TRADE LIBERALISATION IN THE EAST AFRICAN COMMUNITY:
THE NEED FOR COMPETITION LAW AND POLICY IN UGANDA

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Research dissertation presented for the approval of Senate in part fulfillment of the requirements for the degree of Master of Laws in the Department of Commercial Law

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DECLARATION

Research dissertation presented for the approval of Senate in part fulfillment of the requirements for the degree of Master of Laws in the Department of Commercial Law
DEDICATION

To the memory of my father, Hajji Ahmed Kawugu Mugaino.
ACKNOWLEDGMENT

I would like to thank my supervisor, Judge Dennis Davis for his comments on my work. While all the mistakes are mine, the thesis benefited a lot from the assistance of Ngaya Munuo who helped edit the final version, and Marumo Nkomo who made comments on an earlier draft. Finally I would like to thank my family, especially my son who had to endure my absence throughout the many months it took complete this research.
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<tr>
<td>EAC</td>
<td>East African Community</td>
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<tr>
<td>EU</td>
<td>European Union</td>
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<tr>
<td>UEGCL</td>
<td>Uganda Electricity Transmission Company</td>
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<td>EACPA</td>
<td>East African Cement Producers Association</td>
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<tr>
<td>PEAP</td>
<td>Poverty Eradication Plan</td>
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<tr>
<td>GDP</td>
<td>Gross Domestic Product</td>
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<tr>
<td>US</td>
<td>United States Of America</td>
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<tr>
<td>COMESA</td>
<td>Common Market For East And Central Africa</td>
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<tr>
<td>UN</td>
<td>United Nations</td>
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<tr>
<td>IGARD</td>
<td>Intergovernmental Authority On Research And Development</td>
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CHAPTER I: INTRODUCTION AND STATEMENT OF THE PROBLEM

1.1 Introduction

The East African Community (EAC) is one of the regional economic building blocks for the African Economic Community. The treaty establishing the community was signed on 30th November 1999 and entered into force in July 2000. It currently comprises of the Republics of Kenya, Uganda, Tanzania, Burundi, and Rwanda. Combined, the EAC has a population of approximately 130 million people, an area of 1.82 million square miles and a GDP of 74.5 billion dollars. The highest population growth rate of 3.5 percent was recorded in Uganda and the lowest was in Kenya. Rwanda had the highest growth rate of 7.5 percent and that of Uganda was 5.6 percent. Agriculture is the main economical backbone of the EAC economy. Kenya has the highest per capita GDP of 833.4 dollars and Burundi has the lowest of US$ 173. Rwanda’s GDP is US$ 540 dollars per capita, Uganda US$ 525.9 per capita and Tanzania 522 dollars per capita respectively.

The key integration strategy of the EAC is articulated in article 5(2) of the EAC treaty which states that,

Partner states undertake to establish among themselves and in accordance with the provisions of this treaty, a customs union, a common market and subsequently a monetary union and ultimately a political federation in order to strengthen and regulate the industrial, commercial, infrastructural, cultural, social political and

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1 The Treaty of the East African Community, 1999 in force 7th July, 2000, (hereinafter EAC Treaty). The overall objectives of the treaty are the development of policies for widening and deepening cooperation among member states in political, economic, social and cultural fields, research and technology, defence security, and legal and foreign affairs. The vision of this regional integration is to create a prosperous, competitive, secure, stable and politically united East Africa while the mission is to widen and deepen economic, political, social and cultural integration in order to improve the quality of life of East African’s through increased competitiveness, value added production, trade and investment. See article 5 of the EAC Treaty. Available at www.eac.int/treaty, accessed on 20 November, 2011.
2 Rwanda and Burundi acceded to the treaty in 2007.
5 Ibid.
6 Ibid.
7 Ibid.
other relations of the partner states to the end that there shall be accelerated, harmonious and balanced development and sustained expansion of economic activities the benefit of which shall be equally shared.

In 2005, the EAC launched a customs union. The objectives of the customs union are: the continued liberalisation of intra-regional trade in goods on the basis of mutually beneficial trade agreements among member states, the promotion of efficiency in production within the community, enhancement of domestic cross border, foreign investment in the community, the promotion of economic development and industrialization.

In 2010, the EAC became a common market whose overall objectives were;

To promote common understanding and cooperation among the partner states for their social economic development and enhancing research, and to accelerate economic growth and development of the partner states thru trade, and strengthening the coordination of economic and trade regulations among partner states.

It was hoped that the attainment of these objectives will result in the following: 'that a single market will create competition making the existence of monopolies very difficult, leading to the closure of insufficient companies, cheaper products and greater benefits to consumers'.

It's therefore not in doubt that trade liberalisation through increased competition is a key ingredient for the success of the EAC. This argument is strengthened by article 74 of the EAC treaty which provides that, '...in order to achieve the objectives of the community as set out in article 5 of the treaty and in furtherance of article 2 of the treaty, the partner states shall adopt the East African trade regime and cooperate in trade liberalisation and development in accordance therewith'.

Under the EAC common market, trade is liberalised at zero tariffs between member countries and common external tariffs of 99 percent from third countries. The EAC is also negotiating free trade agreements with other trading blocks. Under the European Union negotiation

8 This was in accordance with article 75 of the EAC Treaty.
13 Ibid.
agreement, the regional market access offer consists of liberalisation of 86.2 per cent of all European Union imports over a 25-year period. The region is also negotiating a free trade agreement with the United States. The EAC's policies and treaties are therefore opening up the region to internal and external competitive trade with direct implications on the Ugandan economy.

Opening up of these borders has increased both the intra-regional trade and trade with non-EAC members. The latest EAC trade report of 2009 gives Uganda 28 per cent of intraregional trade. This report also indicates that Uganda is a major importer in the intra-regional trade accounting for 48.3 per cent of the imports.

Increase in trade often leads to increase in anti-competitive practices and therefore it is imperative to have laws, policies and institutions to monitor and sanction abusive practices. Realising this danger, the EAC under article 75(1) of the EAC treaty emphasised fair competition as an essential ingredient for the success of the community and resolved to have completion policy and law. The EAC Competition Act of 2006 was therefore enacted to regulate regional anti-competitive practices. Furthermore the EAC development strategy of 2001 recommended that 'in order to operationalise the common market, the development

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14 The EU is the region's biggest trading partner with trade amounting to 19 percent of total regional trade. The EC market access offer begun on 1/1/2008 and consists of duty free offer of all EAC exports to the EC apart from arms. See EU-EAC Economic Partnership Agreement. See 'Briefing on EAC-EC Negotiations' available at www.eac.int/trade, accessed on 7 November, 2011.

15 Trade between the region and the US in 2010 was 1.1 billion dollars. See 'United States and East African Community Launch Discussions on New Trade and Investment Initiative' Office of the United States Trade Representative. Available at http://www.ustr.gov/, accessed on 4 November, 2011.

16 Implications include the opening up of the economy to regional competition and trade effects. However, it is noteworthy that the EAC countries and Uganda in particular is also opening up its economy through other agreements such as COMESA, UN, WTO and I GARD. Uganda is also fast tracking the COMESA tariff reduction and nearly 800 products are covered by these preferences. See also Competition Regimes in the World-A civil Societies Report pages 297-298. Available at http://competitionregimes.com/, accessed on 25 December, 2011.

17 According to the latest available EAC trade report, in 2008 total intraregional trade increased by 37.6 percent reaching record values of $2715.4 million compared to previous years. See EAC trade report 2009. Available at http://www.eac.int/statistics/, accessed on 24 December, 2011. Please note that EAC trade reports from 2010 are not available.

18 Ibid.

19 Ibid.


22 EAC council of ministers during their meeting of 8th January resolved to enact competition policy and law. See Njoroge, P. M., 'Regional cooperation on Competition Policy and Law. The East African community experience'. Available at http://www.pactafrica.org/, accessed on 17 November, 2011.

23 Ibid at 8.
strategy will ensure the formulation of a common competition policy, and harmonise export
promotion polices in developing their capacity to compete internationally. 24

However, the EAC Competition Act is not yet operational because some partner states including
Uganda have not enacted legislation to regulate anti-competitive behavior. 25 Therefore this
implies that anticompetitive practices committed within the region as result of its trade
liberalisation policies, will have direct impacts on the Ugandan economy. Moreover as large
regional importer, any anticompetitive conducts within the EAC will affect the consumers
adversely. It therefore remains to be seen if the Ugandan policy makers anticipated the potential
anti-competitive challenges that will arise as result of the regional trade liberalisation without an
effective competition regime.

1.2 Statement of the Problem

Like other developing countries, Uganda has the following developmental challenges: high
levels of poverty; low levels of literacy; democratic challenges; and high unemployment rate. As
a result, her policies are directed towards the eradication of these challenges through market
reforms that aim at enhancing competition. The belief that economic liberalisation would
automatically increase investments and solve these challenges was based on the Washington
consensus theory. 26 Therefore most of Uganda's social policies are geared towards the increase
of competition and have trade liberalisation, increase in competitiveness and poverty eradication
as major components as seen below:

Trade liberalisation; Uganda operates a free market environment aimed at promoting the
participation of the private sector. Price controls by government have largely been discontinued
with the government mostly concentrating on policy formulation and monitoring. 27

Privatisation; in 1952 the government formed the Uganda development cooperation that
managed over 40 parastatals that have now been diversifed through the governments Public

25 Only Kenya and Tanzania have fully operating competition authorities and legislation.
27 Government's role is only to promote trade diversification through increases in exports and restore credibility of
the fiscal and monetary policies. See 'Competition Regimes in the World-A civil Societies Report' pages 297-298.
Enterprise Reform and Divesture Act (PEARD) which regulates and implements government’s privatisation policy. The role of the Act is to reduce government’s role in the private sector and promote the development of efficient private sector markets and generation of incomes. The overall objectives of these policies were; stimulation of private investments, increase of employment, promotion of national middle class and improvement of the overall efficiency of the Ugandan economy. While the policy succeeded in increasing the availability of commodities for consumers, it failed in its desire to increase the indigenous ownership of these assets. Its emphasis on efficiency also led to greater unemployment as the new capitalists had no regard to sociological effects. In addition, the privatisation processes was alleged to have some corruption challenges.

The poverty Eradication Plan (PEAP) has been the overriding government policy since 1997 with the aim of reducing poverty by ten percent in 2017. The overall purpose of PEAP is the transformation of the people’s standard of living. This strategy is based on four pillars namely:

(a) Creating a framework for accelerated economic growth and development through the setting of appropriate macroeconomic incentives such as trade liberalisation. The aim of this framework is to improve market competitiveness.

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28 Herein referred to as PEARD.
29 Statute no. 9 of 1993.
31 Ibid at 25.
32 Ibid at 12.
33 Ibid at 28.
34 The objective of involving Ugandans in the ownership of these companies was not met as only two public companies issued public offerings. See Ibid at 36.
35 The new managers were more concerned with profit accumulation and not employment. See Ibid at 37.
36 During the privatisation process a number of Parastatals were sold with allegations of rigging. These included Uganda commercial bank, Coffee Marketing Board and Diary Corporation. See ‘Competition Regimes in the World-A civil Societies Report’ supra note 27 at 10.
(b) Improving good governance and security. This is considered a pre-requisite of economic growth and development. This involves improving transparency and efficiency in the public sector and dissemination of knowledge.

(c) Increasing incomes of the poor. This approach involves modernisation of agriculture which is the main employer, increasing accessibility of the rural poor to microfinance and land.

(d) Increasing the quality of life of the poor. This approach involves improving service delivery, adult literacy, health standards and accountability to consumers.

The Plan for the Modernisation of Agriculture (PMA); since agriculture is major source of livelihoods governments’ strategy of modernising it is an impetus to economic development. It is part of the government’s broader strategy of poverty eradication. Among its main strategies is that of removing direct involving of government in commercial agriculture and promoting the role of the private sector which will in turn increase competition and farmers’ incomes. If successful, the increase of incomes will reduce the poverty levels.

Medium Term Competitiveness Strategy (MTCS); this aims at putting in place mechanisms that attract and increase competitiveness of the private sector in regional and international markets. This will in turn increase agriculture output and exports to the regional neighbors.

Procurement policy; government passed the PPDA Act, to promote transparency in public procurement, to increase competition and reduce governments costs in the production of essential services that are essential for poverty reduction.

All the above policies are inter-related and have the increase in competitiveness of the private sector as the major strategy of achieving economic growth and development. However, it is

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39 Ibid.
40 Ibid.
41 Ibid.
42 Uganda Law Reform Commission supra note 37 at 10.
44 Uganda Law Reform Commission, supra note 37 at 10.
45 Agriculture is singled out because it is the backbone of the economy and major employer.
questionable if the above objectives that have competition as their major pivotal anchor may be achieved without domestic competition regime to compliment them.

Surprisingly although Uganda has introduced various domestic competition enhancing policies and opened up her regional trade borders, it has no competition policy. Yet scholars have argued that the benefits of market reforms may only be ascertained if there is regulation and polices (competition policy) to monitor the increased competition.47

This study will show the relevance of competition policy and law is not only stopping anti-competitive practices but also its role in complimenting government reforms and policies in Uganda. The research will contribute to the development of the relevant competition law legislation for Uganda. The motivation of the study is derived from the competition challenges facing Uganda today, a country that has liberalised and privatised its economy but has no competition policy and law.

1.3 Objectives and Significance of the Study

Using Uganda as case study, this research investigates and analyse if both the available domestic laws in Uganda and the regional Competition Act, will protect Uganda against domestic and international anti-competitive practices. This research also discusses the Ugandan Competition Law Bill and its suitability for the country from third countries perspective. To do so, following questions are raised as follows;

Does Uganda need a national competition law to regulate anticompetitive practices that may arise because of trade liberalisation? Will a competition law and policy compliment Uganda's economic and social reforms by reducing poverty levels and increase economic growth and development?

In absence of domestic law will the regional East African Competition Act protect Uganda against anti-competitive practices? What kind of competition law and policy is suitable for Uganda?

1.4 Methodology

The methodology for this research was through desk-top means. Literature review was conducted on the existing competition laws and international instruments signed by Uganda. Data was collected from the available internet sources that report on competition policy in Uganda and the EAC and the globe. Journal articles, newspapers stories, speeches, competition law textbooks and paper presentations by leading scholars was also used. In addition, the thesis used reports and research outputs done by reputable organisation. Also data from third world countries that have successfully introduced and benefited from competition policy and law was used for persuasive purposes.

1.5 Synopsis of Chapters

By opening up her borders through the trade liberalisation policies of the EAC, Uganda exposed itself to domestic and international anticompetitive practices. Without a domestic competition regime in place the research investigates if the existing domestic and regional legal framework may protect Uganda from such trade dangers. Furthermore, the research investigated the link between Uganda’s policies and competition policy as engines of growth and development and ascertains whether Uganda needs competition policy and law.

CHAPTER 2: INTRODUCTION TO THE CONCEPTUAL FRAMEWORK OF COMPETITION LAW AND POLICY

Chapter two proceeds by appreciating the subject of competition law and policy. It also discusses the relevance of such law and policy in solving the major challenges of developing countries.

CHAPTER 3: THE COMPETITION LEGAL FRAMEWORK OF UGANDA: AN EXAMINATION OF ITS EFFECTIVENESS IN CONTROLLING ANTICOMPETITIVE PRACTICES

Chapter three shows the various domestic and regional anticompetitive practices and how the available domestic Ugandan laws are in effective in regulating them.

CHAPTER 4: THE REGIONAL EAST AFRICAN COMPETITION POLICY AND LAW: IN ABSENCE OF DOMESTIC COMPETITION POLICY CAN IT PROTECT UGANDA FROM DOMESTIC AND INTERNATIONAL ANTICOMPETITIVE PRACTICES?

Chapter four shows that even the regional East African Competition Act is ineffective in protecting Uganda’s economy from anticompetitive practices and therefore a domestic regime is needed to supplement the regional EAC law.
CHAPTER 5: WAY FORWARD AND RECOMMENDATIONS NECESSARY FOR THE ACHIEVEMENT OF AN EFFECTIVE COMPETITION REGIME IN UGANDA

Chapter five provides the necessary recommendations for the achievement of an effective competition regime in Uganda and conclude that Uganda needs domestic competition law and policy.
CHAPTER II: INTRODUCTION TO THE CONCEPTUAL FRAMEWORK OF COMPETITION LAW AND POLICY

Before discussing the relevance of competition law and policy to Uganda, it is necessary to have a clear understanding of what it is. Therefore, this chapter begins by discussing the discipline of competition policy and law. It distinguishes competition policy, from law and other related economical disciplines and thereafter discusses its importance to developing countries by referring to its general facets. An understanding of these issues enables us relate its importance to Uganda’s needs.

2.1 Competition Policy and Law; What Does It Mean?

Competition is an effort by two or more parties to ensure the custom of another party by offering the most favorable terms. Competition policy refers to government measures which affects both firm behaviors and economic structures. This includes economic policies adopted by governments that enhance competition in local (domestic) markets, international (extraterritorially) markets and a competition law that regulates anti-competitive behavior. An appropriate competition policy should therefore include competition law (also referred to as antitrust law or monopoly law) designed to prevent anti-competitive business and government’s involvement in the market sector through liberalisation and deregulation.

On the other hand, competition law is a set of rules and remedies that governments may adopt to prohibit and challenge practices by private enterprises and public authorities that restrict or distort the contestability of a territorial market. These rules are applied both domestically and internationally for consumer benefit.

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48 Ibid.
49 Definition by www.cuts.international.org, accessed on 13 November, 2011.
50 Ibid.
51 Ibid, supra note 24.
53 Whish R., supra note 52 at 1.
Ant-competitive practices refer to a wide range of business practices in which a firm or group of firms may engage in order to restrict inter-firm competition to maintain or increase their relative market position and profits without necessarily providing goods or services at lower costs or of higher quality. These practices include price fixing, cartel formation, monopolisation and abusive of dominant positions.

Market definition in competition law is an economic concept that helps to 'identify and define the boundaries of competition between firms and serves to establish the framework within which competition policy is applied.' This is relevant in determining the commission of anti-competitive practices in the relevant product and geographical markets. However, there is a tendency to confuse competition law with related disciplines and therefore it is important to discuss the practical and conceptual relationships between the related disciplines.

2.2 Distinction of competition law from related disciplines

It is important to point out that there is distinction between competition law and policy. Competition law is a single component of a competition policy which has wider dimensions and includes both private and public activities as discussed earlier.

Competition law and consumer protection law; although both of them ensure that markets function to the benefit of consumers by providing them with variety of competitive products and services.
services, competition law is not directly about consumer protection.\(^6^0\) Whereas competition law ensures that the market place remains competitive so that consumers have variety of options, consumer protection law protects the ability of consumers to choose freely and effectively among the different options.\(^6^1\) Also it should be noted that competition law requires only sufficient range of choice such as a competitive market would have produced. On the contrary, consumer protection law just sufficient amount of information and not perfect information.\(^6^2\) Furthermore whereas competition law requires that consumers have choice options not hindered by anti-competitive practices, consumer protection law ensures that consumers may choose from the available options.\(^6^3\) Lastly in competition law if vertical restraints increase cost of prices, what matters is whether options for purchases have been misled.\(^6^4\) In spite of their differences, the two have similar goals and some scholars have referred to them as 'two sides of the same coin'.\(^6^5\)

Competition law and anti-dumping law; although the two concepts interrelate, they are different. While competition law is concerned with protection of the market process, anti-dumping laws target foreign exporting countries that sell products below the market price in third countries.\(^6^6\) That is to say, competition law concentrates on the achievement of economic efficiency and regulation of concentrated economic power while anti-dumping is not concerned with monopoly regulation but protection of industries from external competition.\(^6^7\) Specifically while competition law favors dynamic competitive markets, anti-dumping law favors static model of

\(^{60}\) Their business practices which may be beneficial to consumers but which are offensive to competition laws. An example is the concept of predatory pricing. If the predatory pricing firm charges lower prices consumers benefit from cheaper products. However, such activities are anti-competitive because efficient firms that cannot sustain the price wars may exist in the market. See Nnamdi. D., supra note 58 at 9-11.

\(^{61}\) Ibid at 10.

\(^{62}\) Ibid.

\(^{63}\) Ibid.

\(^{64}\) Ibid.

\(^{65}\) Ibid.

\(^{66}\) Speech by Johnson M., MP 'International and Comparative Law conference, senate house London 15/52003' Available at www.dti.gov.uk/ministers/speeches, accessed on 11 December, 2011. It is because of these similarities that some countries have one agency that regulates both consumer protection and competition laws e.g. the United States Federal States Commission. Also see Nnamdi. D., supra note 58 at 10.

\(^{67}\) Nnamdi. D., supra note 58 at 13. Also see Barfield. C., Anti-dumping Reform: Time to go back to basics 2009 at 719.

the market to protect domestic investors from foreign competition. In some instances antidumping measures may actually be anti-competitive. Competition law and Economics; competition law is related to economics because of its intention of protecting free markets from anti-competitive practices. As the American supreme court stated ‘antitrust analysis must be based upon demonstrable economic efficiency rather than [...] formalistic line drawing.’ Therefore competition law practitioners have to understand basic economic concepts such as consumer surplus and elasticity of demand to be able to understand market behaviors.

2.3 Role of Competition Law in Markets

Having understood the meaning of competition law, we need to know why it is so important in markets. Arguably, its importance is derived from its close relationship with market economics. The theory of perfect competition is based on efficient markets that cannot be improved by competition laws and as result, sellers have no influence on the products prices and the entire market as a whole. However, in practice these conditions are seldom observed in the actual market place. This is because perfect competition operates in a market of large number of buyers and sellers, all producing similar products, with resources following freely in the market, consumers having perfect knowledge, there is no monopoly and with no barriers of entry in the market. These conditions being unrealistic makes competition law relevant in regulating markets in order to achieve economic efficiency which is categorised as follows:

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68 Nnamdi. D., supra note 58 at 12.
71 In reality monopolies exist and circumstances are different. Under monopoly the monopolist may control the market price since he has no competitor. See Whish R., supra note 52 at 6.
Allocative efficiency; this involves the production of goods and services using resources based on market demand.\textsuperscript{75} Secondly there is productive efficiency which involves the production of goods and services at the lowest cost.\textsuperscript{76} Thirdly there is dynamic efficiency; whereas allocative and productive efficiencies describe static conditions, dynamic efficiency requires flexibility of the production firms in response to the changing market conditions.\textsuperscript{77} Lastly there is inter-temporal efficiency which involves the balancing of today's needs and those of the future.

By regulating market efficiency, competition law enables firms to optimally use resources and maximise profits.\textsuperscript{78} The promotion of market efficiency to satisfy consumer welfare is the optimum goal of competition law. To the consumers the increase in business rivalries in competitive market will result in cheaper and better quality products.\textsuperscript{79} This is important because it reconciles the interests of consumers with those of the community. Whish explained that the 'essential purpose of competition law "should be to protect the interests of consumers not by protecting the competitive process itself but by taking direct actions against offending undertakings [...]'\textsuperscript{80} It may also be argued that market regulation is social stability mechanism that protects the lower class of society from economic power.\textsuperscript{81} However, some scholars have cautioned that even if competition law favors free competitive markets, every sector should not be left to unbridled competition for instance health services.\textsuperscript{82}

Scholars argue that efficiency enables entrepreneurs achieve economies of scale, enhance their international competitiveness and will promote their research and development capabilities.\textsuperscript{83}

\textsuperscript{75} Goods and services are produced according to the requirements of society. This means that the supplier will expand production to the point where market price and marginal cost coincide thus creating an equilibrium market. Jones A. and Sufrin B., supra note 71 at 17.

\textsuperscript{76} By implication all firms have to produce at the lowest cost or else they will make losses and exit the market. This is because of the free flow of information in a competitive market. Ibid at 8.

\textsuperscript{77} This is done through innovation and technological innovation. However, this is controversial as some scholars argue that innovation may better be achieved through monopolistic tendencies and economic power. See Ibid at 17.

\textsuperscript{78} Nnamdi. D., supra note 58 at 4–5.

\textsuperscript{79} Ibid.

\textsuperscript{80} Whish R., supra note 52 at 19.

\textsuperscript{81} Modern market economy is no longer for the fittest and strongest, but for the entire community. Therefore more economic power requires responsibility of competition authorities to preserve opportunities of the under privileged to also gain economic power.

\textsuperscript{82} Jones A. and Sufrin B., supra note 71 at 1 and also Nnamdi. D., supra note 58 at 6. For example in the EU agriculture is controlled by common agriculture policies that favor subsides because of the importance of food as security mechanism.

This is done by increasing the capability of enterprises, 'to produce goods that consumers need, in the quantities they need, applying the most efficient production methods, marketed and distributed in the most efficient manner'.

2.4 The Relevance of Competition Law in Achieving the Millennium Development Goals of Developing Countries

Skeptics of competition policy in developing countries argue that they are interested in protection of domestic industries from being out competed by multilateral companies and therefore introduction of competition policy will undermine their protective industrial policies. However, this fear is a result of lack of clarity between both policies. Whereas industrial policy supports specific sectors of the economy, competition policy supports all sectors of the economy and protects them from both local and external anti-competitive practices.

Developing countries have also argued that competition law is not a priority because of other social needs like hunger, poverty and housing and that the resources for implementing of competition policy should be used to address these needs. Countries with competition regimes have not convincingly shown that competition policy is the reason behind their economic success. It is also said that the lack of logistical support such as funds and trained personnel, makes the implementation of competition regimes useless. This is further complicated by the existence of the informal sector in developing countries which makes the assessment of

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84 Ibid at 175. Also see OECD Report of 1997.
85 Ibid Lipimile G., supra note 83 at 176. Supra note. Industrial protection may create monopolies that abuse their market power as shown earlier in the power sector in Uganda. As will therefore be shown later competition regime will bring positive results if it is part of general industrial policy.
86 Lipimile G., supra note 83 at 174.
88 This argument is based on the fact that competition policy is often is often implemented as basket of government regulatory reforms and therefore it is difficult to attribute any resultant benefits solely to the adoption of competition i.e.w. See Lipimile G., supra note 83 at 176.
89 However, it is the existence of such short comings that warrant the application of competition policy to protect consumers by fighting for the poor that are unable to take on global companies. This is because the Competition Authority using government resources may solve social injustices. See Plessis L. et. al., supra note 87 at 5-7.
concentrations, relevant markets and effect of anticompetitive practices difficult and yet competition is promoted by trade liberalisation policies.

However in contrast to the above views, competition policy is relevant in addressing the needs of developing countries as shown below:

Competition law may be used to disperse economic power and redistribute wealth which Whish describes as ‘the promotion of economic equity rather than economic efficiency’. This is through its control of dominant firms because this aspect of competition law controls the conduct of firms that restrict competition through the usage of acquired market power. Such market power may be obtained through trade expansionist strategies or purchase of government corporations and thus they gain positions where they are less constrained by market forces due to the existence of major barriers of entry. This is not to suggest that competition law is against successful firms acquiring large portions of the market but rather it is to deter firms from abusing their market power. This can be illustrated by the production of its distinctive products. Also where dominant firm refuses to supply customers, it abuses its dominant position. However, renowned scholar Whish argues that this is controversial because most legal systems provide for freedom of contract and compulsory dealing is not normal part of law. Nevertheless such a
deterrent is essential for consumers in poverty stricken developing countries that need cheap essential products.

Jones and Sufrin argue that competition law may not only maximise consumer welfare but holds the foundation of liberal democracy by precluding the wealth of excess market power. They argue that "... of the most important arguments in favor of competitive market structure, where the individual sellers and buyers are insignificant in relation to the size of the market is that it decentralises and disperses private power and protects individual freedom."

Competition law may be used to protect insufficient small firms from dominant firm's efficient low costing systems with the intention of nurturing small firms to grow into competitive businesses in future. That is to say competition law promotes fairness and not free competition. This argument is reinforced by Whish who states that "the competition authorities should hold the ring and ensure that the small guy is given a fair chance to succeed". This is essential for developing countries that need the nurturing and growth of their home industries which cannot compete with multilateral rich corporations. However, this is not without controversy, because the protection of small competitors may conflict with the interests of consumers that competition law strives to protect.

Competition law may be used to influence other policies such as industrial, environment and employment opportunities with the intention of achieving countries social needs such as; reduction of poverty and unemployment in developing countries. For example this is done by...

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99 This argument was influential in America because of mistrust of big businesses. See Whish R., supra note 52 at 20. Also see Jones A. and Sufrin B., supra note 71 at 17. Also see Amato G., Antitrust and Bounds of Power. Hart Publishing (1997) at 2 and 3.

100 Jones A. and Sufrin B., supra note 71 at 17. Also see Amato G., supra note 99.

101 Jones A. and Sufrin B., supra note 71 at 17 and 18. Also see Whish R., supra note 52 at 20. For example in the EU Microsoft case, Microsoft was ordered to share some of their intellectual properties with its rivals to enable them compete with it.

102 Ibid Whish R., supra note 52 at 21. Application of article 82 of the EU Treaty has been applied with protection of small competitors in mind.

103 A case in point is predatory pricing, although it hurts small firm's consumer's benefit from low priced commodities and therefore any intervention by competition law may lead to higher costs of commodities in the market. The Chicago school of thought is the leading critic of this ideology arguing that they should be less intervention in markets because it's harmful to social and consumer welfare. Their argument is based on the belief in the ability of free markets to achieve economic efficiency. This is contrasted by the Harvard school which criticises the Chicago school for having so much faith in the correcting powers of free markets and yet their situations where it has failed to control market distortions. See Posner R., 'The Chicago School of Antitrust Analysis' (1979) 127 university of Pa R. 1925 cited in Nnamdi D., supra note 58 at 18.
prohibiting mergers that will cause job losses, increase consumer costs\textsuperscript{104} or allowing restrictive agreements that will preserve declining industries or produce environmental benefits\textsuperscript{105}. Merger control is imperative for developing countries because of the existence of few firms with high concentrations\textsuperscript{106} which may tempt them to commit anticompetitive practices. However, there is a view that merger control is not important in small economies in Africa because it impedes the capacity of firms to compete on the world markets, but then firms cannot compete internationally if there is no domestic competition.\textsuperscript{107} The pursuing of these social objectives is against the balancing act of market efficiency and some scholars have cautioned about the temptation of sacrificing the competition gains to achieve social objectives.\textsuperscript{108} However countries have different social needs and should use competition policy when it meets their objectives.\textsuperscript{109}

Competition laws may be an effective tool of achieving economic integration of states. The presence of competition rules in the European Union treaty is perfect example of this and it has been argued that these rules were set out to achieve the aims and objectives of the European Union.\textsuperscript{110} To this end it can be argued that Uganda's objectives of integrating within the EAC'S regional block will be achieved with a competition policy in place.

In terms of regulation of prices, one may argue that the regulation of prices by competition authorities is contradictory to the main philosophy of competition law which is determination of prices by the market forces of demand and supply. However, this regulation is relevant in the

\textsuperscript{104} For example if one competitor acquired another competitor consumers may be deprived of choice and in absence of competition may have to pay higher prices. See Whish R., supra note 52 at 3. Also see S.7 of the Clayton Act of the US and 139/2004 regulates mergers.

\textsuperscript{105} See Jones A. and Sufrin B., supra note 18.

\textsuperscript{106} Concentration is defined in European community merger regulation under article 3(1) as; the merger between two or previous undertakings or parts of undertakings or the acquisition by one or more persons already controlling at least one undertaking or by one or more undertaking, whether by purchase of securities or assets, by contract or by any other means of direct or indirect control of the whole or parts of one or more undertakings. Its worthy noting that article 3(5) gives exceptions to concentrations such as acquisition of securities by credit where the voting rights are exercised to protect the investment.

\textsuperscript{107} Lipimile G., supra note 83 at 183 and 184.


\textsuperscript{109} For instance in the European Union there instances where mergers have been accepted after firms have agreed to remedy the anticompetitive practices that may arise if it benefits the economic objectives of the EU. See Whish R., supra note 52 at 818.

\textsuperscript{110} Jones A. and Sufrin B., supra note 18.
protection of consumers in situations of natural monopolies and essential facilities. These usually exist without competition thus making the philosophy of market forces determining prices a fallacy. In such situations it is imperative that the law authorises competition authorities to protect consumers from unnecessary abuse of natural monopolies and essential facilities. Price control may increase the affordability of basic essential commodities for consumers in developing countries and thus protect them from exploitative natural monopolies. This reduces the poverty levels and increases the quality of living while lowering its cost.

Regarding the regulation of cartels and restrictive agreements, some have described them as 'cancers on the open market economy' while the American Supreme court has referred to them as the supreme 'evil of antitrust'. This aspect of competition law controls the ability of firms to enter into cartels. Cartels are simply agreements by undertakings that have as their objective the prevention, restriction or distortion of trade. Such agreements include; price fixing agreements, agreements that restrict output, market or customer sharing agreement, etc.

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111 These monopolies are called natural because they arise from natural conditions of the market. The unifying characteristic of natural monopolies is the ability of single firms to provide goods and services at lower cost than set of firms. See Gal M., *Competition Policy for Small Market Economies*, Harvard University Press 2003 at 113. Also see Nnamdi. D., supra note 58 at 28.

112 These are government-created facilities that cannot be duplicated for policy reasons. For example, environmental clearances or land usage problems may hinder the building of second competing airport even if the market demands it. Intellectual property rights may also prohibit competing firms to operate in the market. Where a competitor controls a critical source necessary to compete then it also becomes an essential facility. However, these may be eroded by removing the artificial barriers to entry that created them. See Gal M., supra note 111 at 113. Also see Nnamdi. D., supra note 58 at 28.

113 For example airports, seaports major electricity grids operate with little or no competition.


117 However, some agreements restricting trade may be desirable e.g. specialisation agreements, research and development agreements and joint production agreements. See Whish R., supra note 52 at 113.

118 An agreement where undertakings agree jointly the prices they will charge consumers in the market. This is cited as an example of anticompetitive agreement in article 81(1) (a) of the EC treaty and it doesn't matter whether the restriction is horizontal or vertical. Horizontal agreements eliminate inter-brand competition while vertical agreements eliminate intra-brand competition. See Whish R., supra note 52 at 119.

119 This refers to situation where competing undertakings agree to restrict production to create scarcity in the market with the objective of escalating cost of commodities through manipulation of demand and supply. See Nnamdi. D., supra note 58 at 15 and 25.
129 collusive tendering or bid rigging121, bolstering provisions122, agreements relating to terms and conditions123, and information sharing agreements.124 Cartels are detrimental to consumers because they have no alternatives except to either choose not to pay higher price for the product or pay the cartel prices expensively leading to economic hardship.125 This increases the cost of living and widens the poverty gap. Cartels also reduce the incentive to produce efficiently and innovate. Although no specific studies have been done on the impact of costs of cartels in Uganda, studies have shown that in the 1990s cartel imports were 5.2 percent of total imports and 1.2 percent of total GDP in developing countries.126 Therefore anti-cartel enforcement should be priority for all developing countries. However this can only be achieved with a competition regime in place.127

Nevertheless there is general consensus among scholars of the need to use competition policies to achieve economic efficiency. However, the extent to which it should be used to achieve other social objectives is debatable, not because this may be done at the expense of consumers128 but

129 This is situation where competing firms agree to assign themselves customers or specific markets. Exclusivity to particular geographical market or customers creates monopolies for the undertaking which may be subject of abuse. See Nnandi, D., supra note 58 at 15 and 25. These are also specifically mentioned as an example of anticompetitive agreements in article 81(1) (c) of the EU treaty. See Whish R., supra note 52 at 119.
121 This refers to situation where competing firms collaborate in their responses to invitation to tender of the supply of goods and services. See Richard Whish. Competition Law, 6th edition, Butterworth at 519. This practice is common in public procurement where companies may agree on the least offers to submit and the eventual successful bidder. The ECJ has ruled that, 'In a system of tendering competition is of the essence. If the tenders submitted by those taking part are not the result of individual economic calculation, but knowledge of the tenders by other participants or of consultation with them competition is prevented or at least distorted and restricted'. See the European Sugar cartel 1973 CMLR para.42 and cited in Nnandi. D., supra note 58 at 15 and 26.
122 This refers to situation where members of cartel agree to reinforce the operation of cartel for example by refusing to supply customers who purchase from outside the cartel. See Nnandi. D., supra note 58 at 15 and 26.
123 This refers to agreements which limit competition by usage of terms and conditions given to customers. However, Whish argues that standardisation of terms and conditions may not sometimes be beneficial to customers as it may enhance price transparency. See Whish R., supra note 52 at 522.
124 This refers to the exchange of information to support anti-competitive practice. For example if firms establish cartels they will exchange information of compliance to the cartel. See Whish R., supra note 52 at 524.
125 Hassan Q and Lipimile G. (eds.), supra note 52 at 56.
126 The Vitamin cartel cost developing countries 1.71 billion US $, Citric Acid cartel 67 million US$, Steel tube cartel 1.19 billion US dollars. See Mehta P., 'Living with Cross Border Competition Challenges'. Available at http://www.competition-regulation.org.uk/, accessed on 13 November, 2011. Also see Hassan Q and Lipimile G. (eds.), supra note 52 at 57.
127 For example The United States, Canada and the EU prosecuted the Vitamin cartel in their respective markets and fined the cartels approximately $1 billion US $ in America and 855 million Euro in the EU. However, it may be difficult to sanction cartels legalised by other countries whose legislation allows the formation of cartels as long as they don't affect their internal markets. A case in point is that of India's attempt to stop the American soda ash cartel that was met with stiff resistance from the American government resulting into India's loss of GSP preferences. See Mehta P., supra note 126.
128 Ibid.
because countries have different social needs. Therefore the question for developing countries should always be: to what extent does their competition policy address their social economic and political objectives? This answer will depend on the particular needs of the country in question.

2.5 What form of competition policy is relevant in addressing the needs of developing countries?

Western countries have made efforts to export their competition models to developing countries as a condition for trade liberalisation. As result developing countries seeking to be both internationally accepted in the global trade and to attract western investments have a temptation of transplanting these competition policies into their domestic jurisdictions. However these rationales underscore the other considerations investors use to choose investment destinations. I therefore suggest that these reasons should not be used as justifications for cutting and pasting of developed countries models. This is not to suggest that it has no advantages; for example Uganda would benefit from the already developed literature of competition law, create legal certainty if they copied developed countries models. I am only emphasising that the use of cutting and pasting will not fulfil the intended objectives of competition policy.

There is general consensus that theories behind legislation are always suited for particular economic, political and social circumstances and therefore cannot succeed in other setting with different environments. It is therefore not surprising that most scholars agree that developing countries should avoid the temptation of copying international antitrust laws that do not fit within

129 In America they have done it through the sighing of regional trade agreements and conditional assistance in draft legislation on competition law in Eastern and Central Europe. The EU also spreads Competition law through its Economic Partnership agreements by coercing its weaker trade members to adapt to competition provisions similar to theirs and by signing trade cooperation agreements with they have performance conditions based on their trade policies. See Aydin U., ‘Promoting Competition: European Union and the global competition order’ (2009) paper presented at the Biennial Conference of the EUSA, 23-25 April, Los Angeles, CA. See also Fidler D., ‘Competition Law and International Relations’ [1992] 41 International and Comparative Law Quarterly 563. Also see Shahein H., New Jurisdictions and Competition Law: Shaping Policies and Building Institutions, Edward Elgar Publishing 2012.


131 Eleanor Fox suggest that policy makers in these countries are of the view that adapting western competition policies will build confidence in their economies and increase investments. See Fox E.M., ‘Antitrust and Regulatory Federalism: Races up, Down, and Sideways’ (2000) 75 New York University Law Review, 1784.

132 These include democracy, literacy and investment subsidies.

their development/special concerns. This advice is based on the fact that developing countries have special needs that are not similar to those of developed countries and therefore competition policy should be modeled to address these challenges. Whereas I agree with such an argument, it is very challenging for poor countries with very little resources to experiment with a system that diverges from international customs. This may not only be costly but may lessen foreign investments from the developed countries and donor funding for a competition regime. In these circumstances a model that suits Uganda's special concerns and those of international antitrust is desirable. Such model will give it the legitimacy for effective implementation of competition policy. I will name this model, the mixed model.

The above discussion raises the question as to which form of international antitrust law will be most suited to include in Uganda's development/special concerns? The American model; this model has evolved to be concerned with mainly efficiency as the only goal of antitrust. It discourages enforcement unless it is proved that there are output limitations. Although this reluctance to intervene creates efficiency, it is argued that this may not be true for developing countries because of its narrow view of antitrust. The ability of the Ugandan bench to interpret its many complex laws is so challenging because of lack of expertise. Also to an extent, the model has succeeded because of the large American market and therefore its effectiveness in a

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134 These special needs are; political history, culture and level of development. See Fox E.M., "Economic Development Poverty and Antitrust: The Other Path. Southwestern Journal of Law and Trade in the Americas, (2007) 15, 211-232. Also see Plessis L. et. al., supra note 87.

135 These special needs are the UN millennium development challenges such as; poverty, lack of good access to medical care, lack of quality education, massive corruption, unemployment and poor governance.

136 Although there no agreed international laws for competition there agreed principles that may move towards international customs and these don't include what is ideal for the development concerns for developing countries. See Fox E.M., "In Search of Competition Law Fit for Developing Countries. 'Law and economics research paper no. 11-04 at 15. Available at papers.ssrn.com, accessed on 2 February, 2012.

137 Fox E.M., argues that the gains of attracting international investments and legitimacy may be lost. See ibid at 15.


139 Fox E.M., supra note 136.


141 Concern for preservation of competition process by opening up of markets and rivalry may also lead to efficiency more than the US noninterference policy. See Fox E.M., supra note 136.

142 The ideal that developing countries lack expertise is also suggested by many antitrust scholars these include: Shaheen H., in 'Designing Competition Law in New Jurisdictions' 1994 at 20. Also see Plessis L. et. al., supra note 87 at 23 and 27.
very small Ugandan market is doubtful. The renowned scholar Eleanor F suggests that it may be used if adjusted to the realities of developing countries, but such adjustments imply that it is no longer the American model! With the above limitations in mind I recommend that it is not ideal for developing country like Uganda.

With regards to the EU model, it encourages openness and access, limits state action in state procurement and promotes economic integration of the EU. However just like the American competition law it was also designed for developed markets that have different characteristics to those of Africa. Nevertheless the successful blending EU competition law with local realities by South Africans cannot be ignored and is an important lesson for developing countries that are enacting competition laws.

The South African model is reflected in the Competition Act of South and is a mixture of EU, American, Canadian, and Australian law. This law uses the best practices of international antitrust in consideration of its special needs. As a result its competition policy is used to address economic inequality, consumer protection, solve unemployment, develop small scale enterprises, enable property ownership of historically disadvantaged persons and increase the ability of its firms to compete in global trade. The use of competition policy to solve social problems in South Africa has been criticised by some scholars arguing that it was only intended to achieve efficiency. However, I am in agreement with Eleanor Fox who justifies this approach by arguing that the historical running of the South African economy by small majority at the expense of the minority may not achieve efficiency. Furthermore the author argues that the participation of historically disadvantaged groups will enable their economy to achieve maximum output. The South African Competition Act also shifts the burden of proof in certain circumstances of abuse of dominance, discrimination and excess pricing. Such evidential

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143 Ibid Shahin supra note 142.
144 Fox E.M., supra note 136 at 12.
145 Its rules of best trade practices are similar to those of the EU. Its rules on price discrimination are similar to the US Pat man Act. Ibid.
149 Ibid.
shift is relief for developing country like Uganda that lacks expertise and resources to investigate anticompetitive practices and scrutinise mergers.

With the above analysis in mind I recommend the use of mixed model of competition policy that uses the best international practices to suit Uganda’s developmental needs. However by way of comparison Uganda should have special reference to South African. Reference to the South African experience is proposed because of the following reasons; it has successfully blended local realities with international competition policies, has similar developmental challenges to Uganda, and is all inclusive. These experiences will give some lessons to Uganda and save it the experimental costs of inventing new systems. This is not intended to suggest that other competition policies should not be consulted; but it is to recommend its use as reference text because of its special similarities with developing other countries like Uganda.¹⁵⁰

However it is noteworthy that there is no “fit all design” competition policy, therefore Uganda’s design should reflect her economic, social and political conditions with the objective of improving the standard of living of her people and reducing poverty. This will enable the government to fulfil its poverty eradication plans that were discussed earlier.

The next chapter shows the various anticompetitive practices in Uganda and how the existing legal framework is ineffective in stopping them.

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¹⁵⁰ Although Zimbabwe, Zambia, Kenya and Namibia have competition regimes that may be referred to, none has the detailed literature and jurisprudence of South Africa.
CHAPTER III: THE COMPETITION LEGAL FRAMEWORK OF UGANDA: AN EXAMINATION OF ITS EFFECTIVENESS IN CONTROLLING ANTCOMPETITIVE PRACTICES

This chapter describes the legal competition framework in Uganda and thereafter demonstrates how it is unable to regulate domestic and international anticompetitive practices that exist as result of trade liberalisation and thus resulting into consumer costs. In addition, the chapter shows how competition policy is relevant tool for the effectiveness of Uganda’s social economic policies that are geared towards economic growth and development. The purpose thereof is to show that Uganda’s policies are attracting anticompetitive practices and the existing laws cannot regulate them. Arguably, all of these factors points to the relevance of competition law and policy to Uganda.

3.1 An overview of the nature of the competition market in Uganda

Market competition in Uganda is dominated by retail trade because the country still has narrow industrial base. Most of the countries essential commodities are imported from its regional neighbor Kenya. Retail trade is dominant with many buyers and sellers and minimum differences in nature of their products. There is a reduction in the number of independent whole sellers because of the emergency of multinational companies. The small numbers of whole sellers have vertical links with manufacturers especially in sugar, beer and soft drinks industries. However, in the services industry, there is stiff competition with high market concentration acting as barrier to entry. The small industrial base mainly consists of food processing and beverages. In areas that require huge capital investments oligopolies exist especially in the

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151 It is generally accepted that anti-competitive practices increase consumer costs by increasing prices of goods. It is not easy to impute monetary value to these costs in developing countries because of insufficient data. Uganda is not an exception to this challenge. See Hassan Q and Linimile G., (eds.), supra note 52 at 57.
152 These include coca cola.
153 These industries also don’t have vigorous competition in their respective sectors. See ‘Competition, Competitors and Development: Lessons from Third World countries’. Available at http://www.unctad.org/, accessed on 7 October, 2012.
155 Manufacturing counts for about 10 percent of GDP with potential in the production of textiles, clothes and footwear, minerals, chemicals and petroleum. See Uganda Integrated Industrial Policy for Sustainable Development
utility sector.\textsuperscript{156} To date, many multilateral companies are targeting production sectors of the economy with a view of exporting to the free trade areas of the EAC and COMESA.\textsuperscript{157}

3.2 **Legal and Institutional Framework**

The government policies of privatisation and trade liberalisation are evidence of the government intentions of promoting competition and non-interference in the market.\textsuperscript{158} However, there is no comprehensive policy and law that addresses anti-competitive trade practices although a bill is now in place. The nearest to competition is the inadequate English common law statutes of Resale Price Act and Restriction of Trade Practices Act.\textsuperscript{159} But even in England where these statutes originated from, they were found to be effective and therefore replaced with the UK Competition Act of 1998 which has modern facets of competition law.\textsuperscript{160} Uganda also has series of statutory monopolies in the utility sector that set their own prices subject to approval of the relevant minister.\textsuperscript{161} There is no professional central investigative authority to monitor and coordinate their activities.

Although there are some laws whose main interests is consumer protection, these generally prohibit unfair trade practices that are meant to confuse consumers and were never intended to address the modern day competition challenges.\textsuperscript{162} Nevertheless, some statutes have some elements of competition law with view of protecting consumers in specific sectors of the

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\textsuperscript{156} These include; the National Water and Sewage Corporation, Uganda Railways Corporation and Uganda Electricity Distribution Company limited.

\textsuperscript{157} These include; South African franchises like Game and Shoprite, Lafarge that have entered the Ugandan market etc.

\textsuperscript{158} Uganda Law Reform Commission, supra note 24 at 16.


\textsuperscript{160} This act prohibits abuse of dominance, cartel formation, regulates mergers just as the EC Treaty provisions in articles 81 and 82. Also see Uganda Law Reform Commission, supra note 24 at 16.

\textsuperscript{161} These include; the National Water and Sewage Corporation, Uganda Railways Corporation and Uganda Electricity Distribution Company limited. See Uganda Law Reform Commission, supra note 24 at 16.

\textsuperscript{162} These include the following; the Contracts Act (cap 73), under this Act if consumers are cheated they may sue for breach of contract. Sales of Goods Act (Cap 82); this gives exceptions to contract when consumers are misled to buy products. Uganda National Bureau of Standards Act (cap 327); this gives the bureau powers to monitor standard of goods to protect consumers. National Drug Authority Act (cap 206); this regulates the import and export of drugs with aim of protecting consumers. All of these laws are available at [http://www.ulii.org/ug/legislconsol_act/](http://www.ulii.org/ug/legislconsol_act/), accessed on 12 November, 2011. All of these laws are insufficient in regulating anticompetitive practices as they have no developed jurisprudence in competition law.
economy. These are the: Communications Act 2000\textsuperscript{163} which privatised the communication sector requires the communication commission to regulate fair competition\textsuperscript{164} and forbids anti-competitive practices under section 57.\textsuperscript{165} However, it has limitations; it neither defines dominancy, uncompetitive mergers, or uncompetitive agreements\textsuperscript{166}.

Realising the importance of regulating competition, some sector statutes provide for price regulation with aim of protecting local production entities from predatory pricing by multinational firms.\textsuperscript{167} These are; under the Civil Aviation Authority Act\textsuperscript{168}, where the minister may determine flight fares.\textsuperscript{169} Similarly under the Uganda Coffee Development Authority Act, the authority has power to ‘monitor the price of coffee to ensure that no export contract for sale of coffee is concluded below the minimum price’. However, the method of monitoring and implementation of fixed average prices is not elaborated. Thus having power but without procedures of how to effect it, undermines the importance of this provision.

All these agencies have no full autonomy and are subject to ministerial control which limits their ability to function and therefore cannot effectively control anti-competitive practices.\textsuperscript{170}

\begin{quote}
\textsuperscript{164}Ibid S.4 and S.56.
\textsuperscript{165}This section prohibits abuse of dominant position, cartels and anticompetitive mergers.
\textsuperscript{166}This raises questions such as; what is dominant firm? What amounts to cartels? Who determines anticompetitive merger? All these questions would be answered by modern law dealing specifically with competition, for example the South African Competition Act describes dominant firms under s. 7 and mergers under S.12. Furthermore competition law is an enormous subject that can’t be comprehended in just provision of law hence the difficulties in implementation.
\textsuperscript{167}The rationale for price control arises out of the fear that if prices are left to market forces the firms through anticompetitive practices may exploit farmers. See Lipimile G., supra note 83 at 196.
\textsuperscript{169}Ibid S. 41. Although ‘may’ is used, as matter of practice airlines apply to the authority for approval of flight fares, in effect prices are regulated.
\textsuperscript{170}Although there body corporate there are no provisions in their respective Acts that guarantee their independence as a Competitive Law regime would. For example S.20 of the South African Competition Act guarantees independency of the Competition Commission.
\end{quote}
3.3 Market Distortion Practices in Uganda and the ineffectiveness of the current legal regime. ‘The really big distortions in competition are in poor countries.’

3.3.1 Government distortions

Government distortions inform of tax holidays given to foreign investors at the expense of local companies. As of June 2011, 50 foreign companies had tax exemptions one of which is a Kenyan based company called BIDCO oil palm which has been exempted for twenty five years. As a result, local manufactures have questioned the criteria under which they are given because they benefit multilaterals and suffocate the development of small medium scale enterprises.

3.3.2 Cartel formation

Theoretically, trade liberalisation policies eliminated price controls in Uganda. However, the absence of competition law regime undermines the adherence to the achievement of market determined prices. As a result restrictive trade practices are rampant and unchallenged as shown below:

With regards to the restrictive agreements in the petroleum industry, Uganda imports all of its petroleum products through the usage of ports belonging to her regional neighbors. This industry was privatised in 1994 and is currently dominated by shell Uganda ltd, and total Uganda ltd. There is circumstantial evidence of cartel formation in the local petroleum

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172 This is done under the justification of attracting foreign investment but it has also been argued that multinationals look at political stability and good governance as an incentive. See ‘Dealing with Tax Holidays In the Face of Narrow Tax Base.’ Available at http://www.trademarks.org, accessed on 12 January, 2012.
173 Ibid.
174 Ibid, Gideon B. the chairman of the private sector foundation lamented that ‘incentives are going to the wrong people why would you give an incentive to company that is starting in Uganda and yet there existing companies that need help?’
176 85 percent of the products come in through Kenya and 15 percent through Tanzania. See energy policy
177 Such liberalisation gives oil companies the autonomy to set prices. For example in Malawi after the liberalisation of the oil sector companies formed cartel called Petroleum Importers that colluded and fixed prices. Fortunately Malawi’s competition was able to sanction the cartel because they had competition law. See Hassan Q and Lipimile G.(eds.), supra note 52 at 56.
178 Shell’s market share is about 40 percent, total 40 percent having bought Caltex and there other players like GAPCO 10 percent, and the rest shared by Petrol, Kobil, City Oil, Gaz, Hass etc.
industry; and the Ugandan opposition has often claimed that the high cost of fuel is a result of cartels in the government.\textsuperscript{179} Furthermore parliament has continuously requested government to investigate allegations of oil cartels.\textsuperscript{180} It is also factual that prices of oil products are not only uniform but also increase in the same proportion as the increases of prices on the world markets. This is not accidental and may be concluded that the owners of the oil companies hold meetings to deliberate market prices. The observer newspaper has commented in its welcoming message for 2012 that ‘... worrying for the petroleum industry is the growing impatience among the public over the fuel prices. Hidden in this debate is the idea that many petroleum stations are owned by cartel of businessmen who are either politicians themselves or have strong political backing’.\textsuperscript{181}

Legally the Petroleum Supply Act\textsuperscript{182} would have been an affective avenue to control this practice. The Act provides that, 'participants in the supply chain shall not form cartels or attempt to control prices or create artificial shortages of products or engage in any other restrictive trade practices or any other acts or commissions contrary to the principles of competition...'\textsuperscript{183} A question then arises as to why cartels exist in the sector. Under section 30 (4) the responsibility of monitoring its implementation is given to single commissioner in the ministry of Energy. It is practically impossible for single person to monitor such an important sector of the economy.\textsuperscript{184} It is therefore not surprising that no single corporation has ever been prosecuted or investigated for cartel formation.\textsuperscript{185} The existence of similar cartels in Kenya\textsuperscript{186} further worsens the situation because Uganda imports ninety percent of her fuel through her east African neighbor. Moreover,

\textsuperscript{179} See ‘Uganda opposition leader claims high prices due to cartels’. Mpunga M., an opposition Member of Parliament stated that the high fuel prices are because of mafias in government that are part of regional cartel. See Daily Monitor 4 August, 2011. Available at www.africanrio.com, accessed on 18 December 2011. Also see wwwmonitor.co.ug


\textsuperscript{184} The giving of such enormous responsibility to single individual raises the government’s commitment to stop fuel cartels and strengthens the belief that government officials are part of the cartels. Furthermore competition law is an enormous subject that can’t be comprehended in just provision of law hence the difficulties in implementation.

\textsuperscript{185} Ugandan government ministers have denied knowledge of the existence of fuel cartels and promised to investigate them. See New Vision supra note 180.

\textsuperscript{186} Evidence of cartel formation in Kenya may be seen from the prosecutions done by the Kenyan monopolies and competition commission. Egoli and Sasol fuel companies were convicted of cartel formation. See ‘Petroleum industry in hot seat’. Available at www.biz.community.co.ke, accessed on 25 December, 2011.
because of the regional trade liberalisation the Ugandan economy is prone to spillover effects from her neighbors. Uganda therefore needs competition regime to control cartel formation.

Another example of price fixing is in the sugar industry; surprisingly a cabinet minister is alleged to be behind the cartel. The cartel was alleged to be importing sugar to Uganda through Kenya that is unfit for consumption. On application to court by the Kenyan authorities to destroy the sugar containers at Mombasa, the media reported that ‘... that the cartel had planned to show three lories of sugar mixed with soil to the media to indicate that they had destroyed the same...’ Following a public outcry on the high cost of sugar, the Ugandan president issued directive barring his party members from dealing in sugar but General Otafire, the minister behind the cartel, defied the directive saying that ‘the head of state has no control over his private business’. Indeed in absence of an appropriate law to investigate and control this cartel, the president has no business in the general’s activity although such activities are illegal in countries that have competitive legal regimes.

Market sharing agreements have also been reported among multilateral soft drink companies. Coca Cola and Pepsi Cola bought the two leading mineral water companies, a measure that deprived consumers of choice of products in the soft drink industry. These purchases were intended to reduce competition in the mineral water industry which had corroded the soda industry. This sector has also been involved in vertical trade practices by dictating

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187 According to the OECD, this is an agreement between sellers to rise or fix prices in order to restrict inter-firm competition and earn higher profits. See http://stats.oecd.org/glossary, accessed on 4 January, 2012.
188 The Ugandan media reported that justice minister General Kahinda Otafire is behind a sugar cartel prompting the high cost of sugar in the country. See Daily Monitor supra note 179.
190 ‘Otafire defies Museveni on Sugar’ Daily Monitor supra note 179.
191 Ibid.
192 For example it is illegal under S.4 of the Competition Act of South Africa and under the Competition Bill of Uganda; price fixing is described as anticompetitive agreement in S.3.
193 Scholars point out that most of these multilateral companies abused their power in developing countries after the introduction of market reforms in countries without competition laws to the detriment of consumers. See Lipimile G., supra note 83 at 198-199.
194 In such scenario with two fairly large soft drink suppliers and none controlling the market (oligopoly), the market is naturally distorted as result of them acquiring the two leading mineral water industry.
195 It is also reported that this purchase was inspired by the fact that the market for soft drinks is affected by the availability of near substitutes. See The Monitor 20 June, 2006. Available at http://allafrica.com/stories/200606200036.html, accessed on 15 January, 2012. Also see Competition and Consumer Trade scenario in Uganda. Consumer Education Trust 22-23. Available at http://siteresources.worldbank.org/, accessed 14 December, 2011.
recommended prices for retailers which is equivalent to resale price maintenance.\textsuperscript{197} These activities distort markets and reduce consumer choices but until a Competition Act is enacted, these currently legal practices, will continue unhindered.

In the agricultural sector cotton farmers have complained about price exploitation by middlemen. This year the Cotton Development Organisation an organisation that monitors the cotton industry fixed cotton prices at one thousand six hundred shillings although middlemen were buying cotton at one thousand shillings. Adnan Khan middle man justified the lower prices by saying that, ‘we had another meeting that agreed to further reduce the prices to one thousand shillings per kilogram for us to break even.’\textsuperscript{198} This price fixing limits incomes of rural farmers, thus increasing poverty levels.

3.4 Abuse of dominance

The issue of abuse of dominance has been seen in the telecommunications sector. MTN Uganda limited dominates the provision of mobile services while UTL dominates the provision of fixed lines.\textsuperscript{199} This sector is regulated by the UCC Act\textsuperscript{200} and the Communication (Fair Competition) Regulations 2005 which have the objective of promoting efficiency and competitiveness in the industry.\textsuperscript{201} Dominant firms have continuously charged high interconnection fees to discourage entry of new competitors in the market.\textsuperscript{202} Thus the East African Business Week reported that ‘the incumbent companies are quasi monopolies standing in the way of free and fair competition. Even if a new player comes in with state of the art service it makes it very hard to break into the

\textsuperscript{196} This refers to agreements between undertakings operating at different stages of the production and marketing chains.
\textsuperscript{197} Resale price maintenance is restriction on the prices of products to be charged by retail firms.
\textsuperscript{198} \textit{New Vision} supra note 180, also see, \url{http://allafrica.com/stories}, accessed on 24 January, 2012.
\textsuperscript{200} Uganda Communications Act herein referred to as UCC. This Act is governed by competition law principles in the communication sector. Available at \url{http://www.ultl.org/legis/consol_act/}, accessed on 2 February, 2012.
\textsuperscript{201} These are important competition law principles. See regulation 3 of the Communication (Fair Competition) Regulations (2005). Also see Alemu R., supra note 198 at 14.
\textsuperscript{202} Regulation 14 of the telecommunications (interconnection) regulations prohibits abuse of dominance while charging these fees. Available at \url{www.ucc.co.ug/regulatons/fairCompetitionRegulations}, accessed on 12 February, 2012.
However, to date, UCC has never prosecuted any service provider despite their acknowledging of the existence of the practice and the existence of the Communication (Fair Competition) regulations of 2005. In addition, Uganda has the fourth highest number of internet users and price wars have also been reported in this area. The ineffectiveness of UCC as regulator propagates the argument that perhaps a competition legal regime would be relevant in controlling the existing anti-competitive practices.

The Communication (Fair Competition) Regulations 2005 give exemptions to operators who conduct anticompetitive practices in public interest. However, 'public interest' is not defined which may lead to abuse. In contrast to Competition legal regime, investigations and decisions under the UCC Act are not conducted publically. On mergers, the regulations neither define, nor elaborate procedures for their control as modern competition policy would. Therefore there is no doubt that the increase in telecommunications competition justifies the need of a competition regime to adequately address these challenges.

3.5 Anti-competitive practices in utility sectors: From state to private monopolies

The electricity industry was liberalised in 2001. The rationale was to covert the sector into a commercially viable industry that will provide cheap power to consumers. The Electricity Act

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204 This is because UCC has adopted a non-interference policy, instead of promoting competition. See Alemu R., supra note 199 at 17.


206 Note that these regulations have competition principles that may be used to control anticompetitive practices.


208 As result of this incompetence commentators have argued that UCC has mandate that is too big to implement and thus the need for competition law. See Ntahireki B: 'Is UCC Really Carrying out its Mandate in the Telecommunications industry.' Available at [www.sebalulule.co.ug/ucc](http://www.sebalulule.co.ug/ucc), accessed on 14 January, 2012. Also see Alemu R., supra note 199 at 17.

209 Regulation 8 and 9. However, unlike EU law that forbid anticompetitive agreements, these regulations also grant exceptions to abuse of dominance and anticompetitive mergers to both individual and block exemptions.

210 Regulation 6(5) of The Communication (Fair Competition) Regulations 2005. The regulations just mention that change in ownership is anticompetitive if it affects the relevant market with no mention or definition of merger. Also see Alemu R., supra note 199 at 16.

211 As a result of this incompetence commentators have argued that UCC has mandate that is too big to implement and thus the need for competition law. See Ntahireki B: 'Is UCC Really Carrying out its Mandate in the Telecommunications industry.' Available at [www.sebalulule.co.ug/ucc](http://www.sebalulule.co.ug/ucc), accessed on 14 January, 2012. Also see Alemu R., supra note 199 at 17.

212 The major aim of electricity liberalisation is introduction of competition in electricity generation, increasing consumer choices and abolishing the government monopolies in the sector.
divided the state Uganda Electricity Board into UEGCL, UETCL and UEDCL. The UEGCL was given the mandate of generating power from the existing dams; however, Eskom later got twenty year concession to perform this role. It was also given the exclusive rights of purchasing power from both UEGCL and private power generating companies which power was to be sold to consumers by UEDCL. In a surprise twist, the government later sold its consumer distribution rights in UEDCL to Umeme; a joint venture of Globeleq and Eskom.

This means that Eskom generates power and sells it to the government company UEGCL at a profit which in turn sells it to Umeme (company partly owned by Eskom), and Umeme later sells it to consumers again for profit. No wonder; Uganda’s power tariff is not only the highest in East Africa but second to Sweden in the world despite the fact that Uganda exports power to the entire east African region. The question as to how exported power becomes cheaper than its country of origin points to nothing other than abuse of dominance and price fixing. Furthermore, the high tariffs are subsidised by government to a tune of 212 billion shillings annually. This has led the public to question who gains from the high tariffs. As a result of public outcry the minister of energy has requested police to investigate the manipulation of power tariffs but to no avail. This has increased production costs because Ugandan manufactures

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213 The government’s electricity company was incurring losses and as result government wanted to privatise it. See Kasibayo K., ‘To What Extent may Uganda Learn from Previous Mistakes of California and UK Electricity Liberalisation?’ University of Dundee ( ) at 2. Available at www.dundee.ac.uk, accessed on 17 January, 2012.
214 Uganda Electricity Generation Company Limited herein referred to as UEGCL. Although originally owned by government Eskom bought twenty year concession and currently generates power from all governments’ dams for profit.
215 Uganda Electricity Transmission Company Limited herein referred to as UETCL. A company wholly owned by government.
216 Uganda Electricity Distribution Company Limited here in referred to as UEDCL. Although originally owned by government Umeme acquired a twenty year concession with exclusive power distribution rights.
217 This is about 300MW and 98 percent of Uganda’s power. See Kasibayo K., supra note 213 at 4.
219 These include Aggreko, Industrial Promotion Services Limited, Kilembe mines and Kasese cobalt companies.
221 A perfect example of public monopoly turned into private monopoly.
223 While Sweden is developed country Uganda is among the least developed countries in the world. It is therefore ironical of how cost of power may be that expensive to poor consumers of a third world country.
cannot compete with their counterparts in the EAC who have cheaper power rates and producing under similar EAC tariffs.226

The available regulatory body is the Electricity Regulatory Authority;227 which in performance of its functions is mandated 'to promote competition in the generation and marketing of electricity' and 'ensure fair balance of the interests of consumers'.228 However, the Electricity Act 229 neither stipulates how the regulatory body shall control competition nor does it prohibit abuse of dominance and cartel formation. As far as the Act is concerned, the abuse of dominance and cartel formation in the sector are legal because they are not prohibited!230

The railway sector; this was liberalised in 2006 through a concession that was given to Rift Valley Railways. It was thought that the new investors would refurbish the infrastructure leading to reduced transportation costs. This would in turn open up the country to inter regional trade. To date the railway network is not functional despite of it being the countries cheapest export and import route to the coast. This has increased the importation costs that are transferred to consumers. Ironically the government has failed to intervene and make the concessionaries accountable. The failure of the concessionaries to fulfill their initial obligation implies that they cannot be trusted to protect consumers that rely on such an important route for commodities. Furthermore government did not formulate any laws for controlling such monopoly abuses. Therefore there is a need for competition policy to control utility monopolies.

3.6 Merger

Merger control regulations enable countries to verify if the proposed merger will harm their economy. However, by Uganda not having the appropriate legislation it deprived itself of the authority to challenge domestic and foreign mergers as illustrated below:

226 Ibid, 'ERA grilled for Raising Power Tariffs.'
228 Ibid S.11.
229 Ibid Chapter 145.
230 No studies have been made to estimate losses that Uganda has got as result of privatisation of the power sector. However, by comparison similar studies in Brazil estimate that the country lost up to $500million as result of cartel behavior in privatisation of the government power distribution programme. Therefore how much the Ugandan consumer is losing is of utmost interest. See Kububa A.J., in 'Anti-competitive Practices and Their Adverse Effects on Consumer Welfare: The Zimbabwean Experience' at 96. Available at www.oecd.org/officialdocuments , accessed on 1 January, 2012.
In 1997 South African breweries entered into joint venture with Nile breweries buying 40 percent of the company and later on acquiring majority stake of 93 percent in 2001. This merger had the objective of limiting competition in the beer market in Uganda of which Nile breweries had a 57 percent market share.\textsuperscript{231} The eventual impact of this merger is not known because no studies have been done on the issue. However, it is certain that South African breweries have been engaged in market distortions in similar mergers in other African countries. The difference with the Ugandan scenario being that there was no law to assess the impacts of the merger.

In the EAC, Tanzania breweries\textsuperscript{232} and Kenya breweries\textsuperscript{233} engaged in cross border mergers and market sharing that limited regional competition amongst them.\textsuperscript{234} Tanzania breweries acquired Kenya breweries factory in Tanzania in exchange for Kenya breweries acquisition of factory belonging to South African breweries in Kenya, and resulting in 90 percent control of their respective national markets. Before the market sharing arrangements there was stiff beer competition in Kenya resulting into wider choices, improved quality and cheap beer.\textsuperscript{235} The managing director for South African breweries in response to the competition said, ‘prices will no longer be determined by company accountants but by the beer drinkers.’\textsuperscript{236} Justifying the merger external affairs director of East African Breweries said ‘castle was losing money in Kenya and we were losing money in Kibo’ .\textsuperscript{237} Both mergers were originally rejected in Kenya and Tanzania by the respective competition commissions.\textsuperscript{238} It is no doubt that this merger lessened competition in the EAC and had potential effects for the Ugandan economy because of the regional zero tariffs among EAC countries. However, in absence of notification requirement

\textsuperscript{231} It is reported that Nile breweries entered the merger to restrict competition from foreign brands as result of the government’s lift of the ban on importation of beer. See ‘SABI Enters Ugandan Beer Market’ \textit{New Vision} supra note 180, 30 October, 1997.

\textsuperscript{232} A company largely owned by South African breweries.

\textsuperscript{233} A company owned by East African breweries.


\textsuperscript{235} Ibid.

\textsuperscript{236} See Evenett S. and Jenny F., supra note 234. Also see Global information Network, Nairobi November 1998.

\textsuperscript{237} Ibid.

\textsuperscript{238} On appeal to the ministers in respective countries they were later accepted after the Tanzania Fair Trade commission worries of job losses were addressed. However, this was due to political pressure because the merger committed the following anticompetitive practices; hindering the sale, supply of goods and services, geographical market sharing and inducing a competitor to sell its assets and merge. See the East African Standard 14 May, 2002. Also see Mutabigwa A., deputy secretary general of the EAC ‘Should the EAC regulate Competition?’ Available at \url{www.eac.int/news}, accessed on 14 February, 2012.
under Ugandan laws, no actual investigations were carried out to assess its impact on the economy.

Similarly, the formation of East African Cement Producers Association mirrors the Egyptian cement cartel and should send alarming bells to Uganda. The EACPA was formed in 2001 and consists of cement producers of Tanzania, Kenya and Uganda. Lafarge has market share of over seventy percent in the region and according to the French ministry of finance, the objective of EACPA is to lobby the African governments so that they take appropriate measures to fight cement imports from Egypt. This is similar to the Egyptian scenario where transnational multilateral companies led by Lafarge lowered their prices below breakeven point to outcompete domestic firms. Lafarge was also found guilty of cartelisation in the Indian cement industry through a cement producers association that raised cement prices. A report of the effect of anticompetitive practices in cement industry in Zimbabwe showed that they affect consumers by aggravating increase of prices on the market and through industrial usages like public constructions. Unlike India and just like Egypt, Uganda will be unable to stop any predatory pricing that will arise out of the cement association because it has no competition legal regime leading to consumer harm.

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239 Here in referred to as EACPA.
240 These are Mbeya Cement Company owned by Lafarge and having market share of 44 percent, Tanga Cement Company having 11 percent of market share and Tanzania Portland Cement having 38 percent of the market share.
241 These consist of Bamburi Cement Company owned by Lafarge and having market share of 60 percent, East African Portland Cement owned by Lafarge with market share of 34 percent, Arthi River Mining owned by Bamburi group and Lafarge having market share of 6 percent. See Evenett S. and Jenny F., supra note 234.
242 These are Bamburi Cement Company owned by Lafarge with market share of 60 percent and Tororo Cement Company with market share of 45 percent. Ibid.
243 Most of Lafarge’s profits are from emerging economies without effective competition regulatory regimes this raises questions of the company committing anticompetitive practices. Why does it perform so well only in such economies? Ibid.
244 Lafarge owned 25 percent of the market in Egypt. Ibid.
246 No studies are available on this in EAC therefore Zimbabwe being a developing country just like Uganda would have comparable effects of such cartels to consumers. See ‘Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe’ (2006), unpublished quoted in Kububa A.J., supra note 230.
247 Kububa A.J., supra note 230 at 119.
248 Kenya and Tanzania would regulate such abuses because they have competition law regimes.
A study on the impact of merger control in Zimbabwe showed that competition policy proved to be major benefits to consumers and the economy. These benefits included; ‘continued availability of goods and services’ on the market, generation of economies of scale, reduction of management inefficiencies, facilitation of research and development, employment creation and increase in government exports'. Therefore Uganda needs competition legislation to control anticompetitive practices of local subsidiaries of multinational corporations merging with those of the industrialised world and to achieve economic benefits from the existence of such regime.

3.7 Globalisation

As a result of globalisation, there is an increase in anticompetitive practices located beyond national and regional boarders. These are normally done through mergers with multinational corporations in domestic countries. A case in point is the Coca Cola Schweppes merger of 1998. Although it had international implications, the absence of merger control in the EAC and Uganda in particular prevented it from being assessed. Research has also shown that transnational companies find it easier to commit anti-competitive practices in countries like Uganda without competition policy legislation. Although it is difficult to control international cartels, the presence of competition regimes may act as deterrence of firms engaging in international cartel behavior.

As shown above; anticompetitive practices increase costs of commodities to consumers, create output restrictions and harm economic efficiency. Just like other developing countries cartels are

249 No studies exist for Uganda. However, by comparison Zimbabwe is developing country like Uganda its success is an incentive for formulation of competition regime in Uganda.

250 See the Rothmans Pall Wall and BAT merger.

251 See ‘Report on Study on Socio-Economic Impact of Implementation of Competition Policy and Law in Zimbabwe’ (2006), unpublished quoted in Kububa A.J., supra note 230. Also see Coca Cola and Cadbury Schweppes merger and Rothmans Pall Wall and BAT merger.

252 In the COMESA and SADC region it is only Zimbabwe and Zambia that received notifications because they were the only countries with competition legislation. In both of these countries the merger was approved with certain conditions that aimed at enhancing competition, increase in job creation and investment. See Lipimile G., supra note 83 at 186.


254 Lipimile G., supra note 83 at 198.
the predominant anti-competitive practices in Uganda.\textsuperscript{255} Also, having a competition policy and law will not only benefit Uganda in controlling anti-competitive practices but will also compliment Uganda’s development policies as discussed below.

3.8 The Relevance of a Competition Policy and Law to the Social and Economic Policies of Uganda

3.8.1 Competition Policy and Trade Liberalization

As discussed earlier, Uganda’s trade liberalisation policies have reduced both domestic and regional trade barriers by lowering tariffs and encouraging export oriented strategies.\textsuperscript{256} By opening up her boarders Uganda increased its trade competitiveness in the EAC\textsuperscript{257} which has increased regional trade and pressure on the local firms to be productive efficient. This may in future lead to high quality low priced goods for both regional and domestic consumers. However, the absence of competition policy may also attempt firms to engage in multinational anticompetitive practices that distort Uganda’s market\textsuperscript{258} leading to not only to higher cost of commodities\textsuperscript{259} but also reducing the potential of local firms to export to the liberalised regional market.\textsuperscript{260}

Also the EAC is in the process of signing free trade agreements with America and the EU. This means the opening up of Uganda’s boarders to the advanced more efficient firms of the west. The question then becomes not whether Uganda’s firms may compete with these firms but if its economy is protected from the extraterrestrial effects arising from offshore anticompetitive

\textsuperscript{255} Hassan Q and Lipimile G.(eds.), supra note 52 pint out that cartels are the most predominant forms of anticompetitive practices in developing countries.
\textsuperscript{256} See introduction to Uganda’s social and economic policies at the introduction of this theses.
\textsuperscript{257} The liberalisation of international trade allows firms to export their horizon to regional markets rather than depending on domestic markets. By implication the Ugandan market has been opened up to competition from other firms in the EAC. See UNCTAD secretariat ‘Objectives of Competition Law and Policy: Towards a Coherent Strategy for Promoting Competition and Development.’ Available at http://www.ifc.org/, accessed on 12 January, 2012.
\textsuperscript{258} Ibid, research has shown that foreign firms feel freer to engage in multinational anticompetitive practices in countries without competition legislation. Therefore Uganda without competition policy will be affected most in the EAC. For example see also market distortion practices earlier discussed involving the beer, cement and soft drinks market. See ‘Objectives of Competition Law and Policy: Towards a Coherent Strategy for Promoting Competition and Development.’
\textsuperscript{259} Also as shown earlier Uganda imports most of her intermediate goods from Kenya therefore increase in regional anticompetitive practices without a law to control them will definitely lead to high cost of commodities to consumers and the economy.
\textsuperscript{260} Such anticompetitive practices may be trade barriers than even tariffs therefore unless anticompetitive practices are controled trade liberalisation polices aimed at increasing exports in the regional market cannot be realized.
practices that may arise.\textsuperscript{261} It therefore needs no mention that having a competition policy will enable Uganda enjoy the benefits of global trade liberalization.\textsuperscript{262}

### 3.8.2 Competition Policy and Privatisation

Uganda privatised most of the key sectors in her economy with the aim of boosting government revenues to improve productivity and efficiency in former public companies. However, it is now accepted by economists that 'it is not ownership that determines economic performance but the degree of competition.'\textsuperscript{263} This quotation illustrates the complementary role of competition policy towards an effective privatisation policy.\textsuperscript{264} The Ugandan privatisation process has led to the creation of private monopolies in the railway and power sectors.\textsuperscript{265} Moreover, the bitter irony is that there is nothing illegal about firms engaging in cartel formation and abuses of dominancy. This is so despite the harm caused by anticompetitive practices to consumers and the economy.\textsuperscript{266} Having competition legislation will solve this anomaly.

### 3.9 Competition Policy and Investment

Research has shown that foreign firms are most likely to invest in developing countries with competition legislation.\textsuperscript{267} This is because competition policy provides foreign investors with level playing field and creates stable and predictable markets.\textsuperscript{268} A study by the Commission for Africa showed that competition policy directly affects investment because it affects costs, risks

\textsuperscript{261} In other words how will Uganda regulate competition from the EU without competition law?
\textsuperscript{262} Uganda's export promotion strategies assume fair competition in the liberalised regional markets and therefore if its exporters are not protected from anticompetitive practices its development strategy will be mirage of itself.
\textsuperscript{263} Lipimile G., supra note 83 at 178.
\textsuperscript{264} Ibid. This is because 'for the privatisation authority it doesn't matter to whom the private company is sold or whether such sale will lead to concentration or will create or strengthen a dominant position whereas for competition the important question is whether such sale shall impede competition in the market...'
\textsuperscript{265} This discussion shows circumstantial evidence of abuse of dominancy in power and railway sectors. Cartel formation in cement, sugar and petroleum sectors.
\textsuperscript{266} Studies have shown that the success of most liberalisation programs in Europe in the 1980s-1990s couldn't occur without an effective competition policy.
\textsuperscript{268} However, as shown earlier, Uganda's investment policy has discriminated against local investors therefore a competition policy will enable them to not only have equal opportunities with their counterparts but also provide legal basis for them to launch their complaints.
and barriers to competition.\textsuperscript{269} Thus the implementation of competition regime in Tanzania has led to increase in foreign investments.\textsuperscript{270} This implies an increase in the regional export potential of Uganda’s economic rival.\textsuperscript{271} Worse still, although Uganda’s investment policy aims at attracting foreign capital to boost the industrial base such foreign direct investments without regulation may lead to market distortions that retard developmental projects.\textsuperscript{272} Therefore without competition law and policy Uganda’s aspiration of successful export strategies is wishful thinking because other EAC countries are a better alternative to the attraction of capital that is essential for industrialisation.\textsuperscript{273} In order to gain from her investment policy, Uganda needs a competition policy to regulate the opened up regional EAC market, increase certainty,\textsuperscript{274} attract capital and improve efficiency in direct investments.

3.10 Competition Policy and Industrialisation

Uganda’s industrial policy is desirous of increasing its industrial base to be able to compete and export in the liberalised regional market. Therefore competition policy may be relevant tool of protecting infant home industries against anticompetitive practices of big firms thus enhancing their productivity and growth. For instance the 2005 African research found that ‘robust competition laws and policies with strong institutions to enforce them are vital to improving productivity and to promote innovation and better practices.’\textsuperscript{275} Scholars also point out that the strengthening of competition law has a correlation to the ability firms to earn export oriented profits and compete against imports in their jurisdiction. If Uganda’s industrial policy is to

\textsuperscript{269} See OECD Secretariat supra note 267.
\textsuperscript{270} In Tanzania it was found that ‘firm’s level of investments after the adoption and implementation of competition law was found higher than the pre competition period.’ See UNCTAD secretariat, ‘Objectives of competition law and policy: Towards a coherent strategy for promoting competition and development’. UNCTAD (2003) at 6. See Plessis L, et.al., supra note 87 at 13.
\textsuperscript{271} George Lipimile argues that foreign investors are likely to penetrate those markets where they are sure that competition legislation will protect their investments. See Lipimile G., supra note 83 at 180.
\textsuperscript{272} For example in anticompetitive multinational mergers that may lessen competition.
\textsuperscript{273} Scholars’ argue that when an investor is going to make decision between two alternatives a country with an effective competition policy and law will be favored. See UNCTAD secretariat, ‘Objectives of competition law and policy: Towards a coherent strategy for promoting competition and development’. UNCTAD (2003) at 5. UNCTAD secretariat, supra note 270 at 5.
\textsuperscript{274} Scholars argue that competition law increases business certainty which encourages development. See Preston J., "Implementing Competition Policy in Developing Countries: The Role of Donors, at 9. Available at www.businessenvironment.org, accessed on 2 February, 2012.
\textsuperscript{275} See OECD Secretariat supra note 267 at 48.
achieve its intended goals, the existence of an effective competition policy is vital for the achievement of these objectives.

3.11 Competition Policy and the Poverty Growth Strategies of Uganda

Competition policy promotes the efficient usage of scarce resources which is ideal for developing country like Uganda. Efficiency leads increase in innovation, distribution and technologies the essential ingredients of economic growth. Such economic growth will increase Uganda’s competitiveness in the EAC and reduce imports from her industrialised neighbors. Furthermore scholars argue that the existence of a competition policy in domestic markets also enhances international industrial integration.

Uganda’s Poverty Eradication Plan is geared towards eradication of poverty by increasing incomes, standard of living and infrastructural services to the public. However, the existence of anticompetitive practices in essential commodities increases the cost of living and poverty. The existence of international cartels in cement industry, a vital construction ingredient, increases the government’s cost of providing infrastructure such as roads and hospitals. This infrastructure is essential for attracting investment increasing the countries competitiveness in the region. Competition regime also increases the effectiveness of government procurement through its control of collusive tendering. This leads to the efficient use of the limited government funds in the provision of infrastructural services. The affordability of consumer goods and the effective provision of public infrastructure by the government contribute to the welfare of the poor. However, this is only achievable if competition policy is in place to complement the PEAP.

The PEAP also advocates for financing of marginalised groups and small manufacturing enterprises to increase their effectiveness in job creation and poverty reduction. However, in

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278 In 2011 cartels in construction industry were estimated to cause twenty nine billion Rand loss in South Africa. No similar studies have been made in Uganda but if this could happen in country with competition policy like South Africa what of Uganda? See the ‘competition commission invites construction forms to settle.’ Available at www.compcom.co.za, accessed on 5 February, 2012.
279 These create jobs, reduce income inequalities and develop pool of skills for future industrialisation. See Lipimile G., supra note 83 at 182.
absence of competition regime the effectiveness of this policy is questionable because of the
domestic and regional anticompetitive practices that increase the marginalisation of these groups.
Furthermore these small manufacturing enterprises cannot withstand unfair competition from
multinational companies. Having competition policy will not only control trade abuses but will
also give specific attention to the specific needs of these groups. This minimises job losses and protects these sectors.

Eleanor Fox a re-known scholar also points out that competition policy may be used to address
poverty in developing countries and by implication; Uganda may use competition policy to
empower its economically disadvantaged groups. Similarly the usage of competition policy to
stop cartel activities on essential items reduces the extra consumer costs which will eventually
assist in eradication of poverty. Other scholars have also advocated for the use of competition
policy to address social concerns. That said, a policy on agriculture may enhance poverty
eradication as illustrated below.

3.12 Uganda's Policy for the Modernisation of Agriculture

The policy is geared towards increasing incomes for farmers by stabilising food prices and
increasing production for export. However, as discussed earlier, cartels may distort the
agricultural markets leading to lower prices for the farmers. Having a competition regime will

280 For example in south Africa the Competition Act provides that 'the purpose of this act is to promote and maintain
competition in the republic in order to ensure that small and medium sized enterprises have an equitable opportunity
to participate in the economy.' Ibid at 181.
281 However, the protection of inefficient small and medium enterprises may harm consumers Moreover, with no
guarantees that they will become effective in the long run but it is also important to point out that the deminis rule
limits the application of competition law to most of these marginalised groups. Ibid at 182.
282 She argues that there is direct link between competition and poverty eradication. This is done by freeing markets
that eventually reduces prices of essential commodities and by stopping anticompetitive practices. See Fox E.M.,
supra note 134. Also see Hassan Q and Lipimile G.(eds), supra note 52 at 137. This linkage of growth and poverty
eradication is further emphasised by the World Bank. See Preston J., supra note 274.
283 Plessis L. et. al., supra note 87 at 15.
284 Alvarez. A.M., 'Anti-Competitive practices and the Attainment of the Millennium Development Goals:
Implications for Competition Law Enforcement and Inter Agency Cooperation. UNCTAD publications of Trade and
Development 2007 at 4. Also see Plessis L. et. al., supra note 87 at 16.
285 It may sometimes lead to high food prices which is detrimental to consumers. Research has also shown that rising
food prices have pushed about one hundred people in poverty therefore competition law may also be used to curb
these prices and reduce poverty levels. See UN Millennium Development Goals Report 2011. Available at
increase the effectiveness of the agricultural policy by limiting trade barriers, allowing the purchase of inputs at lower prices and increase the country’s export potential within the EAC.\textsuperscript{286} As explained above such a policy may result in reduction of poverty through job creation. However, jobs cannot be created if there are anti-competitive practices that question the effectiveness of the above policies. Therefore it is crystal clear that competition regime will complement the country’s social economic aspirations to eradicate poverty. This cannot be further explained other than the words of George L. and Hassan Q who wrote that, ‘in the context of competition policy, it is essential to hypothesize that any poverty alleviation efforts have to create wealth (through efficiencies), create jobs (through new entry), and or reduce prices (through competition).\textsuperscript{287} That said, the next chapter discusses whether the regional competition policy and law can fill the void left by domestic legislation.

\textsuperscript{286} Research has shown that farmers benefit generally in competitive markets. See Preston J., supra note 274.
\textsuperscript{287} Hassan Q and Lipimile G. (eds.), supra note 52 at 136.
CHAPTER IV: THE REGIONAL EAST AFRICAN COMPETITION POLICY AND LAW: IN ABSENCE OF DOMESTIC COMPETITION POLICY CAN IT PROTECT UGANDA FROM DOMESTIC AND INTERNATIONAL ANTICOMPETITIVE PRACTICES?

In the previous chapter I showed that the current legal structure in Uganda cannot protect it against domestic and international anticompetitive practices without a competition regime. This chapter discusses whether the regional East African Competition Act may protect Uganda from the aforementioned practices. This discussion will enable us to know if the existing regional competition policy makes a domestic competition regime irrelevant.

4.1 Introduction to EAC Competition Policy and Law

Scholars point out that the main aim of competition law and policy in free trade areas is to make sure that the benefits of trade liberalisation of intra-regional trade are not frustrated by anticompetitive conducts. To this end the EAC put in place completion policy and law to regulate trade within the region. Their main elements of the competition policy include the following: provisions emphasising the adoption and application of competition policy and law in the EAC, provisions advocating for cooperation between the EAC and global competition bodies and provisions for fairness and transparency among member states in application of competition law. The EAC competition act generally contains several provisions that prohibit


289 For instance the competition policy provides that it should be established at the regional EAC level (principle of supra nationality). This was realised with the enacting of the Competition Act of 2006. This policy is available in Njoroge. P. M., 'Regional Cooperation on Competition Policy and Law- The East African Community experience.' Available at http://www.unctad.org/, accessed on 17 November, 2011.

290 For instance the competition policy provides that partner states 'should cooperate in implementation of competition policy (duty of royalty)' and 'Partner states competition policy should be brought in line with the EAC.' Ibid.

291 For instance competition policy provides that it 'should be translated into legal rules that meet the requirements of transparency and legal certainty; this means that scope of prohibitions should be defined. (Rule of law)' Ibid.

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anti-competitive practices such as abuse of dominant positions,\textsuperscript{292} regulation of mergers and acquisitions.\textsuperscript{293}

It also prohibits market collusions\textsuperscript{294} and misleading, deceptive, unsafe products for consumers.\textsuperscript{295} The Act also provides for the establishment of regional Competition Authority that is only subject to review by the East African Court of Justice.\textsuperscript{296} The Competition Authority has wide powers to enforce the act.\textsuperscript{297}

4.2 Advantages of a Regional Competition Regime to the EAC

The regional competition policy will have a more objective approach to competition issues than national competition regimes that may knowingly or unknowingly be nationalistic.\textsuperscript{298} Therefore such an approach will ensure the effective controlling of anticompetitive practices that hinder the benefits of trade liberalisation.

Also the regional competition policy has greater extraterritorial influence in terms of economical size and population. Therefore this enables the region to have greater negotiation power with the developed countries on issues like market access clauses\textsuperscript{299} and regulating of export cartels.\textsuperscript{300}

The importance of this regional approach to competition issues cannot be emphasised more than the words of the EU commissioner Mario Monti, he said that ‘one of the reasons for the success
of the US/EU cooperation in the field of competition policy is sometimes over looked, the EU and the US carry comparable weight in the terms of global enforcement of competition law because when it comes to the scrutiny of mergers Europe acts as one not fifteen (soon 25)\(^{301}\)

4.3 Shortfalls of the EAC Competition Policy; Why Uganda Still Needs Competition Regime

However, despite the above advantages of the regional competition regime, Uganda still needs a national competition policy to effectively protect its economy from domestic and international anticompetitive practices. This is because of the existing legal and practical weaknesses of the EAC competition regime. Therefore to answer the question as to whether the EAC Act protects Uganda; I discuss it from four perspectives namely; the wide scope of the anticompetitive provisions, its ability to protect Uganda from domestic anticompetitive conducts that have no crossover effects, its ability to protect Uganda extraterritorially, and its ability to protect Uganda from regional crossover effects.\(^{302}\) These issues are addressed in the next sections.

4.4 Can the EAC Competition Act protect Uganda from Domestic Anti-Competitive Practices Arising From and Affecting only Uganda?

Section 4 (1) of the Uganda EAC Competition Act, states that ‘this Act shall apply to all economic activities and sectors having cross border effects.’ This implies that the act cannot apply to anticompetitive practices originating from Uganda and affecting only Uganda.\(^{303}\) Uganda therefore needs a domestic law to protect it from anticompetitive practices that have no cross border effects.

4.5 Can the EAC Competition Act Protect Uganda from Anticompetitive Practices outside the Common Market but Affecting Uganda (can it Act Extraterritorially)?\(^{304}\)


\(^{302}\) However, I caution that it is difficult to adequately assess the effectiveness of the EAC law when it is not yet operational.

\(^{303}\) The act will only be relevant if the effects of these anti-competitive conducts are Trans regional.

Section 5 (3) states that 'any concerted practice by undertakings restricting exports to or imports from foreign countries is prohibited, if it is intended to have anti-competitive effects on the relevant market within the community or access of the community undertakings to exports or imports'. The language of this article shows that the Act may apply extraterritorially and therefore it may be used to protect Uganda from global anticompetitive practices. However, as mentioned earlier the EAC Act is not operational therefore in its absence Uganda needs a domestic competition regime to fill this gap. It is noteworthy that usage of extraterritorial provisions by third world countries against multinational companies of donor agencies may be difficult without cooperation from the developed countries.

4.6 Can the EAC Competition Act Protect Uganda from Cross-Border Regional Anti-Competitive Effects?

Section 4 of the Act applies to all cross border effects and therefore it may protect Uganda from regional anticompetitive spillover effects. However, the Act is not yet operational because some states have not yet put in place competition regimes. Therefore Uganda needs a domestic competition regime to protect itself not only from regional anticompetitive spillover effects but also to operationalise the Act. However, although theoretically the EAC Competition regime...
protects Uganda from regional and international anti-competitive effects, it has general limitations that hinder its effectiveness.

4.7 Limitations of the EAC Competition Act

Section 4 (3) of the EAC Competition Act has an exemption to its applicability. It states that 'this act shall not apply to restraints on competition imposed by and resulting from partner states regulation of specific sectors or industries to the extent that the anti-competitive conduct is required by such regulation within their own jurisdiction.' Decision making at the regional level should not have wider exemptions from anticompetitive rules in order to encourage free trade within the free trade area. Since all the regional countries are competing for attraction of foreign investments to their economies this exception may be easily abused under the disguise of industrialisation. Therefore this provision does not deter national countries from engaging in anti-competitive practices. As such the Ugandan economy will be prone to anticompetitive effects arising out of the usage of this exception by her regional competitors. Therefore domestic law is relevant to help control the abuse of this provision and also act as deterrence against the government from distorting the Ugandan market.

The Act’s punitive measures are laughable and will not discourage multinational companies from committing anticompetitive practices. For example under section 5 (4) the maximum penalty for anti-competitive practice is one hundred thousand American dollars while the general penalty for an offence under the Act is fine of ten thousand dollars or imprisonment of not more than two year. These punishments are not effective deterrents against firms that commit anticompetitive

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309 This is so because the Act doesn’t specify the conditions under which states will use this exception. The regional states are given wide discretion.


practices.\footnote{312 Researchers believe that firm’s decision to engage in anti-competitive practices depends on its gains from such activities and the nature of sanctions it will face in case of prosecution. See Evenett S. J., supra note 308 at 8.} Uganda needs to control her destiny by having a domestic law that has serious punitive consequences for violators and in doing so the law becomes an effective deterrent.\footnote{313 Deterrent punishments should reflect percentages of companies’ annual turnovers. However, arrangements are under way to have these provisions of the EAC act amended. See EABC secretariat, East African Business Council briefing paper, issue 5/2010.}

The EAC Competition Act is more concerned with competitive markets and has no interests in public interest concerns such as; effects of mergers on employment, ability of small medium enterprises to compete or the ability of historically disadvantaged persons to be competitive.\footnote{314 There is no specific mentioning of using of competition policy to address historical injustices and special preferences to disadvantaged persons as domestic legislation usually does.} Thus there is need for a domestic competition regime for Uganda that recognises its special social challenges.

EAC countries have no commitment to the enforcement of the competition act. This argument is based on the fact that it is not operational five years after enactment.\footnote{315 The formation of a regional competition agency was step in the right direction as it gives these poor countries an opportunity to mobilise pool of resources to enable them regulate competition and also strengthens the deterrence effect.} This is coupled with other general limitations of regulating competition in third world countries that include; lack of enough funds to run the EAC Competition Authority, lack of human resources trained to handle competition issues, and lack of advocacy and education among the public.\footnote{316 ‘Should the EAC regulate Competition?’ Mutabigwa A., supra note 238. Also see Baker. M., supra note 299.} Therefore Uganda cannot hope for law that has not only legislative inefficiencies but may also never be implemented. Therefore there is need for domestic competition law to protect her economy from anti-competitive practices.

Even after it becomes operational, Uganda will still need a domestic competition regime to evaluate the effectiveness of competition policy at the regional level.\footnote{317 Evenett S. J., supra note 308.} Furthermore Uganda may wish to address anticompetitive issues that are wider in scope than those of the EAC Competition Act.\footnote{Ibid at 13.} To this end, a national competition regime is relevant for this use.

As discussed above, the EAC Competition Act is not effective in regulating all anticompetitive practices affecting Uganda. It principally concerns the controlling regional cross over effects and
has legal and practical challenges to effectively minimise anticompetitive practices. Therefore a domestic competition regime for Uganda will enable her control and act as deterrence for anticompetitive practices. That been said, the next chapter discusses the possible factors that need to be in place to achieve an effective domestic competition policy.

CHAPTER V: WAY FORWARD AND RECOMMENDATIONS NECESSARY FOR THE ACHIEVEMENT OF AN EFFECTIVE COMPETITION REGIME IN UGANDA

Having discussed the importance of competition policy and law in achieving the developmental goals of developing countries like Uganda; I concluded that the existing domestic and regional EAC laws cannot protect Uganda from the existing domestic and cross border anticompetitive practices. Furthermore I concluded that even if the regional competition policy later becomes operational, Uganda still needs domestic competition policy tailored for its conditions in order to complement its social economic policies that are anchored on market competition.

This chapter provides recommendations on the way forward for Uganda to enable it to have an effective domestic competition policy and law. Thereafter, the chapter concludes and proposes some changes to the competition Bill of 2004 in order to make it more effective.

5.1 Way Forward

1. Formulation of Competition Policy: This should aim to achieve economic efficiency and be also coherent with the other developmental policies of Uganda. Its emphasis should be aimed at solving the existing challenges such as poverty reduction, reducing unemployment levels, promoting the equal distribution of wealth among disadvantaged persons, export promotion, promotion of small medium enterprises and regional integration within the EAC.

2. Enacting of Competition Law that reflects Uganda's social concerns; although the current competition bill outlaws all forms of anticompetitive conducts, it has no reference to the national policies aimed at reducing poverty and increasing the standard of living of the nationals. Moreover it also has legal impediments. I recommend its enactment subject to the following amendments:
• Need for policy directives: the current competition bill has no policy directives which the legislation aims to achieve. Therefore there should be amendments to include policy directives reflecting the competition policy.\textsuperscript{319} These objectives should reflect Uganda’s social economic conditions as reflected in its development policies.

• Intellectual property: Section 43 (6) (b) legalises abuse of dominancy in intellectual property. This is so despite the willingness of the TRIPS agreement to allow countries to enact certain provisions in their national laws to protect them against monopolisation of intellectual property. This is ironical because just like other developing countries, Uganda needs technological advancements to meet its social economic challenges.

• Relationship between competition policy and law and other sector regulators: As discussed earlier various regulators exist in different sectors of the economy. Although Section 52 gives the competition bill over ridding effect against any other law, there is need for clarity and certainty on who is responsible for sanctioning anticompetitive conducts. I suggest that this should be reinforced with a mandatory provision that refers final decisions on all anticompetitive conducts to the competition authority. It is astonishing that Section 16 requires the competition commission not only to consult these sector regulators but also gives them discretions to make the final decisions. By implication unless this is amended the inefficiency of the sector regulators in controlling anticompetitive conducts will continue unhindered and supported by the law!

• Composition of the commission: Section 6(4) requires all members to be full time. However to solve the problem of lack of expertise this should be amended to allow the employment of part time experts that may not be able to work at the commission as full time members. Furthermore this section should also require the chairperson to be knowledgeable in competition law.

• Appeals: Under section 36, these matters are left to be decided by the High Court. However this Court is over burdened with cases and yet competition issues are of commercial nature and need special attention. Also the Court lacks the special

\textsuperscript{319} It’s difficult to access the suitability of this bill to Uganda’s social economic conditions because it lacks policy objectives.
expertise for competition law because of the requirement of economic analysis. For example it is reported that both Jamaica and Russia experienced enforcement difficulties because judges did not understand competition law.\(^{320}\) I suggest that special tribunal be made to handle these appeals. This will enable Uganda build expertise in dedicated tribunal.\(^{321}\)

- **Independence of the Competition Authority:** To ensure effectiveness in regulation of anticompetitive practices the Competition Authority must be independent. However Section 52 (4) gives the minister of trade power to set the duties and functions of the commission members. Such power should be given to the public service commission.

- **Above all the competition law should reflect Uganda’s developmental polices earlier discussed.** This will enable their effective implementation.

However, the adoption of competition regime is not in its self-sufficient to solve Uganda’s competition challenges, there are other factors that are necessary for an effective competition regime in developing countries.\(^{322}\)

### 5.2 Recommended Inputs Necessary for an Effective competition Regime in Uganda

1. Through competition advocacy, the Competition Authority may influence the changing of anti-competitive government policies in favor of the more efficient and consumer friendly alternatives.\(^{323}\) Such advocacy in an ignorant community about the benefits of competition regime gives protective barrier against lobbyists that are against the formation of competition regimes.\(^{324}\) This results in increased national support and

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\(^{321}\) For example South Africa and Israel have dedicated special competition tribunals’. Also because of problems of expertise and corruption in Uganda it may be better for administrative authorities to enforce the law than the courts.

\(^{322}\) Gal M., reports that World Bank studies have shown that competition regimes have been 40% more effective in developed countries than developing countries. See Ibid.


legitimacy for the enforcement agency.\textsuperscript{325} However, the competition bill of Uganda does not specifically mandate this role to the Competition Authority. Therefore this should be made a mandatory role of the Competition Authority.\textsuperscript{326}

2. The competition regime also requires effective enforcement tools to enable it to effectively control anticompetitive practices as shown below:

- Competent human resources: this is vital in the interpretation of complex economic and legal issues associated with competition law. Without them the Competition Authority may make mistakes that eventually destroy its public reputation which is an essential ingredient for its success. Yet Uganda might experience problems of attracting such professional staff.\textsuperscript{327} Therefore efforts should be made to address this challenge through technical cooperation with other authorities, arranging of external training for proposed staff and encouraging the teaching of the subject in national universities.\textsuperscript{328}

- Financial resources: These improve the working conditions of human resource by giving adequate salaries to staff and funding their investigation and training.\textsuperscript{329} The government must be committed to allocating adequate finances to the authority.\textsuperscript{330}

- Enforcement powers: The Competition Authority requires wide investigative powers to enable them collect information and sanction stubborn company officials.\textsuperscript{331} Fortunately the competition bill gives the authority all of these powers but it remains to be seen how they will be applied.\textsuperscript{332}

\textsuperscript{325} For example the hostile government resistance of competition authorities in Zimbabwe and Zambia hasn’t prevented their effectiveness. Ibid.
\textsuperscript{326} For example India, Zimbabwe and Zambia give the enforcement authorities this role.
\textsuperscript{327} Most developing countries have experienced this obstacle. Ibid at 20-38.
\textsuperscript{328} For example Barbados overcame this problem by training its staff before the passing of competition law. Ibid.
\textsuperscript{329} For example, although the Chilean Competition Authority had good professional staff, they had no funding for many years which limited their functioning for long time. In contrast the Zambian authority with good funding has been able to function. Ibid.
\textsuperscript{330} It’s suggested by Michael Gal that since developing countries have smaller budgets, they should consider enforcement in rational way. For example Uganda may initially consider investigating anti-competitive practices that are less costly than their harms. Ibid.
\textsuperscript{331} The importance of this may be seen from the Coca cola fiasco in Zambia, the management of coca cola refused to cooperate with the Competition Authority because there wasn’t a punitive law. Later on when legislation was passed that sanction companies that refused to cooperate with the authority, cooperation was granted. Ibid.
\textsuperscript{332} Sections 14, 15, 25 and 35 of the Competition Bill.
3. The Competition Authority must also have credibility building tools in order to increase social compliance and thus reduce compliance costs. One way of building credibility is by taking on large companies. Umeme should be perfect target for Uganda because it affects all sections of society. Credibility is also attained if there clear transparent rules and methods of operation. Therefore it is essential to have complete access to commission authority’s records and data bases. The law should also apply to all sectors of the economy otherwise it may be deemed to target only a few. This means that exemptions to be limited. To sum it up, the personality of the head of the Competition Authority should be person of integrity and credibility. This is essential for Uganda because of the lack of public confidence in government institutions as result of massive corruption.

4. There must also be an adoption of consumer protection law. This should be done concurrently with the enactment of competition law because researchers believe that if enforced by the same authority it makes easier to link antitrust to consumer protection in developing countries. This attains it social acceptance which softens enforcement.

5. Global cooperation may also help in the training of personnel, data collection, and experienced advice in competition issues. UNCTAD’s may offer technical advice to the Competition Authority on how to handle complex issues like extraterritorial conflict involving developed nations. OECD global forum’s standing committee on competition

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333 However researchers caution on this, they suggest that such choice should be easy to investigate and win and should be carefully chosen. For instance Jamaica’s failure to successfully investigate the Bar association damaged its reputation in an organisation that it need to promote its activities. See Gal M., supra note 320 at 20-38.

334 For example the competition commission of South Africa has website and publication that has increased its transparency. Available at http://www.compcom.co.za/. Uganda should also do the same.

335 For example South Africa has succeeded because its law is all embracing. See S. 2 of the South African Competition Act.

336 Uganda is ranked no 113 in the world in corruption free standings. See http://www.worldaudit.org/corruption.htm, accessed on 24 February, 2012. Also because of problems of expertise and corruption it may be better for administrative authorities to enforce than the courts.

337 Gal M., supra note 320 at 20-38.

338 It has already offered assistance to Zambia. See also, implementation of competition law and policy, UNCTARD programme. Available at http://www.unctad.info, accessed on 16 November, 2011.
law may offer legal advice, help in capacity building if requested by the government.\textsuperscript{339}

Such international and regional cooperation will be essential in regulation of cartels.\textsuperscript{340}

6. Prioritisation; the Competition Authority should prioritise conduct that affects the economy most.\textsuperscript{341} For example case screening, assessment of the economic importance of the conduct and weighing the probability of success is essential in saving the already needed scarce resources.\textsuperscript{342}

During the conduct of this research I visited the Ministry of Trade and Tourism to inquire as to why the competition bill was not passed into law. The permanent secretary replied 'why are you interested? That bill was put on the shelves long time ago! I realised the political sensitivity about the matter and I left. I cannot rule out the existence of political lobbyist on the policy makers not to enact this bill.\textsuperscript{343} One way of countering these lobbyists is by creating pro-antitrust pressure groups through education of consumers about the benefits of a competition regime. Global institutions may also help in creating pressures for the adoption of competition law.\textsuperscript{344}

5.3 Conclusion

With the objective of increasing economic growth, development and poverty; Uganda introduced various competition enhancing policies as mechanism of achieving these objectives. This was done concurrently with the opening up of her borders through the regional trade liberalisation policies of the EAC. Researchers have shown that trade liberalisation has led to the increase of cross-border anticompetitive practices that distort trade and reduce its benefits to the

\textsuperscript{339} Mehta P., supra note 126.

\textsuperscript{340} This is relevant in the EU/EAC discussions because export cartels are illegal in the EU; it may easily cooperate in the investigation and evidence collection. Thus clause should also provide for recognition and cooperation as regards EAC concerns in cartel activities. For instance the EAC should be allowed to benefit from EU prosecutions by filing amicus curie proceedings for damages in EU commission cases involving cartel prosecutions that affect it as result of spillover effects from the EU.

\textsuperscript{341} See ‘Strategic Priorities of Competition and Regulatory Agencies in - Circ.in.’ Available at www.circ.in/, accessed on 9 September, 2012.

\textsuperscript{342} Ibid.

\textsuperscript{343} This is not surprising in developing countries because economic power is in the hands of few beneficiaries that resist the forces of change. Often the economic power and the government officials are the same. See Gal M., supra note 320 at 20-38.

\textsuperscript{344} Such as; UNCTAD, World Bank and WTO. Many developing countries have adopted competition law because of global and donor pressure. See Gal M., supra note 320 at 20-38.
consumers. As a result Uganda’s efforts to reduce poverty and increase incomes and the standard of living are going to waste. To add pain to the injury, the country lacks an effective competition regime to sanction these anticompetitive conducts.

This is contrary to its developmental objectives that are aimed at regulatory competition as mechanism of reducing poverty and enhancing growth. Therefore the writing is on the wall for Uganda, the country needs a competition policy and law suited to its needs in order to complement her poverty reduction policies and to act as deterrence against anticompetitive practices. The regional East African Competition Act cannot adequately protect Uganda due to various technical and practical challenges. The domestic competition regime will therefore increase economic efficiency and protect the consumers from abuse.

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