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REGULATORY FRAMEWORK ON CROSS-BORDER MERGERS AND ACQUISITIONS IN THE COMESA AND EAC REGIONS: IN CONFLICT WITH THE KENYAN REGIME?

BY

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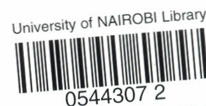

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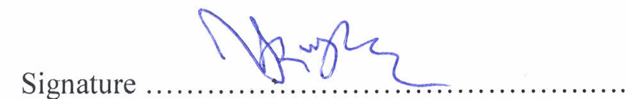

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DEDICATION

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TABLE OF CASES

American Banama Co v United Fruit Co (1909) 213 US 347

United States v Aluminum Co of America (2d Cir 1945) 148 F 2d 416

Timberlane Lumber Co v Bank of America (9th Cir 1976) 549 F 2d F97

Reference Number 1 of 2012, *Polytol v Mauritius* (COMESA Court of Justice, First Instance Division)

LIST OF ABBREVIATIONS

COMESA	Common Market for Eastern and Southern Africa
EAC	East Africa Community
CCC	COMESA Competition Commission
CA	Competition Authority
EU	European Union
ICN	International Competition Network
OECD	Organisation for Economic Co-operation and Development
PIT	Public Interest Test
SLC	Substantial Lessening of Competition
UK	United Kingdom
US	United States of America
TFEU	Treaty on the Functioning of the European Union
ACA	Anti-trust Cooperation Agreements

CHAPTER ONE: INTRODUCTION

1.0 Background to the Study

A "merger" is an acquisition of shares, business or other assets, whether inside or outside a country, resulting in the change of control of a business, part of a business or an asset of a business in that country in any manner, and includes a takeover.[1] It occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of another undertaking.[2] It becomes cross-border when it involves undertakings in two or more countries. On the other hand, an "acquisition" means any acquisition by an undertaking of direct or indirect control of the whole or part of one or more other undertakings, irrespective of whether the acquisition is effected by merger, consolidation, take-over, purchase of securities or assets, contract or by any other means.[3]

Since the advent of a transformed constitutional regime marked by the promulgation of a new Constitution (2010), Kenya has gone headway in its regime to regulate cross-border mergers and acquisitions. This saw the birth of the Kenyan Competition Act No. 12 of 2010 to ensure fair competition in Kenya. The Act is very germane in the regulation of mergers in Kenya, although there are other legislations for industry-specific mergers, such as the Banking Act, the Capital

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[1] See the Kenya Competition Act No. 12 of 2010, s 2; see also section 2 of the EAC Competition Act, 2006, for a similar and simplified definition; See also Article 23 of the COMESA Competition Regulations, 2004 – which defines a "merger" as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:

a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
b) the amalgamation or combination with a competitor, supplier, customer or other person; or
c) any means other than as specified in sub-paragraph (a) or (b).

[2] Competition Act No. 12 of 2010, s 41(1).

[3] See Section 2 of the EAC Competition Act, 2006.

Markets Act, and Insurance Act. Besides, Kenya is a member of COMESA[4] and EAC, and any legislations or regulations adopted by these blocs to which Kenya has signed or ratified form part of Kenya's domestic law by virtue of Article 2(5) and (6) of the Kenyan Constitution. Thus, the COMESA and EAC competition laws apply in Kenya, particularly on cross-border mergers and acquisitions.

However, issues of conflict arise where a provision or provisions of such regional regulations purport(s) to oust the jurisdiction of the Kenyan Competition Authority established under the Kenyan Competition Act. A question therefore arises as to which body, between the Kenyan Competition Authority and regional competition bodies, has exclusive jurisdiction to approve notifications of cross-border mergers and acquisitions. For instance, a recent debate on the supremacy of the Kenyan Competition Authority over the COMESA Competition Commission revealed a jurisdictional conflict between the application of Kenyan Competition Act and the COMESA Competition Regulations in relation to cross-border mergers.[5] This study delves on this uncertainty, in addition to the extent to which the Kenya Information and Communications Act pose a challenge on merger notifications or approvals in Kenya. The study also examines the EAC competition laws to augment the uncertainties.

1.1 Statement of the Problem

This study seeks to address the problem of jurisdictional conflicts between the Kenyan Competition Authority (CA), the COMESA Competition Commission (CCC), and the EAC Competition Authority in relation to notifications of cross-border mergers and acquisitions.

[4]Kenya signed the Treaty establishing the Common Market for Eastern and Southern Africa on 5 November 1993 and this Treaty was ratified on 8 December 1994.

[5] See George Omondi & David Herbling, "Conflict of local and COMESA laws holds up firms' mergers" (29th January 2013) http://www.trademarksa.org/news/conflict-local-and-comesa-laws-holds-firms-mergers (accessed 9th Sep2014).

In the Kenyan context, the Competition Act has an extraterritorial reach, meaning that the Competition Authority established therein has jurisdiction over cross-border merger dealings which are likely to affect fair competition in Kenya. Specifically, section 6 expressly states that the Act applies to any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya. It also applies to any acquisition of an undertaking situated either inside or outside Kenya or an acquisition of the controlling interest in a foreign undertaking that has a controlling interest in a subsidiary in Kenya. The Act also provides that the Competition Authority established therein would prevail in case of conflict with external competition authorities. Ruefully, there is a debate whether this extraterritorial reach qualifies the supremacy of the Competition Act over regional competition regimes.

Further, there is a roles overlap between the Kenyan Competition Authority and the Communications Authority of Kenya (CAK). The CAK is established under the Kenya Information and Communications Act and is, besides other powers, mandated to ensure fair competition in the communications sector.[6] The CAK must be notified of any proposed change in ownership of an entity which it has licensed and is also required to give its prior written consent to certain changes in the shareholding of a licensed entity. As a result, it is not uncommon for the approval of both the Competition Authority and the CAK to be required in a merger transaction relating to an entity that holds a license issued by the CAK. Further, there is lack of clarity on what recourse the merger parties would have in the event that one authority grants consent to the transaction while the other declines to grant consent.

[6] See Section 84R of the Kenya Information and Communications Act, Cap 411A of the Laws of Kenya.

In the COMESA region, the relevant legal framework on competition comprises the COMESA Competition Regulations (2004), and Competition Rules (2010). The Regulations provide for mandatory notifications of mergers in which either the acquiring firm or the target firm or both, operate in either two or more Member States and certain thresholds of combined annual turnover or assets are exceeded. Under the terms of the Regulations, each Member State is required to adopt measures (which includes legislations) to fulfill the cooperation obligations imposed on it under the Regulations.[7] For instance, the Preamble to the COMESA Competition Regulations specifically recognizes that member states should cooperate at regional level in the implementation of their national legislation as well as the Regulations in order to eliminate harmful effects of anti-competitive practices.

However, even though the COMESA Regulations allow for a Member State to request that a merger notified to the CCC be referred to their national competition authority (a decision which falls within the COMESA Commission's exclusive discretion[8]), it is not clear whether the COMESA Commission has the exclusive jurisdiction to assess the transaction. The wording of Article 3(2) of the Regulations specifically provide for "primary jurisdiction" which in substance does not accord the CCC exclusive jurisdiction over cross-border mergers. To the extent that the Regulations apply to Kenya, it remains an open debate as to whether the Regulations are capable of overriding the Kenya Competition Act in circumstances of conflict or overlap. It is equally difficult to determine which particular law applies to anti-competitive trade practices which fall within the ambit of both the COMESA and Kenyan regimes. This uncertainty is further worsened by the level of primary jurisdiction purportedly exercised by both the Regulations and

[7] See for example Article 5(1) of the COMESA Regulattions.
[8] Article 24(8) of the COMESA Commission Regulations, 2004.

the Kenyan Competition Act over anti-competitive trade practices.[9] These rhetoric issues form part of this study.

In addition, the East Africa Community (EAC) Competition Act (2006) creates additional regional competition compliance requirements for Kenya, which compound the jurisdictional and enforcement concerns raised by the COMESA Competition Regulations. The purpose of this Act is to promote and protect fair competition in the EAC, provide for consumer welfare and establish the EAC Competition Authority. The reach of the EAC Competition Authority extends to matters of anti-competitive practices, abuse of dominance, mergers and acquisitions, subsidies, public procurement and consumer protection in the EAC.

A further conflict arises from the different notification timelines and threshold under the Kenyan Competition Act, the COMESA Regulations and the EAC Competition Act. For instance, COMESA Regulations require the CCC to make a decision on the notification within one hundred and twenty (120) days after receiving the notification. This period is inconsistent with Kenya's sixty (60) days hence cumbersome and bureaucratic. Both timelines are also in conflict with EAC's forty five (45) days of determination.[10] The inconsistence is manifest where the parties are required to notify both the CA and the CCC in which the timelines applicable to both regulators apply, and this may translate into significant delays in the consummation of merger transactions. This situation arises where, for example, a Kenyan company with a presence in two or more COMESA member states seeks to merge with another Kenyan company with a presence in two or more COMESA member states, in which case the parties would be compelled to notify

[9] See Article 3(2) of the Regulations compared to Section 5(2) of the Kenya Competition Act (2010). Section 5(2) provides that the Competition Act prevails in circumstances of conflict between the Act and the provisions of ay other written law with regard to matters concerning competition.
[10] See Regulation 14 of the EAC Competition Regulations (2010).

the merger to the Competition Authority of Kenya under the terms of the Kenyan Competition Act and to the COMESA Competition Commission (CCC) under the terms of the Regulations.

The above conflict and overlap issues are likely hamper economic integration goals if no amicable solution is found. This study is aimed at defining these conflicts and proffer for harmonization of both Kenyan and regional competition regimes.

1.2 Justification for the Study

The main justification for this study stems from the need to address the conflicts between the EAC and COMESA competition laws and those of Kenya in relation to notification of cross-border mergers and acquisitions. The thesis lays down an important roadmap toward reform and/or harmonization of these laws in order to ease notifications. Its findings and recommendations shall serve as an eye opener for companies that intend to form cross-border mergers and acquisitions. Further, it appears from the ensuing literature review section that there is scarcity of literature on this area of competition law and hence a study such as this is germane in bridging the prevailing gap.

The above justifications are fleshed by the wanting challenges associated with multiplicity of notifications of mergers and acquisition in Kenya. In a system that is characterized by different competition regulations, issues of overlap are never rhetoric. As stated here-above, Kenya is a Member State to both COMESA and EAC regional blocs and hence any competition regulations or rules adopted to reinforce economic development in the regions. The primacy of these regulations however poses serious challenges especially as regards notifications of mergers and acquisitions. For example, certain provisions of the COMESA Regulations and Rules have been brought into question both within and outside COMESA, particularly those provisions relating to

the scope of application of the Regulations. The initial thresholds for mandatory notification are set at nil, which has also been heavily criticized for placing an inappropriate burden on parties, particularly where relatively small transactions are concerned.

Further, if not conducted efficiently and effectively, multiple notifications can negatively impact on the timing or completion of transactions and significantly increase transactional costs.[11] This, coupled with the misgivings identified herein, attracts a lasting solution that forms the corpus of this study.

1.3 Research Questions

The central research question for this study is as follows: To what extent do the EAC and COMESA competition laws conflict with the Kenyan laws in relation to cross-border notification of mergers and acquisitions? Specifically, the study responds to the following questions:

1. Is there any jurisdictional conflict on notifications of mergers between Kenya, EAC and COMESA competition laws?
2. Is there any roles overlap between the Kenyan Competition Authority and the Communication Authority of Kenya in relation to merger notifications?
3. What are the appropriate remedies for the contention between the said regional competition laws and the Kenyan law?

[11] John Oxenham *Balancing Public Interest Merger Considerations Before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-jurisdictional Merger Control Certainty* US-China Law Review Vol 9 p. 212, at <http://www.davidpublishing.com/davidpublishing/Upfile/7/27/2012/2012072706196124.pdf> (accessed 10th September 2014).

1.4 Research Objectives

Main Objective

The main objective of this study is to appraise the extent to which the EAC and COMESA competition laws conflict with the Kenyan laws in relation to notification of cross-border mergers and acquisitions.

Specific Objectives

Within the above broad objective, the study will seek to:

1. find out which one between the Kenyan and regional competition regulations in relation to cross-border notifications of mergers and acquisitions is superior;
2. establish the roles overlap between the Kenyan Competition Authority and the Communication Authority of Kenya on notification of mergers; and
3. provide recommendations for the harmonization of merger regulatory regimes to solve jurisdictional conflicts.

1.5 Research Hypotheses

The theoretical postulates informing this study are as follows:

1. There is a conflict between the EAC and COMESA competition regulations, and the Kenyan competition laws on notifications of cross-border mergers and acquisitions.
2. In case there is a conflict between the Kenyan and EAC/COMESA competition rules and regulations on merger notifications, the domestic rules should take precedence.

3. There is a roles overlap between the Kenyan Competition Authority and the Communications Authority of Kenya.
4. Unless there is a review and/or harmonization of the regional and national competition laws, regional economic integration goals will remain mythical.

1.6 Theoretical Framework

A review of philosophical foundations on mergers and acquisitions spark a conclusion that there is lack of theoretical explanations and related empirical research that could explain notifications of cross-border mergers and acquisitions. It is therefore impractical to apply a non-existent theoretical perspective on the Kenyan, EAC and COMESA competition law rift. This study however takes a legal positivist model of examining the law as posited. However, the researcher takes note of the importance of various doctrines or approaches on cross-border or transnational mergers and acquisitions, inter alia, the "principle of territoriality," and the "effects doctrine". These approaches emerged from judicial pronouncements and have been adopted by various countries to explain the extraterritorial nature of national competition laws in relation to cross-border mergers. The study therefore adopts these approaches in explaining the impact of the extraterritorial reach of the Kenyan Competition Act.

The study also takes a legal positivist model of examining the law as posited. Its relevance in this study centres on some of its distinctive claims about what constitutes legal validity. It is the validity and applicability of the COMESA and EAC competition law in Kenya that triggers the use of this theory. The supremacy of the Kenyan Competition Authority over those of the EAC and COMESA is what forms the central argument under this theory.

1.6.1 Territoriality Approach

This approach describes a situation in which a country's laws apply only to the national activity. The approach was traditionally exemplified by the US Supreme Court decision in *American Banama Co v United Fruit Co*[12] (*American Banama*) in which Justice Oliver Wendell Holmes observed that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done,"[13] and expressly rejected any claim that the law could be extended to the conduct occurring in another state.[14] The reach of domestic competition law was, therefore, considered coextensive with the geographic territory of the country.

Although recognized exceptions to this approach exist and new claims to the extraterritorial reach of competition laws have emerged, the starting point for the application of merger laws, as with other laws, will be whether or not the physical conduct – the merger or merger agreement – took place within the territory of the sovereign state asserting jurisdiction. If it did, there will be no question of that state having international recognized power to apply its laws and regulations.

Related to the territoriality approach is the 'domicile' principle, pursuant to which a country may exert jurisdiction over persons ordinarily domiciled in their country, even if not citizens. This is sometimes referred to as "pseudo-territoriality"[15] and is still relied upon by some OECD states in formulating jurisdictional criteria for the enforcement of their merger laws. Thus, for example, in

[12] 213 US 347 (1909).
[13] *American Banama,* p. 356.
[14] Ibid.
[15] Jurgen Basedow, 'Competition Policy in a Globalised Economy: from Extraterritorial Application to Harmonisation' in Manfred Neumann and Jurgen Weigant (eds), *The International handbook of Competition* (2004), p. 323.

Canada, pre-merger notification requirements are not triggered unless the transaction involves an 'operating business' in Canada.[16]

1.6.2 The Effects Doctrine

This approach was first, (in) famously, expressly adopted by the US Court of Appeal in the Second Circuit decision of the *United States v Aluminum Co of America* (*Alcoa*)[17] which applied US antitrust laws to 'activities of non-nationals abroad where this produced anti-competitive effects within the USA.' In this case, an action was brought against foreign companies who had allegedly engaged in conduct which contravened the provision of the Sherman Act. Despite the actions in this case occurring outside US borders, the Court considered that it had jurisdiction because the conduct was intended to and did, in fact, have economic effects in the US.[18] The application of this approach was met internationally with widespread criticism, and claims that it was inconsistent with the principle of sovereignty of some nations, some arguing that it was indicative of a US commitment more to power than to law.

As a result of the critical reaction to the *Alcoa* effects doctrine from other states, the Ninth Circuit in *Timberlane Lumber Co v Bank of America*[19] (*Timberlane*) observed that '... at some point, the interests of the United States are too weak and the foreign harmony incentive for restraint too strong to justify an extraterritorial assertion of jurisdiction.'[20] In place of the rigid effects test in *Alcoa*, the Court established a two-pronged jurisdictional 'rule or reason' or a 'balancing test,' pursuant to which jurisdiction was initially in the same manner as in *Alcoa* but,

[16] Neil Campbell & Mark Opashinov, 'Canada,' in John Davies (ed), *Merger Control 2009: The International regulation of Mergers and Joint Ventures in 64 Jurisdictions worldwide, Getting the Deal Through* (2008), p. 81.
[17] 148 F 2d 416 (2d Cir 1945).
[18] *Alcoa*, p. 444.
[19] 549 F 2d F97 (9th Cir 1976).
[20] *Timberlane*, p. 609.

as a matter of comity and fairness. The doctrine was given statutory force in the US in 1982 with the passage of the Foreign Trade Antitrust Improvements Act, providing for the extraterritorial application of the Sherman Act to conduct having a 'direct, substantial, and reasonably foreseeable effect' on US commerce.

Germany was the first state to expressly adopt an effect based approach to jurisdiction in competition law matters. The Law Against Restraint on Competition provides that it applies 'to all restraints of competition having an effect within the territorial scope of this Act, even if they are caused outside the territorial scope of this Act.'[21] This study adopts this approach is its recommendations for review of the Kenyan Competition Act and the regional competition laws. The same is explored under Chapter Four of this study.

1.6.3 Legal Positivist Theory

The term "positivism" denotes a system of philosophy that entails the study of things as they are without regard to the social, political, and psychological background. Legal positivism therefore includes an examination of the law as it is. Its primary idea lies in the derivation of "positum" emphasizing that the law is something laid down or posited. Some of the proponents of this philosophy include *John Austin*, *Jeremy Bentham*, *HLA Hart*, *Hans Kelsen*, and *Leslie Green*. The latter provides a summary of this theory, thus;

> Whether a society has a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law. What laws are in force in that system depends on what social standards its officials recognize as authoritative; for example, legislative enactments, judicial decisions, or social customs. The fact that a policy would be just, wise, efficient or prudent, is never sufficient reason for thinking that it is actually the law; and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. According to positivism, law is a matter of what has been posited (ordered, decided,

[21] Law Against Restraints on Competition (Germany) s. 130(2).

practiced, tolerated, etc.); as we might say in a more modern idiom, positivism is the view that law is a social construction"[22]

The legal positivist concern is with the "is" of the law and not the "ought" of the law. The said proponents argue that if normative rules reflect no more than subjective opinions, they cannot be deduced from physical reality. Their definition of law approach therefore excludes value judgment and moral considerations. Austin formulated thus: "the existence of law is one thing, its merit or demerit is another."[23]

Central to the positivist school is the concept of sovereignty. It describes the sovereign asa person or group of persons to who is rendered habitual obedience by the bulk of the population but who does not render such obedience to anyone. This by extension implies that, once a person, body or entity has been accorded sovereign power, the same should not be transferred to any different body, person or entity. Thus where there is a conflict between two persons, entities or bodies as to who/which is supreme, the one accorded sovereignty by law takes precedence. Article 2 (1) of the Kenyan Constitution (2010) makes the Constitution supreme law of the republic of Kenya which binds all and, per Para 2 thereof, its validity is not subject to challenge by or before any court or other state organ. Just like the Consumer Protection Act which finds Constitutional entrenchment under Article 46 (2) of the Kenyan Constitution, the Competition Act of Kenya (2010) is a Constitutional creature and hence any authority falling within its purview reigns supreme over any regional body.

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[22]Green, Leslie, "Legal Positivism" in the Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/legal-positivism/> (accessed 11th September 2014).

[23] Omony John Paul, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (1st ed., Law Africa Publishing (K) Ltd) at 48.

The positivist sovereign command thesis is supported by Manyindo D.C.J's decision in the Ugandan case of *Salvatore Abuki v A.G*[24]to the effect that however abstract the Ugandan Witchcraft Act was, it must be upheld as law.[25] This view was best manifested in the Amin era when Uganda was administered through decrees and legal notices.

1.7 Literature Review

Joyce Karanja-Ng'ang'a et al[26] illuminates merger notification challenges in the Kenyan perspective and also within the regional dimension. Under the Kenyan Competition Act (2010), there are no jurisdictional or substantive measures or thresholds defining which transactions are notifiable mergers based on factors such as market share, turnover or asset base. Therefore all mergers, whether small, intermediate or large, fall within the definition of mergers in the Competition Act and must be notified to the Competition Authority (CA). This coupled with the fact that the Act accords CA extraterritorial reach in a manner to suggest that it applies to mergers outside Kenya, broadens the scope and number of mergers that have to be notified to the Authority. Despite the fact that the Act has prescribed timelines for the determination of notifications, the lack of thresholds results in the CA being inundated with merger notifications. This creates a significant amount of work for the CA, with a large number of merger notifications undoubtedly being small or having little or no effect on competition in Kenya.

Further, the authors take note of the Communication Authority of Kenya's (CAK's) role in approving notifications of mergers of entities licensed under the Kenya Information and

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[24] Constitutional Appeal No. 1 of 1998
[25] *Id* note 45 above at 55.
[26] Joyce Karanja-Ng'ang'a&Rosemary Njoki Maina, "The African and Middle Eastern Antitrust Review 2014: Kenya – Overview" (2014) Available at <http://globalcompetitionreview.com/reviews/59/sections/204/chapters/2311/kenya-overview/> (accessed 9th Sep 2014)

Communications Act. The CAK is generally required to accept or refuse to grant consent to such notifications within 30 days of receipt of the request, which is in conflict with the 60-days timeline prescribed under the Competition Act of Kenya. Accordingly, it is not uncommon for the approval of both the Competition Authority and the CAK to be required in a merger transaction relating to an entity that holds a licence issued by the CAK. Besides, the jurisdictional conflict created by the COMESA and EAC competition laws on merger notifications pose a great challenge on economic integration. Their writing, however, fails to respond to the challenges, or provide a framework of reform and harmonisation.

John Oxenham (2012)[27] provides an overview of the key issues typically considered by competition agencies (and merging parties' legal practitioners) when fashioning and negotiating merger remedies in the case of multi-jurisdictional and cross-border mergers.[28] Although the overview is specifically scoped at the South African context and partly covers the sub-Saharan region, it is very central in this study insofar as it covers multijurisdictional issues on mergers and acquisitions. John notes that mergers between multinational and transnational corporations have the potential to have a significant impact on various national economies. Accordingly, the challenge for companies engaging in multi-jurisdictional mergers (or, in essence, mergers that require notification in more than one jurisdiction) is that the assessments conducted by the respective antitrust agencies in each jurisdiction are not consistent across all the economies concerned and certain unique merger review considerations re-emerge which have the capacity to increase the costs of and the time required to complete multijurisdictional filings by increasing the scope of the merger investigation process, and therefore the types of remedies which may be

[27] John Oxenham, "Balancing Public Interest Merger Considerations before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-Jurisdictional Merger Control Certainty" (2012) US-China Law Review Vol. 9, p. 211-227 (hereinafter "John Oxenham 2012")
[28] Ibid at 212.

imposed.[29] He bases this position in reference to a report by Whish and Wood which assessed merger control procedures in various jurisdictions,[30] thus;

> [...] even where all agencies began their reviews contemporaneously, which is a rare occurrence, the lengthy review process of some agencies and the lack of a fixed endpoint by others both created cost and uncertainty for the merging parties.[31]

In his view, this highlights the difficulties that are likely to be encountered even when parties have the best intentions to embark on a coordinated notification process.[32] John recommends that ensuring the coordination in merger review timing between jurisdictions is vital in order to avoid imposing inconsistent or conflicting remedies. Importantly, it is necessary to ensure that remedies adopted in one jurisdiction are effective and do not adversely affect remedy outcomes in other jurisdictions. Furthermore, even greater cooperation across jurisdictions will be required where a single remedy package, which addresses concerns across various jurisdictions, is being negotiated. Whereas he takes cognizance of the new COMESA competition regime,[33] his writing however omits the very teething problem of jurisdictional conflicts posed by the extraterritorial nature of some competition authorities vis-à-vis the COMESA Competition Commission.

Gibson Dunn[34] underscores the fact that, in many ways modelled on the European Union merger control procedure, COMESA appears to have been conceived as a one-stop shop for merger control clearance in the region. While there is much to be said for supra-national merger control, there are a number of difficulties and crucial uncertainties under the COMESA regime that need to be ironed out, especially given its potentially very broad scope of operation. For instance,

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[29] Ibid.
[30] Ibid at 226.
[31] Richard Whish and Diane Wood, *Merger cases in the real world—A study of merger control procedures* (OECD, 1994) Referred to at the International Competition Network, Report on the Costsand Burdens of Multijurisdictional Merger Review, Mergers Working Group Notification and Procedures Subgroup, November 2004.
[32] John Oxenham 2012:226 (ibid).
[33] Ibid at 227.
[34] Gibson Dunn, "Clarification of Comesa Merger Control Procedures Anticipated, Following First Notification to African Regional Competition Authority" (29th March 2013).

COMESA's jurisdictional thresholds are both broad-ranging and unclear, which means they have the potential to catch a significant number of transactions. As a starting point, any merger or acquisition in which both the acquiring firm and target firm, or either the acquiring firm or target firm, operate in two or more COMESA member states, is subject to review. At this stage, it is not clear whether import sales alone are sufficient to trigger a notification requirement, or whether the parties need to have a local presence (such as a subsidiary, branch or fixed assets). In his view, there are no financial thresholds applicable under the COMESA merger control regime. Although COMESA's laws allows for *de minimis* thresholds based on turnover and assets, these have formally been set at zero. On the other hand, the applicable rules also suggest that COMESA merger control may only apply to transactions which have an appreciable effect on trade between member states and which restrict competition in the common market. While it is not clear how this will be applied in practice, it may exempt a number of transactions from notification requirements. Gibson fails to explore jurisdictional conflicts arising between the COMESA competition regime and the national laws in relation to notifications of mergers.

Mayer Brown,[35] a global legal services organization advising many of the world's largest companies, has briefly outlined the issues circumscribing COMESA on mergers and acquisitions. In its view, the scope COMESA mergers control requires further clarification.[36]One of the pitfalls identified is that the COMESA merger rules and regulations have a limited local nexus. The rules only require that at least one of the parties to a transaction operates in two or more COMESA Member States. The draft COMESA competition guidelines adopt a definition of the term "*operate*" that includes "*being directly domiciled in a Member State,*" "*having*

[35]Mayer Brown, "Multijurisdictional Merger Filings: News and Recent Developments" (April 2014) Antitrust & Competition.
[36]Ibid at 1.

operations through exports, imports, subsidiaries etc, in a Member State" but also "*deriving turnover in a Member State.*" This definition is too broad to provide adequate clarification as to the local nexus required. As regards the allocation of jurisdiction, the author makes reference to an August 2013 decision of the COMESA Court of Justice (in *Polytol v Mauritius*[37]) about the applicability of the COMESA Treaty within COMESA Member States.[38] In that ruling, the COMESA Court of Justice rejected the view that transactions notifiable to the CCC must also be notified to the national authorities where requirements are triggered. However, the author recognizes the fact that some Member States, such as Kenya, Mauritius and Zambia have not yet transposed the COMESA Regulations into national law. As a result, it remains unclear if CCC has an exclusive jurisdiction or if transactions notifiable to CCC shall also be notified to national authorities. The article does not provide any answer to this problem.

Marianne Wagener and Candice Upfold[39] consider two issues raised by the COMESA Regulations namely, whether the COMESA Commission has exclusive jurisdiction to assess mergers having a regional dimension, and the notifiability of merger transactions. They argue that exclusive jurisdiction is of paramount importance in a regional competition regime, in that without it, multiple merger notifications could be required. This results in multiple filing fees having to be paid as well as unnecessary time being utilised to compile the various filings.[40] Multiple notifications also results in different approval dates by the various authorities which creates uncertainty for the implementation of a transaction. Coupled with the fact that firms may

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[37] Reference Number 1 of 2012 (COMESA Court of Justice, First Instance Division)
[38] Ibid at 2.
[39] Marianne Wagener and Candice Upfold, "Regional competition regimes: A comparative study of the COMESA Competition Commission and the European Competition Commission" (herein after "Wagener & Candice") Available at http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-4/Conference-Paper-M-Wagener-and-C-Upfold.pdf (accessed 24th September 2014)
[40] For instance, the filing fees payable for a merger notification in COMESA are prohibitively high, reaching a maximum of COM$500 000.

also be required to notify the transaction to national competition authorities and pay the required national filing fee in addition to the COMESA filing fee, this may result in the failure to notify at all. All of these aspects are counter-intuitive to the main reason for the existence of a regional competition regime, being legal certainty and accessibility.

Their view concerning COMESA's jurisdiction is that, it is unclear whether the CCC is in fact a 'one-stop shop' body.[41] In other words, there is no clear provision in the COMESA Regulations expressly granting the CCC exclusive jurisdiction to assess mergers having a regional dimension. In reality, the current wording states that the Regulations shall have "primary jurisdiction over an industry or a sector of an industry which is subject to the jurisdiction of a separate regulatory entity (whether domestic or regional) if the latter regulates conduct covered by Parts 3 and 4[42] of the Regulations".[43] In their view, primary jurisdiction is not the same as exclusive jurisdiction and an uncertainty thereon lends support to the notion that other bodies may also have jurisdiction to assess mergers.

Wagener and Candice further point out that the question to look at when determining whether the COMESA Commission has exclusive jurisdiction to assess a merger, would be whether the Member States have ceded their sovereignty to COMESA and the COMESA Commission when having regard to the COMESA Treaty.[44] As a basic rule, when states enter into a treaty with one another they inevitably contract to achieve or further the stipulated aims or goals of the treaty. Any suggestion to the contrary would serve to render the treaty nugatory and would run counter to the provisions of the 1969 Vienna Convention on the Law of Treaties.[45] Further, when states

[41] Wagener & Candice (ibid) at 7.
[42] Part 4 deals with merger control.
[43] Article 3(2) of the COMESA Competition Regulations, 2004.
[44] Wagener & Candice (ibid) at 7.
[45] Ibid.

contract in this manner they assign certain matters that previously fell within their reserved domain to the treaty organisation and in this case the COMESA Commission when enacting domestic legislation to give effect to the treaty. It is their consideration that COMESA Member States have to some degree limited their sovereignty in favour of the COMESA Commission.[46]

Thus, Wagener and Candice recommend for a clear statement in the COMESA Regulations or COMESA Rules (as is provided for in the European Community (EC) Merger Regulations and the EC Commission Notice on Case Referral in respect of concentrations (2005/C 56/02)), that the COMESA Commission has exclusive jurisdiction over mergers having a regional dimension and furthermore, the COMESA Regulations need to be incorporated by all the Member States into their domestic legislation in order to give effect to the COMESA Regulations.[47] Their writing is important in this study as it acknowledges the steadfast denial raised by the Kenyan Competition Authority against COMESA's exclusive jurisdiction over mergers.[48] However, they do not cover the extraterritorial nature of some of the national competition laws and the resultant jurisdictional conflict in relation to notifications. This study even goes further to provide for an appropriate response.

The foregoing literature review is narrow as it largely focuses on the COMESA competition regime without much consideration on the EAC and Kenyan Competition perspectives. More legal research and analyses are therefore needed to capture the uncertainties emanating from cross-border mergers and acquisitions in the East African region and specifically in Kenya, with

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[46] Article 5 of the COMESA Regulations provides that Member States must "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of these Regulations or resulting from action taken by the Commission under these Regulations". This provision indicates that states are required to cede their sovereignty to COMESA, but it is not clear whether all Member States have in fact done so.

[47] Wagener & Candice (Ibid) at 8

[48] Ibid; see also <http://www.trademarksa.org/news/kenya-told-take-grievances-comesa-court> (accessed September 25, 2014).

more emphasis on the overlap between the Kenyan Competition Authority and the Communications Authority of Kenya. Ruefully, the overlap, coupled with the challenges associated with the COMESA Regulations and Rules, is likely to hinder the ease of business within the EAC region insofar as the extraterritorial nature of the Kenyan Competition Act remains.

1.8 Research Methodology

This study was essentially analytical of the existing competition law framework on notification of mergers and acquisitions in the Kenya, COMESA and EAC regions. It adopted a qualitative approach based on interpretation for data analysis. This involved use of both primary and secondary sources of data. The secondary source study entailed an evaluation of the existing Kenyan competition law on notification of mergers and acquisitions, and establishment of the grey line between such laws and the EAC and COMESA competition regimes.[49] Textbooks, journals articles, official publications and reports in this field were of primary significance. Other secondary sources to be utilized include newspapers reports and online sources. The researcher specifically picked grey literature and published materials, as well as perspectives from other legal experts. The COMESA and EAC websites were visited to get the various merger and acquisition agreements that have been approved and disallowed and the reasons appended to their refusal. To augment library and internet based research, primary methods, such as interviews and focus group discussions, were used to source information from senior officials from the Competition Authority of Kenya. This however never extended to the Communications Authority of Kenya, the COMESA Commission and the EAC Competition Authority because of

[49] These include the Kenyan Competition Act (2010), the Kenya Information and Communications Act, the EAC Competition Act (2006) and Regulations (2010), and the COMESA Competition Regulations (2004) and Rules (2004.

time limitations. Information obtained from the different sources were aggregated and analyzed to inform the arguments and findings of this study.

1.9 Scope and Limitations of the Study

The research is scoped in Kenya but traverses to the EAC and COMESA Competition laws in order to establish the issues of conflict informed by such laws, especially with regard to cross-border notifications of mergers and acquisitions. Thus, the primacy of this study concerns the Kenyan legal framework on notification of mergers and acquisitions vis-à-vis that of the EAC and COMESA regions. The study specifically elucidates the challenges posed to the Kenyan Competition Authority, bearing in mind its extraterritorial jurisdiction. With this wide scope, the timescale and finances for the entire research were wanting. Consequently, not every aspect connected with the subject matter of this study was exhausted. The researcher only managed to interview officials from the Competition Authority. Thus, the prime part of this study is predicated on the library and internet searches.

1.0 Chapter Breakdown

The study comprises four chapters.

Chapter one offers the foundation of the thesis as it provides a general introduction to the study, the statement of the problem, the objectives and assumptions driving this study, and most importantly, offers the methodology that forms the basis of the entire research. It therefore outlines the basic framework within which this study is premised.

Chapter two delves on the legal framework on mergers and acquisitions in Kenya, and COMESA and EAC regions. Emphasis is put on multiple cross-border notifications of mergers

and acquisitions between Kenya and other Member States of the said regions. This shall be subdivided into three separate parts, namely, the Kenyan competition regime comprised of the Competition Act of Kenya (2010), and the Kenyan Information and Communications Act; the EAC regime comprising the Competition Act (2006) and Rules (2010); and the COMESA competition regime comprising the Competition Regulations (2004) and Rules (2004). An in-depth analysis of these frameworks is very apposite in drawing the gap that this study is meant to define. Importantly, the Chapter shall provide and answer as to whether the COMESA competition framework indeed entrenches a one-stop shop system of mergers and acquisitions.

Chapter three examines the legal framework on cross-border merger notifications. Its primacy provides a critique of the above competition laws in relation to mergers and acquisitions in order to expose the teething conflict that exudes from such laws. Other ancillary challenges of, inter alia, jurisdiction, and timelines of notifications form part of this Chapter. Regard is made on the effects of such challenges on regional economic integration goals as set out in the EAC and COMESA parent treaties.

Finally, **Chapter four** gives the conclusion and recommendations of the thesis. This includes a recommendation that the EAC and COMESA Competition laws be reviewed and harmonized in tandem with the national laws of the Member States in order to suppress any jurisdictional or other conflict. An alternative proposal requires the Member States to agree as to the domestic processing of all mergers and acquisitions before proceeding to the regional authorities for harmonization. A one-stop-shop system of registration or approval of mergers is also recommended in addition to addressing the conflict between the Kenyan Competition Authority and the Communication Authority of Kenya.

CHAPTER TWO: CROSS-BORDER MERGERS' REGULATORY FRAMEWORK

2.0 Introduction

Kenya remains ahead of many African countries in its competition regulations, albeit with a myriad of implementation challenges. The Competition Authority of Kenya is awake to these challenges and has been continuously investing in capacity building to step up its performance. This includes, inter alia, providing direction on the interpretation of the provisions of the Competition Act (2010) and the formulation of guidelines, policies and draft subsidiary legislation in a bid to clearly define its mandate. However, the jurisdictional supremacy question remains rhetoric insofar as cross-border mergers and acquisitions are concerned. The extraterritorial reach set under the Act raises controversy vis-à-vis the COMESA and EAC competition regime to which Kenya is a party, and which form part of the Kenyan competition regime per Article 2(5) and (6) of the Constitution (2010). A further conflict arises between the Kenyan Competition Authority and the Communication Authority of Kenya (CAK), the latter being mandated to approve mergers between companies licenced under the Kenya Information and Communications Act (as amended in 2013). This study takes a view that an appropriate answer to these conflict issues can be found upon examination of the competition regime in relation to mergers.

While taking cognizance of other industry or sector-specific legislations[50] which play an important role in providing for and regulating mergers and acquisitions in Kenya, this Chapter delves on substantive and procedural provisions in relation to mergers and acquisitions caught under the Kenyan Competition Act (2010); the Kenya Information and Communications Act and

[50] Such legislations include the Companies Act (Chapter 486 of the laws of Kenya), the Capital Markets Act (Chapter 485A of the Laws of Kenya), the Capital Markets (Takeovers and Mergers) Regulations 2002, the Banking Act (Chapter 488 of the Laws of Kenya), and the Insurance Act (Chapter 487 of the Laws of Kenya).

related legislations; the COMESA Competition Regulations (2004), Rules (2004) and Draft Merger Assessment Guideline (2013); and the EAC Competition Act (2006) and Regulations (2010). The basis for this analysis is to provide for a critique framework that forms part of the next Chapter Four (4) of this study. These laws are explored in this Chapter under three subheadings, namely, the Kenyan Competition Regime, the COMESA Competition Regime, and the EAC Merger Regulatory Regime.

2.1 Kenyan Competition Regime on Mergers and Acquisitions

As aforementioned, the issues addressed under this study invite the analysis of the Kenya Competition Act (2010) and the Kenya Information Communication Act provisions in relation to mergers. These are discussed herein.

2.1.1 The Kenya Competition Act (Chapter 504 of the Laws of Kenya), 2010

The key statute regulating mergers and acquisitions in Kenya is the Competition Act, which came into force on the 1st day of August 2011, repealing and replacing the 1989 Restrictive Trade Practices, Monopolies and Price Control Act. In addition to regulating mergers and acquisitions, the Competition Act also contains provisions regulating restrictive trade practices, unwarranted concentrations of economic power, abuse of dominance and consumer protection. It applies to all persons including the Government, state corporations and local authorities in so far as they engage in trade within the Kenyan domestic market.[51] With regard to the cross-border mergers and acquisition transactions, the Act is clearer on its national and extraterritorial effect. For instance, section 6 expressly states that the Act applies, inter alia, to any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a

[51] Ibid Section 5 (1).

business, part of a business or an asset of a business, in Kenya. It also applies to any acquisition of an undertaking situated either inside or outside Kenya or an acquisition of the controlling interest in a foreign undertaking that has a controlling interest in a subsidiary in Kenya.[52] An interpretation of this provision implies that the Competition Authority's jurisdiction is extended to practices outside Kenya which are deemed to affect competition in the domestic market. Section 5(2) thereof defines the supremacy of the Act in case of a conflict with other written laws, thus;

> Where there is a conflict between the provisions of this Act and the provisions of any other written law with regard to matters concerning competition, consumer welfare and the powers or functions of the [Competition] Authority under this Act, the provisions of this Act shall prevail.[53]

Further, Section 5 (3) provides that, if a body charged with public regulation has jurisdiction in respect of any conduct regulated in terms of the Act within a particular sector, the Competition Authority and that body shall: (a) identify and establish procedures for management of areas of concurrent jurisdiction; (b) promote co-operation; (c) provide for the exchange of information and protection of confidential information; and (d) ensure consistent application of the principles of the Act. However, if there is any conflict, disharmony or inconsistency in all matters concerning competition and consumer welfare, the determinations, directives, regulations, rules, orders and decisions of the Authority prevails.

Section 7 (1) of the Act establishes the Competition Authority which is mandated, inter alia, to approve all mergers and acquisitions falling within the auspices of the Act.[54]Any person found

[52] Section 6 states: "This Act shall apply to conduct outside Kenya by— (a) a citizen of Kenya or a person ordinarily resident in Kenya; (b) a body corporate incorporated in Kenya or carrying on business within Kenya; (c) any person in relation to the supply or acquisition of goods or services by that person into or within Kenya; or (d) any person in relation to the acquisition of shares or other assets outside Kenya resulting in the change of control of a business, part of a business or an asset of a business, in Kenya."

[53] Emphasis added.

guilty of failing to obtain an authorising order is liable, upon conviction, to imprisonment for a term not exceeding five years or a fine not exceeding 10 million Kenyan shillings or both. In addition to these penalties, the Competition Authority may impose a financial penalty of an amount not exceeding 10 per cent of the preceding year's gross annual turnover in Kenya of the undertaking(s) in question. Although approvals cannot be expedited, the Competition Act grants the Competition Authority discretion to exclude certain mergers from the mandatory requirement for obtaining prior approval. However, the Act does not detail the criteria that will be used to consider whether or not parties would be exempted from seeking approval.

Per section 2 of the Act a "merger" is an acquisition of shares, business or other assets, whether inside or outside Kenya, resulting in the change of control of a business, part of a business or an asset of a business in Kenya in any manner, and includes a takeover.[55] A merger therefore occurs when one or more undertakings directly or indirectly acquire or establish direct or indirect control over the whole or part of another undertaking.[56] It may be achieved in any manner, including:

(a) the purchase or lease of shares, acquisition of an interest, or purchase of assets of the other undertaking in question;
(b) the acquisition of a controlling interest in a section of the business of an undertaking capable of itself being operated independently whether or not the business in question is carried on by a company;
(c) the acquisition of an undertaking under receivership by another undertaking either situated inside or outside Kenya;

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[54]An approval of a proposed merger by the Authority, or by the Competition Tribunal upon a review, shall however no relieve an undertaking from complying with any other applicable laws (see section 49(1) of the Competition Act).

[55] See section 2 of the EAC Competition Act, 2006, for a similar and simplified definition; See also Article 23 of the COMESA Competition Regulations, 2004 – which defines a "merger" as the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:

a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
b) the amalgamation or combination with a competitor, supplier, customer or other person; or
c) any means other than as specified in sub-paragraph (a) or (b).

[56] Competition Act No. 12 of 2010, s 41(1).

(d) acquiring by whatever means the controlling interest in a foreign undertaking that has got a controlling interest in a subsidiary in Kenya;
(e) in the case of a conglomerate undertaking, acquiring the controlling interest of another undertaking or a section of the undertaking being acquired capable of being operated independently;
(f) vertical integration;
(g) exchange of shares between or among undertakings which result in substantial change in ownership structure through whatever strategy or means adopted by the concerned undertakings; or
(h) amalgamation, takeover or any other combination with the other undertaking.[57]

The Act also provides for clear timelines within which mergers ought to be notified to the Competition Authority as well as the timelines within which the Competition Authority should review merger applications, make recommendations, request for additional information and make its final determination.[58] Section 43(1) of the Act provides that, where a merger is proposed, each of the undertakings involved shall notify the Authority of the proposal in writing or in the prescribed manner.[59] The Authority may, within thirty days of the date of receipt of the said notification, request such further information in writing from any one or more of the undertakings concerned.[60] The Competition Authority is then required to consider and make a determination within 60 days of the date it receives the notification; or if the Authority requests further information under section 43(2), within sixty days after the date of receipt by the Authority of such information; or if a hearing conference is convened in accordance with section 45,[61] within thirty days after the date of conclusion of the conference.[62]However, under Section 44 (2), the Authority has power to extend this timeline due to the complexity of the issues involved, provided that the extension is notified in writing to the undertakings before the expiry

[57] Ibid s 41(2).
[58] *Id* note 97.
[59] This however excludes mergers involving telecommunication services providers licenced by the Communication Authority of Kenya.
[60] Section 43 (2) of the Competition Act of Kenya.
[61] Section 45 (1): If the Authority considers it appropriate, it may determine that a conference be held in relation to a proposed merger.
[62] Section 44(1).

of the 60 days and provided further that the extension does not exceed 60 days from the time it takes effect.

The threshold for mandatory notification s provided for under the Merger Guidelines pursuant to section 42 of the Competition Act.[63] Where the proposed merger involves parties in the health sector, the combined turnover of the merging parties should be over five hundred million shillings and the turnover of the target, fifty million shillings. In the case of carbon-based mineral sector, the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger, should be over four billion shillings. In other sectors, the combined turnover of the merging parties should be over one billion shillings and that of the target over one hundred million shillings. The turnover values are obtained from the audited financial statements of the merging parties, one of the documents to accompany the Merger Notification Form as required by the Authority.[64] The sanctions for providing false information are provided for under Section 91 of the Competition Act that is, a fine not exceeding 500, 000 shillings or to imprisonment not exceeding three (3) years, or both.

In making a determination in relation to a proposed merger, the Authority may either give approval for the implementation of the merger; decline to give approval for the implementation of the merger; or give approval for the implementation of the merger with conditions.[65] It conducts a Substantial Lessening of Competition (SLC) Test and Public Interest Test (PIT) as specified in section 46 of the Competition Act.[66] This includes, inter alia: (a) the extent to which the proposed merger would be likely to prevent or lessen competition or to restrict trade or the

[63] See the Guidelines from www.cak.go.ke/Statutes&Resgulations/Guidelines/Mergers/mergers; see also interview questionnaire with Competition Authority, 30th October 2014.
[64] Ibid.
[65] Section 46(1) of the Competition Act, 2010.
[66] Interview with Christopher M. Mutei, Competition Authority of Kenya (30th October 2014).

provision of any service or to endanger the continuity of supplies or services; (b) the extent to which the proposed merger would be likely to result in a benefit to the public which would outweigh any detriment which would be likely to result from any undertaking, including an undertaking not involved as a party in the proposed merger, acquiring a dominant position in a market or strengthening a dominant position in a market; (c) the extent to which the proposed merger would be likely to affect the ability of small undertakings to gain access to or to be competitive in any market; (h) the extent to which the proposed merger would be likely to affect the ability of national industries to compete in international markets.[67] In this case, the Authority has to contact customers and competitors of the merging parties as part of the merger review process to hear their views on the likely impact of the proposed transaction on competition.[68]

Section 46 (6) requires the Authority to give notice of its determination in relation to a proposed merger to the parties involved, in writing, and issue written reasons for the same. The Authority may at any time revoke a decision approving the implementation of a proposed merger if the decision was based on materially incorrect or misleading information for which a party to the merger is responsible; or if any condition attached to the approval of the merger that is material to the implementation is not complied with – and an intention to revoke must be notified to every undertaking involved in the merger, and to any other person who in the opinion of the Authority is likely to have an interest in the matter.[69] A decision made by the Authority may be reviewed by the Competition Tribunal established under Section 71 of the Act;[70] and any party who is dissatisfied with the decision of the Tribunal may appeal to the High Court against the Tribunal's

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[67] Competition Act (2010) section 46(2).
[68] Ibid.
[69] Competition Act of Kenya, section 47.
[70] Ibid section 48.

decision within thirty days after the date on which a notice of that decision has been served on him and the decision of the High Court shall be final.[71]

Further, besides notifiable mergers, the Authority confirmed in an interview that it also deals with non-notifiable mergers which are below the threshold for mandatory notification and, after is assessment, excludes such transactions from the provision of Part IV of the Competition Act within fourteen (14) days from the date of receipt.

2.1.2 Kenya Information and Communications Act (Cap 411 of the Laws of Kenya)

This Act[72] inter alia provides for the establishment of the Communications Authority of Kenya (CAK) to facilitate the development of the information and communications sector (including broadcasting, multimedia, telecommunications and postal services) and electronic commerce.[73] Section 3 (1) thereof establishes the CAK as an independent body, free of control by government, political or commercial interests in the exercise of its powers and in the performance of its functions.[74] The CAK is purposed to licence and regulate postal, information and communication services in accordance with the provisions of the Act;[75] and is required to fulfil its mandate in accordance with the national values and principles of governance in Article 10 and the values and principles of public service in Article 232 (1) of the Constitution of Kenya (2010).[76]

[71] Ibid section 49(2).
[72] As amended by the Kenya Information and Communications (Amendment) Act No. 41A of 2013.
[73] See the Preamble to the Kenya Information and Communications Act.
[74] The Kenya Information and Communications (Amendment) Act (2013) section 5A (1).
[75] The Kenya Information and Communications Act section 5(1).
[76] The Kenya Information and Communications (Amendment) Act (2013) section 5A (2).

Among other functions, CAK is mandated to ensure fair competition in the communications sector.[77]Section 84R (2) of the Act provides that, the CAK shall in the performance of its functions under the Act, promote, develop and enforce fair competition and equality of treatment among licensees. Thus, a licensee under the Act should not engage in activities, which have or are intended to or likely to have the effect of unfairly preventing, restricting or distorting competition where such "act or omission" is done in the course of, as a result of or in connection with any business activity relating to licensed services.[78] In the wording of Section 84S (2) (c), an "act or omission" includes the effectuation of anti-competitive changes in the market structure and in particular, anti-competitive mergers and acquisitions in the communications sector; and the CAK may, on its own motion or upon complaint, investigate any licensee whom it has reason to believe or is alleged to have committed, or engaged in, any such act or omission in breach of fair competition or equal access.[79] Licences issued by the CAK to the licensed companies[80] contain provisions that require the approval of the CAK to be sought prior to the change of control in that licensed company. Accordingly, CAK must be notified of any proposed change in ownership of an entity which it has licensed and is also required to give its prior written consent to certain changes in the shareholding of a licensed entity. The CAK is generally required to accept or refuse to grant consent to such change in shareholding within 30 days of receipt of the request.

Section 84T (6) provides that, where the Commission makes a decision that a licensee is competing unfairly, the Commission may: (*a*) order the licensee to stop the unfair competition; (*b*) require the licensee to pay a fine not exceeding the equivalent of ten percent of the annual

[77] The Kenya Information and Communications Act section **84S** (1)
[78] Ibid section 84Q.
[79] Ibid sections 84S (1) and 84T (1).
[80] Companies licensed under the Kenya Information and Communications Act, include broadcasters, telecommunications service providers and radio communication service providers.

turnover of the licensee for each financial year that the breach lasted up to a maximum of three years; or (*c*) declare any anti-competitive agreement or contracts null and void. This provision does not in any way affect the right of any person to make and sustain any claim under any law in force in Kenya for the act or omission which constitutes an offence under the Act or from being liable under that other written law to any punishment or penalty higher than that prescribed under the Act.[81] Any person aggrieved by the Commission's decision may appeal to the Appeals Tribunal established under Section 102(1) of the Act.[82]

2.2 COMESA Competition Regime on Mergers and Acquisitions

Article 55 of the Treaty establishing COMESA provides for the regulation of competition in the common market. The Member States agreed under Article 55(1) that any practice which negates the objective of free and liberalized trade shall be prohibited. Thus, any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market, is prohibited. Further, article 55(3) provides that the Council of Ministers shall make regulations to regulate competition within member states. In this connection, the Council made and adopted the COMESA Competition Regulations in December 2004 and these have been in force since then, although the institution set up under Article 6 to implement them, the COMESA Competition Commission (CCC) only became operational on 14th January 2013. The other COMESA legislations relevant to this study comprise the COMESA Competition Rules (2004), and the 2013 Draft Merger Assessment Guideline under the COMESA Competition Regulations, 2004 (hereinafter referred to as "the Draft Guideline").

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[81] The Kenya Information and Communications Act, section 84T (7).
[82] Ibid section 84T (8).

The purpose of the Regulations is provided for in their Article 2, which reads:

> The purpose of these Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors.

2.2.1 Jurisdictional Thresholds on Cross-border Mergers

A 'merger' is defined under Article 23(1) of the COMESA Competition Regulations as the direct or indirect acquisition or establishment of a controlling[83] interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of: (a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person; or (b) the amalgamation or combination with a competitor, supplier, customer or other person. Article 3(1) and 3(2) of the Regulations set out the jurisdictional threshold of the Regulations, thus;

> These Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities as set forth under Article 4.
>
> These Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.

The letter of Article 3(1) implies inter alia that, merger control applies only where the following conditions are met: (a) the conduct must be covered by Part 4 of the Regulations; (b) the conduct referred to in (a) above must have an appreciable effect on trade between COMESA Member States; and (c) the conduct referred to in (a) above must restrict competition in the COMESA region. On a reading of the Regulations, it appears that the conditions set out in Article 3 are

[83] For the purpose of Article 23(1), a "controlling interest", in relation to: (a) any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking; and (b) any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset (see Article 23(1). Section 2.2 of the Draft Guideline provides that, "control" shall be constituted by rights, contracts or any other means which, either separately or in combination, and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking.

cumulative and a pre-requisite to the application of the merger control provisions contained in Part 4 of the Regulations. This would mean that any 'merger' (as defined in Article 23 of the Regulations) should only be subject to a notification obligation if the three preliminary conditions under Article 3 are met.

Arguably, Article 3 of the Regulations introduces a 'local nexus' condition to merger notifications in line with Section 1A of the International Competition Network (ICN) Recommended Practices for Merger Notification and Review Procedures which provides that 'jurisdiction should be asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned.' Thus, businesses considering whether a notification exists under the Regulations will be assessing whether a transaction which has no appreciable effect on trade between COMESA Member States or which does not restrict competition in the COMESA region should be notified under the Regulations. As long as the merger filing thresholds are set at zero, Article 3 will be called upon to play a significant role in assessing the applicability of the Regulations to transactions with limited impact in the COMESA region.

2.2.2 Regional Dimension Threshold (Article 23 Para 3 of the Regulations)

Article 23(3) of the COMESA Competition Regulations ('the Regulations') provides that:

> This Article shall apply where:
>
> a) both the acquiring firm and target firm or either the acquiring firm or target firm operate[84] in two or more Member States; and
>
> b) the threshold of combined annual turnover or assets provided for in paragraph 4 is exceeded.

Section 3.2 of the Draft Guideline divides Article 23(3) (a) into two parts as follows:

[84]The word 'operate' is taken to mean that a firm(s) in issue derives turnover in two or more Member States. Therefore does not need to be directly domiciled in a Member State but it can have operations through exports, imports, subsidiaries etc. in a Member State (see Section 3.10 of the Draft Guideline).

(a) both the acquiring firm and the target firm operate in two or more Member States; and

(b) either the acquiring firm or target firm operate in two or more Member States.

The meaning of the first part above is that, for a merger to fall within the dominion of Part IV of the Regulations, both the acquiring firm and the target firm should operate in two or more Member States.[85] For example if Company A is the acquiring firm and it operates in Kenya and Tanzania and Company B is the target company and it equally operates in Kenya and Tanzania, then the requirements of the first limb are satisfied and the merger falls within the ambit of Part IV of the Regulations. Another scenario where the first part is satisfied is where Company A, the acquiring firm, operates in Kenya and Tanzania and Company B, the target firm, operates in Tanzania and Ethiopia. In this example, both Company A and Company B operate in two or more Member States.[86] The third scenario is where Company A, the acquiring firm, operates in Kenya and Tanzania and Company B, the target firm, operates in Djibouti and Madagascar. In this example, both Company A and Company B operate in two or more Member States.[87]

As regards the second part, a merger falls within the province of Part IV of the Regulations where, for example, Company A, the acquiring firm, operates in Kenya and Seychelles and acquires Company B, the target, which has no operations in the COMESA Member States. The second part may also be satisfied where Company A, the acquiring firm, has no operations in any of the COMESA Member States but acquires Company B, the target, which operates in Rwanda and Burundi.[88] These presupposes that both the acquiring firm and the target firm do not have to operate in two or more Member States as is the case for the first limb; but, where either the target

[85] See Section 3.3 of the Draft Guideline (2013).
[86] Ibid Section 3.4.
[87] Ibid Section 3.5.
[88] Ibid Section 3.7.

or acquiring firm operates in two or more Member States, the merger is captured under Part IV of the Regulations.

Noteworthy, Section 3.9 of the Draft Regulations provide that where the acquiring firm operates in only one Member State and the target firm operates in another Member State and only that Member State, then such a merger does not satisfy the jurisdictional requirements of Part IV of the Regulations. This is however on the premise that such firms do not control any other firm whether directly or indirectly in a third Member State. Such firms should also not be controlled whether directly or indirectly by any other firm in a third Member State. For instance, where Company A, the acquiring firm operates in South Africa only and Company B, the target, operates in Kenya only, such a merger does not meet the jurisdictional requirements of Part IV of the Regulations. The situation may be different where Company A has a stake in Company C which operates in Malawi or Company B has a stake in Company D which operates in Uganda.

2.2.3 Notification and Determination of a Proposed Merger

According to Article 24 (1) of the Regulations, a notifiable[89]merger must, within thirty (30) days of the parties' 'decision to merge',[90] be notified to the CCC where both the acquiring firm and target firm or either the acquiring firm or target firm meets the above explored regional dimension.[91]The notification is required to be in the prescribed form and accompanied by a fee

[89] Article 23(5) (a): A "notifiable merger" means a merger or proposed merger with a regional dimension with a value at or above the threshold as prescribed under the terms of the Regulations.

[90]'Decision to merge' in Article 24(1) is construed, under Section 4.2 of the Draft Guideline, when there is established a concurrence of wills between the merging parties in the pursuit of a merger objective.

[91] Section 1.3 of the Draft Guideline provides that where both the acquiring and the target firm, or either the acquiring firm or the target firm, operate in two or more Member States, the merger shall be notified in accordance with Article 23 of the Regulations subject to the following thresholds:

(a) the combined worldwide aggregate annual turnover or the combined worldwide aggregate value of assets, whichever is higher, of all firms to the merger in the Common Market equals or exceeds COM$ Zero; and

calculated at 0.5% or COM$500,000, or whichever is lower, of the combined annual turnover or combined value of assets in the Common Market, whichever is higher.[92] According to Section 4.3 of the Draft Guideline, the COM$500,000 is the maximum fee payable for merger notification. When the merger is received, the CCC is required first to calculate a 0.5% of the combined turnover of the merging parties; and then calculate a 0.5% of the combined value of assets of the merging parties. The CCC is then required to compare results in both cases above and get the higher value, which higher value shall be compared to the COM$500,000. If the higher value is lower than the COM$500,000, the CCC will consider the higher of either the combined assets or turnover as a notification fee. If either the combined assets or turnover is higher than COM$500,000, then the latter shall be the notification fee.

Currently, the merger notification threshold is zero.[93] This is provided for under Rule 4 of the Rules on the Determination of Merger Notification Thresholds under Article 23 of the Regulations.[94] Therefore, all mergers having a regional dimension are mandatorily required to be notified regardless of the size of the firms involved. It is important to note that whenever a merger is consummated, there is a rebuttable presumption that it would lead to a substantial lessening of competition. This presumption can only be rebutted after an assessment of the merger subsequent to notification has been made.

(b) the aggregate annual turnover or the aggregate value of assets, whichever is higher, of each or at least two firms to the merger in the Common Market equals or exceeds COM$ Zero.

The thresholds for notifications of mergers under the Regulations apply to a notifiable merger. However, per Article 23 Para 6 of the Regulations, the CCC may require parties to a non-notifiable merger to notify the Commission of that merger if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest.

[92] See Section 4.3 of the Draft Guideline.

[93] The reason why the threshold has been currently set at zero is because different Member States are at different levels of economic development and hence a realistic threshold can only be determined after the Regulation has been tested on the market. Therefore, the threshold shall be raised after a period of implementation of the Regulations (see Section 1.3 of the Draft Guideline).

[94] Section 4.4 of the Draft Guideline.

Notification is deemed complete once the merger notification fee is paid and all the relevant information is submitted to the Commission.[95] The Commission is required to issue a certificate of completion indicating that the notification procedure has been completed. The certificate of completion bears the actual date and, for purposes of Article 25, such date is the commencement date for assessment of the merger.

Article 25 of the Regulations requires the CCC to examine a merger as soon as the notification is received and make a decision on the notification within one hundred and twenty (120) days after receiving the notification; provided that if the notification is incomplete, the examination period begins on the day following receipt of complete information. Further, if, prior to the expiry of the 120-day period, the Commission has decided that a longer period is necessary, it shall so inform the parties and seek an extension from the Board of Commissioners established under Article 12 of the Regulations.[96] The Commission may seek such an extension from the Board in circumstances where it is impractical to complete the assessment of such a merger.[97] The maximum time for examination of the merger after an extension has been approved by the Board shall be determined by the Board taking into account the exigencies of the situation. The reasonableness test shall be applied here.[98] The parties shall be informed within 5 calendar days of such extension and the duration thereof.[99] Besides, The 120 working days within which to make a decision shall exceptionally be suspended where, owing to circumstances for which one of the undertakings involved in the concentration is responsible, the Commission has had to request information by decision pursuant to Rule 41 of the COMESA Competition Rules or to order an inspection by decision pursuant to Rule 44 of the COMESA Competition Rules.

[95] Section 4.6 of the Draft Guideline.
[96] COMESA Regulations, Article 25(2).
[97] See Section 5.5 of the Draft Guideline.
[98] Ibid.
[99] Ibid.

Per Section 5.6 of the Draft Guideline, the 120 days within which the decision on the notification must be made are working days as opposed to calendar days. This position is derived from Rule 3(2) of the COMESA Competition Rules (2010) on the Computation of time. Rule 3(2) provides that where the time prescribed by or allowed under these Rules for doing an act or taking a proceeding expires on a Sunday or on a day on which the office of the Registrar is closed, the act may be done or the proceeding may be taken on the first day following that is not a Saturday, Sunday or day on which that office is closed. It therefore means that Saturdays, Sundays and Public holidays are not taken into account in the computation of time and hence the days contemplated are the working days. The holidays to be considered are those of the host country, that is, the Country in which the Commission is domiciled and this is Malawi in this case.[100]

2.2.4 Substantive Review Test

As aforementioned, the substantive test for merger review to be applied by the Commission is to determine firstly whether the merger is likely to substantially prevent or lessen competition by assessing various matters such as the actual or potential level of import competition in the market, the ease of entry into the market, the level, trends of concentration and history of collusion in the market and whether the merger will result in the removal of efficient competition.[101]When considering the effect of the contemplated merger, the Commission shall also consider other matters that may outweigh the anti-competitive effects of the merger such as any technological efficiency or other pro-competitive gain that would result from the merger. Then, and if it considers that the merger is likely to substantially prevent or lessen competition, the Commission shall take into account public interests grounds such as the interests of

[100] See Section 5.7 of the Draft Guideline.
[101] COMESA Competition Regulations, Article 26(2).

consumers, purchasers in regard to the prices, quality and variety of commodities and services.[102]Further to this substantive test, the Commission can approve the merger, declare the merger unlawful, restrict the merger or prescribe prohibitions and restrictions regarding the manner in which the business is carried out. Where the Commission has not taken a decision in accordance with Article 25 of the Regulations and Section 4 of the instant Guidelines, a merger shall be deemed to have been declared compatible with the Common Market.[103]

2.2.5 Suspensive Effect and Sanctions

COMESA's merger control rules impose no suspension obligation on parties to a notifiable transaction. The only obligation imposed is to notify within 30 days of the Parties' decision to merge. However, the current version of the notification form states that merger implemented in contravention of the Regulations shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market.[104]The CCC also asserts that it has the power to block or unwind unlawful mergers. The above arguably suggests that deals can be closed prior to clearance without penalty, but at the parties' own risk – though again this remains uncertain. In addition, where a merger is carried out contrary to Article 24(1) of the Regulations, the Commission may impose a penalty not exceeding ten *per centum* of either or both of the merging parties' annual turnover in the Common Market as reflected in the accounts of any party concerned for the preceding financial year.[105]

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[102] Ibid Article 26(4).
[103] See Section 5.12 of the Draft Guideline.
[104] COMESA Competition Regulations, Article 24 (1); See also Section 4.10 of the Draft Guideline.
[105] Ibid Articles 8(5) and 24 (4).

2.2.6 Article 24(7): A Synergy for One-stop Shop Procedure?

COMESA's supranational merger control regime is said to provide a simplified one-stop shop procedure for filings in the region. However, the reality is less clear, as conflicting views between domestic competition authorities in the region hold. The controversy arises from the COMESA merger control rules which do not expressly recognize the exclusive jurisdiction of the CCC over transactions meeting COMESA's merger filing thresholds. The CCC asserts that its exclusive jurisdiction is implicit from the reading of the legislation and that the domestic competition authorities have the power only to request the referral of a transaction caught by the COMESA merger control rules. Under Article 24(7) of the Regulations, a Member State having attained knowledge of a merger notification submitted to the Commission may request the Commission to refer the merger for consideration under the Member State's national competition law if the Member State is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the Member State or any part of the Member State. The Commission shall consider that request, and inform the concerned Member State in writing within 21 days of the receipt of the request that: (a) the Commission will deal with the case itself in order to maintain or restore effective competition on the market concerned and the region as a whole; or (b) the whole or part of the case will be referred to the competent authorities of the Member State concerned with a view to the application of that Member State's national competition law.[106] This provision means that the Commission has the sole discretion of deciding whether or not the case should be referred to a Member State.[107] This will be after the Commission has taken into consideration all the relevant factors surrounding such a merger.

[106] Ibid Article 24(8).

[107] See Section 4.9 of the Draft Guideline.

The CCC's interpretation of the above provision is consistent with the one-stop shop principle which should apply to regional merger control regimes to avoid duplicative filing processes. However, as aforementioned, since the power to grant a referral is at the entire discretion of the CCC, the CCC's interpretation has the practical implication of depriving national competition authorities of the discretion to exercise their local merger review power in relation to mergers meeting COMESA filing thresholds. This is why certain Member States, most notably Kenya, argue that a filing to the CCC cannot be viewed as a substitute for a filing under the national rules. This furthers the uncertainty for business deals in the region.

2.3 The East African Community Merger Regulatory Regime

In addition to the foregoing, Kenya is a member of the East African Community (EAC) having signed the EAC Treaty, which also envisions the creation of a common market for free movement of goods and services, addresses the importance of regulation of competition in each market and promotes the establishment of competition authorities in the respective jurisdictions. In 2004, the East African Community Council of Ministers adopted East African Competitions Policy; and subsequently the East African Legislative Assembly enacted the East African Competitions Act (herein "the EAC Act") in 2006. Its purpose is to promote and protect fair competition in the EAC, provide for consumer welfare and establish the EAC Competition Authority. It establishes the EAC Competition Authority under Section 37 and provides it with powers, express and implied, necessary for the implementation and enforcement of the EAC competition law.[108] The reach of the EAC Competition Authority extends to matters of anti-competitive practices, abuse of dominance, mergers and acquisitions, subsidies, public

[108] The EAC Competition Act (2006) s 42.

procurement and consumer protection in the EAC, provided that these have cross-border effect.[109]The EAC Act is however not required to apply to sovereign acts of the Partner States.[110]

Part IV of the EAC Act deals with mergers and acquisitions. Section 2 of the EAC Act defines "acquisition" as any acquisition by an undertaking of direct or indirect control of the whole or part of one or more other undertakings, irrespective of whether the acquisition is effected by merger, consolidation, take-over, purchase of securities or assets, contract or by any other means. Similarly, the term "merge" means an amalgamation or joining of two or more firms into an existing firm or to form a new firm. Under Section 12(1) of the EAC Act, a merger or acquisition shall not come into effect before its notification to the Authority and the Authority has given its approval of the proposed merger or acquisition; and any contravention of this provision constitutes an offence under the Act.[111] Accordingly, a person intending to execute a merger or an acquisition is required, under Section 11(1) of the Act as read with Regulation 3(1) of the EAC Competition Regulations (2010), to notify the Authority of such merger or acquisition. The notification under may be submitted by a representative of a person intending to execute the merger or acquisition, and in that case, that representative shall produce written proof, that the representative is authorised to act for that person.[112] The notification is required to be submitted in Form EACCA 1 in the Schedule to the EAC Competition Regulations and should be accompanied by a prescribed fee to be determined by the Authority.[113]

[109] Ibid s 4(1).
[110] Ibid s 4(2) (c).
[111] Ibid s 12(4) and (5).
[112] See Regulation 3(2) of the EAC Competition Regulations (2010).
[113] Ibid Regulation 3(3). Under Regulation 4, a merger or acquisition notice shall be accompanied by original or certified copies of relevant documents to support the intended merger or acquisition.

2.3.1 Review of Intended Merger or Acquisition

Per Regulation 5(1) of the EAC Competition Regulations, the Authority shall review the intended merger or acquisition to determine if all the relevant information and documents have been submitted by the person. Where the Authority finds that the merger or acquisition notice contains all the relevant information and documents required, an acknowledgement shall be given to the person. The Authority shall make a decision on the intended merger or acquisition, within forty five (45) days after notification requirements have been satisfied.[114] If the Authority has not communicated its decision within the 45 days, the merger or acquisition may be implemented.

Where the Authority finds that the merger or acquisition notice lacks certain information or documents, it shall request the person making the notification to provide such information or documents in Form EACCA 2 in the Schedule to the EAC Competition Regulations; and if the person neglects to provide the information or documents requested so requested, the Authority shall not consider the merger or acquisition and shall notify the parties to the merger or acquisition.[115]

Under Regulation 7(1) of the EAC Regulations, the Authority is required, within fourteen days of issuing an acknowledgement of receipt of a notification of an intended merger or acquisition, to publish a notice of the intended merger in at least two newspapers of national circulation in each Partner State, and on the Community website. The notice is purposed to invite interested persons to express their views on the proposed merger or acquisition within fourteen days of publication of the notice.

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[114] Regulation 5(3) of the EAC Competition Regulations.
[115] Ibid Regulation 5(5).

2.3.2 Substantive Approval Test under the EAC Act

A merger or acquisition shall not be approved by the Authority if that merger or acquisition leads to the creation, or strengthening of an already subsisting dominant position, and thereby substantially lessening competition in the relevant market.[116] In determining this, the Authority shall take into account all relevant competitive factors, and in particular shall consider: (a) the competitive structure of all markets affected by the merger or acquisition, including the potential competition from both inside and outside the Community in light of legal or other barriers to entry; (b) the undertakings in the markets affected, their control of essential facilities, their integration in upstream and downstream markets, and their financial resources; (c) the competitors and the alternatives available to suppliers and consumers;(d) any pro-competitive effects of the merger or acquisition which may outweigh the harmful effects on competition.[117]

The Authority shall, after considering the intended merger or acquisition: (a) approve the merger or acquisition, with or without conditions; (b) decide that the intended merger or acquisition falls outside the jurisdiction of the Act; or (c) reject the intended merger or acquisition.[118]

2.3.3 Appeal of the Decision of the Authority

A person aggrieved by the decision of the Authority on an intended merger or acquisition may, through the Secretary General, appeal to the Council of Ministers established under Article 9 of the EAC Treaty within thirty days from the date of the communication of the decision of the Authority.[119] The Council may after considering the appeal: (a) reject the merger or acquisition; or (b) approve the merger or acquisition, with or without conditions, but only where the intended

[116] Ibid s 13(1).
[117] Ibid s 13(2).
[118] See Regulation 10(1) of the EAC Competition Regulations.
[119] Ibid Regulation 12(1).

merger or acquisition fulfils an overriding public interest.[120] Where the Council approves the merger or acquisition the Council shall direct the Authority to issue a merger or acquisition clearance certificate.

2.3.4 Sanctions under the EAC Act

Section 42 (2) Any person who wilfully fails to comply with an order of the Authority with respect to availing any information or production of any document or appearing before the Authority proceedings commits an offence and shall be liable to a fine not exceeding five thousand dollars or to imprisonment for a term of not more than six months or both. (3) The Authority shall be authorized to reduce penalties for or grant amnesty to anyone that co-operates with the Authority in the enforcement of the East African Community Competition Law by submitting full and correct information.

2.3.5 Jurisdiction of the EAC Competition Authority

Section 44(1) provides that the determination of any violation of the Act is within the exclusive original jurisdiction of the Authority. Regulation 10(2) of the EAC Regulations provides that, where the Authority decides that the merger or acquisition is outside the jurisdiction of the Act, the Authority shall refund seventy five percent of the fee for filing a merger or acquisition notice, to the person that paid it.

Where a case or legal dispute to be decided by a Partner State's competition authority or court is also pending before the Authority or the Court, the Partner State's competition authority or court shall stay such proceedings until the Authority has made a decision. Further, where a case or legal dispute within the scope of application of the Act is not yet under consideration by the

[120] EAC Competition Act, s 13(4).

Authority, Partner States' authorities or courts shall refer the case or the legal dispute to the Authority;[121] and in case of disagreement between the Authority and Partner States' authorities or courts, the matter shall be referred to the East Africa Court of Justice.[122]

2.4 Best Practices on Jurisdictional Conflicts: The European Union

The potential for conflict in the EU merger control is magnified when business conduct or transactions have effects in more than one jurisdiction. The following section underscores how the EU competition enforcers try to avoid and minimize such conflicts.

2.4.1 The Merger Referral System under the EU Merger Regulation

The control of mergers and acquisitions at the European level is envisaged under the EU Merger Regulation, which was originally adopted in 1989. The Regulation was revised and replaced by the current version of the Merger Regulation which came into force on 1st May 2004.[123] The EU Regulation lays down the conditions under which the European Commission (EC) or the National Competition Authorities (NCAs) have jurisdiction over concentrations. Generally, concentrations with an EU dimension must in principle be notified to the EC, which has exclusive jurisdiction to investigate, without the NCAs being able to apply their national merger control rules. Those concentrations without an EU dimension fall within the jurisdiction of NCAs in accordance with the domestic merger control rules. Whether a transaction has an EU dimension depends on whether it satisfies certain turnover thresholds. These thresholds are purely jurisdictional in nature. However, this simple allocation of jurisdiction is subject to a number of exceptions under the EU Merger Regulations. In the researcher's view, the exceptions

[121] Ibid s 44(4).
[122] Ibid s 44(6).
[123] Council Regulation (EC) 139/2004 (OJ 2004 L24/1, 29.1.2004).

are important in mitigating any elements of conflict especially where a national competition authority has extraterritorial jurisdiction like in Kenya.

Firstly, where parties to a proposed merger with an EU dimension conclude that it would be simpler or more advantageous if their transaction could be reviewed, either in whole or part, at the Member State level rather than by the EC, Article 4(4) of the EU Merger Regulation provides for a voluntary procedure under which the parties may opt to have the case referred to the NCA in question instead of notifying it to the EC. The parties are required to make a reasoned submission to the Commission, which will then forward copies to all the NCAs without delay. The identified NCA then has 15 working days from receipt of the request in which to agree or object to the proposed referral. If the NCA agrees, the Commission must then decide within a maximum of 25 working days from the submission of the request whether or not to make the referral. If the Commission refers the case in whole, it will then only be necessary for the parties to notify the case to the NCA in question, which will review the case under its applicable national merger control rules. In case of a partial referral, the aspects concerned will be reviewed by the NCA in question and the parties will be required to make a notification to the Commission under the Merger Regulation in respect of the remaining aspects of the merger. In either case, the proposed merger continues to have an EU dimension such that the other NCAs will not be able to apply their national merger control rules (unless the Commission were to agree to a subsequent Article 9 request).

One of the advantages of using the article 4(4) procedure can be to pre-empt a request by the Member State for referral under article 9 of the EU Regulation. Used in that way, article 4(4) can overcome uncertainty regarding the risk of article 9 referral by ensuring that jurisdiction is settled between the Commission and national authorities before the transaction is formally

notified. Another potential advantage of article 4(4) is that, in certain circumstances, it may enable UK-centric transactions to close sooner than if the transaction remained subject to the EU Merger Regulation suspensory obligation.

Secondly, where a transaction fails to meet the EU thresholds but is capable of being reviewed by the competition authorities in three or more Member States, the parties have the right to choose to notify to the Commission and not to the Member States at issue under Article 4(5) of the EU Merger Regulation. This provision was included in the 2004 amendment Regulations to ease cases of conflict where parties may find themselves in the unenviable position of having to make a significant number of Member State filings within the EU because they lack sufficient turnover to qualify for a "one-stop-shop" filing with the Commission. Article 4(5) not only helps to achieve greater efficiency in dealing with merger cases, but also relieves smaller Member States with thin resources from having to review transactions when the Commission is far better positioned and equipped to do so. Before notifying any of the NCAs, the parties must make a reasoned submission to the Commission (using Form RS under the EU Merger Regulation) which will then be forwarded to all the NCAs. Each of the NCAs which would, in principle, have jurisdiction to under its national merger control rules then has 15 working days from receipt of the Form RS in which to object. If not NCA objects, the proposed merger transaction is deemed to have an EU dimension and must be notified to the Commission. However, if any of the Member States objects, then jurisdiction is not transferred and the proposed merger remains subject to notification and review at the Member State level.

Thirdly, under Article 9 of the EU Merger Regulations, a Member State can request that a concentration notified to the Commission be referred to it in whole or part if the transaction (a) threatens to affect significantly competition in a market within that Member State which presents

all the characteristics of a distinct market, or (b) affects competition in a market within that Member State which presents all the characteristics of a distinct market and does not constitute a substantial part of the internal market.[124] The Member States have 15 working days from receipt of their copy of the notification in which to make such a request. If the request is made, the requisite timetable is extended from 25 to 35 days. The Commission must then accept or reject the request. If the Commission accepts the request and the case is referred to the Member State, the NCA has no fixed timeframe within which to reach its final decision. However, it must inform the parties of its preliminary assessment and proposed future actions within 45 working days (and must reach a final decision without undue delay).

The Commission and Member States are free to discuss prior to notification whether a given transaction should be referred under article 9 provided that such discussions do not breach the Commission's confidentiality obligations under article 17 of the EU Merger Regulation and article 18 of European Commission Regulation No. 802/2004 or the Commission officials' confidentiality obligations under article 339 of the Treaty on the Functioning of the European Union (TFEU).

In all other referral requests under article 9, the Commission has regard to three guiding principles when determining whether or not to make the referral:

(a) Referral should be made only if the authority to which it is made is the more appropriate authority to review the concentration.

(b) Regard should be had to the value of one-stop- shop review and fragmentation of reviews should, therefore, be avoided where possible.

[124] Slaughter and May, *The EU Merger Regulation: An Overview of the European Merger Control Rules* (2015), retrieved from <www.slaughterandmay.com> accessed 29 November 2015.

(c) Legal certainty. Given the importance of legal certainty regarding jurisdiction over mergers, departure from the original jurisdiction should occur only if there are compelling reasons.

While the Commission has regard to these guiding principles, it nevertheless has broad discretion to accept or refuse requests for referral under article 9. Its decisions under article 9 are subject to review by the General Court and the European Court of Justice.

Fourthly, although the EC has exclusive jurisdiction, Member States can intervene under Article 21(4) of the Merger Regulation to take appropriate measures to protect legitimate interests other than competition, such as national security, plurality of the media and prudential rules for financial services, for example in the banking and insurance sectors. In the defence sector, the Member States may prevent parties from notifying military aspects of merger transactions to the Commission under Article 346 of the TFEU.

Finally, Member States that do not have national merger control laws have a legal basis under Article 22 of the EU Merger Regulation to ensure that potentially anti-competitive mergers were reviewed. This provision states that one or more NCAs may request the Commission to review a concentration without an EU dimension provided the concentration affects trade between Member States and threatens to affect significantly competition within the territory of the Member State or States making the request. The request must be made within 15 working days of the merger transaction being notified to the Member State. If no notification is required in a particular Member State, the time limit will run from when the concentration was otherwise made known to the Member States concerned.

2.4.2 Anti-trust Cooperation Agreements

ACAs are competition-specific agreements negotiated directly between competition authorities rather than governments. They do not override and do not carry the same force of law or degree of obligation as do treaties, and as a result are often referred to as "soft" agreements. In addition to incorporating requirements of traditional and positive comity, ACAs facilitate investigation and coordination and are particularly relevant to *ex ante* merge review. In addition to notification of matters of interest and consideration of positive comity, most ACAs deal predominantly with the sharing of information and the coordination of investigations; that is, they provide some guidance for procedural cooperation and convergence rather than for any form of substantive harmonisation.[125]

The most famous and most frequently utilised ACA in relation to transnational mergers is the 1991 Agreement between the US and the EU. The purpose of this Agreement is to 'promote coordination and lessen the possibility or impact of differences between the parties in the application of their competition law.'[126] The Agreement is divided into the following key areas: notification; exchange of information; cooperation and coordination in enforcement activities; cooperation regarding anti-competitive activities in the territory of one party that adversely affect the interests of the other party; avoidance of conflict; consultation; and confidentiality of information.[127]

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[125] Julie Nicole Clarke, 'The International Regulation of Transnational Mergers' (Doctor of Philosophy thesis, Queensland University of Technology 2010) 306.

[126] Agreement between the Government of the United Stated of America and the European Communities Regarding the Application of their Competition Laws (23 September 1991), Article I.

[127] Agreement between the Government of the United Stated of America and the European Communities Regarding the Application of their Competition Laws (23 September 1991) Article II-VIII.

In addition to the 1991 ACA, the European Commission and the US have formulated an 'Administrative Arrangement on Attendance' (AAA),[128] providing for 'administrative arrangements between the respective competition authorities allowing for reciprocal attendance at certain stages of the procedures in individual cases,' including in relation to *ex ante* merger review.[129]

The EU and US have also established a Merger Working Group (US-EU Working Group) having the principal objective of enhancing 'transatlantic cooperation in the control of global mergers. This Group has developed a set of best practices on cooperation in merger investigations (US-EU Best Practices)[130] which is designed to reduce the risk of divergent outcomes, facilitate compatible remedies, enhance the efficiency of investigations, reduce burdens on merging parties and on third parties, and increase transparency.[131]

The US-EU Best Practices also build on the ACA's call for information sharing, providing that competition authorities should seek to coordinate with one another throughout their investigations and keep one another appraised of their progress. This includes discussion about matters relating to merger analysis. The authorities should contact one another when learning of a transaction that appears to require review by each agency[132] and, at the start of any investigation that might benefit from substantial cooperation, each authority should design a contact person responsible for setting up a schedule of conference between authority staff and to discuss the possibility of coordinating timetables with merging parties and or coordinating

[128] This arrangement was signed in 1999.
[129] This is reinforced by the US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (October 2002) para 13.
[130] US-EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (October 2002).
[131] Ibid para 2.
[132] Ibid para 9.

information gathering and seeking confidentiality waivers.[133] Efforts should be made to agree on a tentative timetable for consultation during the course of investigation.[134]

The Best Practices also provide that where remedies might not always be identical due to potential differences in the two markets, 'reviewing authorities should strive to ensure that the remedies they accept to do not impose inconsistent obligations upon the merging parties.' In doing this, the authorities should share draft remedy proposals or settlement papers upon which each can make comments.[135]

The EC has described cooperation between it and the US authorities under these agreements as of considerable benefit, both in 'avoiding unnecessary conflicts or inconsistencies between those enforcement activities, and in terms of better understanding of each other's competition policy regimes.'[136]

Another highly successful ACA is the 1983 Australia/New Zealand Closer Economics Relations Trade Agreement (ANZCERTA),[137] which established a free trade area between Australia and New Zealand (the trans-Tasman market). These countries share unique geographical, economic and social histories that have helped facilitate cooperation in competition law. As part of the agreement, parties were to harmonise national competition laws and this has been enforced to a significant degree.[138] In 1994, the competition agencies entered into a cooperation agreement[139]

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[133] Ibid para 10.
[134] Ibid para 11.
[135] Ibid para 15.
[136] European Commission, *Report from the Commission to the Council and the European Parliament on the application of the agreements between the European Communities and the Government of the United States of America and the Government of Canada Regarding the Application of their Competition Laws, 1 January 2002 to 31 December 2002* [2003] COM (2003) 500 final, 3.
[137] *Australia and New Zealand Closer Economics Relations*, signed on 28 March 1983, [1983] ATS 2 (entered into force 1 January 1983).
[138] For instance, in relation to mergers, New Zealand has amended its merger legislation to more closely align with that of Australia.

and in 2006 they entered into a Protocol for Merger Review (ACCC/NZCC Protocol)[140] which designed to minimise procedural conflicts and, at least where market effects are substantially the same, to reach non-conflicting outcomes.[141] The ACCC/NZCC Protocol is similar in many respects to the EU-US Best Practices. Agencies are required to notify each other upon becoming aware of a merger which might affect competition in their market[142] and, where both agencies are likely to review the same transaction, the agencies should each nominate a contact person and should establish a timeframe for further contact.[143]

2.4.3 Principle of Positive Comity

While the principle of positive comity is not part of merger control regimes, the lessons learned from its application in other jurisdictions informs the discussion in this study. Comity refers generally to non-binding state practices which reflect a courtesy and respect between nations of the laws and interest of other nations.[144] This includes substantial considerations of foreign legal and political interests when determining whether to pursue domestically a legal claim which affects the interests of other nations.[145] Positive comity requires that "when anticompetitive conduct that adversely affects the important interests of one party occurs within the borders of another party, the 'affected party' may request that the 'territorial party' initiate appropriate

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[139] *Cooperation and Coordination Agreement between the Australian Trade Practices Commission and New Zealand Commerce Commission* (1994).
[140] Australian Competition and Consumer Commission and New Zealand Commerce Commission, *Cooperation Protocol for Merger Review* (August 2006).
[141] Ibid para 2.
[142] Ibid para 4 and 15.
[143] Ibid para 10.
[144] Julie Nicole Clarke, 'The International Regulation of Transnational Mergers' (Doctor of Philosophy thesis, Queensland University of Technology 2010) 284.
[145] Ibid 285.

enforcement actions."[146] This structure attempts to lessen any conflicts that might arise over jurisdiction.[147]

Competition authorities have recognized, through these principles, that it is often important to avoid conflict in sensitive areas such as extraterritorial jurisdiction.[148] By allowing other nations to conduct reviews regarding anticompetitive behaviour that occurred within their borders, these countries recognize that other authorities might be better able to handle the issue. This idea could also be applied to the merger review context. When companies seek to merge, especially in cases where both companies are based in one country, great deference should be given to the merger review authorities in that country. In the context of the EU merger laws, the principle of positive comity has traditionally been applied restrictively.[149] The EC only takes comity into consideration in circumstances where the relevant conduct is mandated in the third country and that, wherever real conflicts exists, the Commission will very likely seek to claim an overriding interest in enforcement and brush aside comity.

The first competition agreement encompassing the principle of comity was signed in 1991 between the United States and the European Union.[150] This agreement was based on OECD Recommendations and was the first bilateral competition law agreement to include a positive comity provision in the form of a procedure by which either party could invite the other to take appropriate measures regarding anti-competitive behaviour occurring in their territory affecting

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[146] Kathryn Fugina, "Merger Control Review in the United States and the European Union: Working towards Conflict Resolution" (2005-2006) 26(2) *North-western Journal of International Law & Business* 471, 490.
[147] Ibid.
[148] Kathryn Fugina, "Merger Control Review in the United States and the European Union: Working towards Conflict Resolution" (2005-2006) 26(2) *North-western Journal of International Law & Business* 471, 491.
[149] Julie Nicole Clarke, 'The International Regulation of Transnational Mergers' (Doctor of Philosophy thesis, Queensland University of Technology 2010) 286.
[150] Agreement Between the Government of the United States of America and the Commission of the European Communities Regarding the Application of Their Competition Laws, U.S.-EC, Sept. 23, 1991.

the important interests of the requesting country. Although this could in theory apply to mergers, it has never been invoked in a merger case. Principles of positive comity were further developed in the 1998 bilateral 'Agreement on the Application of Positive Comity Principles in the Enforcement of their Competition Laws' between the EU and US but, in recognition of the practical limitations imposed by strict statutory deadlines for *ex ante* merger reviews, that agreement does not extend to mergers.

In general, positive comity might provide at least a partial solution to the problems inherent with concurrent extraterritorial jurisdiction, in particular by facilitating deferral of the review of transnational mergers and other anti-competitive conduct to the country having the closest connection.[151]

2.4.4 State Cooperation Arrangements

As indicated above, considerations of comity can help to relieve tension through notification and consideration of foreign interests. However, comity cannot alleviate the cost burden for regulators or firms associated with the multiple notification and review of transnational mergers. Even if it could, such an approach may lead to under-regulation in cases where a single national jurisdiction prevents a merger which might have resulted in a net increase in global welfare. As a result of such deficiencies and limitations of a comity-based approach, cooperation has become a more useful tool for ensuring that the evaluation of mergers and other anti-competitive activities which affect the economic interests of multiple jurisdictions are dealt with efficiently and optimally. This is particularly true in relation to mergers operating on strict timetables.

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[151] Julie Nicole Clarke, 'The International Regulation of Transnational Mergers' (Doctor of Philosophy thesis, Queensland University of Technology 2010) 293.

Numerically, majority of formal cooperation agreements have developed bilaterally and occur most commonly between countries which have close geographic or political ties, or are at similar stages in the development of their competition laws. Some of these, such as those between the EU and the US,[152] and Canada and the EU,[153] have proven particularly useful at promoting cooperation and convergence in merger review processes.

In 1997, the NCAs of Germany, France and the UK adopted a voluntary common filing form to ease issues of conflict. However, the form has rarely been used because it is only available where parties are notifying at least two of the three jurisdictions. In addition, it does not constitute formal notification in either France or UK and it requires more information than the domestic form in Germany. It will also not be relevant where the transaction has an EU dimension, such that it is captured by the EU Merge Regulation.[154]

2.5 Chapter Conclusion

The foregoing analysis evidences a sound legal regime on mergers and acquisitions in Kenya and within the COMESA and EAC regions. However, a deeper interpretation of such laws uncovers the conflict issues that this study is meant to address. For instance, from the express wording the Competition Act, there are no jurisdictional or substantive measures or thresholds defining which transactions are notifiable mergers based on factors like market share, turnover or asset base. In fact the Act is very silent on the requisite thresholds. The same is replicated under the EAC competition regime, even though this has not fully gained root since its inception. A Further

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[152] Agreement between the Government of the United Stated of America and the European Communities Regarding the Application of their Competition Laws (23 September 1991).
[153] Agreement between the Government of Canada and the European Communities Regarding the Application of their Competition Laws (17 June 1999).
[154] Julie Nicole Clarke, 'The International Regulation of Transnational Mergers' (Doctor of Philosophy thesis, Queensland University of Technology 2010) 317. The Form was adopted prior to the lowering of thresholds for the EU Merger Regulation.

difficulty is raised by the zero turnover threshold articulated under the COMESA Regulations. The compounded overhaul is whether the COMESA and EAC regions will indeed achieve their economic integration objectives with the current superfluous competition legislations. Besides, whether the COMESA competition regime provides for and supports a one-stop shop system is a question of fact that invites consideration under this study. In a nutshell, the prevailing legal framework on mergers is not very clear on these issues and hence there is need to provide a remedy in order to suppress administrative inefficiencies, uncertainties and conflicting decisions. The ensuing chapter therefore provides a critique of the foregoing competition framework in order to define the nature of the lacuna that this study is meant to bridge. The EU best practices discussed above provide a yardstick within which the critique is premised.

CHAPTER THREE

DEFICIENCIES IN LAW: A SUPPRESSION ON THE NOTIFICATION OF CROSS-BORDER MERGERS?

3.0 Introduction

As explored heretofore, the process of notification of cross-border mergers in Kenya is predicated on three competition regimes: the Kenyan Competition Act, the COMESA regime, and the EAC regime. The letter of the respective laws reveals a wide lacuna that stifles notification of cross-border mergers and hence economic integration in these regions. The differential timelines of notification, coupled with the question of jurisdiction, cannot be gainsaid. This Chapter provides an in-depth examination of the laws covered here above in order to define the gap the study strives to bridge. The findings from the interviews conducted with the Competition Authority corroborate the arguments put forward in this Chapter cum the theoretical underpinnings identified under Chapter One.

3.1 The Kenyan Cross-border Merger Regime: A Critique

As aforementioned,[155] regional completion laws have been given constitutional recognition and hence apply in Kenya. However, the efficacy of application on cross-border mergers is stalled by the fact that, under the terms of Kenya's Competition Act, the Competition Authority maintains its sovereignty over Kenyan mergers and takeovers as well as extraterritorial merger activity that results in a change of control of a Kenyan subsidiary, business, part of a business, or an asset of a

[155] See Chapter One of this thesis.

business in Kenya. This supremacy may be attributed to section 5 of the Kenyan Competition Act which provides, thus;

> (3) If a body charged with public regulation has jurisdiction in respect of any conduct regulated in terms of this Act within a particular sector, the Authority and that body shall—
>
> a) identify and establish procedures for management of areas of concurrent jurisdiction; promote co-operation;
> b) provide for the exchange of information and protection of confidential information; and
> c) ensure consistent application of the principles of this Act:
>
> Provided that in all matters concerning competition and consumer welfare, if there is any conflict, disharmony or inconsistency, the determinations, directives, regulations, rules, orders and decisions of the Authority shall prevail.[156]

There is a concern as to whether, in view of the above provision, the jurisdiction of the Kenyan Competition Authority supersedes that of the EAC Authority and CCC. Article 3(2) of COMESA Competition Regulations suggests that the regional competition body has primary jurisdiction over an industry whose operations transcend national borders with respect to anti-competitive trade practices and mergers and acquisitions. The concern expressed in this research is that this exclusive jurisdiction may hinder the experience and growth of national competition agencies. Indeed, in the case of mergers, for as long as there are no financial thresholds in place and the only criterion for triggering the CCC's exclusive jurisdiction is that at least one of the merging parties operates in at least two Member States, the Competition Authority of Kenya and any other national competition may soon find their merger work drying up. The uncertainty over whether in fact the CCC has exclusive jurisdiction over such transactions may result in uncertainties among the business and legal communities as to which authorities have jurisdiction

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[156] Further, section 5(2) provides that where there is a conflict between the provisions of this Act and the provisions of any other written law with regard to matters concerning competition, consumer welfare and the powers or functions of the Authority under this Act, the provisions of this Act shall prevail.

in the case of mergers, given that the CCC's Regulations do not appear to change the merger filing requirements under Member State laws.[157]

The Competition Act provides for clear timelines within which mergers ought to be notified to the Competition Authority as well as the timelines within which the Authority should review merger applications, make recommendations, request for additional information and make its final determination. However, this is not contemporaneous with the regional timelines. For instance, while determination of notifications in Kenya is done within 60 days of reception of the notification, the period is far-fetched from CCC's 120 days as stated under Article 25 of the COMESA Regulations. This timeline is also inconsistent with EAC's 45 days. In an interview with the Competition Authority, it was confirmed that the Authority has given its position with regard to the long COMESA timelines and proposed for their reduction since it is a hindrance to investment in the region. That notwithstanding, the Authority maintains it is in practice trying to align its time scale with EAC's 45 days. On average, it takes 45 days to finalise determinations instead of the sixty (60) statutory days. It is, however, important to note that the EAC competition regime has not gained complete hold of the market since its inception. Thus, the COMESA regime dominates in most cross-border mergers and hence there is need to harmonise the timelines.

With regard to the Communication Authority of Kenya (CAK), there is no defined framework for cooperation with the Competition Authority. Whereas section 5(3) of the Competition Act provides for the cooperation requirement, there is still a challenge on approval of mergers which concurrently fall within jurisdictions of both bodies. From the interview findings, what usually

[157] Kate Oglethorpe, *Kenya Questions COMESA's Merger Jurisdiction* Global Competition Review, 30 January 2013 at <http://globalcompetitionreview.com/news/article/32989/kenya-questions-comesas-merger-jurisdiction/> (accessed 10th September 2014).

happens is that the Authority deals with post-ante regulations while CAK deals with ex-ante regulations. The two notify each other of the same and consult on the case, to understand the market and receive data to facilitate their analysis. However, the approval that CAK gives does not relieve parties of the obligation to observe other laws and regulations, for example the Competition Act.[158] To the extent that there is cooperation guideline, the roles overlap between the two bodies shall continue affecting merger notifications in Kenya.

3.2 Uncertainties of the COMESA Competition Regime on Merger Notifications

A review of the literature materials justify the fact that the COMESA merger notification regime is plagued by various misgivings. These are discussed under the following thematic areas.

3.2.1 The CCC Jurisdictional Issues

From a general continuum, COMESA Regulations (including the Guideline) create two potentially fundamental challenges: jurisdiction; and general overlap. On the one hand, there does not appear to be any guidance to explain how the COMESA Regulations will interact with local or Kenyan law, particularly in instances of conflict or overlap. Both the Regulations and the Kenyan Competition legislation purport to exercise some level of primary jurisdiction over anti-competitive trade practices.[159] Section 5.3.2 of the Guideline also indicates that the CCC has jurisdiction to enforce the Regulations against undertakings which implement restrictive practices within the Common Market. To the extent that the Regulations apply to Kenya, it remains rhetoric as to whether the Regulations are capable of overriding the Kenya Competition

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[158] Interview with Christopher M. Muteti, Competition Authority of Kenya, 30th November 2014, Questionnaire Response number 20, p. 5.

[159] See Article 3(2) of the Regulations compared to Section 5(2) of the Kenya Competition Act (2010). Section 5(2) provides that the Competition Act prevails in circumstances of conflict between the Act and the provisions of a other written law with regard to matters concerning competition.

Act in circumstances of conflict or overlap. It is equally difficult to determine which particular law applies to anti-competitive trade practices which fall within the ambit of both the COMESA and Kenyan regimes.

On the other hand, considering that the uncertainty over the conflict question can be clarified, there are other difficulties in the application of the Regulations in Kenya, particularly where these overlap with the national law. While the Guideline for instance offers a comprehensive explanation of the 'cumulative' tests applied under Article 16 (1) and 16 (4) of the Regulations,[160] no such explanation is given in relation to equivalent Kenyan provisions. As a consequence, it is conceivable that business practices in Kenya which are also subject to regulation by the CCC will likely be subject to an additional (and probably unnecessary) level of compliance under the Kenyan law.

3.2.1.1 An Interpretation of Article 3 of the COMESA Competition Regulations

Articles 3(1) and 3(2) of the Regulations provide that:

> These Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities as set forth under Article 4.
>
> These Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market.

The above provision limits the scope of application of the Regulations; it is intended to set out the jurisdictional threshold for the exercise by the CCC of its enforcement powers. As in many

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[160] Article 16 deals with restrictive business practices. Paragraph 1 provides

> The following shall be prohibited as incompatible with the Common Market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which:
> a) may affect trade between Member States; and
> b) have as their object or effect the prevention, restriction or distortion of competition within the Common Market.

Paragraph 4, however, gives exceptions to the above restrictions.

other merger control regimes, such jurisdictional clauses ensure that jurisdiction is asserted only over transactions and conduct that have an appropriate connection to the relevant jurisdiction. The letter of Article 3(1) implies inter alia that, merger control applies only where the following conditions are met:

(a) the conduct must be covered by Part 4 of the Regulations;

(b) the conduct referred to in (a) above must have an appreciable effect on trade between COMESA Member States; and

(c) the conduct referred to in (a) above must restrict competition in the COMESA region.

Notably, on a face reading of the Regulations, it appears that the conditions set out in Article 3 are cumulative and a pre-requisite to the application of the merger control provisions contained in Part 4 of the Regulations. This would mean that any 'merger' (as defined in Part 4) should only be subject to a notification obligation if the three preliminary conditions under Article 3 are met. Thus, any other interpretation would deprive Article 3 of its meaning. Businesses considering whether a notification exists under the Regulations will be assessing whether a transaction which has no appreciable effect on trade between COMESA Member States or which does not restrict competition in the COMESA region should be notified under the Regulations. As long as the merger filing thresholds are set at zero, Article 3 will be called upon to play a significant role in assessing the applicability of the Regulations to transactions with limited impact in the COMESA region.

Besides, Article 3 of the Regulations sets out a 'local nexus' condition to merger notifications in line with Section I.A of the International Competition Network (ICN) Recommended Practices for Merger Notification and Review Procedures which provides that 'jurisdiction should be

asserted only over those transactions that have an appropriate nexus with the jurisdiction concerned.' The other conditions to notification contained in Part 4 of the Regulations (that is zero thresholds as well as the pre-requisite for parties to a merger to operate in two or more Member States) fall short of an appropriate standard of materiality as to the 'local nexus' required. Accordingly, the standard of materiality set out in Article 3 regarding appreciable effect on trade and restriction on competition takes on critical importance as part of the jurisdictional test to ensure that jurisdiction is not asserted over transactions that do give rise to an appreciable effect on trade between COMESA Member States and competition within the COMESA region.[161]

3.2.1.2 The Exclusivity of the CCC's Jurisdiction

An analysis of the COMESA Competition Regulations indicates an uncertainty on whether the jurisdiction of the CCC is indeed exclusive as against the national competition authorities. This controversy is debatable as there is no express provision to this effect under the Regulations or the Draft Merger Assessment Guideline. Emanating from the debate is whether the Member States have ceded their sovereignty in favour of CCC and hence exclusive jurisdiction. In the researcher's view, the States have to some degree done so. While Article 10 of the COMESA Treaty provides, inter alia, that a regulation of the Council shall be binding on all the Member States in its entirety, Article 5(2) of that Treaty crucially reads:

> Each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular
>
> 1. To confer upon the Common Market legal capacity and personality required for the performance of its functions; and

[161] As provided in Section I.B of ICN's Recommended Practices: 'in establishing merger notification thresholds, each jurisdiction should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory.'

2. To confer upon the regulations of the Council the force of law and the necessary legal effect within its territory.

Pursuant to Article 5(2)(b) set above, Article 5 of the COMESA Regulations provides that Member States must "take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of these Regulations or resulting from action taken by the Commission under these Regulations." This provision indicates that states are required to cede their sovereignty to COMESA, but it is not clear whether all Member States have in fact done so.[162] Furthermore, and perhaps of vital importance is Article 29(1) of the COMESA Treaty which provides that "except where the jurisdiction is conferred on the Court by or under this Treaty, disputes to which the Common Market is a party shall not on that ground alone, be excluded from the jurisdiction of national courts." This Article implies that even if it is found that the Member States have ceded their sovereignty, the COMESA Commission does not have exclusive jurisdiction unless exclusive jurisdiction is conferred on it.

The provisions from the COMESA Treaty so cited indicate a treaty organisation in which the Member States assign certain designated functions to the organs of COMESA, while reserving a significant domain to the Member States themselves. And, in the absence of express wording, the question of exclusive jurisdiction in relation to the COMESA Commission is uncertain. The Draft Merger Assessment Guideline does not address this question. While CCC's view is that its 'primary jurisdiction' under Article 3(3) of the Regulations does indeed mean that the CCC is a 'one-stop-shop' for filings in the region, it has become clear that not all national competition authorities (NCAs) share this view. For example, following a consultation with the Attorney General, the Competition Authority of Kenya has publicly stated that it retains primary control

[162] It is not clear whether all the Member States have enacted domestic legislation to give effect to the COMESA Regulations.

over the regulation of competition (including mergers) in Kenya. Similarly, Egypt's NCA has referred the issue to the Egyptian Ministry of Justice for advice.

Thus, even though the COMESA Regulations allow for a Member State to request that a merger notified to the COMESA Commission be referred to their national competition authority (a decision which falls within the COMESA Commission's exclusive discretion), it is not clear whether the COMESA Commission has the exclusive jurisdiction to assess the transaction. In addition, it is not clear whether all the Member States have in fact given effect to the COMESA Treaty and the COMESA Regulations by enacting domestic legislation to that effect. In the circumstances, even if the COMESA Regulations were to provide for the exclusive jurisdiction of the COMESA Commission, this would not necessarily be binding to Kenya and any other Member State.

This risks depriving the merger control provisions of the Regulations of their utility and purpose resulting in multiple filings within COMESA and the same competition issues being reviewed and decided upon by both the CCC and the NCAs. Not only would such duplication be costly and inefficient for the CCC and the relevant NCAs and businesses (with an attendant chilling effect on mergers and acquisitions in the COMESA Common Market), it also creates a risk of conflicting decisions (e.g. where a merger is cleared by one authority but blocked by another).

3.2.2 Zero Turnover Notification Thresholds

Article 23 Para 3 of COMESA Regulations require the Board of Commissioners of the CCC to prescribe a threshold and a method of calculation of annual turnover or assets in the region as relates to determination of mergers. However, presently, the threshold of the annual turnover and assets of all firms to the merger in the common market has been set at zero COMESA units of

account. The absence of a proper threshold regime for COMESA mergers and the lack of legal precedent within COMESA on competition matters places merging parties and their advisers in a difficult position in determining whether or not a merger needs to be notified to the CCC.

Further, the current thresholds in terms or Article 23(4) (a) of the Regulations deprive COMESA's merger control regime of a useful and objective measure of materiality which would be clear and transparent for businesses to apply. As a result, businesses will not be certain whether a notification is required and cautious businesses may make notifications where there is no clear enforcement benefit for COMESA. Importantly, NCAs may face a significantly reduced volume and scope f mergers that fall within their national jurisdictions. Their incentives to cooperate with the creation of CCC's one-stop-shop jurisdiction are correspondingly reduced. The possibility for NCAs to request a referral of mergers does not address this problem, given such referral is at the discretion of the CCC.

3.2.3 Uncertainty Regarding Referrals between CCC and NCAs

While taking cognisance that the Kenyan Competition Authority has never received any referral from the CCC,[163] the study welcomes the clarification in Section 4.8 of the Draft Merger Assessment Guideline that the period within which NCAs may request a referral will be limited to 30 calendar days of their receipt of notice of a merger. Yet, when combined with the 21 day period provided for under Article 24(9) of the Regulations, this means that parties will have no certainty as to whether their merger will be referred until 51 days from the date on which the CCC gives notice of the merger to NCAs under Article 26(6) of the Regulations (which in itself is unspecified). This period is too long.

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[163] Interview with Christopher M. Muteti, Competition Authority of Kenya, 30th November 2014, Questionnaire Response Number 18, p. 5.

Further, the referral procedures stipulated in the COMESA Guideline still leave open questions. Specifically, there is no indication of the time within which the CCC will give notice of the mergers to the NCAs in accordance with Article 26 (6) of the Regulations, meaning that merging parties will have no certainty as to when the 30 calendar days will begin or end. The Guideline is also silent on the procedures that will apply in the event of a referral, except for reference in Section 12 thereof to investigations by Member States being done in accordance with Rule 43 of the COMESA Competition Rules.

The COMESA Regulations do not address the question of whether national filing fees are payable in the event of a referral. Given that the CCC's filing fees are already very high, and a significant proportion of those fees go to Member States, it will be unfortunate if merging parties are asked to pay further filing fees in the event of a referral.

3.3 EAC Competition Regime

As stated under Chapter One, the EAC Competition Act (2006) creates additional regional competition compliance requirements for Kenya, which compound the jurisdictional and enforcement concerns raised by the COMESA Competition Regulations. An analysis of the regime indicates that there is no defined merger notification threshold. The EAC Competition Act only talks of a limitation of jurisdiction on mergers having cross-border effect, excluding sovereign acts of the Party States.[164] The timelines for notification are clear, but the same conflicts with Kenya's sixty (60) days. These inconsistencies will manifest if there are no timely harmonisation.

[164] EAC Competition Act, sections 4(1) and 4(2) (c)

3.4 Conclusion

The above examination of the Kenyan, COMESA and EAC competition regime reveals a gap that calls for a corresponding response. Apparently, the jurisdictional confusion emanating from the wording of the laws has raised investment uncertainties in both the national and regional level. The fact that the geographical dimension, SLC and PIT thresholds are germane in defining which regime has jurisdiction on cross-border mergers is in itself inadequate in addressing this controversy. A more pragmatic approach is required to redefine the jurisdiction and also allow for cooperation and harmonisation across the system. This study proffers various measures that can help streamline notification of cross-border mergers.

CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

4.0 Conclusions

Generally, a system without uniformity is never effective. This is even worse if that system comprises two or more bodies performing the same function, albeit under different standards. The only synergy toward viability is to introduce a framework of cooperation and operationalise it. The Kenyan Constitution acknowledges, in its Article 2 (5) and (6), international law as part of the Kenyan laws. Thus, any treaty or international instrument ratified by Kenya, including any rules or regulations, applies in Kenya. Regional laws to which Kenya is a party are no exceptional. The COMESA Competition Rules and Regulations, and the EAC competition regime apply in Kenya cum the provisions of the Competition Act, 2010. However, an analysis of these laws in relation to notification of cross-border mergers in Kenya reveals controversial issues, inter alia, the conflict of jurisdiction, differential timelines and undefined thresholds or thresholds which, even if defined, plague the process of notification. Apparently, the Kenyan extraterritorial jurisdiction cannot be underestimated. Exuding therefrom is the question whether the Competition Act becomes supreme over regional competition laws on cross-border mergers. Whereas the CCC claims to have primary jurisdiction over mergers that have appreciable effect in the Common Market, the uncertainty is whether this amounts to exclusive jurisdiction. Broadly viewed in tandem with the Competition Act's extraterritorial application, this uncertainty exerts a great burden insofar as cross-border merger notifications are concerned. The resultant effect is multiple notifications of mergers, increased filing fees and incidental difficulties that sway investment goals in Kenya. That aside, the Communication Authority of Kenya has roles that interlock with those of the Competition Authority. The ease of notification of mergers and acquisitions in Kenya is compromised even further. This study drives on the

position that, if no legal transformation, cross-border merger notifications in Kenya will be greatly at stake. The study therefore goes headway in laying a roadmap toward improvement of the process. This forms part of the ensuing recommendations section.

4.1 Recommendations

The recommendations of this study are discussed under the following thematic areas.

4.1.1 Interagency Coordination

One of the findings of this study is that there is a roles overlap between the Competition Authority of Kenya and the Communications Authority. The latter is mandated to approve mergers between companies licensed under the Kenya Information and Communications Act (as amended in 2013). To minimize possible procedural conflicts, it is recommended that the authorities should seek to coordinate on mergers that may raise competitive issues of common concern. This will also help in reducing duplication and avoiding unnecessary delays and burdens for parties and the authorities. However, coordination should be voluntary and should not prejudice the rights of each authority to reach its own independent decisions. The authorities should also encourage the parties to coordinate. The authorities may also seek remedies tailored to cure inconsistencies. This is important in mergers where there is potential for remedies to conflict.

4.1.2 Harmonisation of Jurisdictional Thresholds

- As regards the Competition Act of Kenya's extraterritorial reach, the Act should be amended not to stop its application outside Kenya, but to specify, in addition to the local nexus requirement, a threshold that will help define which cross-border mergers should be notified

to the Kenyan Competition Authority. A national cooperation framework should be adopted to ensure that the Communication Authority of Kenya and the Competition work together, in a harmonised time-scale, within delimited bounds to avoid any conflict of roles.

- It is worth pointing out that the Competition Act of Kenya has not operationalised the application of the EAC competition regime.[165] The jurisdictional conflicts will thus be felt once the two regimes work in tandem. It is therefore important that any differences on jurisdiction, timelines and notification thresholds be harmonized beforehand. This is profound in ensuring effective investment in the EAC region.
- From the legal analysis explored earlier, the main jurisdictional challenge is posed by the COMESA competition regulations and the extraterritorial jurisdiction of the Kenyan Competition Act. While an internal amendment of the Act may suffice to suppress any controversy, the best step on jurisdiction should be regional-oriented. Thus, this study proffers that a clear statement be made in the COMESA Regulations or COMESA Rules that the CCC has exclusive jurisdiction over mergers having a regional dimension. Furthermore, the COMESA Regulations need to be incorporated by Kenya and other Member States into their domestic legislation in order to give effect to the COMESA competition regime without jurisdictional controversy. In relation to both points, this study proffers that it is important that efforts are made by the regulators to firstly agree on the jurisdiction question and then to exercise their respective powers to align the Regulations and the Competition Act of Kenya to avoid any potential conflict or overlap.
- The CCC needs to address in its Draft Merger Assessment Guideline under the COMESA Competition Regulations how it intends to apply and give effect to Article 3 of the

[165] Interview with Christopher M. Muteti, Competition Authority, Kenya, 30th November 2014, response Number 17.

Regulations. The CCC should also recognise in the Draft Merger Assessment Guideline the relevance of Article 3 as part of the notification process and provide businesses with guidance as to the transactions which it views as caught by the notification obligation set thereat. Importantly, the most logically compelling interpretation which satisfies the three conditions laid down in Article 3 of the Regulations is to require that a merger filing is required only if a merger results in an overlap in activities between two or more COMESA Member States. The CCC's review should then focus on whether the transaction raises any COMESA competition concerns.

- The study further encourages the CCC to clarify in Section 1 of the Draft Merger Assessment Guideline the relevance of Article 3 as the legal basis for assessing its jurisdiction only over transactions that have significant nexus to COMESA. In its view, the scope of application of the Guideline cannot be limited, as suggested in Section 1.1 and 1.2 of the Guideline, to mergers with a regional dimension without recognizing the CCC's absence of jurisdiction over transactions that do not meet the test set out in Article 3 of the Regulations. By taking the approach that merger control filings are required only for transactions giving rise to an overlap in activities between two or more COMESA Member States, the CCC would provide an interpretation of Article 3 of the Regulations which applies an appropriate standard of materiality in line with COMESA's body or competition rules and with the ICN Recommended Practices. This is very important in preserving the integrity of COMESA's merger control regime and the CCC as an enforcement body.
- Further, it is recommended that, in order to prevent the conflicting decisions on multiple notifications of cross-border mergers within the COMESA region, the CCC should amend the Regulations to include an express provision on NCAs reviewing transactions that are

notifiable to the CCC. Alternatively, the CCC should engage with the NCAs and government bodies of the Member States in question to advocate their acceptance of the CCC's primary jurisdiction and to amend any conflicting national legislations accordingly.

4.1.3 Cooperation Arrangement between Regional Blocs

Based on the findings of this study, there is an apparent variation between COMESA and EAC merger control regimes. Thus, in situations where a country is a member state to both regional blocs, it is recommended that the relevant regional blocs adopt cooperation arrangements to alleviate jurisdictional conflicts. Such arrangements are informed by the 1991 Agreement between the Government of the United Stated of America and the European Communities Regarding the Application of their Competition Laws, which has successively promoted cooperation and convergence in merger review processes between the EU and the US. The other example includes the 1999 Agreement between the Government of Canada and the European Communities Regarding the Application of their Competition Laws. Issues of information sharing, remedies and timelines may be addressed in such arrangements.

4.1.4 Notification Timelines

According to the interview findings,[166] currently, due to some issues inherent in the COMESA Competition Regulations, for example lack of thresholds, lack of cooperation frameworks on sharing of information among others, if a transaction involves an undertaking with operations in Kenya and COMESA region, the parties have to notify both the Competition Authority and the CCC. While the CCC and the NCAs are in the verge of resolving these issues, the conflict of time has to take priority because it is the heart of any fair procedure. In a nutshell, the study

[166] Interview with Christopher M. Muteti, Competition Authority of Kenya, Kenya, 30th November 2014.

proposes that the efficacy of notification of cross-border mergers can only be ensured if the differential timelines are aligned.

4.1.5 Turnover Thresholds

Whereas the researcher welcomes the provision in the Kenyan Merger Guidelines on the requisite turnover thresholds for mandatory merger notifications, there is need to augment the existing requirements for non-notifiable mergers and acquisitions. This is to ensure that mergers which do not meet the statutory standard of notification are not cast out of the Competition Authority's mandate. In other words, a legal specification of non-notifiable mergers will help capture mergers which would otherwise lessen competition in the market.

With regard to COMESA's zero turnover thresholds, CCC should increase the threshold to ensure that the jurisdictional thresholds are objectively quantifiable and easy to apply, and to ensure that the regime only applies to transactions which "are likely to have a significant, direct and immediate economic effect"[167] within COMESA's Common Market. It is however acknowledged that Section 1.3 of the Draft Merger Assessment Guideline provides that a "realistic threshold" will be put in place after the regime gains ground. Until this is ensured, any study shall often make mention of this to stress on its significance in simplifying notification of mergers.

4.1.6 Referrals of Mergers and Acquisitions

As regards the uncertainties on referrals, the study recommends, first, that the NCAs be required to request a referral within 21 calendar days of their receipt of notice of a merger. Further, it

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[167] See ICN Best Practice 1 (c), Comment 1.

should be made clear in the COMESA Guideline that the CCC electronically or instantaneously communicates the relevant details of filing to all NCAs within a specific period which, in the researcher's view, should not exceed 24 hours of receiving the filing. To avoid dual payments, it should further be clarified in the COMESA regime that further fees should not be paid in the event of referrals.

BIBLIOGRAPHY

Books

Haralambos & Holborn, *Sociology: Themes and Perspectives* (Harper Collins Publishers Limited, 2008) at 787

Mitsuo Matsishita, *International Cooperation in the Enforcement of Competition Policy* Washington University Global Studies Law Review Vol 1 2002, p. 473-475

M. J. Trebilcock and Robert Howse, *The Regulation Of International Trade* (London: Routledge, 2005) pp 464-467

Omony John Paul, *Key Issues in Jurisprudence: An In-depth Discourse on Jurisprudence Problems* (1st ed., Law Africa Publishing (K) Ltd) at 48

Journals Articles and Papers

Andreas Stargard & John Oxenham, "Crossing the competition rubicon: Internationalising African antitrust through COMESA" (2013) Concurrences N°: Competition Law Journal 3 of 2013 – pp. 198-203

Antitrust Committee of the International Bar Association (IBA), "Submission Regarding the COMESA Competition Regulations and Draft Guidelines Dated April 2013" (2013) COMESA Working Group

Catriona Hatton and David Cardwell, "International Merger Control: A review of major developments in China, Africa and elsewhere in 2013" (18th March 2014) Competition Law Insight

Daniela Marotti and Onno Brouwer, "Navigating the Course 6f African Competition Law: A Case for Increased and Improved Regional Cooperation and Convergence" (2013) Master Paper for Competition Annual Conference, South Africa

George Omondi & David Herbling, "Conflict of local and Comesa laws holds up firms' mergers" (29th January 2013) http://www.trademarksa.org/news/conflict-local-and-comesa-laws-holds-firms-mergers (accessed 9th Sep 2014)

Gibson Dunn, "Clarification of Comesa Merger Control Procedures Anticipated, Following First Notification to African Regional Competition Authority" (29th March 2013).

John Oxenham *Balancing Public Interest Merger Considerations Before Sub-Saharan African Competition Jurisdictions with the Quest for Multi-jurisdictional Merger Control Certainty* US-China Law Review Vol 9 p. 212, at <http://www.davidpublishing.com/davidpublishing/Upfile/7/27/2012/2012072706196124.pdf> (accessed 10th September 2014)

Joyce Karanja-Ng'ang'a&Rosemary Njoki Maina, "The African and Middle Eastern Antitrust Review 2014: Kenya – Overview" (2014) Available at

<http://globalcompetitionreview.com/reviews/59/sections/204/chapters/2311/kenya-overview/> (accessed 9th Sep 2014)

Kaarli Harry Eichhorn *Enforcement Cooperation: A Corporate View* Presentation to the ICN Unilateral Conduct Working Group 7 November 2012, at <http://www.internationalcompetitionnetwork.org/uploads/library/doc881.pdf> (accessed 10th September 2014).

Kate Oglethorpe, *Kenya Questions COMESA's Merger Jurisdiction* Global Competition Review, 30 January 2013 at <http://globalcompetitionreview.com/news/article/32989/kenya-questions-comesas-merger-jurisdiction/> (accessed 10th September 2014)

Marianne Wagener and Candice Upfold, "Regional competition regimes: A comparative study of the COMESA Competition Commission and the European Competition Commission" Available at http://www.compcom.co.za/assets/Uploads/events/Seventh-Annual-Conference-on-Competition-Law-Economics-Policy/Parallel-4/Conference-Paper-M-Wagener-and-C-Upfold.pdf (accessed 24th September 2014)

Mayer Brown, "Multijurisdictional Merger Filings: News and Recent Developments" (April 2014) Antitrust & Competition, pp 1

OECD, "International Cooperation in Competition Law Enforcement" (2014) 17 Meeting of the OECD Council at Ministerial Level, Paris 6-7 May 2014 at 6

Richard Whish and Diane Wood, *Merger cases in the real world—A study of merger control procedures* (OECD, 1994) Referred to at the International Competition Network, Report on the Costsand Burdens of Multijurisdictional Merger Review, Mergers Working Group Notification and Procedures Subgroup, November 2004

Sarah George T, "Cross-border Mergers and the Experience of Developing Countries" (2008) Briefing Paper No 11 of 2008, CUTS Centre for Competition, Investment & Regulation

APPENDICES

Appendix A: Generic Interview Script for Study Interviews

Brief introduction of the objectives of the research as per the proposal

- Appraising the extent to which the EAC and COMESA competition laws conflict with the Kenyan laws in relation to notifications of cross-border mergers and acquisitions

Study Questions:

Interviewee's duty and work responsibilities.

General Issues on Notifications

1. Considering the provisions of the Competition Act, what kind of transaction constitutes a notifiable merger?
2. Are non-notifiable mergers reviewable by the Authority?
3. How does the Authority handle notifications of cross-border mergers and acquisitions?
4. What happens when there are multiple notifications?
5. Are there any special rules for multiple notifications?
6. What is involved in the substantive review of mergers by the Authority?
7. Who may challenge a merger and what is the process?
8. Does the Authority contact customers and competitors of the merging parties as part of the merger review process?
9. Is there any criterion or threshold for exemption of mergers from approval?

Jurisdictional Issues

10. Please shade light on the extent to which the COMESA and EAC Competition laws are applicable in Kenya.
11. Which cross-border mergers fall within the confines of the Act?

12. Does the extraterritorial nature of the Competition Act give the Competition Authority exclusive jurisdiction over cross-border mergers? Does this create significant amount of work for the Authority?
13. The Competition Act has prescribed specific timelines for the determination of merger notifications. What efforts has the Authority taken to create harmony with the regional notification timelines?
14. Do the different timelines pose a challenge on the Authority's expeditious determination of cross-border merger notifications?
15. Does the Authority receive any merger notifications that are also amenable to review by the COMESA Competition Commission or the EAC Competition Authority?
16. How does the Authority deal such merger transactions, bearing in mind the different notification timelines?
17. Has the Authority ever referred any cross-border merger notifications to the COMESA Competition Commission or EAC Competition Authority?
18. Has the Authority ever received any referrals from the COMESA and EAC Competition bodies?
19. Does the Authority face any challenge from the jurisdiction of COMESA on cross-border mergers and acquisitions?
20. Has the Authority ever received for approval any merger transactions that require the approval of the Communications Authority of Kenya (CAK)? If yes, how has it dealt with such cases?
21. On mergers which concurrently fall within the Authority's jurisdiction and also that of the CAK, is there any requirement of cooperation?

Notification Thresholds

22. Is there a "size or turnover of the parties" test; if so, what is it?
23. How are size and turnover to be calculated?
24. How are assets and revenues calculated?

25. Is there a "size of transaction" threshold?

26. Is geographic scope/national market effect of transaction an issue with respect to filing or approval requirements? If so, specify.

27. What is the substantive test for clearance?

28. Has the Authority ever received any complaints on merger filing fees?

Penalties

29. Is the filing voluntary or mandatory?

30. What are the sanctions for not filing or filing and incorrect/incomplete notification?

Recommendations

31. What measures has the Authority taken to simplify notifications of cross-border mergers in Kenya?

32. Are there any plans to harmonise the Kenyan Competition regime with that of the COMESA and EAC blocs?

33. Any comments you would like to offer?