹ Fox (2016, 2017).

⁵² Fox (2017).

⁵³ Fox (2022), at fn 74.

⁵⁴ Fox (2012).

⁵⁵ Ibid.

This idea translates into the later concept of ‘outsider-insider antitrust’ (discussed earlier in Section III) and includes the postulate that market creation in Africa will dispense with the need for foreign subsidies if the empowerment of own enterprise is truly implemented. As such, the parallel can be made that there is no need for legal transplants in the African continent, as they work much like subsidies (putting a plaster on a gaping wound); instead, a home-grown solution through empowerment of enterprise should be aimed at. This translates into the slogan ‘Competition policy empowers people to do what they can do for themselves’.⁵⁶ As we will see in Section IV below, such a credo is very much consistent with ordoliberal thought in the EU, but without going in the relativism of objectives that seem to be suggested by Fox. The broad conception of inclusiveness she suggests, with a dispersed focus on all kinds of economic actors, could be more streamlined in order not to frustrate and over-complicate the scope for objectives of antitrust; according to some, goals of antitrust for developing and/or small economies need to remain clear and more limited.⁵⁷

Indeed, at first sight, the ideas of Fox are enticing and do in the end rely on the market mechanism starting to revolve, once having been structured within the mold of local conditions. However, another problem with such a conception of competition, as noble as it sounds, is that it makes the competitive process too dependent on internal factors, to the extent it might not be acceptable globally anymore.⁵⁸ There are of course detractors to this idea as well; namely, Maher postulates that the US competition regime has been so dominant, ‘as it is entirely and willingly “homegrown”’.⁵⁹ Hence, Maher sees some form of global resilience in the quality of being ‘home-grown’. Although interesting as an idea, this formulation is challengeable if we look at the case of the EU, which – as we will see next – is a hybrid between imported (neoclassical) and home-grown (ordoliberal) values. The latter, ordoliberal values could be successfully exported as a system to be applied in a developmental context, as argued by van der Vijver.⁶⁰ Unlike the insightful but not systematically postulated ideas of home-grown antitrust by Fox, ordoliberalism is a school of thought with an established ideology and systematic thinking. This feature – being a system – also makes it more suitable for successful exportation according to the reasoning of Mousourakis.⁶¹

⁵⁶ Ibid.

⁵⁷ Gal (2003).

⁵⁸ Waked (2016); Sucker and Klaaren (2021).

⁵⁹ Maher, 2015.

⁶⁰ Van der Vijver (2019).

⁶¹ By analogy, according to Mousourakis, ‘it was the perceived superiority of Roman law *as a system* that led to the adoption of its norms’. Mousourakis (2019).

IV. A third way forward: ordoliberalism

So far, in searching for mechanisms, through which African digital policy interests could be asserted, we have discussed two opposing views – through diffusion (legal transplants) or through a home-grown regime. We discussed the opportunities and limitations of each of the above theories and now turn to an alternative, which seems to embody features of both.

Strictly speaking, ordoliberal thought would be a transplant to the African context, as it originated in the German city Freiburg in the beginning of the 20th century⁶² and as such is a foreign system of law. However, EU antitrust scholars have pronounced it to be ‘dead’⁶³ and in such sense it is unlikely that the EU would use methods such as coercion or competition to induce compliance with a defunct theory. Hence, only learning or emulation are available as policy strategies, which are much ‘softer’ and depend to a larger extent on the adopter. In that respect, the African continent can exercise ‘free will’ to a large extent. It also seems that such will might be present, if one looks at the writings of Bakhoun, who expresses the following view: ‘developing countries face the same issues that developed jurisdictions such as the EU and the US faced in their early years of antitrust enforcement. Looking at the enforcement approach at those times might be beneficial for developing countries’ current situation.’⁶⁴

When one looks at ordoliberal thought on substance, it becomes clear that its main tenet is that the economy and society are interwoven and the one reflects the other.⁶⁵ Hence, there can be no economic order that does not mirror society – an argument very much reminiscent of Fox’s ‘home-grown’ regimes idea. However, the scope and setting of antitrust goals for ordoliberals departs from Fox’s conception by relying on a singular consideration – the optimization of a competitive market structure with an utmost dispersal of market power.⁶⁶ In this sense, the school offers a more manageable standard for enforcement better fit for inexperienced jurisdictions. This is not to say broader goals are not possible, but they need to be subjected and reasoned within the framework of utmost dispersal of market power. Ordoliberal thought based on competitive market structure maintenance, is also likely to intervene harshly exactly in those parts of the economy most susceptible

⁶² Goldschmidt (2012).

⁶³ Hien and Joerges (2018).

⁶⁴ Bakhoun (2011).

⁶⁵ Deutscher and Makris (2016).

⁶⁶ This will be consistent with Lipimile’s idea of supporting Small and Medium Enterprises though competition enforcement. Lipimile (2019).

to market power accumulation,⁶⁷ which is exactly how anti-competitive digital market dynamics can be held in check. According to van der Vijver, this is also what African markets riddled by cartelization might need.

Additionally, as van der Vijver argues, ordoliberalism ‘provides analytical tools how to deal with the interaction between market power and vested interests.’⁶⁸ Hence, not only market power, but also cronyism and corruption could come under fire through this framework because it puts an emphasis on independent institutions working separately and under the strict control of each other in the name of a prosperous economy – an ‘economic constitution’ of sorts. In this sense, ordoliberals put a special emphasis on independent enforcers of competition law that are to provide counter-balance to the executive and judiciary, which are generally to be distrusted. In the context of the African continent, this would mean that all enforcers would have to develop impeccable records and start working in the public interest for dispersal of power. This fact also makes our subsequent empirical inquiry – focused on antitrust agencies in Africa – particularly apposite, if seen from an ordoliberal perspective. With respect to agencies and their role in antitrust enforcement, a recent parallel with the US is also striking. Writing in the midst of the pandemic, First and Fox argue that the Federal Trade Commission needs to start enforcing more in the public interest and less on the basis of a narrow, neoclassical economic ‘consumer welfare’ standard.⁶⁹ Such a movement away from pure efficiency (or ‘welfare’) is also to be detected in the Executive Order of President Biden from July 2021,⁷⁰ which advocates for a ‘whole of government’ approach to eradicate entrenched market power in American society. The narrative, one could argue, has moved away from neoliberal and more towards ordoliberal conception of antitrust, even across the ocean.

This retrenchment from pure neoclassical notions, associated with the Chicago school of thought, can also be traced back to the works of American academics (now policymakers) Lina Khan and Timothy Wu. Together, they are dubbed as the founders of ‘hispter’ or ‘neo-Brandeisian’ antitrust that rose with the advent of digital markets and the huge accumulation of market power in the US that it triggered. The neo-Brandeisians are suspicious of bigness and adopt the slogan ‘big is bad’, first expressed by Justice Brandeis in the early decades of the 20th century. In this sense, it seems that the pendulum is swinging back from unbridled market liberalism and non-interventionism to ‘ordered’

⁶⁷ Van der Vijver (2019).

⁶⁸ Ibid.

⁶⁹ Fox and First (2020).

⁷⁰ ‘Executive Order on Promoting Competition in the American Economy’, available [here](#).

competition with an interventionist impetus, somewhat reminiscent of the early ideas of the Freiburg school in Europe. Moreover, we see a retrenchment away from neoclassical ideas in the EU as well, where the newly adopted Digital Markets Act talks about ‘equality, fairness and contestability’ on digital markets.

In this uncanny convergence of similar (non-neoliberal) ideas across the Atlantic Ocean, the African continent and its digital markets policy might stand to profit. As van der Vijver argues, a singular neoclassical conception of the economy is not compatible with development and should not be tolerated for general antitrust matters or digital market developments. Hence, in these shifting conditions of global economic and digital governance, Africa might be able to find its voice.

| V. Concluding remarks

This paper set out to explore the theoretical options for devising a sound digital regulatory strategy for the African continent. In the absence of a global antitrust regime and marred by several internal and external challenges, this task seems to be a tall order.

In an attempt to provide an initial glimpse of a possible theoretical strategy, we juxtaposed the theories of legal transplants (and its sister sociological theory ‘policy diffusion’) and ‘home-grown’ antitrust regimes. We concluded that – although both of them have merit and explanatory power from a descriptive point of view – they paint a rather bleak picture for the potential of Africa to assert itself on the scene of global digital governance. Hence, moving to a rather normative debate, and borrowing from van der Vijver, we introduced the theory of ordoliberalism as an in-between solution that presumptively ‘makes the best of both worlds’. By adding the layer of digital markets to the picture, we also noticed that ordoliberal thought might bear resemblance to current moves away from neoclassical liberal thinking in the context of Big Tech power. We speculate that – to the extent that such ideas allow for a broader conception of the economy and society’s role in it – the African continent might be able to capitalize on them. A further empirical and bottom-up study will verify or falsify the above stipulations.

| VI. LITERATURE LIST

- Akinkugbe, 'Reflections on the Value of Socio-Legal Approaches to International Economic Law in Africa' (2021) 22 Chicago Journal of International Law
- Argenton and Prüfer, 'Search Engine Competition with Network Externalities' (2012) 8 (1) Journal of Competition Law and Economics
- Aydin, 'The International Diffusion of Competition Laws' (2010) SSRN Electronic Paper, available [here](#)
- Bakhoun, 'A Dual Language in Modern Competition Law? Efficiency Approach versus Development Approach and Implications for Developing Countries' (2011) 34(3) World Competition Law and Economics Review
- Bakhoun and Fox, 'South Africa: Leaning Towards Inclusive Development' in Bakhoun and Fox (eds), *Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa* (OUP, 2019)
- Börzel and Risse, 'From Europeanization to Diffusion: Introduction' (2012) 35(1) West European Politics
- Buthelezi and Hodge, 'Competition Policy in the Digital Economy: A Developing Country Perspective' (2019) 15 Competition Law International
- Cernat, 'Trade and Competition Policy in the Digital Era - Towards a Regulatory Framework for Global e-Business' (2003) 4 Journal of World Investment
- Dahlman et al, 'Harnessing the Digital Economy for Developing Countries' (2016) OECD Development Center Working Paper No. 334
- Davidson, 'Creating Effective Competition Institutions: Ideas for Transitional Economies' (2005) 6 Asian-Pacific Law and Policy Journal
- Dawar and Lipimile, 'Africa: Harmonising Competition Policy under the AfCFTA (2020) 2 Concurrences Review
- Deutscher and Makris, 'Exploring the Ordoliberal Paradigm: The Competition-Democracy Nexus' (2016) 11(2) The Competition Law Review
- First and Fox, 'We Need Rules to Rein in Big Tech' (2020) NYU School of law, Law and Economic Research Paper Series Working Paper No. 20-46, available [here](#)
- Fox, 'Competition, Development and Regional Integration: in Search of a Competition Law Fit for Developing Countries' (2012) NYU School of law, Law and Economic Research Paper Series Working Paper No. 11-04, available [here](#)
- Fox, 'Competition Policy: The Comparative Advantage of Developing Countries' (2016) 79 Law and Contemporary Problems

Paper author: Dr. Zlatina Georgieva, Utrecht University

Paper co-author: Vellah Kigwiru, Technical University of Munich (Hochschule für Politik), University of Nairobi

Fox, 'Integrating Africa by Competition and Market Policy' (2022) 60 *Review of Industrial Organization*

Fox 'Outsider Antitrust: Making Markets Work for People as a Post Millennium Developmental Goal', in Bonakele et al. (eds), *Competition Policy for the New Era: Insights from the BRICS Countries* (OUP, 2017)

Fox, 'Should China's Competition Model be Exported?: A Reply to Wendy Ng' (2019) 30(4) *European Journal of International Law*

Friederici et al, 'Digital Entrepreneurship in Africa' (2020, MIT), available [here](#)

Gal, 'The General Implications of Small Size for Competition Policy' in Gal (ed), *Competition Policy for Small Market Economies* (HUP, 2003)

Gerber, 'Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe' (1994) 42(1) *The American Journal of Comparative Law*

Graef and Prüfer, 'Mandated Data Sharing is a Necessity in Specific Sectors' (2018) 103 *Economisch Statistische Berichten*

Goldschmidt, 'Alfred Müller-Armack and Ludwig Erhard: Social Market Liberalism' (2004) *Freiburger Diskussionspapiere zur Ordnungsökonomik*, No. 04/12, Albert-Ludwigs-Universität Freiburg, Institut für Allgemeine Wirtschaftsforschung, Abteilung für Wirtschaftspolitik, Freiburg i. Br.

Hien and Joerges, 'Dead Man Walking: Current European Interest in the Ordoliberal Tradition' (2018) *EUI Working Paper 2018/3*, available [here](#)

Ismail, 'Developmental Regionalism Approach to the AfCFTA' (2020) *TIPS Working Paper Series*, available [here](#)

Khan, 'Amazon's Antitrust Paradox' (2017) 126(3) *The Yale Law Journal*, available [here](#)

Kigwiru, 'The Cooperation on Competition Policy under the African Continental Free Trade Area' (2020) 17(1) *Manchester Journal of International Economic Law*

Klaaren, 'The Emergence of Regulatory Capitalism in Africa' (2021) 50 (1) *Economy and Society*

Koop and Lodge, 'Exploring the Co-ordination of Economic Regulation' (2014) 21(9) *Journal of European Public Policy*

Lacey, 'Reality Check: The Lack of Consensus on New Trade Rules to Govern the Digital Economy' (2020) 54 (2) *Journal of World Trade*

Lenz, 'Spurred Emulation: The EU and Regional Integration in Mercosur and SADC' (2012) 35(1) *West European Politics*

Lipimile, 'Towards a Digital Industrial Policy for South Africa: A Review of the Issues' (2019) *Industrial Development Think Tank at the University of Johannesburg Working Paper*, available [here](#)

Maher, 'Competition Law Fragmentation in a Globalizing World' (2015) 40 *Law and Social Inquiry*

Paper author: Dr. Zlatina Georgieva, Utrecht University

Paper co-author: Vellah Kigwiru, Technical University of Munich (Hochschule für Politik), University of Nairobi

Mateus, 'Competition and Development: Towards an Institutional Foundation for Competition Enforcement' (2010) 33(2) *World Competition Law and Economics Review*

Mousourakis, 'Comparative Law, Legal Transplants and Legal Change' in Mousourakis (ed), *Comparative Law and Legal Traditions* (Springer, 2019)

Morin and Gold, 'An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries' (2014) 58(4) *International Studies Quarterly*

Nicolini, 'African Legal Traditions' in Mousourakis (ed), *Comparative Law and Legal Traditions* (Springer, 2019)

Prüfer, 'Competition Policy and Data Sharing on Data-driven Markets: Steps Towards Legal Implementation' Project Commissioned by the Friedrich Ebert Stiftung (2018-2020)

Rossotto et al, 'Digital Platforms: A Literature Review and Policy Implications for Development' (2018) 19 *Competition and Regulation of Network Industries*

Simmons et al., 'Introduction: The International Diffusion of Liberalism' (2006) 60(4) *International Organization*

Sucker and Klaaren, 'Trade and Competition (Laws): Interrelations from a Southern African Perspective' (2021) SSRN Electronic Paper, available [here](#)

Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism and Unofficial Law*

Twining, 'Social Science and Diffusion of Law' (2005) 32(2) *Journal of Law and Society*

van der Vijver, 'Law & Ordo: Exploring What Lessons Ordoliberalism Holds for African Competition Law Regimes' (2019) 42(3) *World Competition Law and Economics Review*

Ukponu et al, 'Globalization and the Sovereignty of African States in the Post-Colonial Era: A Contemporary Afrocentric Legal Perspective' (2022) 119 *Journal of Law, Policy and Globalization Globalization* 50

Waked, 'Adoption of Antitrust Laws in Developing Countries: Reasons and Challenges' (2016) 12(2) *Journal of Law, Economics and Policy*

Wu, *The Curse of Bigness: Antitrust in the New Gilded Age* (Columbia Global Reports, 2018)