

**THE NEED FOR DEVELOPING A SUCCESSFUL COMPETITION REGIME IN
UGANDA: AN ANALYSIS OF THE FACTORS HINDERING THE
OPERATIONALISATION AND IMPLEMENTATION OF THE EAST AFRICAN
COMMUNITY COMPETITION ACT.**

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CATHERINE NANSUBUGA

14/09/2015

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ABSTRACT

Uganda is in the process of enacting a competition law. Like most developing countries, it faces a unique adoption process, local circumstances and concerns that make the competition law and enforcement practices distinguishable from other jurisdictions. This research will analyse the need for developing a successful competition regime in Uganda by highlighting the factors that should inform the law and policy. The study will examine the adequacy of the current competition bill 2004 in comparison with the competition laws of Kenya, Tanzania and South Africa and propose that Uganda needs to develop a competition regime that is suited to its local development needs. The East African Community (EAC) which aims at enhancing trade liberalisation and development, among other sectors adopted the East African Community Competition Policy in 2004 and subsequently the East African Legislative Assembly enacted the East African Community Competition Act in 2006. However to date an East African Community Competition Authority has not been established and the law is not yet operational. The study will appraise the challenges to the operationalisation and implementation of the East African Community Competition Act and suggest that apart from the fact that Uganda has not enacted a competition law as required by the East African community Protocol, there are other significant challenges hindering the progress of this law.

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LIST OF ABBREVIATIONS

COMESA	Common Market for East and Southern Africa
CONSENT	Consumer Education Trust
CEDP	Competitive and Enterprise Development Project
CUTS	Consumer Unit and Trust Society
EAC	East African Community
EACSO	East African Common Services Organisation
GDP	Gross Domestic Product
MCR	Merger Control Regulation
MSMEs	Micro Small and Medium Enterprises
NRM	National Resistance Movement
NGOS	Non-Governmental Organisation
NDA	National Drug Authority
ODA	Official Development Assistance
OECD	Organisation for economic Development
PDO	Project Development Objective
PCU	Project Coordination Unit
PSFU	Private Sector Foundation
SADC	Southern African Development Community
SMEs	Small and Medium Enterprises
TNC	Trans National Corporations

UNCTAD

United Nations Centre for Trade and Development

UN

United Nations

URSB

Uganda Registration Services Bureau

WTO

World Trade Organisation

CHAPTER ONE:INTRODUCTION

1.1. Background to the Study

The history of competition law dates back to the Roman Empire. Before development of anti-trust/Competition law, common law as was developed in England and the United States recognised a positive value in competition, which was easy to find among small businesses and small firms that dominated the scene.¹

Many of the market features of developing countries are inherently opposed to competition, for instance a lack of resources, slow and imperfect market structures, large networks of informal markets, negative exchange rate movements, high transport costs, lack of technological infrastructure, high taxes and weak government support systems. In addition, developing countries are exposed to a higher degree of state intervention in the form of state-owned enterprises comprising monopolies, with elements of privilege and preference by government creating almost insurmountable barriers to entry.² It has thus been argued that the adoption and enactment of competition law in developing countries is too difficult and does not render results.³ On the contrary, this research will show the necessity for adoption of competition laws by developing countries using Uganda as a case study.

The basic and most outstanding characteristic of developing nations is the low level of development of their markets. Until recently, many developing nations were planned economies characterised by high government intervention in markets. The move towards a more market oriented economy and the governmental control of privately erected anti-competitive barriers to competition is a much more recent phenomenon, which in many jurisdictions is still in its transitional stages. Trade liberalisation, privatisation, deregulation and endorsement of foreign direct investment have all been part of this move. Such changes

¹ Albert A.Foer and Robert H.Lande:The Evolution of United States Anti-Trust Law: The Past, Present and (Possible) Future: (October 20,1999) American Anti-Trust Institute at page 2

² Louise Du Plessis.Jude Lurie & Amy Van Buuren: Competition Legislation and Policy, is it necessary in a developing economy? (2011)Fifth Annual Competition Law ,Economics and Policy Conference 4th & 5th at page 2

³ Ibid

have been followed by adoption of enabling laws of which competition laws are an integral part.⁴

The phenomenon of developing countries adopting competition law is not new. Approximately one hundred nations in the world have adopted antitrust laws. Perhaps a quarter of these nations are developing countries. Yet other developing countries have not adopted antitrust laws; some are considering doing so. By one perspective, all of these nations should adopt antitrust laws.⁵ That notwithstanding, questions still arise with regard to the efficiency and effectiveness of adopting and enforcing a competition law especially when a country suffers from low levels of development. Given these circumstances, it is important to discuss not only the perceived goals of the law but also the challenges it is likely to face including the level of recognition of the benefits by competitors and consumers.⁶

1.2 .Relevance of competition law to developing countries

The formal adoption of competition laws by African states is on a steady increase both at national and regional level, most likely due to the continent's growing attractiveness as an investment destination.⁷ Over the last decade most developing countries have adopted competition laws that aim at preventing anti-competitive practices and facilitating efficient competitive environments. The motives to adopt these laws have varied. In some instances, rules have been adopted over the course of many years in response to local pressures, in order to mend behaviours imposing social costs on societies. In other instances, rules have been recommended as tools to achieve development. In other circumstances, they were imposed through treaties and international pressure. Most developing countries either adopted competition rules in response to recommendations of international institutions or because of various obliging treaties they signed.⁸

⁴ Eleanor Fox and Michal S.Gal: Drafting Competition Law for Developing Jurisdictions: Learning from Experience.(2014) New York Law & economics Research Paper Series Working Paper No.14-11 at page 7 & 8

⁵ Eleanor M.Fox:Anti-Trust,Economic Development and Poverty: The Other Path (2007) New York University Law and Economics Working Papers, Paper 102 South Western Journal of Law and Trade in America 211 at page 214

⁶ ibid

⁷ Ife Oluwa Adebajji: Recent Competition Law Developments in Africa. Available at <http://www.polity.org.za/article/recent-competition-law-developments-in-africa-2013-08-13> [accessed on 2/12/2014]

⁸ Dina I. Wake: Competition Law in the Developing World: The Why and How of adoption and its implication for International Competition Law. Available at <http://www.icc.qmul.ac.uk/GAR/GAR2008/Waked.pdf> [accessed on 15/12/2014]

Developing countries, just like developed ones, need competition policy to ensure that big companies that are either local or international do not abuse their market power, and that public and private anti-competitive practices do not keep prices high and shut small producers out, thus preventing the poor from gaining the full development benefits of globalisation.⁹

Eleanor Fox explored this idea of the relevance of competition law in developing countries in her article.¹⁰ She emphasised that, „competition law must be part of a major development agenda that aims at economic development. By doing that, competition law may be used as a tool, not to protect producers and local champions but to facilitate development. This is not only essential because development is the more pressing issue for third world nations, but because competition legislation that merely focuses on economic efficiency tends to entrench a political economy that favours the ruling elite and discriminates against the masses.”¹¹

This assertion has been supported by other authors like Michal S Gal who reiterated that the relevance of competition law in developing countries has risen in response to the privatisation and liberalisation movements that have swept many developing economies in the past two decades and have been spawned by technological, economic, political and ideological forces. He adds that, to enjoy the benefits of liberalisation, however, an appropriate regulatory framework must be put in place. Otherwise, private barriers may simply substitute governmental barriers to trade, an outcome which might prevent improvements in social welfare.¹²

The relevance of competition on the continent has been picked up by regional bodies. Perhaps the most significant development, relates to the Common Market for Eastern and Southern African States (COMESA) and the commencement of its Competition

⁹ Competition Policy, Law and Developing Countries. Department for International Development Background Briefing (September 2001) Why Trade Matters Series Available at <http://webarchive.nationalarchives.gov.uk/+http://www.dfid.gov.uk/Documents/publications/itdcompetitionbrief.pdf> [accessed on 27/12/2014]

¹⁰ Op.Cit note 4

¹¹ Op City note 4 at page 106

¹² Dr.Michal S Gal: The Ecology of Anti-Trust: Pre-conditions for Competition Law Enforcement in Developing Countries (2004).New York University Law and Economics Working Papers .Paper 10

Commission's operations on the 14th of January 2014. This highlighted the fact that while many strides are being made in Africa's implementation of competition laws, there still remains some work to be done to ensure that these regimes function optimally.¹³

In addition to the aforementioned, a number of developments are anticipated on the African competition law horizon. One such development with particular relevance to this study relates to the East African Community (EAC). Despite having competition legislation, the EAC currently does not have an operational competition authority. However, in light of the COMESA developments, the EAC is seriously considering implementing its own regional competition authority. Thus, it could be a matter of time before this region develops a fully-fledged competition regime.¹⁴

Regional agreements come in many different configurations, from loose cooperation agreements to custom unions with a centralized competition policy; thus from loose to tight integration, regional agreements can become nodes in the larger anti-trust family and eventually provide stepping stones to broader regional frameworks or possibly a global one.¹⁵

This research seeks to examine the need for developing a competition regime in Uganda. In particular, the study will identify the institutional and policy conditions that are necessary for the successful development and implementation of the proposed Competition bill 2004. This will be achieved based on the existing theoretical framework as well as analysing the experiences of select jurisdictions in applying competition laws. Since the lack of a competition law and policy in Uganda and Kenya has been cited as one of the reasons hampering the operationalisation of the EAC competition law, the study will identify other factors hindering its operationalisation and future implementation.

¹³ Op Cit note 7

¹⁴ *ibid*

¹⁵ Eleanor M Fox: Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries. (2012) New York University Law and Economics Research Paper Series Working paper No.11-04 pp 19.

1.3. Justification of Study

With considerable interest in developing countries for adopting competition laws, either at the behest of external pressures or as a result of internal developments, it can be inferred from an analysis of motivations that in most cases, adoption of competition policy has been as a result of pressure from outside agencies (bilateral, multilateral, advisers, et cetera.) rather than internal policy reforms.¹⁶ Having employed such a reactive approach to evolving competition regimes, governments in the developing world have failed to support the process of competition law adoption through concurrent policy measures and practices that support competition in the market, contributing to economic growth and development.¹⁷

The Ugandan market is replete with uncompetitive market practices in absence of a regulatory regime. Specific to Uganda, interest in market competitiveness is a fairly new phenomenon. Prior to the country's economic liberalisation policy that started in the mid 1980's the government through a number of parastatals was an active player in the market. Over the last 20 years, government has slowly reduced its involvement in the offer of goods and services and created bigger space for the private sector to take over this role. However, markets are seldom perfect and the government is putting in place a regulation to ensure that where markets fail or act imperfectly national development imperatives and consumer welfare are not compromised.¹⁸ This is evidenced by the 2004 competition bill which has not yet been passed despite years of enactment.

An optimal competition policy regime stimulates pro-competitive behavior for the benefit of consumers, while minimizing the risk of stifling genuinely pro-competitive behavior. However the design and operation of such an ideal regime requires a number of key elements which include among others the correct analytical framework within which to develop and apply its policy and the institutional ability to carry out its mission.¹⁹

¹⁶ Rijit Sengupta & Cornelius Dube: Competition Policy Enforcement Experiences from developing Countries and Implications for investment. (27-28 March 2008) (OECD Global Forum on International Investment VII, Best practices in promoting investment for development", Paris, France at page 4

¹⁷ ibid

¹⁸ Socio-economic Implications of the Uganda's Draft Competition Law: Addressing Challenges at National and Regional Levels .Cuts International Policy Briefing BIEAC No. 1/2010 Available at http://www.cutsinternational.org/ARC/Nairobi/BIEAC/pdf/BIEAC-Socio-economic_Implications_of_the_Ugandas_Draft_Competition_Law.pdf [accessed on 1/12/2014]

¹⁹ John Fingleton and Ali Nikpay: Stimulating or chilling competition. (25th September 2008) Speech at the Fordham Annual Conference on International Anti-Trust Law and Policy in New York.

At a regional level, Uganda has taken initial steps towards economic integration into the East African Community (EAC). These policies entail member states creating private markets at home. Despite efforts at creating a market economy, Uganda has no formal competition law.²⁰ This is not surprising because efforts first focused on the basic building blocks of the commercial infrastructure such as property law, contract law, a civil code, securities regulation, and corporate law.

As a direct result of the Customs Union, competition in the EAC has intensified. With the advent of the Common Market, the intensity of competition is predicted to double. As competition intensifies and more players enter the market, firms have a tendency to conspire, scheme, collude, and form cartels in order to fix prices, allocate markets and make it difficult for other companies to enter the market.²¹ From this basic understanding stems the need to regulate competition to ensure that firms don't abuse their powers.

To combat the above anti-competitive practices, the East African Community Competition Act was assented to in 2006. However to-date the Act is not fully operational. East African Community is taking steps to operationalise the East African Community Competition Act, 2006. However, operationalising the Act will require EAC Partner States to have national competition laws and institutions in place. Currently, only Kenya and Tanzania have fully functional national competition laws and institutions. Burundi recently enacted a Competitions Act and is in the process of establishing the requisite institution while Uganda and Rwanda are also at different stages of enacting their own competition laws.²²

The need for a competition regime given the current state of affairs in the country and the challenges hampering the operationalisation and implementation of the EAC competition Act is what this research seeks to discuss and provide recommendations.

Uganda's economic freedom score is 59.9, making it the 91st freest economy on the 2014 index. Uganda is ranked 10th out of 46 in the Sub-Saharan Africa region, and its overall

²⁰ Article 21 of the Protocol on the Establishment of the East African Customs Union requires partner states to prohibit any practice which adversely affects competition within the community

²¹ Alloys Mutabingwa: Should EAC Regulate Competition. Available at http://www.eac.int/news/index.php?option=com_docman&task=doc_view&gid=153&Itemid=78 [accessed on 1/12/2014]

²² Godwin Muhwezi Bonge: Towards EAC Competitions Law and Policy. EAC Briefing Paper August 2010 issue 5/10 available at http://www.eabc.info/uploads/Briefing_Paper_EAC_Competitions_Policy.pdf [accessed on 28/11/2014]

score is below average.²³ Recording its second lowest economic score ever in the 2014 index, the Ugandan economy has fallen back to mostly unfree.²⁴ Competition policies are generally designed globally to prevent actions which are unethical, offer no benefits to consumers and hurt fair trade. While Uganda's economic history is emblematic of many economic changes as indicated above, it is unfortunate that Uganda has neither a policy on competition nor a comprehensive law to regulate the same, in spite of the many market oriented reforms that have taken place in the country. Market oriented reforms can only be effectively sustained if competition, which results from these reforms, is protected and consolidated by legislation and suitable policies.²⁵

This study is going to examine the question: Is there need to develop a successful competition regime in Uganda? The study will further critically appraise the factors hindering the full operationalisation and implementation of Uganda's Competition Bill and the East African Community Competition Act.

1.4 Methodology

The study employs a critical, non-empirical research method. Primary and secondary materials from libraries including domestic and foreign case law, scholarly articles, journals, working papers and relevant textbooks will be used. Internet resources will also be heavily relied upon as the subject of this study is very contemporary.

1.5 Scope of the study

The study will focus on Uganda and deal with the reasons why it needs to develop a competition regime. To contextualise the arguments in the research, examples of functional competition regimes will be drawn from Tanzania and Kenya who already have competition laws because the economies of these countries can be fairly compared to Uganda. Reference will also be made to South Africa because it has a developed and regulated competition regime based on the best international practice with a pro-poor and pro-development leaning.

²³2014 Index of Economic Freedom. Available at <http://www.heritage.org/index/country/uganda> [accessed on 1/12/2014]

²⁴Ibid

²⁵ Competition Regimes in the World: A civil Society Report. Available at <http://competitionregimes.com/pdf/Book/Africa/58-Uganda.pdf> [accessed on 1/12/2014]

1.6. Structure of the Study

The study consists of four chapters broken down as follows;

Chapter one: this chapter provides an introduction and background to competition law with particular emphasis on its relevance in developing countries and regional integration in Africa and examines the reasons why competition law is necessary. The chapter will provide the justification for this study, the scope of this study and the methodology that the researcher has adopted for the study.

Chapter Two: this chapter will focus on the rationale for having a competition regime in Uganda. It will further examine the institutional, normative and policy competition structure that is suited for Uganda against the status of the market in the absence of a competition regime. The focus of the discussion here will be factors that should inform the new law especially comparing the key provisions of the proposed competition bill with functional competition laws from other jurisdictions such as Kenya, Tanzania and South Africa. The chapter will also discuss the limitations to competition regulation in Uganda.

Chapter Three: The chapter will provide insight into the regional legal, policy and institutional framework on competition. It will be argued that for a regional competition law to be successful, it is necessary for all member states to have national competition laws. This chapter will also look at the other challenges that can hinder the operationalisation and successful implementation of a regional competition regime.

Chapter Four: This chapter will provide recommendations to the study by answering the research question that Uganda needs to develop a successful competition regime. The chapter will provide recommendations to ensure that the adoption and implementation of competition law in Uganda is conducted in such a manner that the ultimate objectives of the policy are achieved. The chapter will further provide recommendations to challenges that have hampered the operationalisation of the East African Community Competition Act and a conclusion to the study.

CHAPTER TWO:RATIONALE FOR HAVING A COMPETITION LAW IN UGANDA

2:1 INTRODUCTION

Uganda is formerly part of the British East African Colony; it got its independence in 1962. It has a population of approximately 39 million people, 80% of whom are peasants in the rural areas and 20% scattered in the urban centers.²⁶ Uganda is a member of regional and international socio-economic groupings like the East African Community(EAC),Common Market for East and Southern Africa(COMESA) ,Cotonou Agreement ,United Nations (UN) and the World Trade Organisation (WTO).²⁷

Uganda operates in a relatively free-market environment, after the pursuance of an economic reform agenda in the 1980s through the 1990s to date aimed at generally boosting the national economy, reducing government involvement in business and encouraging private sector development. Further, to correct the imbalances in the factor allocation system, the government introduced reforms aimed at among other things, encouraging export diversification and restoring credibility of the fiscal and monetary policies.²⁸ In addition, the reform strategies were aimed at promoting and developing a competitive private sector.²⁹

Competition law is relevant to developing countries not just for economic but also social development reasons.³⁰ This chapter will analyse the rationale for having a competition law in Uganda. The chapter will discuss the institutional normative and policy competition structure suited for Uganda in light of the competition bill 2004. Reference will be made to Kenya, Tanzania and South Africa. The chapter will finally discuss the major factors hindering operationalisation of the Uganda Competition Bill 2004.

²⁶ Available on <http://worldpopulationreview.com/countries/uganda-population/> [Accessed on 13/01/2015]

²⁷ Cornelius Dube:Competition Law in Uganda a toolkit CUTS Centre for Competition ,Investment and Economic Regulation page 11

²⁸ Competition and Consumer Protection Scenario in Uganda :CUTS Centre for Competition, Investment and Economic Regulation and Consumer Education Trust (CONSENT) 2003, page 8

²⁹ J Dumba Sentamu & Adam Mugume.The Privatisation Process and its Impact on Society. Uganda National NGO Forum Structural Adjustment Participatory Review Initiative(SAPRI) July 2001

³⁰ Elis K and Singh R:Assessing the Economic Impact of Competition (2010) Overseas Development Institute Page 1

2.2. The Economic Reform Agenda

Uganda's economic history has gone through distinct episodes since independence. Despite continuing insecurity in certain parts of the country, being land locked, having (until the recent discovery of oil) few mineral resources, over the last twenty years, Uganda has had one of the fastest growing economies in sub-Saharan Africa. This has contributed to a substantial reduction in poverty levels, from 56% in 1992 to 31% in 2006.³¹

Characterised by long periods of political turbulence during the 1970s following Idi Amin's coup in the mid-1980s, Uganda has spent much of the past two decades rebuilding its economy. This has been made possible by the implementation of a comprehensive and ambitious reform agenda, which began with the Economic Recovery Programme of 1987 supported by IMF, World Bank and other multi-lateral and bilateral donors. The principle objectives were to rehabilitate the economy, enhance economic growth, reduce inflation and the potential of a balance of payment crisis.³²

The development of Uganda's economic policy since 1986 can be divided into four distinct stages. The period from 1986-1990 was characterised as the pre-reform period during which the current National Resistance Movement (NRM) government agonised over which economic policy it should take, with a choice between direct state influence and liberalisation. The second stage was between 1990-1995 when the most fundamental economic reforms were undertaken, irrevocably setting Uganda on the road to a liberal market economy. Three milestones stand out from this phase: i) Liberalisation of the parallel foreign exchange market in March 1990 (which marked the start of the reform Programme; ii) Liberalisation of coffee marketing in 1991; iii) The merger of the Ministry of Finance and the Ministry of Planning and Economic Development in 1992 and achievement of macroeconomic stability. The third stage from 1995-2002 is the period during which the fundamental reforms initiated in the early 1990s were taken forward and built through policies such as decentralization, the Poverty Eradication Action Plan, and the Medium Term Expenditure Framework.³³ The policy focus was on Poverty reduction and expanded provision of public services. The fourth and last stage is the period from 2002 onwards which

³¹ Florence Kuteesa, Ishmael Magona, Maris Wanyera and James Wakodala: Uganda a decade of Budget Reform and Poverty Reduction: OECD Journal on Budgeting (2006) Volume 6 No.2

³² Ibid at page 3

³³ Florence Kuteesa, Emmanuel Tumusiime-Mutebile, Alan Whitworth and Tim Williamson: Uganda's Economic Reforms Insider Accounts. (2010) Oxford University Press page 2-4

has been one of consolidation and adjusting to political and other infrastructural changes. The emphasis of economic policy has shifted from poverty eradication to economic growth, with a somewhat interventionist role for government.³⁴

Because of the consistence with which these measures were and are being implemented, Uganda is again starting to capitalise on its natural assets and favourable conditions for farming and tourism.³⁵ Real Gross Domestic Product (GDP) growth averaged 7% per year in the 1990s and the 2000s, but from 2006 and onwards, the country witnessed more economic volatility and GDP growth slowed to an average of just about 5%. Uganda's economic outlook is positive, but down size risks abound.³⁶

According to a WTO Secretariat report (1995), the reforms were supported by more discipline in public expenditure, a rationalised tax system, privatisation of a number of State enterprises and the maintenance of an exchange rate in line with market realities. Trade liberalisation and internal deregulation, including the derestriction of farm prices, are also injecting a degree of competition into Uganda's limited manufacturing and services industries.³⁷

Although Uganda continued with efforts to liberalise its trade regime, there was still heavy economic dependence on the agriculture sector especially coffee. Reforms emphasised diversification and modernisation of agriculture. In the manufacturing sector, low capacity utilisation and high production costs had meant that few of Uganda's manufactured goods were competitive.³⁸

There are still a number of steps that Uganda must take before it can celebrate its economic performance. Post-war recovery and the subsequent economic and institutional reforms led to high growth rates.³⁹ The liberalisation of the trade regime, the elimination of marketing boards and the supportive external environment with stable or rising prices of the main export products, return of flight capital, and high inflows of Official Development Assistance (ODA) played a significant role. After several years of high growth, growth rates

³⁴ Ibid

³⁵ Available at http://www.wto.org/english/tratop_e/tpr_e/tp12_e.htm [Accessed on 27/1/2015]

³⁶ Available at <http://www.worldbank.org/en/country/uganda/overview> [Accessed on 27/1/2015]

³⁷ Ibid

³⁸ Op Cit note 18

³⁹ The economy was starting from a low base line

have started to decline.⁴⁰ Slower growth as well as political and economic instability, social fragmentation, high population growth, high aid dependency, low savings and investment rates and lost momentum in policy and economic reforms represent enormous challenges for the country and its ambitious goal to reduce poverty to 10 percent by 2017.⁴¹

2:3. Why Regulate Competition in Uganda

Competition law is a branch of law that safeguards competition in a free market economy.⁴² Competition has also been defined as a process of rivalry between undertakings selling goods or services of the same kind at the same time to a certain group of consumers.⁴³ The presence of this competitive process in a market economy has numerous positive effects. It lowers prices, increases economic efficiency in production and allocation of goods and services and fosters innovation.⁴⁴

It improves consumer welfare through allocation of resources in a way which is preferred by consumers and leads to economic growth through inventions and adjustment to technological changes. In order to ensure that competition is maintained in the market, and that it provides these positive effects, it should be guided by certain minimum standard rules to regulate the behaviour of firms.⁴⁵

Promoting competition is broadly accepted as the best available tool for promoting consumer well-being.⁴⁶ Competition law is critical in governing domestic markets in the interest of the general populace. On one hand, it aims at disciplining behaviours of large firms especially Transnational Corporations (TNCs), which sometimes exhibit a tendency to bend markets. On the other hand it can promote product efficiency among local firms by creating a level playing field. Competition law also plays a positive role in protection of consumers' interests and even in poverty reduction. For this to happen however, the law must

⁴⁰ Matt Andrews, Lawrence Bategeka. Overcoming the Limits of Institutional Reform in Uganda. Centre for International Development at Harvard University Working Paper No.269 October 2013

⁴¹ Robert Kappel, Jann Ray, Susan Sterner: Missing Links-Uganda's Economic Reforms and Pro Poor Growth (February 2004) Available at <http://www.eldis.org/fulltext/Kappel.pdf> [Accessed on 20/02/2015]

⁴² Alison Jones and Brenda Sufrin, EC competition law 3rd edition (Oxford University Press, 2008) page 1

⁴³ Katalin Judit Cseres: Consumer Law and Consumer Protection. Kluwer Law International 2005 page 308

⁴⁴ United Nations Conference on Trade and Development (UNCTAD): Implementing Competition-Related provisions in Regional Trade Agreements: Is it possible to obtain development gains? New York 2007

⁴⁵ Ibid page 309-10

⁴⁶ Maurice E. Sturke. Is Competition always good? Journal of Antitrust Enforcement, Vol.1, (2013) pp.162

be adapted to the developmental level and needs of the country in which it is being implemented.⁴⁷

The development of a competition law and policy in countries like Uganda is hampered by the presence of a large state sector. However, in the new privatised domestic economic environment, competition regulation and policies have become essential.⁴⁸ The benefits from the incorporation of competition principles in the legislative and regulatory activities of government can be substantial, especially in countries that have recently privatised some of the network infrastructure industries and where adequate regulatory expertise is scarce.⁴⁹

Uganda being a poor country where the majority of people rely on farming and small businesses for their livelihood, the government must take cognisance of the unique way people interact with the economy. It is the government's responsibility to help markets to function effectively for the poor so that they enable choice, encourage innovation and provide goods and services to consumers at the lowest possible prices. Competition law is necessary to create a conducive environment for economic growth and put in place measures to address all these concerns.⁵⁰

Competition legislation is required to allow countries to combat the possible anti-competitive implications of certain world trade agreements like TRIPs. Multi-lateral agreements necessitate application of competition criteria and tests the results of which are not always directly beneficial to least developing countries.⁵¹ Thus regulating competition at the national level is one of watering down the negative effects of these agreements.

Certainly every market economy is in need of a competition policy that enables the business environment to flourish according to a fair set of competition rules.⁵² Hence, Uganda is no exception when we argue that it is in need of a competition law. Competition

⁴⁷ Op Cit note 36

⁴⁸ Ajit Singh: Competition Policy, Development and Developing Countries:(November 1999) Indian Council for Research on International Economic Relations Working Paper No. 10.

⁴⁹ Mark A Dutz, Maria Vagliasindi. Competition Policy Implementation in Transitional Economies(2000) An Empirical Assessment European Economic Review 44 at page 766

⁵⁰ Nick Godfrey: Why is Competition Important for Growth and Poverty Reduction? (27th -28th March 2008) OECD Global Forum on International Investment Background Paper.

⁵¹ Bernard Hoekman & Peter Holmes (1999), Competition Policy, Developing Countries and the WTO. Blackwell Publishers Limited 1999 at page 891

⁵² Ahmed Farouk Ghoneim: Competition Law and Policy: What does Egypt really need? Economic Research Forum Working Paper No. 0293, paper submitted for the ERF 9th Conference 2002.

legislation in Uganda has an important role to play, both in promoting a competitive environment and in building and sustaining public support for a pro-competitive stance by the government.⁵³ For example, in 2010, steel manufacturer Uganda Baati threatened to stop further capital investment in Uganda due to what it termed as unfair competition. The company wanted the government to protect it through imposing a 10 per cent import duty on galvanised coils that competing firms imported, while Uganda Baati locally manufactured the same.⁵⁴

The East African Community Competition Act provides that the Act shall apply to all economic activities and sectors having cross border effect.⁵⁵ It is therefore apparent that the Act envisages the existence of national authorities with jurisdiction over national operators alongside the existence of an East African Community Competition Authority. It is also important to note that in the EAC, competition is one of the outstanding issues in the common market negotiations.⁵⁶ The creation of a single or common market necessitates the existence of a single EAC Competition authority. Nevertheless, while that may be the eventual outcome, there is the need to address the immediate issues surrounding competition regulation in Uganda at the moment.

For a long time, in absence of a competition law, market behaviour and competition has been controlled through sectoral regulatory agencies especially after economic reforms were introduced in Uganda. For example the Uganda Communications Commission is in charge of competition in the telecommunications sector,⁵⁷ in the power sector, there is the Electricity Regulatory Authority,⁵⁸ while the banking and financial sector is regulated by the Bank of Uganda.⁵⁹

A competition regulation is important to acknowledge the status of these regulatory authorities when faced with matters of competition in their various sectors. For example, the South African competition law provides that *“in as far as the Act applies to an industry or a sector of an industry, that is subject to the jurisdiction of another regulatory authority, which*

⁵³ Op Cit note 23 at page 890

⁵⁴ Available at <http://www.theeastafrican.co.ke/business/Uganda-s-Cabinet-to-approve-Competition-Bill/-/2560/2389964/-/xx6mf8/-/index.html> [Accessed on 12/01/2015]

⁵⁵ Article 4 of the EAC Competition Act

⁵⁶ The EAC development strategy(2001-2005) states that in order to operationalise a common market, the development strategy will ensure formulation of a common competition policy, harmonise export promotion policies and cooperate in developing their capacity to compete internationally

⁵⁷ Uganda Communications Act 2013

⁵⁸ Uganda Electricity Act 1999

⁵⁹ The Financial Institutions Act 2004

*authority has jurisdiction in terms of conduct regulated in terms of chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction.*⁶⁰

The Kenyan Competition Act provides on the other hand that where there is a conflict between the provisions of the law and any other Act with regard to matters of competition, the Competition Act would prevail.⁶¹ The regulation of specific sectors should be brought within the scope of the competition regime in order to avoid overlap of responsibilities between the competition Authority and the sectoral authorities.

Regulation and enforcement of the Act is likely to benefit consumers and producers. Controlling anti-competitive practices will yield quantifiable benefits to the consumers in form of low prices. With the recent merger of Airtel Uganda and Warid telecom, subject to regulatory approval from the Uganda Communications Commission, the stage is set for heightened competition within the telecom industry in Uganda in what according to sector experts, could potentially result into a two-horse race with MTN Uganda.⁶² Consumers will only be able to benefit from such mergers if the business environment in which they operate is competitive and regulated. The presence of a competition law to manage such transactions is therefore timely.

Competition law and policy present tools that can be used to restrict abuses of market power and protect consumers from the inherent hazards of the economy.⁶³ This highlights the need for a competition law in Uganda. Unfortunately over the past decade little has been done in the adoption and implementation of a national competition law. Efforts should be engineered through extensive capacity building by relevant international and national organisations such as Organisation for Economic Development (OECD), Consumer Unit and Trust Society (CUTS) and Consumer Education Trust (CONSENT) in order to ensure that the bill is passed into law but also that its effect is understood by the people.

⁶⁰Section 3 1(A)a of the South African Competition Act

⁶¹Section 5 of the Kenya Competition Act

⁶²Available at <http://www.independent.co.ug/business/business-news/7748-airtel-warid-merger-shakes-market> [Accessed on 27/01/2015]

⁶³ Competition law in Kenya: Snap shot- CUTS Briefing paper available at http://www.cuts-international.org/ARC/Nairobi/Competition_in_Energy_Sector/pdf/Competition_Law_in_Kenya.pdf [Accessed on 1/12/2015]

Another reason for regulating competition in Uganda is to ensure effective implementation of ongoing projects which are geared towards creating a competitive environment in Uganda. For example the World Bank recently gave credit to the government of Uganda towards implementation of the Competitive and Enterprise Development Project (CEDP) whose Project Development Objective (PDO) is to improve the competitiveness of enterprises in Uganda through supporting reforms in priority productive and service sectors geared towards a better investment climate with particular focus on Micro Small and Medium Enterprises (MSMEs).⁶⁴

The five-year project will constitute four components which will be implemented by seven agencies. However, the overall coordination of the project will lie with the Private Sector Foundation Uganda (PSFU) through a Project Coordination Unit (PCU). The Uganda Registration Services Bureau (URSB) will implement the second component of CEDP.⁶⁵ Considering the fact that the overall objective of the project is to promote competition, the project should ordinarily be coordinated by an institution in charge of competition. The idea of enacting a competition law and establishing a specialised commission for Uganda is therefore long overdue.

Competition laws are applied all over the world. While at their core they exhibit a high degree of similarity, variations abound in substantive and institutional aspects, and even in the specific goals to be advanced by them. There is need for each jurisdiction to decide whether it would like to follow another jurisdiction's model, create its own, or adopt a mixture of both. As elaborated below, developing countries may face a more pronounced trade off than developed jurisdictions.⁶⁶ Developing countries like Uganda need to regulate competition but in so doing, the law needs to fit the facts of their markets and respond to their needs. The law should be designed and characterised in such a way that the people will embrace it as sympathetic and legitimate, rather than reject it as a mere transplant of a foreign law.⁶⁷

⁶⁴ Available at <http://www.worldbank.org/projects/P130471/competitiveness-enterprise-development-project-cedp?lang=en> [Accessed on 1/03/2014]

⁶⁵ *ibid*

⁶⁶ *Op Cit* note 4 at Page 374

⁶⁷ *Op Cit* note 5 at page 26

2:4 Analysis of the Competition Bill 2004

The bill aims at promoting and sustaining competition in the Ugandan market so as to protect consumer interest, while safeguarding the freedom of economic action of various market participants and preventing practices that limit access to markets or unduly restrain competition, affecting domestic, international trade or economic development.⁶⁸ The bill defines competition as a process by which economic agents acting independently in a market limit each other's ability to control the conditions prevailing in that market; and include; competition from imported goods and services supplied by a person not resident or carrying on business in Uganda.⁶⁹

In Uganda, mergers, takeovers, monopolies, cartels, were uncommon. After deregulation that followed the economic reform agenda, government formed a number of sectoral authorities and commissions such as National Drug Authority, Uganda Communications Commission . It is through these sectoral authorities that the government has provided infrastructure and framework covering licensing, supervision, regulation and surveillance. Anti-competitive activities in Uganda are regulated by a number of regulatory bodies such as the Electricity Regulatory Authority in the power sector, The Uganda Communications Commission in the Telecom Sector, Uganda Taxi Operators and Drivers Association in the transport sector and many others.⁷⁰ However, the effectiveness of these sectoral authorities in regulating competition appears insufficient thus the need for a competition law. The draft competition bill was developed with adoption of and alignment with other national, regional and global competition policy, legal and institutional frameworks.

The competition bill is divided into 10 parts dealing with establishment of the competition commission, jurisdiction, powers and authority of the commission. Part I to IV deals with the duties of the competition commissioner; part V deals with penalties and offences for not complying with the provisions of the law; part VI provides for prohibited agreements and those that constrain market competitiveness; part VII provides for prohibition

⁶⁸ Objective of the competition Bill 2004 as set out in the Long Title to the Act

⁶⁹ Clause 3 of the competition bill 2004

⁷⁰ Op cit note 25 at page 12

against abuse of market dominance; Part VIII deals with regulation of combinations and advocacy and miscellaneous aspects of the law are discussed in parts IX and X.⁷¹

An overview of the bill reveals that an entire part of the Act provides for the establishment of the competition Commission, as an autonomous body which has power and capacity to investigate anti-competitive practices and impose penalties in instances of violation.⁷² The bill does not include a clause on independence of the competition commission and yet it is a common trend that most entities are run down due to government intervention in their management. The Kenyan Competition law for instance expressly provides that the Kenya Competition Authority shall be independent and shall perform its functions and exercise its powers independently without fear or favour.⁷³

It is important for the competition authority to be functionally and operationally independent from the government both in fact and perception by the people otherwise without such independence, it may lack credibility and the community will not have the requisite faith that their complaints will be dealt with in a fair and reasonable manner.⁷⁴ The South African Competition Act clearly states that the Commission is independent and subject only to the law and constitution. It further enjoins the Commission to be impartial and to perform its functions without fear, favour or prejudice.⁷⁵ In that regard, the bill needs to provide for an impartial regulatory body with operational independence that is clearly defined.

The bill takes cognisance of intellectual property rights as one of the exceptions. This is commendable since this is a budding area in Uganda's commercial law environment. However the agriculture sector is noticeably missing among the exceptions despite the fact that it is the back bone of the economy employing 80 percent of the work force and accounts for more than 50 percent of exports.⁷⁶ Like Uganda's competition bill, South Africa's competition law also recognises the interface between intellectual property rights and

⁷¹ The Competition Bill 2004

⁷² Part I of the competition bill

⁷³ Section 7(2) of the Kenya Competition Act no 12 of 2010

⁷⁴ UNCTAD: Voluntary Peer Review on Competition Policy : Kenya available at http://unctad.org/en/docs/ditccp20056_en.pdf [Accessed on 7/08/2015]

⁷⁵ Section 20 of the South African Competition Act

⁷⁶ World Trade Organisations Trade Profiles 2014 available at https://www.wto.org/english/res_e/booksp_e/trade_profiles14_e.pdf (Accessed on 1/03/2014)

competition.⁷⁷ It however goes a step ahead to exempt agreements concerned with promotion of small businesses owned by historically disadvantaged persons from the list of prohibited practices.⁷⁸ This exception indicates that at the heart of South African competition law lies a consideration of the issues that matter most to South Africa as a country. Given that economic empowerment through agriculture is one such priority issue for Uganda, the legislators ought to have included it as one of the exceptions in the competition bill. It should be recalled that the rationale for competition legislation is safeguarding consumer welfare.⁷⁹

The Competition bill states protection of consumer interest as one of the objectives of the law and is implied in the various sections of the bill.⁸⁰ It is important to note that the Kenya Competition Act and the Fair Competition Act of Tanzania both have separate parts regarding consumer welfare.⁸¹ This absence of detailed regulation on consumer welfare is a gap in the Ugandan competition bill that needs to be addressed. For Tanzania competition and consumer protection are addressed under one roof. In terms of consumer protection, the Fair Competition Act contains provisions on product safety and product information.⁸² The absence of consumer protection policy and complementary legislation in Uganda means that consumer perspectives in trade are not taken into account. A law to address this gap will go a long way in refocusing the attention of the authorities on practices that may negatively affect consumers and businesses alike.⁸³

The Tanzanian Act further provides for the establishment of the National Consumer Advocacy Council with wide functions which include representing consumers' interests and establishing regional and sectoral consumer committees. The fair competition Act has been described as "*one that epitomises a developing country's spirit to embark on a hitherto unknown legal and institutional arrangement to promote competition while protecting its consumer society.*"⁸⁴ Since controlling anti-competitive behaviour involves such complex procedures that it may consume a large amount of the economy's resources at an early stage,

⁷⁷ Lawrence Reyburn: Competition Law of South Africa: Durban Butterworths 2000, issue 10 Chapter 5 at page 87

⁷⁸ Section 10 (3) A

⁷⁹ Kaitlin Cseres Judit Op Cit note 5 at page 305

⁸⁰ Proposed new clause under section 44 prohibits customer exploitation, discrimination between customers

⁸¹ Part III of the Fair Competition Act and Part VI of the Kenya Competition Act

⁸² Part VIII of the Fair Competition Act

⁸³ Op Cit note 26 at page 25

⁸⁴ International Development Research Centre (IDRC) Competition Policy Spurs Economy wide gain: Legislating on competition brings productivity and business investment to Tanzania. A case study of competition and Development available at <http://www.idrc.ca/EN/Documents/competition-policy-spurs-economy-gains.pdf> [Accessed on 13/2/2015]

instead, the competition authority could focus on consumer protection, so that consumers can gain a positive understanding of competition law and how it works in their favour. Thus consumer welfare provisions would be a valuable addition to the Ugandan competition bill.

Compared to the Competition Acts of Kenya, Tanzania and South Africa, the Competition bill lacks detail on consumer protection and almost all other provisions. The Act is too general and merely touches on competition with no inclusion of issues that define Uganda as an economy. The Fair Competition Act for instance acknowledges the fact that their manufacturing industry is growing and includes provisions that impose obligations and standards for manufacturers.⁸⁵ The effectiveness of any law can only be measured by its effectiveness in benefiting the people whose conduct it seeks to regulate. As noted by Eleanor Fox, *“legislation should respond to contextual problems that need to be solved. Law is not ideally generated by outsiders who say: We have this law and you should, too.”*⁸⁶

In terms of enforcement, the competition bill creates a single administrative body,⁸⁷ which serves both supervisory, investigative and adjudication purposes. Much as it makes sense from the point of view of economics and resources, procedural fairness demands that investigative functions must be kept separate. This is desirable because competition law and policy must be implemented in an objective, impartial and transparent manner.

In an attempt to attain competitiveness, businesses often merge or acquire assets of one another resulting into a more powerful and more competitive amalgam. Competition law is meant to ensure that such mergers and acquisitions do not result in over concentration of the market or endangerment of prices for consumers leading to uncompetitive behaviour.⁸⁸ The competition bill does not differentiate the various types of mergers namely horizontal, vertical, conglomerate, crossboarder and international mergers yet such a distinction is useful in determining which consolidations are likely to have anti-competitive effects and those that will produce outcomes that will enhance competition. Merger Control regulation (MCR) is more powerful than the instruments available for abuse of dominance or anti-competitive

⁸⁵ Part VII of the Fair Competition Act

⁸⁶ Op Cit note 4 at page 211.

⁸⁷ The competition Commission is established under Part II of the competition bill

⁸⁸ Stewart et al .Competition Law in Action-Experiences from developing countries (May 2007). International Development Research Centre Globalisation. Growth and Poverty Programme at page 6

agreements because MCR is pre-emptive where by an authority can block a merger and its negative effects before it occurs.⁸⁹

The South African Law for example sets out the orthodox aims of most competition laws, that is, efficiency, adaptability and development of the economy but it goes on to state other competition law objectives that are unique to South Africa. The law provides that the Commission or Tribunal must consider, when evaluating a merger, the effect that the merger will have on a particular industrial sector or region; on employment; on the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to be competitive; and on the ability of national industries to compete in international markets. In order to do its work, the Commission or Tribunal may require input from those affected by public interest considerations.⁹⁰

The Competition Act of South Africa is written in a manner that explicitly acknowledges the importance of public interest and provides for the consideration of factors that go beyond the boundaries of competition. This is at the first instance reflected in the preamble and purpose of the Competition Act and is furthermore stipulated as a consideration in both the assessment of exemptions and the assessment of mergers.⁹¹ The interpretation of the role of public interest has centred on the evaluation of mergers. The tribunal has determined that public interest can be used as a basis for approving an anti-competitive merger and can be used to prohibit a pro-competitive merger.⁹² The tribunal stated that a merger that has failed the competition test can still be passed on public interest test and hence approved. Conversely a merger that has passed the competition test could still fail the public interest test and hence be prohibited.⁹³

The competition bill provides for a blanket prohibition for listed anti-competitive agreements without any specific detail.⁹⁴ There are a number of activities that result in conduct which is notorious in Uganda at the local government level and more recently in the procurement of government services. Activities like bid rigging and collusive tendering need

⁸⁹ Ibid page 7

⁹⁰ Section 12A (3) of the South African Competition Act

⁹¹ James Hodge, Sha'ista Goga, Tshepiso Moahloli: Public Interest Provisions in the South African Competition Act: A Critical Review. Competition Policy, Law and Economics Conference Paper 2009

⁹² David Lewis, The Role of Public Interest in Merger Evaluation, International Competition Network, Merger Working Group, Naples, 28-29 September 2002

⁹³ Competition Tribunal in a Merger between Harmony Gold Mining Company Limited and Gold Fields Limited, Case No:93/LM/Nov.04; Para 54

⁹⁴ Clause 45 of the bill

to be emphasised and given more detail so that the violation is well understood and for ease of enforcement. Bid rigging can significantly affect growth by increasing prices and reducing quality of large government projects designed to reduce entry barriers.⁹⁵ The competition Commission needs to create guidelines on how to detect bid rigging. For example in Uganda it has become common that most major public road works end up in a scandal of shoddy, substandard work and mismanagement of funds that were meant for the construction mostly because the process leading to award of government tenders is often mired with rigging and collusion.⁹⁶

The recent construction of the Mukono-Kyetume-Katosi-Nyenga road gravel to paved standard is a typical example of the negative effects of bid rigging. The government is in the process of negotiating a new contract which will mean additional costs from the initial \$58.9million of which \$42.8million was paid to Ms Chico to \$90.3million. The contract won by Ms Chico was initially challenged by the inspectorate of government following allegations that there was mismanagement of the procurement process and collusion up to the award of the tender.⁹⁷ The effects of bid rigging were highlighted in the South African case of **Competition Commission v Adcock Ingram Critical Care (AICC) and 4 others**, which involved collusion and bid rigging by five pharmaceuticals companies for the supply of intravenous solutions to public hospitals. In a statement submitted at the hearing in which the tribunal approved the consent decree, one of the representatives of the department of health summed up the character of bid rigging and the nature of the problems that it poses;

*“We are committed to giving preference to local manufacturers to promote job creation, poverty eradication and skills development. However it is difficult to pursue these objectives for promoting local manufacture when manufacturers act in such a manner. We find it very disturbing that SMEs that get preferential points in the tender system to enable them gain market share, resort to this kind of behaviour”.*⁹⁸

⁹⁵ Evenett S (2004) Links Between Development and Competition Law in Developing Countries, Case studies for the World Bank Development Report 2005 page 19

⁹⁶ The scandal involving construction on the Katoosi road is still making headlines since last year when the procurement process following the award of the tender to an American company represented by a Ugandan company was alleged to be flawed. Investigations are still on going and both bid rigging and collusion have been alleged during the procurement process.

⁹⁷ Available at <http://constructionreviewonline.com/2015/01/uganda-negotiating-new-contractor-katosi-road-project/> [Accessed on 9/03/2015]

⁹⁸ Robert D Anderson and Anna Caroline Muller. Competition Policy and Poverty Reduction: A whollistic Approach; World Trade Organisation Research and Statistics Division Staff Working Paper ERSD-2013-02 at page 14

The competition bill is a result of very poor drafting reflecting provisions that were not well thought out. The bill shows evident disconnection between the legal provisions and the economic realities in Uganda. This may explain why ten years down the road this bill has not yet been passed into law.

2:5 Limitations to Competition Regulation in Uganda

Competition is useful as a means, not as an end in itself. Competition facilitates the efficient allocation of social resources, provides incentives to produce goods in a cost effective manner, and establishes systems of production that are responsive to underlying consumer demand. Competition law seeks to facilitate the ability of the market to perform these functions, while at the same time limiting the abuse of private market power.⁹⁹ In the absence of the legal infrastructure necessary for a complete regime of competition laws, it cannot serve its intended purpose.

Competition regulation in Uganda has been a story of continuous effort that yields no fruits. The first competition bill was drafted in 1998 but was never passed into law. The Uganda Commercial Justice Sector Report commissioned by the Ministry of Justice and Constitutional Affairs and the Ministry of Finance Planning and Economic Development, stated in its appendix that *„new legislation is not a priority in respect of competition law“*. The report instead recommended for the enactment of a Special Economic Zones law that would cover competition and consumer protection.¹⁰⁰ The Special Economic Zones law has never been enacted and that may explain why there has been laxity in passing the competition bill 2004 that preceded the 1998 bill.

A fully effective competition law must be supported by a competition culture where competition objectives are understood by the people and form a natural part of background to decision making by government.¹⁰¹ In most economies where competition law has not been adopted it is because there is a tension between competition as *„bringing out the best in people by enhancing their efforts and creativity“* and competition as *„a corrosive force that*

⁹⁹ Hans Vedder: Spontaneous Harmonisation of national (Competition) Laws in the wake of the modernisation of the EC Competition Law. The Competition Law Review Volume (2004) 1 Issue 1 Page 5-21

¹⁰⁰ Uganda Law Reform Commission; A study Report on the Establishment of Special Economic Zones.(2004) Law Commission Publication No.24 of 2004 at page

¹⁰¹ Nick Godfrey: Why is Competition Important for Growth and Poverty Reduction? (March 2008) Background Paper OECD Global Forum on International Investment. Page 11

reduces us to anti-social beasts’.¹⁰² Unfortunately in Uganda competition is understood only from its negative effects and thus there is ignorance and lack of impetus from consumers to contribute to development of a healthy competition culture which is effective for development.

Current policy discourse in Uganda is dominated by passing legislation for playing politics of the upcoming general election.¹⁰³ In such an environment, the Act cannot be given the attention it deserves. In addition, consumers as immediate beneficiaries of the enforcement lack an organisation structure to compel the government to prioritise its enforcement agenda. The only consumer protection groups are “Consent” and “Cuts” whose impact is not felt as the bodies have not spoken out on many issues concerning safeguarding consumer interests. A vigorous consumer movement and civil society can play a valuable role in creating a culture of competition as well as pushing for law reform and enforcement.¹⁰⁴

Resource constraints hinder the operationalisation of competition law in Uganda. Inadequate budget allocations in almost all primary sectors of the economy are a characteristic trend in the Ugandan economy. This is worsened by the procedural and substantive weaknesses of the proposed enforcement network. Resource scarcity has significant effects on competition law enforcement. Sufficient resources are the bedrock of efficient enforcement because they largely determine whether competition law is workable.¹⁰⁵

The competition bill provides for the creation of a competition fund which shall be used for promotion of competition advocacy, creating awareness about competition issues and training.¹⁰⁶ The source of funds is to be generated mainly from activities of the commission themselves which is not a very reliable income source considering the fact that this will be a newly regulated area. The bill further provides that the fund will not be administered by the commission but by a committee of such members as shall be determined by the chairperson. Once again the management of the fund raises questions as to why it should not be placed in the hands of the commission.

¹⁰² Hayward and Kemmelmeier, M (2007) :How Competition is viewed Across Cultures:A Test of Four Theories: Sage Journals .Cross Cultural Research Volume 41 number 4 page 365

¹⁰³ The Anti-Homosexuality bill and the speed at which the law was passed and later outlawed amidst a lot of media attention and publicity is an example of how promulgation of laws is used as a tool to advance political interests.

¹⁰⁴ Op Cit note 78

¹⁰⁵ Supra note 62 at page 12

¹⁰⁶ Clause 59 of the Competition bill

The inherent nature of markets in developing countries renders the implementation of competition law challenging. Its enactment may however serve to rectify those same deficiencies. For instance competition law can be used to diminish barriers to entry into a relevant market which may in turn result into lower prices and a wider product range for consumers.¹⁰⁷

2.6. CONCLUSION

In conclusion, it is clear that Uganda needs a Competition and Consumer Protection law if market oriented policies are to be given the best possible chance of success. For example, price liberalisation, if not accompanied by competition law aimed at controlling economic behaviour and structures, can result in substantial price increases and reduced benefits for the overall economy. The policy and normative competition law structure suited for Uganda must keep in mind local realities and give sufficient weight to governing capabilities, institutions and political realities.¹⁰⁸

The law can incorporate aspects of the Kenyan law on independence of the competition Commission, Tanzanian law on consumer protection and the South African law on consideration of marginalised groups, priority sectors and public interest. In its current state, the competition bill 2004 is not a sufficient tool of economic development in the Ugandan Context unless it encompasses issues unique to Uganda like introducing significant changes to the rules governing control of mergers and provide stronger guidance for consumer welfare. At this stage it may be cheaper for Uganda to invest in enacting a good law rather than dealing with the problems associated with adoption and enforcement of a law that is out of touch with the context it intends to regulate.

¹⁰⁷ Brusick P and Evenett SJ. Should Developing Countries Worry About Abuse of Dominant Power (2008) Wisconsin Law Review at page 287

¹⁰⁸ Op Cit note 62 page 46

CHAPTER THREE: COMPETITION IN THE EAST AFRICAN COMMUNITY

3:1 INTRODUCTION

This chapter will provide insight into the regional legal, policy and institutional framework on competition in the EAC. It will be argued that while for a regional competition regime to be successful, it is necessary for all member states to have national competition laws, there are other challenges to operationalisation and successful implementation of the EAC Competition Act. These challenges will be discussed in detail.

3.2. Background of the East African Community

The history of integration in East Africa dates back to the completion of the Uganda Railways from Mombasa to Kampala by the British colonial administration, and also marked the 1st Phase of the formal socio-economic and political cooperation of East Africa.¹⁰⁹ However, the persistence of market inequalities and the centralisation of most of the headquarters of common services in Nairobi, Kenya, continued to pose structural challenges to the East African Common Services Organisation (EACSO) as it was previously referred to, creating a centre-periphery relations in the region. This was a result of the fact that most industries tended to cluster in Kenya. These enduring historical and structural challenges, among other reasons, necessitated the reconceptualisation and restructuring of the EACSO into the East African Community (EAC).¹¹⁰ The treaty establishing the next phase of East African regional cooperation was signed by Kenya, Tanzania and Uganda in 1967 broadening the scope of the economic and political integration of the EAC.¹¹¹

The EAC disintegrated in 1977 due to the political, economic, institutional, structural and personality conflicts.¹¹² It was not until 1999 that the Treaty establishing the now current East African Community was signed by the member states, Kenya, Uganda and Tanzania. The EAC treaty entered into force on 7th July 2000 after its ratification by the member

¹⁰⁹ Korwa G Adar: The Democratisation of International Organisations – East African Community (2011) International Democracy Report page 3 and 4

¹¹⁰ Ibid

¹¹¹ Joseph S. Nye Jr. East African Economic Integration. The Journal of Modern African Studies, vol, 1 No.4 (Dec 1963), pp 480

¹¹² A. Hazelwood, 'The End of the East African Community: What are the Lessons for Regional Integration Schemes; in: Journal of Common Market Studies. 1979, pp 40-58

states.¹¹³ In 2007 the Treaty was signed by Burundi and Rwanda, expanding the EAC to five countries.¹¹⁴

According to the Treaty, EAC should first form a customs union, then a common market, a monetary union, and finally a political union.¹¹⁵ The Customs Union became operational in 2005, and was formally completed in 2010.¹¹⁶ The Common Market Protocol was signed in 2009, and the plan is that the creation of a common market, which includes free movement of goods, labour, persons, services and capital, and the right of residence and establishment, will be completed by 2015.¹¹⁷

3.3 Trade Relations within the EAC

Integration has been a central objective of the EAC since its establishment. The customs union was established in 2005, followed by a common market in 2010.¹¹⁸ Internal tariffs on goods from other EAC countries have been eliminated over a five-year period. A common external tariff (CET) was established for imports from third countries: a zero rate for raw materials, a 10 percent rate for intermediate products, and a 25 percent rate for finished goods.¹¹⁹ In practice, however, significant obstacles remain in the operation of the EAC common market. While agreement was reached to gradually remove non-tariff barriers and mechanisms are in place in each country to monitor implementation, actual progress has been limited. Customs procedures and harmonised regulations are yet to be agreed upon but weak administrative capacity hinders the application of existing rules.¹²⁰

Trade relations in the EAC are shaped by the fact that the respective economic strengths of the integrating partners are disparate. For instance Kenya due to geographic, climatic and historic reasons is more economically developed than the other integrating partners with most industries tending to concentrate there and most imports passing through

¹¹³ Oluoch, L.O. Wauna-Legitimacy of the East African Community. *Journal of African Law*, Vol 53, Issue 2 (October 2009) pp 7

¹¹⁴ Ibid

¹¹⁵ Article 5(2) of the Treaty Establishing the East African Community.

¹¹⁶ Customs union allows members to eliminate tariffs between them while maintaining a common external tariff for non-members

¹¹⁷ Dick Durevall: EAC Preconditions for an effective Monetary Union. International Growth Centre Policy Research (IGC) 2011 Policy Research Paper pp2

¹¹⁸ Ibid

¹¹⁹ Hamid R, Davoodi. The East African Community after 10 years. Deepening Integration pp 41. Available at <http://www.imf.org/external/np/af/2012/121712.pdf> [Accessed on 20/4/2015]

¹²⁰ Ibid

the port of Mombasa which acts as a natural gateway to East Africa.¹²¹ The argument is that Kenya naturally asserts itself as the leader of the integrating unit owing to its economic influence which may not auger well with the other countries. The trade relations in such a case necessitate striking a balance between the countries that sense dilution of their economic influence and those that do not want to be regarded as the weaker members of the regional integration unit.¹²²

All economies within the EAC are net producers of raw materials for export to developed economies and net consumers of finished goods from developed economies. This in part, is a result of lack of the necessary infrastructure, technological development and technical expertise needed to enable proper exploitation of resources.¹²³

The high dependence on commodity exports as compared to a well-developed manufacturing sector has led to low levels of development among EAC economies, on account of greater reliance on primary commodity exports. A United Nations Centre for Trade and Development (UNCTAD) report indicates that manufactured goods are better at sustaining growth and expanding export markets and diversification.¹²⁴ One of the prevailing views as a consequence of these shortcomings is that Africa has more to gain economically by integrating with the developed world rather than integrating with itself.¹²⁵ This, however, should not downplay the regional integration objectives of EAC in light of the economic and political uncertainty that Africa's main trading partners in the developed world are facing.

Underlying the more subdued export growth in the EAC, regulatory bottlenecks impede the region's competitiveness. Although a common market is in place, non-tariff barriers are still high in the region and the process of harmonising standards and regulations is still ongoing.¹²⁶ While EAC members have embraced market-supportive policies at a

¹²¹ F.X. Njenga: Contrast Between the Effect of Laws of the European Economic Community and the East African Community in their constituent Territories. East African Law Journal, Vol.4, Issue 3 (September 1968) pp 138

¹²² Tanzania has been a slow mover in the integration process which has led to referring to Uganda, Kenya and Rwanda as the coalition of the willing

¹²³ UNCTAD-Trade Performance and Commodity Dependence. New York and Geneva, 2003: Available at http://unctad.org/en/Docs/gdsafrika20031_en.pdf [Accessed on 20/4/2015]

¹²⁴ Ibid

¹²⁵ ibid

¹²⁶ Note 115 pp 41

broader level and often put in place legal frameworks amicable to investors, business surveys show that enforcement is still problematic.¹²⁷

The period from 2011 to 2020, the EAC is focusing on improving her global competitiveness for faster and sustainable economic growth and moving closer to the status of a newly industrialised region. Specific areas of focus include inter alia, establishment of a robust legal and administrative framework that facilitates the region's economy to generate income and improvement and expansion of infrastructure.¹²⁸

3.4. Policy Objectives in the Formulation of the EAC Competition Act

Regional Competition policy is in most cases, as is the case with the EAC Competition law, usually tied to a greater regional integration objective.¹²⁹ Therefore, an analysis of the policy objectives behind a regional Competition regime is better understood against the backdrop of the regional integration objectives.

The broad objective of the EAC puts focus on both economic and political goals.¹³⁰ The Treaty provides that the objectives of the Community shall be to develop policies and programmes aimed at widening and deepening co-operation among the partner states in political, economic, social and cultural fields for their mutual benefit.¹³¹ However it is important for us to note that the regional integration objectives of EAC, like most Regional blocs in practice use the economic goal to achieve the political objective.¹³² The integration agenda of the East African Community is strongly political in nature as its ultimate goal is to become a federation.¹³³

Within the EAC context economic objectives are a means to achieving the political objective. Regional Integration within the EAC is geared towards economic liberalisation within the common market with the ultimate aim of forming a political federation. However,

¹²⁷ Ibid

¹²⁸ 4th EAC Development Strategy 2014 available at

http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=7&ved=0CFsQFjAG&url=http%3A%2F%2Fwww.meaca.go.ug%2Findex.php%2Ftenders%2Fdoc_do [Accessed on 25/4/2015]

¹²⁹ Josef Drexl, Economic Integration and Competition Law in Developing Countries, Ch 11 at 239 and 239 in Josef Drexl, Mor Barkhoum, Eleanor JM. Fox, Mical S. Gal and David Greber, Competition Policy and Regional Integration in Developing Countries (Edward Elgar 2012)

¹³⁰ Article 5 of the Treaty establishing the EAC

¹³¹ Ibid

¹³² John Akokpari-Dilemmas of Regional Integration and Development in Africa in Akokpari et al (ed) The African Union and its institutions (2008) page 85-110

¹³³ Available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/eac/> [Accessed on 17/4/2015]

the structure of most economies in Africa is such that a substantial amount of economic reforms would need to be undertaken if the objective of an economic community is ever to be achieved.¹³⁴

Article 75(1) the Treaty for the Establishment of the EAC, includes Competition as one of the elements to be contained in the protocol to establish the EAC Customs Union. The Council of Ministers during its first meeting held on 8-13 January, 2001, decided that:

„(a) An EAC Competition Policy and Law be developed the activities of which should be determined by the principle of subsidiarity. The objective of the Competition Policy, which should cover all economic sectors, shall be to ensure, protect and promote free Competition;
(b) The secretariat be mandated to facilitate the process of developing a model EAC Competition Policy and Law on the basis of the existing Partner States Competition Policies and Laws and other relevant materials;

(c) A competent, strong, independent and autonomous regional Authority should be established to implement the Community's Competition Policy and law; and

*(d) The EAC Competition Policy and Law should be concluded in tandem with the Protocol on the Establishment of the East African Customs Union.*¹³⁵

In this regard, in 2004, the EAC Council of Ministers guided by the second East African Development Strategy aimed at enhancing trade liberalisation and development, among other sectors adopted the East African Competition Policy and subsequently the East African Legislative Assembly enacted the East African Competition Act in 2006. This is in line with the key foundation of the strategy which is the development and adoption of an East African Trade Regime with a Customs Union and a Common Market. Competition is one of the cornerstones of the Customs Union.¹³⁶

¹³⁴ Op-cit note 118

¹³⁵ P.M. Njoroge. Regional Cooperation on Competition Policy and Law. The East African Community Experience. A paper presented to the IGE, UNCTAD, GENEVA, 30 October to 2 November, 2006 available at http://unctad.org/sections/wcmu/docs/c2clp_ige7p25_en.pdf [Accessed on 26/04/2015]

¹³⁶ The Second EAC Development Strategy 2001-2005 available at http://www.eac.int/index.php?option=com_docman&task=doc_view&gid=3&Itemid=163 [Accessed on 9/04/2015]

3:5.The Case for a Regional Competition Law in the EAC

The need for a regional Competition law rests upon limits of a State's jurisdictional competence and therefore upon its ability to apply its Competition laws to overseas undertakings under International law. The two elements of a state's jurisdictional competence are; Jurisdiction to make laws through its arms of government known as a state's subject-matter jurisdiction.¹³⁷ Secondly, a state has jurisdiction to enforce its laws and this is referred to as enforcement jurisdiction.¹³⁸ Based on the principles of nationality and territoriality, the extraterritorial application of Competition rules is ensured through regional Competition laws whose arm extends beyond national borders.

Competition policy is important to prevent abuse arising from a market based economy. Competition prevents high prices and poor quality goods. It is therefore beneficial to the consumer, the market partners and the entire economy. Allowing competition on the regional markets can foster the attainment of international competitiveness. Competition policy facilitates the shift of resources towards efficient activities, improves capacity utilisation and promotes efficiency and profitability while ensuring fair treatment of consumers.¹³⁹

Regional Competition Agreements (RCA) carry a promise to overcome some of the core Competition law enforcement glitches faced by developing jurisdictions. The inclusion of Competition law in regional agreements is intended to prevent attempts which may frustrate Competition, thus diminishing the benefits expected from liberalisation and integration.¹⁴⁰

Regional agreements come in various forms, from loose cooperation agreements to customs unions with centralized Competition policy; regional agreements can solve certain problems of small economies with regard to the effectiveness of their Competition systems.¹⁴¹ Each economy may be too small to finance and staff a Competition Authority on its own and each alone may lack the strength to resist, or enforce law against,

¹³⁷ Richard Whish, *The International dimension of Competition law*, Competition law (6th Ed),(2008) Oxford University Press Chapter 12 at pp 472

¹³⁸ Ibid

¹³⁹ Ibid pp 13

¹⁴⁰ Gal M(2010) *Regional Competition Law Agreements: An Important step for Anti-Trust enforcement* :University of Toronto Law Journal volume 60 239-261

¹⁴¹ Op-Cit note 14

anti-competitive measures and acts launched from abroad.¹⁴² Together, they can pool resources and might be able to induce developed countries to obtain and share critical documents, and perhaps even convince developed countries to prohibit their own firms' export cartels targeted at the developing countries.¹⁴³

The East African Community has become a budding ground for foreign investments yet regarding the indicators of market contestability, for example in the finance sector, the presence of foreign banks in the EAC is not associated with greater Competition in the host country's banking system.¹⁴⁴ Foreign-owned banks have a strong presence in the EAC controlling more than half the total assets of the banking sectors in Uganda, Rwanda, and Tanzania (79 percent, 54 percent, and 51 percent, respectively). In Kenya and Burundi, these ratios are 45 percent and 41 percent, respectively.¹⁴⁵

This dominant position makes it difficult for local banks to compete with foreign banks that typically have access to lower cost financing and superior technology from parent banks in home countries.¹⁴⁶ This is worsened by the current structure and performance which reflects collusive and other forms of anti-competitive behaviour which permits more efficient banks to acquire branches of closed banks or buy out less efficient banks leading to a reduction in market competition.¹⁴⁷ With this situation, the case for a regional Competition regime cannot be over emphasised.

The weak consumer culture that characterises most low developed economies like the EAC means that most consumers in these countries prefer similar prices for competing products, in order to make choices easier, over lower but different prices. Furthermore, the fact that the jurisdictions choose to include Competition law on the regional agenda, in itself, signals its importance to the region.¹⁴⁸ For instance as already stated, the EAC includes Competition as one of the strategic objectives for effective integration.

¹⁴² Ibid

¹⁴³ Gal M and I.F. Wassmer, (2012) Regional Agreements for Developing Jurisdictions. Unleashing the Potential in Competition Policy and Regional Integration in Developing Countries, Cheltenham, UK: Edward Elgar

¹⁴⁴ Sarah Sanya and Mathew Gaertner. Assessing Bank Competition within the East African Community (2012) IMF Working Paper WP/12/32

¹⁴⁵ Ibid

¹⁴⁶ Ibid

¹⁴⁷ Adam Mugume: Competition and Performance in Uganda's Banking System. African Economic Research Consortium (AERC), November (2010)

¹⁴⁸ Op-cit note 141 at pp5

A regional authority can reduce political influence in the enforcement of Competition law, once adopted. Most importantly, it becomes more difficult for decision makers to create political favours, especially if the decision-making body comprises representatives from different jurisdictions. This effect can be strengthened by ensuring the independence of the joint authority and by securing long-term commitments from decision makers to serve on it. Joint enforcement has more added advantages than a domestic law, even if it harms the interests of strong groups in some member states.¹⁴⁹

A more notable benefit involves the opening up of neighbouring markets. Most regional Competition agreements include a commitment by members to enforce their national Competition laws which is important to ensure that access of firms from other members is not blocked by privately erected barriers to trade. As is widely recognized, openness to trade is often one of the most effective tools available to developing economies that are dealing with the limitations of their markets. Accessibility to export markets enlarges their scope and encourages the creation of companies of larger size, or more efficient technology choices, and the achievement of lower production costs by domestic firms. Imports may also significantly affect domestic welfare, as they create an upper limit on domestic firms' prices and may require domestic firms to produce at efficient scales.¹⁵⁰

Efforts towards Competition at regional level are necessary given that in structuring regional programmes such as customs union, some issues crop up which are cross border in nature. These can be in the domain of anti-competitive conduct of companies, mergers and acquisitions and even consumer protection. It is also important to note that trade liberalisation goes hand in hand with adapted legislation.¹⁵¹

Recently in the merger case of East African Breweries¹⁵² and South African Breweries,¹⁵³ the Competition Authorities of Kenya and Tanzania were unable to prohibit seemingly clear anti-competitive practices. Briefly in Kenya, a large beer producer attempted to enter the market, and this resulted in a ferocious price war which saw a dramatic fall in prices. Eventually, the new entrant withdrew from the market, but at the same time signed a

¹⁴⁹ Ibid

¹⁵⁰ Michal S Gal. Competition Policy for Small Economies (Cambridge MA. Harvard University Press, 2003 ch 2

¹⁵¹ Flora Musonda: Role of EAC in promoting Competition in the Region available at http://www.cuts-international.org/7up3/Role_EAC.pdf [Accessed on 25/04/2015]

¹⁵² East African Breweries is East Africa's largest brewer and a subsidiary of Diageo, one of the largest breweries in the world

¹⁵³ SAB Miller is the second largest beer producer globally with beverage operations in Africa across 15 countries and additional 21 countries through a strategic alliance with the Castel Group

share swap agreement with the incumbent, which allowed it to maintain a stake in the Kenyan market. At the same time the Kenyan incumbent closed its plant in Tanzania, but retained its investment in that country by taking a shareholding in a Tanzanian beer company that was owned by the retreating firm.¹⁵⁴ This agreement was anti-competitive because it ended direct competition between the two firms in both markets, potentially allowing greater profits to be made in both and to be shared, to the benefit of both parties.

Such a regional carve-up is anti-competitive and needs to be tackled by regional Competition Authorities. Had the practices leading to the merger in question taken place wholly in one jurisdiction e.g. Kenya, the resultant anti-competitive practices such as hindering the sale/ supply or purchase of goods or services between persons engaged in selling or buying of goods or services; driving a competitor out of business, or deterring a person from establishing a competitive business in any specific area or location ; inducing a competitor to sell assets to, or merge with another party and inducing a competitor to shut down whether temporarily or permanently would have been detected and castigated.¹⁵⁵ But it straddled two jurisdictions (Kenya and Tanzania) yet, each of the two Competition Authorities was only allowed to handle national practices by law. Had the regional Authority been in place, all the above practices would have been investigated.¹⁵⁶

It was only in 2009 when the fair competition Commission of Tanzania handled a complaint brought by one of the Subsidiaries of East African Breweries Limited in Tanzania (Serengeti Breweries Limited) regarding various anti-competitive practices by Tanzania Breweries Limited.¹⁵⁷ Tanzania Breweries Limited was held to have abused its dominant position in the market by instituting restraints aimed at restricting Serengeti Breweries Limited market access through its marketing strategies.¹⁵⁸

In the case of **Premier Food Industries Limited** an application to the Monopolies and Prices Commission seeking approval to acquire assets of Trufoods Limited and Kabazi Canners Limited demonstrated how the Kenya competition commission was concerned about

¹⁵⁴ Centre for competition regulation and economic development Quarterly review available at <http://www.competition.org.za/review/2014/11/7/the-beer-industry-in-africa-a-case-of-carving-out-geographic-markets> [Accessed on 29/04/2015]

¹⁵⁵ All the above conduct would have been castigated as a prohibited restrictive practices under Section 21 of the Kenya Competition Act and Section 50

¹⁵⁶ Op-Cit note 21

¹⁵⁷ Serengeti Breweries Limited V Tanzania Breweries Limited, Decision of the Commission Complaint No.2 of 2009 Available at http://www.competition.or.tz/fcc_files/public/sbl_vs_tbl_final_ruling_-_2010.pdf [Accessed on 15/9/2015]

¹⁵⁸ Ibid

the employment effects of the proposed merger, even in the absence of competition concerns. The Commission recommended that the merger be approved on condition that the acquirer retained the existing workforce of the two target companies.¹⁵⁹ Such considerations would have been taken into account by a regional competition Authority had it been in existence. This further demonstrated the need for the establishment of an EAC Competition Authority. As Gal has argued, a regional Competition Authority creates a force that enables members to establish a stronger opposition to anti-competitive conduct relative to each member's unilateral enforcement and also allows them to present a stronger and more credible joint position in international negotiations.¹⁶⁰

3:6. THE EAC COMPETITION ACT 2006

3.6.1. Conduct Regulated

The East African Community Competition Act 2006, is an act of the Community to promote and protect fair Competition in the Community, to provide for consumer welfare, to establish the East African Community Competition Committee/Authority and for related matters.¹⁶¹

The Act mainly deals with cross border issues. Part I of the Act provides for the applicability to all economic activities and sectors except cases of persons acting in their capacity as consumers, collective industrial bargaining and sovereign acts of the Partner States. Part II provides for restraints by enterprises. It legislates on prohibition of concerted practices among competitors, consumer exploitation and mergers and acquisition. It also makes provision for protection of consumers against exploitation. Part III makes provision for prohibition of state subsidies, the manner of granting subsidies and the areas in respect of which such grants are not allowed.

Part IV lays down the procedure for enforcement of the Competition policy. It addresses the management of activities stipulated within the policy and the law including handling of complaints and enforcement of remedies and sanctions. Part V provides for the institutional framework necessary for implementation of the Competition law as stipulated in the Act. It establishes an East African Community Competition Committee within the institutional framework of the Community. It provides for its functions and its powers. It also

¹⁵⁹ UNCTAD. Volunteer Peer Review on Competition Policy in Kenya. New York and Geneva 2005. Available at http://unctad.org/en/docs/ditcclp20056_en.pdf [Accessed on 20/07/2015]

¹⁶⁰ Op-Cit note 127 pp 260

¹⁶¹ Preamble to the EAC Competition Act 2006

addresses the finance and staffing of this committee and the manner in which it is expected to discharge its functions.

Specifically, the EAC Competition Act is based on principles of supranationality (established at community level), voluntary ceded supremacy in matters which have EAC dimension, subsidiarity (limited to cross border restraints of Competition and those outside EAC leaving national restraint to partner states), loyalty (Partner states to cooperate in implementation of the Competition Policy) and rule of law (Competition policy to be transposed into legal rules that meet the requirements of transparency and legal certainty).¹⁶²

The role of competition law should be understood in the context of its ability to safeguard and further the advances made by governments within the region in liberalising markets through prohibiting of anti-competitive conduct. The Act prohibits anti-competitive practices which include abuse of dominance directly or indirectly, imposing unfairly high selling or unfairly low purchasing prices or other unfair trading conditions; limiting production or technical development and innovation to the prejudice of consumers, discriminating between consumers or suppliers according to non-commercial criteria such as nationality or residence.¹⁶³ The prohibitions further cover activities that lead to predatory pricing, price squeezing, price subsidisation, refusal to deal, refusal to access an essential facility and tying arrangements.¹⁶⁴

The Act has a requirement for merger notification in order for such mergers to be approved.¹⁶⁵ It can be observed that the Act does not stipulate a threshold for the mergers or acquisitions that need to be notified so there is bound to be an influx of merger notifications to be dealt with. In addition, the lack of a stipulated threshold creates a problem when it comes to enforcement because the COMESA Competition Regulations also have a requirement for notification of mergers with a regional effect.¹⁶⁶ This gives rise to a number of jurisdictional questions not only at the extraterritorial level but also regarding the issue of overlapping memberships of the member States in different regional organisations and how the jurisdiction of the COMESA Regulations affects the EAC regional Competition

¹⁶²EAC Competition Policy and Law: Study report prepared for the EAC Secretariat in Cooperation with the German Technical Cooperation(GTZ),pg. 23-70

¹⁶³ Article 7 of the EAC Competition Act 2006

¹⁶⁴ Article 9

¹⁶⁵ Articles 11-13 of the Act

¹⁶⁶ Article 23(5) a of the COMESA Competition Regulations 2004

regulatory framework.¹⁶⁷ Typically, merger control remains the primary activity of many authorities. More progress should be made in terms of prosecution of cartel conduct which is perhaps lacking due to resource constraints facing the Authorities.¹⁶⁸

The Act allows partner states, upon notification to and approval by the Authority to grant subsidies to an undertaking for public purposes provided such subsidy does not threaten or distort Competition in the community or is against public interest.¹⁶⁹ However subsidies which affect competition may be allowed for certain category of products to promote social welfare, for the development of small and medium sized enterprises, for restructuring and modernisation of certain sectors of the economy, for less developed regions, financing a public sector, protection of food security and protection of the environment.¹⁷⁰

The EAC Competition Act incorporates consumer welfare protection provisions in respect of the impact of certain anti-competitive conduct on consumer welfare and the fact that Competition law and consumer welfare work hand in hand. Article 32 specifically addresses the issue of information exchange and dissemination by prohibiting false and misleading representations by persons engaged in trade or commerce in respect of their goods or services. The Act further prohibits unconscionable conduct in consumer and business transactions.¹⁷¹ Unconscionable conduct is not defined but the Act lists non-limiting factors that should be considered in determining whether there has been a contravention of these provisions.

The implementation and enforcement of the EAC Competition Act is to be carried out by the Competition Authority established under Article 3. The Authority is to consist of three commissioners one from each partner state.¹⁷² The Authority has powers to implement and

¹⁶⁷ Uganda, Kenya and Rwanda are also members of COMESA

¹⁶⁸ Simon Roberts, Thando Vilakazi and Witness Simbanegavi: Understanding competition and regional integration as part of an inclusive growth agenda for Africa: key issues, insights and a research agenda: Paper Submitted for the South African Competition Commission and Tribunal Challenge (August 2014). Available at <http://www.compcom.co.za/wpcontent/uploads/2014/09/CompetitioninclusivegrowthregionalintegRobertsSimbanegaviVilakazidraft26-August2014.pdf> [Accessed on 14/4/2015)

¹⁶⁹ Article 15 of the EAC Competition Act 2006

¹⁷⁰ Section 17 of the EAC Competition Act 2006

¹⁷¹ Article 27 of the EAC Competition Act 2006

¹⁷² Article 38 provides for three commissioners but they should be five since Rwanda and Burundi are part of the EAC

enforce the Act ¹⁷³and in this also acts as a court with exclusive jurisdiction in matters pertaining to Competition within the community.¹⁷⁴

The EAC Competition law has adequate provisions to deal with exclusionary conduct and any anti-competitive practices that distort Competition in the common market. A detailed discussion of each and every conduct regulated is beyond this paper however, notably, the law is geared to effectively deal with anti-competitive practices of multi-national corporations based in the region with subsidiaries within the common market. Additionally, it deals with mergers and cartels whose effects stretch beyond national borders.¹⁷⁵

3.6.2. Status of Implementation

Currently, the East African Community Competition Act is in force but not operational because a Competition Authority to man it as required under the Act has not yet been established.¹⁷⁶ Only Kenya and Tanzania have national Competition laws with fully functional and tested Competition Authorities. Burundi has a law in force but is yet to put in place a Competition Authority. The process of getting Competition legislation in place in Uganda and Rwanda is slow, primarily because competition law is not seen as a priority, given the serious socio-economic problems faced by these countries. As highlighted in the previous Chapter, Uganda has had a draft bill since 2004 way before the regional law was adopted but it is still on the shelf and has not yet been passed into law.

3:7. Factors Hindering Operationalisation of the East African Competition Act

Although the EAC Competition Act was enacted in 2006, it has not been operationalised. In fact, the coming into force of the EAC Common Market revealed a legal gap regarding regulating firms with cross-border investments.¹⁷⁷ One of the primary considerations in the analysis of a legal framework is where the boundaries of its applicability and influence lie. In this regard both the jurisdictional limits of the EAC Competition Act in terms of sphere of application and institutional competencies come to question.

¹⁷³ Article 42 of the EAC Competition Act 2006

¹⁷⁴ Articles 44 of the EAC Competition Act 2006

¹⁷⁵ Article 4 of the EAC Competition Act 2006

¹⁷⁶ The Authority is to be established under Article 37 of the EAC Competition Act

¹⁷⁷ Op –Cit note 22

Regional Competition law is difficult to enforce and often requires domestic enforcement capability. A successful regional Competition Authority which is empowered to detect the existence of and remedy anti-competitive practices, to a large extent is dependent on existence of functional national Competition Authorities¹⁷⁸

The biggest argument advanced hindering the implementation of the EAC Competition Act is the fact that to date, only three out of five partner states have Competition laws; these include Burundi, Tanzania and Kenya. Of those three countries, only Kenya and Tanzania have established institutions to enforce the law.¹⁷⁹ Burundi is in the process of establishing a Competition Commission.¹⁸⁰

Developing countries are generally reluctant to adopt Competition rules. This stems from the various challenges they face in implementing these rules. The challenges faced at national level still occur at a regional level. This is mainly due to high costs and low returns associated with adopting these rules compared to other reform oriented policies such as removing trade restrictions.¹⁸¹

Small jurisdictions face enforcement resource constraints as a result of their low levels of development and the resultant financial limitations. They also often suffer from human resource constraints as a result of low levels of education. This financial constraint is further worsened by the fact that the cost of conducting a Competition law investigation is often not affected by size.¹⁸² Resource constraints are often more severe when dealing with multinational issues. Evidence may need to be gathered from foreign sources, a costly and time-consuming exercise. Furthermore, a large international firm will often deploy a high level of legal defence which may be difficult for a Competition Authority with a limited endowment to match such expertise and resources, even if it has a sound case.¹⁸³

Another major challenge to adoption of regional Competition laws especially by poor economies as seen in most EAC countries is high level of concentration of their markets in

¹⁷⁸United Nations Conference on Trade and Development (UNCTAD): Implementing Competition-Related provisions in Regional Trade Agreements: Is it possible to obtain development gains? New York 2007. Available at http://unctad.org/en/Docs/ditccp20064_en.pdf [accessed on 5/5/2015]

¹⁷⁹ The Monopolies and Prices Commission and The Fair Competition Commission respectively

¹⁸⁰ Available at <http://www.iwacu-burundi.org/blogs/english/eac-competition-policy-adopted-but-not-implemented-in-burundi/> [Accessed on 20/4/2015]

¹⁸¹ Op-cit note 127 pp 21

¹⁸² ibid

¹⁸³ Supra note 20 pp 243

comparison to developed countries.¹⁸⁴ Most sectors are dominated by a few firms that produce majority of the output. This stands in the way of adopting and enforcing Competition law especially one that is not favourable towards high concentration levels. Reasons for concentrations include high barriers to entry and exit, low demand or purchasing power in these countries which lowers the number of firms that can efficiently operate in the market.¹⁸⁵ Most concentration is experienced in particular industries for products such as Tobacco, Beer and Cement.¹⁸⁶

Governments usually politicise the administration of Authorities in applying and enforcing competition rules. In East Africa, governments play an active role in regulating and setting bureaucratic measures to be followed by firms to enter or exit the market resulting in rigid barriers. Most companies are government monopolies. The wave of privatisation and liberalisation only meant that these companies were sold to private entities which maintain the monopoly status of formerly government run enterprises.¹⁸⁷

Lack of data collection especially necessary to determine market share is a major problem. This is worsened by the absence of effective statistics offices of public administration that may provide this kind of information.¹⁸⁸ Notably sub-Saharan countries differ in the degree to which national newspapers with significant coverage of commercial matters are available electronically and therefore accessible by researchers in other countries.¹⁸⁹

Differences in Competition cultures often create obstacles to regional Competition. In some situations an entrenched Competition culture might create an obstacle to the setting up of the Regional Authority, especially if it involves joint enforcement.¹⁹⁰ This might accrue when the national Competition culture is quite different from the one which the Regional Competition Authority attempts to create. For example, this is evident from the earlier

¹⁸⁴ Paul Cook: Competition Policy, Market Power and collusion in Developing Countries ;(December 2002) 33 Centre on Regulation and Competition Working Paper Series 3.

¹⁸⁵ Michal S. Gal; Size does matter: The effect of market size on optimal competition Policy (2000-2001);74

¹⁸⁶ CUTS Briefing Paper: Taking the right steps. Competition Administration in Eastern and Southern Africa. Available: http://www.cuts-ccier.org/7up3/pdf/Taking_the_Right_Steps-Competition_Administration_in_Eastern_and_Southern_Africa.pdf [Accessed on 30/4/2015]

¹⁸⁷ Maria Vangliasindi: Competition across transition economies. An Enterprise Level Analysis of the main policy and structural determinants (December 2001) 68 European Bank Working Paper 1

¹⁸⁸ Seppo Reimavuno and Markkas Handelin, Establishing a Credible Competition Authority –The Egyptian Case (March 2005) Trade Enhancement Programme (TEPA) Component 2 Egypt-European Association Agreement 40

¹⁸⁹ Op-Cit note 165 page 274

¹⁹⁰ Op-cit note 127 pp 12

discussion of the Competition laws of Kenya and Tanzania which all represent the Competition cultures of those countries coupled with the fact that Uganda has not adopted its Competition law as required by the regional Competition Act.

A related issue involves the national and regional Competition Authority institutional relationship, which is also crucial for effective operation. The goal of a regional Competition law should be to form synergies between the regional Competition Authorities and national Competition Authorities. The lack of an efficient and effective system of education, idea sharing and case allocation and encouraging cooperation in the enforcement of Competition law by all institutions concerned greatly hinders regional Competition efforts.¹⁹¹

In addition, regional agreements are usually framed as trade agreements, negotiated and operated by trade officials of nations that wish to gain the advantage of regional free trade by tearing down internal state trade barriers. Competition law is often an afterthought and thus is usually sacrificed especially when it conflicts with national interests of member states that do not have competition laws in immediate contemplation.¹⁹² In the East Africa Community, despite being behind step in establishing a Competition Authority, it is not yet up and running and yet the date for its establishment and operationalisation was December 2014.¹⁹³

Another major challenge is lack of awareness and political will. Despite efforts of the Secretariat, the program to establish an EAC Competition Authority has not been sufficiently prioritised.¹⁹⁴ Having a Competition law may prove futile if enforcement cannot withstand political hurdles. This is worsened by the existence of strong political intervention; lack of due process in the administration of the law; and absence of interest in and support for the Competition law from other external stakeholders, such as non-governmental organizations ("NGOs"), academics, and the media.¹⁹⁵

Jurisdictional uncertainty and overlapping memberships is a contributing factor to the failure to operationalise the EAC Competition Act. As noted earlier Uganda, Kenya and Rwanda are members of COMESA while Tanzania is a member of SADC. While the SADC

¹⁹¹ Op-cit note 127pp 16

¹⁹² Op-cit note 127 pp 20

¹⁹³ Available at <http://www.theeastafrican.co.ke/business/EAC-law-to-regulate-trade-coming-in-Dec/-/2560/2498844/-/1e2jocz/-/index.html>

¹⁹⁴ Ibid note 138

¹⁹⁵ Deunden Nikomborirak: The Political Economy of Competition Law: The case of Thailand available at <http://www.thailawforum.com/articles/Competition-law3.html> [Accessed on 4/05/2015]

approach to Competition does not provide for a supranational Authority to enforce regional Competition,¹⁹⁶ the COMESA Competition Regulations address restraints by enterprises, abuse of dominance and mergers and acquisitions in more or less the same manner as the EAC Competition Act.¹⁹⁷ Even more conflicting is the fact that the COMESA Regulations vest in the Commission exclusive primary jurisdiction over violations of the Act within the common market and decisions are binding on the authorities of the Member States.¹⁹⁸

In the academic circle, knowledge of Competition law is very limited. The universities in East Africa do not offer courses on Competition law.¹⁹⁹ With extremely limited education in the field, it therefore comes as no surprise that there is very little research work on Competition-related issues and very little comprehension of the subject among policy makers and law enforcers in the region. The media, the private sector, and the average person also have limited knowledge about Competition law and policy. Most cannot distinguish between "*competitiveness*" and "*competition*." In the complete absence of support and interest from the state, NGOs, academics, and the media, the law is doomed to fail.

3.8. CONCLUSION

There is strong evidence that anti-competitive arrangements can have a regional dimension. The gains from greater cooperation between Competition Authorities are significant and numerous. A regional Competition regime has potential to overcome some of the most significant obstacles to Competition law enforcement in many developing and small jurisdictions. As argued above, by joining forces to create some form of participatory governance, EAC can reduce, inter alia, limitations resulting from scarce enforcement resources, political economy constraints, and limited ability to create credible enforcement threats.

The foundation of a sound regional Competition framework starts at the national level. Member States need to ensure that they adopt within their territories policies aimed at promoting and protecting Competition in order to ease harmonisation of regional efforts at promoting Competition. Identifying the factors hindering the operationalisation of the EAC Competition Act as above is the surest way of putting things in motion in order to develop a

¹⁹⁶ Article 5 of the SADC Treaty and 25 of the Protocol on Trade in the Southern African Development Community 1996

¹⁹⁷ Article 3(1) of the COMESA Competition Regulation

¹⁹⁸ Article 3(2) of the COMESA Competition Regulation

¹⁹⁹ For instance in Uganda and Kenya Competition is offered under the faculties of economics and not law

successful Competition regime in the region. The national Competition law gap is a big hindrance to the operationalisation of a regional Competition law, but the prevalence and contribution of several other factors is weighty and cannot be ignored.

CHAPTER FOUR: CONCLUSIONS AND RECOMMENDATIONS

4:1 Perspectives

The effectiveness of any law in a country depends on the extent to which it has been developed in line with the socio-economic and historical developments of the country and the needs of the people. The acceptance and ownership of the law among stakeholders is only possible if their expectations are taken into consideration while drafting the law. The fundamental importance of competition law is that it lays down rules for fair competition where small and big firms co-exist in a market controlled by market forces. It provides consumers with an opportunity to choose goods and services at a price and quality that suits their needs and increases business by providing a level playing field.

For Uganda and East Africa as a region, the group of stakeholders whose interest and behaviour is important is broad and includes consumers, business owners, government and the political class. The effectiveness of a Competition law at both national and regional level will depend on the degree to which it succeeds in balancing the objectives pursued by the different groups.

Of the five East African countries, only Kenya and Tanzania have functional Competition Authorities. Burundi has enacted a Competition law but is yet to set up its Competition Authority. Uganda and Rwanda have bills in place which have not been passed into law and have not set up Competition Authorities.

At the national level, especially Uganda, it is important to have the draft law vetted by international experts with experience in implementing the law in order for legal errors to be identified. It is not sufficient for lawyers to solely do the job since only a handful of them have the necessary experience and expertise in competition law in the region.

The delay in the operationalisation of the EAC Competition Act and setting up of a regional Competition Authority is due to the nature of the EAC integration process explained by financial and administrative incapacity and the principle of sovereignty which is very closely guarded by Member States. Thus the idea of a supranational regional Authority has been highlighted in the directives and resolutions of the EAC Secretariat since 2006 but has

not been followed by concrete initiatives to establish it.²⁰⁰ The EAC institutional framework is characterised by the role played by national governments which make decisions by consensus leaving the secretariat to carry out administrative functions and coordination of regional agencies. The study has revealed that Competition policy can be used as a double-edged sword to enhance economic efficiency but if not properly implemented can end up being a major impediment to economic development.

4.2. RECOMMENDATIONS

Efforts should be made at national level by Uganda to adopt a Competition law as soon as possible. The absence of Competition laws at national level has been identified as one of the factors hindering the operationalisation of the EAC Competition Act. This should be accompanied by additional legislative reforms in areas of regulation of sensitive sectors such as telecommunication, banking and energy. The Competition Authority and other sectoral regulatory Authorities should be coordinated so as to solve the conflict between Competition and sectoral regulators in Uganda.

There is need to garner sufficient political will at national and regional level in order to establish the Competition Authorities. This should be fortified by building technical capacity at national and regional levels to enforce the laws.²⁰¹ Strong opposition led by public monopolies and government ministries to reforms such as Competition regulations that are designed to facilitate the transition to a market economy and gradually dismantle government and business institutions that centralize economic power in the country is a major challenge in the EAC.

Opposition to reforms can be overcome through education and sensitisation of policy makers, business owners, consumer groups, and the general public in order to increase awareness of the benefits of a Competition law regime. This will dissipate misunderstanding about its scope and purpose. Since this needs sufficient political will, the task of the government, might be made easier if adoption of a Competition law is imposed as a condition for gaining access to other benefits, such as participation in a free trade agreement. This is

²⁰⁰ In 2009 the sectoral council on Judicial and Legal Affairs directed the secretariat to make preliminary arrangements for the establishment of and seating of the EAC Competition Authority and report progress to the council (*EAC/CM18/Decision 103*).

²⁰¹ Op Cit note 21

where international partners, may play an essential role in convincing governments of the importance of adopting or strengthening Competition regulation.²⁰²

This research has shown that investigating cross-subsidisation (transfer of resources between competitive and monopolistic services) cases requires a lot of data, including information about costs, and in particular common costs, transfer of resources within different subsidiaries of the incumbent. Unfortunately, gaining access to such business records may prove particularly difficult despite the fact that such data is often essential for Competition Authorities seeking to prosecute cartels, abuse of dominant position, and other anti-competitive practices. Most monopolies simply refuse to grant access.²⁰³

Secondly, few enterprises, especially State owned firms or recently privatised firms maintain financial accounts that meet internationally-recognized standards, compile business plans and other data required to provide Competition Authorities with a clear vision of the activities of the firm. This suggests, once again, that the adoption of a Competition law regime needs to be accompanied by a broader set of reforms, which should seek to establish the conditions necessary for the functioning of a market economy.²⁰⁴ Resources should be invested in compiling qualitative and quantitative data for use by the Competition Authorities. Competition cannot take place in a vacuum without information.

Sensitisation of key stakeholders at national and regional level on the benefits of Competition regulation, specifically within the context of the Customs Union and Common Market should be undertaken. In addition targeted outreach programs should be conducted all over the country for Uganda and throughout the East African Region. These programmes should focus on educating civil society, private sector, academia, high level politicians and the legal minds as well as the judiciary to increase their understanding of Competition policy and law.²⁰⁵

Closely related to the above, since the weak Competition culture was identified as one of the challenges to the operationalisation of the regional competition Authority, synergies should be established with local institutions not just government authorities and the judicial

²⁰² Damien Geradine: Competition Law and Regional Economic Integration –An analysis of the Southern Mediterranean Countries. World Bank Working Paper No.35 page 64

²⁰³ *ibid*

²⁰⁴ *ibid*

²⁰⁵ UNCTAD, Voluntary Peer Review of Competition law and policy: A Tripartite Report on the United Republic of Tanzania –Zambia-Zimbabwe,8(United Nations Publication 2012) Available at http://unctad.org/en/PublicationsLibrary/ditceclp2012d1_Comparative_Report_en.pdf [Accessed on 25/5/2015]

branch but also with academic bodies, Non-Government Organisations (NGOs), consumers and trade associations and think tanks. This will help to build momentum towards the creation of a general Competition culture.²⁰⁶

Although the challenge of inadequate resources is a reality, it is necessary for Governments to ear-mark the required funds to run the Authorities in order to make planning easy. The Ugandan Competition Bill for instance, provides that the Competition Authority will be funded by monies from the Competition Fund. It should be noted that an Authority commencing its activities cannot be financed from funds which are non-existent. A budget process to kick-start the Authority therefore need to be carefully thought out and planned.

The process of enacting Competition laws at national level needs to be expedited in the case of Uganda and Rwanda. As already mentioned in the previous chapter, national Competition Authorities will work hand in hand with the regional Competition Authority so the existence of functional national Competition Authorities will go a long way in easing the work of the regional Authority because most of the problems that are likely to occur in the initial stages of operation of the regional Authority will have been dealt with at the national level.

Jurisdictional uncertainty can be resolved by adopting a balancing test approach where the relevant institution through a set of established principles determines whether to exercise jurisdiction or defer jurisdiction to another state or institution. Factors that can be considered for example, include among others, the link of the activity or the person/economic actor to the territory, the nature of the activity to be regulated (i.e. how important is it to the common market) and the importance of the regulation from an international perspective (politically, economically, socially).²⁰⁷

This test will work well to alleviate some of the challenges facing the regional Competition Authority highlighted in the previous chapter. This is particularly necessary for the extraterritorial application of the EAC Competition Regulations and the determination of jurisdiction between the national and the regional Authorities and the COMESA Competition Regulations where Kenya, Uganda, Rwanda and Burundi are members.

²⁰⁶ United Nations Conference on Trade and Development (UNCTAD): Implementing Competition-Related provisions in Regional Trade Agreements: Is it possible to obtain development gains? New York 2007. Available at http://unctad.org/en/Docs/ditceclp20064_en.pdf [accessed on 5/5/2015]

²⁰⁷ IBA Legal Practice Division Report of the Task Force on Extra-territorial jurisdiction 16,17 (International Bar Association 2009) Available at tinyurl.com/taskforce-etj-pdf [Accessed on 25/5/2015]

There is need to undertake harmonisation of laws. This is most effective at national level where member states are required to set their Competition laws to a specific standard. The EAC Council of ministers issued a directive in which the secretariat was mandated to facilitate the process of developing a model EAC Competition Policy and Law on the basis of the existing Partner States Competition Polices and Laws and other relevant materials.²⁰⁸ Harmonisation helps to ensure a level of predictability and certainty as to what an economic actor can expect when subject to the jurisdiction of another member State. It also makes it easier to implement the regional legal framework fairly among the Member States.

In addition to the above, the lack of harmonisation can be solved by conclusion of cooperation agreements. The EU and the US have for instance concluded such agreements in order to cooperate on investigations, jurisdiction, information sharing and enforcement.²⁰⁹ This approach would resolve any tension between two conflicting regional organizations in the case of overlapping memberships in different Regional Economic Communities (RECs). This will be timely in light of the COMESA-EAC-SADC Tripartite Free Trade Area (FTA) that is currently being negotiated. The cooperation and coordination arrangements can play a major role in facilitating joint enforcement with the foreign Authorities for example in instances where some multinational corporations have larger turnovers than the GDP of the Member States combined to the extent that the welfare effect within the common market is far greater than the cost incurred by the firm in pulling out of the common market.²¹⁰

Further research that documents the nature of Competition in the various sectors especially those that are characterised by high levels of concentration such as cement, Beer and sugar should be undertaken. The research should outline the welfare costs of anti-competitive arrangements at country and sectoral level and should at least demonstrate the importance of competitive rivalry for economic development within countries. Such studies could focus on: growth impacts, employment impacts and consumer welfare impacts of anti-competitive conduct by large firms in the respective countries. This will help to strengthen the hand of Competition Authorities and policy-makers and make a strong case for adoption of Competition law in all the EAC countries especially where none exists.²¹¹

²⁰⁸ This was a Directive from the council meeting held on 8-13th January 2011

²⁰⁹ Op-Cit note 193

²¹⁰ Michal S Gal: The Ecology of Anti-Trust: Pre-conditions for Competition Law Enforcement in Developing Countries (2004).New York University Law and Economics Working Papers .Paper 10

²¹¹Op-Cit note 166

Substantial effort should be made towards development of academic programs, including courses, seminars, and workshops, in the area of Competition law and economics. All the EAC countries suffer from a lack of qualified experts in Competition law and economics, which is partly due to the short supply of graduates in these areas. Moreover, Competition law reforms are unlikely to produce effects, before a sufficient mass of professionals have the required knowledge of Competition law principles and processes. For example competition sensitisation has to be conducted by people who have knowledge in the same.

4:3. CONCLUSION

This paper has demonstrated that there is need to develop a successful Competition regime in Uganda and highlighted the factors that are hindering the operationalisation and implementation of the Uganda Competition Bill and the East African Community Competition Act. A regional Competition law framework is a vital component for the achievement of regional integration objectives. However, the benefits of a regional Competition regime can only be achieved with proper implementation. Regional Competition law is difficult to implement without existence of functional Competition laws at national level because it makes exchange of information an uphill task. The establishment of a regional Competition Authority with exclusive competence to enforce the regional Competition policy has the advantage of maximising the limited human resources available, and overcoming the problem of unequal development of national Competition laws mentioned above.

As already established, the foundation of a sound regional Competition framework starts at the national level. Member States need to ensure that they adopt within their territories policies aimed at promoting and protecting Competition. At the same time, there has to be harmonisation of the Member States' efforts to ensure that there are no substantial inter-jurisdictional divergences in the respective Competition law policies. This harmonisation will also help to ensure a uniform implementation of the regional framework.

A regional Competition law poses many challenges so that, while efforts by jurisdictions to make it happen are visible, the results are slow in materialising. This paper proposes that developing countries like Uganda and East Africa as a whole need to develop a perspective of their own. It proposes that a law drafted to suit the social, economic and

historic conditions of these countries and certain Competition-law principles of South African law may comprise the best available model, on grounds that this law incorporates the Spence principle of efficient inclusive development while also incorporating important insights of the revised Washington Consensus which respects the problem of seriously limited resources.

The EAC Competition Act in its present form requires some amendment in order to create more certainty. As noted in the previous chapter there are various challenges especially in terms of jurisdictional uncertainty, lack of political will, inadequacy of resources, weak enforcement framework and weak Competition culture. However, proper regulation of Competition law may increase the welfare of members if the recommendations elaborated above are implemented. It will be a long way forward and might require an in-depth analysis of conditions and solutions that call for a high degree of innovation to create institutions that are carefully adjusted to bring about incentives for mutual commitment; some might not be applicable, given the prevailing conditions but others may well promise significant benefits. The journey will certainly be a challenging one but initial steps must be taken since the formulation of a regional Competition framework will be beneficial as we move towards achieving the EAC integration objectives.

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