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DEVELOPING A SUITABLE COMPETITION LAW AND POLICY FOR DEVELOPING COUNTRIES: A CASE STUDY OF TANZANIA

A minor dissertation submitted in partial fulfilment of the requirements for the degree of Master of Laws in International Trade Law

EPHRAIM MUSIBA

(MSBEPH001)

SUPERVISOR: JUDGE DENNIS DAVIS

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LIST OF ACRONYMS AND ABBREVIATIONS

Alcoa	Aluminium Company of America
ANSAC	American Natural Soda Ash Corporation
CAC	Competition Appeal Court of South Africa
CMB	Crop Marketing Boards
CUTS	Consumer Unity and Trust Society
ed	editor
ESRF	Economic and Social Research Foundation
et al	et alia (and others)
etc.	et cetera (and other things)
EWURA	Energy and Water Utilities Regulatory Authority
EU	European Union
FTPA	Fair Trade Practices Act 4 of 1994
FCA	Fair Competition Act 8 of 2003
FCC	Fair Competition Commission
FCT	Fair Competition Tribunal
FDI	Foreign Direct Investment
GDP	Gross Domestic Product
Ibid	Ibidem (in the same place)
IDRC	International Development Research Centre
ie	that is
IMF	International Monetary Fund
NSGRP	National Strategy for Growth and Reduction of Poverty

OECD	Organisation for Economic Co-operation and Development
op cit.	opere citato (in the work cited)
POS	Point of Sale
s	Section
SAP	Structural Adjustment Programme
SBL	Serengeti Breweries Limited
sic	sic erat scriptum (thus was it written)
SME	Small and medium-sized enterprises
SUMATRA	Surface and Marine Transport Regulatory Authority
TANROADS	Tanzania National Roads Agency
TBL	Tanzania Breweries Limited
TCAA	Tanzania Civil Aviation Authority
TCRA	Tanzania Communications Regulatory Authority
TZS	Tanzanian Shilling
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
v.	versus

CHAPTER 1

INTRODUCTION

This dissertation aims to examine one major issue: namely, the most appropriate competition law for developing countries from the perspective of 'looking from the inside out'.[1] Reference is made particularly to Tanzania, with a close evaluation of its Fair Competition Act, 2003 and some case law, so as to assess the efficiency and effectiveness of competition policy and law within its Tanzanian context. This involves taking into consideration the inherent characteristics of the Tanzanian economy since it is necessary that Tanzania have a competition law that reflects and addresses its particular needs. So the basis of this dissertation is to analyse the efficacy of the Fair Competition Act to deal with the specific requirements of Tanzanian society; and if the result is found to be in the negative, then the dissertation goes on to suggest what type of competition law model Tanzania should develop that will best suit the country's needs.

1.1 BACKGROUND

According to CUTS International,[2] over 100 countries around the world, both developed and developing, have thus far adopted competition law and policy to regulate their domestic competition. CUTS goes on to draw a distinction between competition law and competition policy: competition policy refers to 'those government measures that affect competition by directly affecting the behaviour of enterprises and the structure of industry'.[3] The measures comprise strategies that, for instance, promote competition in the national markets by relaxing industrial policy; by liberalising trade restrictions to ease conditions for entry and exit into markets; and by generally reducing government control of the markets.[4] The adoption of competition law *per se* is the more important aspect of this trend towards government

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[1] 'From the inside out' is a phrase used by Eleanor M Fox in one of her articles. I use this phrase throughout this dissertation to mean from the point of view of the needs of each particular society as opposed to a view from the perspective of global free markets.
[2] Consumer Unity and Trust Society
[3] CUTS Centre for Competition, Investment and Economic Regulation 'Competition policy and economic growth – is there a causal factor?' (2008) at 1 available at *http://www.cuts-international.org/pdf/CCIER-2-2008.pdf* accessed on 2 December 2013.
[4] Ibid.

regulation of competitive practices.[5] It incorporates Acts of Parliament, ministerial regulations and judicial decisions, and is aimed at preventing anti-competitive business practices from dominating in the market.[6]

Competition law strives to ensure that there is an 'efficient allocation of scarce economic resources through the protection of free market competition'.[7] This in turn should lead to improved productive efficiency and a more even allocation of resources. Likewise, it intends to ensure that consumer welfare is attained by forcing markets to become more efficient. In the end this leads to the presence of a greater choice of products and services at lower prices. [8] It is these benefits that flow from competition law that have generally inspired different countries to enact legislation to prevent anti-competitive practices.

With regard to the formulation of competition policy, countries differ in the design of their policies. This is because the values on which policies are based reflect each society's individual aspirations, culture, history or institutional structure.[9] As a result, 'the nature and scope of competition law and policy' varies from country to country,[10] and this diversity is for the most part also affected by the school of thought or theory that prevails when the country enacts its legislation.

Therefore, before proceeding with this dissertation it is important to understand the different theories or schools of thought that affect competition-law models. It is also necessary to demonstrate how they play a role in shaping the competition law and policy of different jurisdictions.

1.2 COMPETING THEORIES OF COMPETITION LAW

One of the fundamental objectives of competition law is to prohibit activities that harm free and fair competition in the market. This objective invariably leads to the question of what type

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[5] For the purpose of this dissertation, 'competition law' and 'antitrust law' will be used interchangeably to mean the same thing.
[6] CUTS op cit note 3.
[7] Louise du Plessis, Judd Lurie and Amy van Buuren 'Competition legislation and policy-is it necessary in a developing economy?' Fifth Annual Competition Law, Economics and Policy Conference, 4 &5 October 2011 at 3, available at *http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/FINAL-PAPER-2011.pdf* accessed on 9 October 2013.
[8] United Nations Conference on Trade and Development 'Application of competition law: exemptions and exceptions' (2002) at 7, available at *http://unctad.org/en/docs/ditcclpmisc25_en.pdf* accessed on 23 November 2013.
[9] Ibid at 8.
[10] Ibid.

of activities or behaviours are regarded as harmful to competition? There is no simple answer to this question as it has always been a subject of debate. The opinions of a variety of scholars, competition law practitioners and experts as to what qualifies as 'harm' to competition differ according to each proponent's particular school of thoughts. There are three prominent and thought-provoking theories that explain what constitutes 'harm' in the context of competition.

The first theory, known as 'output limitation theory', regards conduct as anticompetitive if it negatively affects the output of a relevant product or service such that the quantity of the product or service is reduced in the market and the shortage in turn gives rise to a price increase.[11] The second theory, known as 'open market theory', deems conduct as anticompetitive if it results in limiting output and if it degrades the market mechanism by hindering openness and access to markets based on merit.[12] The third theory, known as 'fair competition theory', holds that conduct harms competition if it limits output, undermines access to markets based on merit and if it harms the competitive dynamic among small- and middle-sized firms or if it negatively affects the public interest.[13] This third theory is considered to be protectionist in nature as it is said to protect competitors and not competition.

In a nutshell, the first view regards exploitative activities as anticompetitive activities; this view reflects the dominant contemporary US antitrust position. The second view, open market theory, regards exploitative activities and exclusionary activities as anticompetitive and is mostly represented by European competition law. Lastly, the third view regards both exploitative and exclusionary activities as anticompetitive but in addition it expresses the need to modulate competition in order to create a stable environment. This third view represents concerns raised mostly by developing countries.[14]

1.2*(a) Output limitation theory*

This theory influences US antitrust law greatly. Prior to the development of this theory, the purpose of US antitrust law was to protect the competitive process; therefore any activity that harmed the proper functioning of the market and the competitive process was considered to be

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[11] Eleanor M Fox 'We protect competition, you protect competitors' (2003) 26 *World Competition: Law and Economics Review 2* at 2.
[12] Ibid.
[13] Eleanor M Fox 'What is harm to competition? exclusionary practices and anticompetitive effect' (2002) 70 *Antitrust Law Journal* at 372.
[14] Fox op cit note 11.

anticompetitive.[15] For example, if the activity resulted in lessening rivalry among market actors, such as interfering in the natural flow of competition by exclusionary practices or by competitors forming cartels, it was considered to be harmful.[16] So during this era, antitrust law prohibited both exploitative and exclusionary conduct because the law was used as a tool for preserving the competitive functioning of the market, minimising privilege and power, and protecting competition on the basis of merit.[17]

By the end of the 1970s the scope of the law had expanded and it was considered by some to be out of control because it did not only prohibit output-limiting and unjustified exclusionary conduct, it even prohibited activity that appeared to be a threat to the existence of less efficient firms even if that activity was not anticompetitive by nature.[18] This reach of the law was not well received and, as a result, when the 1980s ushered in a new US administration one of the first things it did was to propose a plan to cut back antitrust law that appeared to be handicapping American businesses.[19] The new administration succeeded in doing this by introducing a new rule known as the 'rule of non-intervention'.

This rule of non-intervention was developed and advocated by a group of economists known as the Chicago School of Economics.[20] The Chicago Scholars were known to be heavily against the interventionism of antitrust authorities and courts,[21] and thus their theory was that market conduct should not be interfered with unless the conduct appeared to be inefficient. The inefficiency of the conduct was determined by looking at whether the conduct granted market power to a particular entity and hence put that entity in a position in which it could limit output of products or services that would eventually affect the market.[22] To them exclusionary practices could by no means be regarded as threats to competition merely because the practice was likely to lead to the curtailment of a rival's access to the market. It was more likely that the exclusionary practice would lead to greater efficiency and would not be output-limiting.[23] Furthermore, if efficient firms were eliminated from the market, they would be able to find a way to manoeuvre around the exclusionary restraint.[24] In addition, the Chicago School

[15] Ibid at 3.
[16] Fox op cit note 11 at 3.
[17] Fox op cit note 13 at 376–377.
[18] Fox op cit note 11 at 3.
[19] Ibid at 4.
[20] Fox op cit note 13 at 378.
[21] Massimo Motta *Competition policy: theory and practice* (2004) at 8.
[22] Fox op cit note 13 at 378.
[23] Ibid.
[24] Ibid.

bolstered their theory with the concept of consumer welfare, which contends that there should be no intervention of the law in business matters unless the conduct of firms decreases aggregate consumer welfare.[25] Hence, the Chicago School recommended shifting the focus of antitrust law against exploitative activities such as the formation of cartels.[26]

However, by the end of the twentieth century a debate arose among antitrust jurists and enforcers in the US about whether or not exclusionary conduct does meet the test of diminishing consumer welfare and thereafter can be regarded as anticompetitive.[27] The Post-Chicago School of Economics challenged the Chicago School's model and supported the pre-Chicago position, even going further to show that in some circumstances practices, such as exclusive dealing, tying arrangements and predatory pricing, can be anticompetitive.[28] Nonetheless, there were antirust minimalists who were of the view that antitrust intervention should be restrained unless there is credible proof that the conduct would increase market power, limit output and raise prices.[29] Even so, post-Chicago theories have not yet had a dramatic effect on the evolution of the US antitrust law, but they have had some success albeit that their success has had limited 'precedential' effect.[30]

1.2*(b) Open market theory*

The underlying principle of this theory is akin to that of 1960s and 1970s American jurisprudence which asserted that the purpose of competition law is to protect the competitive structure and dynamics of the market.[31] In other words, competition law should protect access to markets, and should ensure the openness of markets as well as the right of firms to compete on merit, and hence to not be unfairly wiped out by dominant firms.[32] This theory represents the position taken by European Union competition law. In a speech given by the former European Competition Commissioner Mario Monti, he explained that the Commission was granted broad powers in order to ensure open markets and free competition:

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[25] Fox op cit note 13 at 379.
[26] William H Page 'The ideological origins and evolution of US antitrust law' (2008) 1 *Issues in Competition Law and Policy* 1 at 10.
[27] Fox op cit note 11 at 5.
[28] Page op cit note 26 at 16.
[29] Fox op cit note 11 at 6.
[30] Page op cit note 26 at 16.
[31] Fox op cit note 13 at 392.
[32] Ibid.

> 'The Union and in particular the Commission have been assigned such broad powers in the competition field in order to ensure the application of the principle, enshrined in the Treaty, of "*an open market economy with free competition*". Since its adoption more than 40 years ago, the Treaty acknowledges the fundamental role of the market and of competition in guaranteeing consumer welfare, in encouraging the optimal allocation of resources, and in granting to economic agents the appropriate incentives to pursue productive efficiency, quality and innovation.'[33]

From its inception, the Treaty establishing the European Community (Treaty of Rome, 1957) has contained competition provisions. For example, article 85[34] prohibits anticompetitive agreements that distort or restrict competition in the market and article 86[35] provides for the prohibition of abuse of dominance. Thus exclusionary contracts are prohibited in the European Union because they are considered to be a form of abuse of dominance.[36] Additionally, even the Treaty on European Union (1992) under article 3(*1*)(*g*) provides that the Community needs a system that will ensure that competition in the internal market is not distorted. This provision also makes it imperative for the Community to prohibit exclusionary practices because they are believed to disrupt the normal functioning of the market.[37]

Exclusionary conduct which is prohibited by the European Court is based on the idea that firms in the market have equal right to enjoy access to the market and the same right to compete on merit.[38] As a result, non-dominant firms are granted the opportunity to conduct their businesses without being unfairly blocked from the market by dominant firms.[39] This is considered to be crucial because it creates an environment in which there is legitimate competition and in the long run it is beneficial for all market players, that is, both competitors and consumers.[40]

Furthermore, under the EU, mergers may be conceived as either exclusionary, price-raising or even both. For example, if there is a merger between two firms and the merger results in creating a market structure in which the market share of the two firms increases so that they

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[33] Mario Monti (Commissioner for Competition Policy) 'European competition policy for the 21st Century', *Address at the Fordham Corporate Law Institute—Twenty-eighth Annual Conference on International Antitrust Law and Policy* (New York 20 October 2000) available at http://europa.eu/rapid/press-release_SPEECH-00-389_en.htm?locale=en accessed on 5 June 2014.
[34] Article 85 of Treaty of Rome is now Article 101 of the Treaty on the Functioning of the European Union.
[35] Article 86 of Treaty of Rome is now Article 102 of the Treaty on the Functioning of the European Union.
[36] Fox op cit note 11 at 9.
[37] Fox op cit note 13 at 393.
[38] Fox op cit note 11 at 9.
[39] Ibid at 10.
[40] Ibid.

become dominant, this merger is likely to be prohibited because it creates an environment for abuse of dominance.[41] This position was adopted in the case of *General Electric/Honeywell v Commission.*[42] General Electric (GE) is the world's largest producer of large and small jet engines for commercial and military aircraft, and General Electric Commercial Aviation Services (GECAS) is one of the world's largest aircraft leasing companies as well as one of the largest buyers of planes. GE wanted to merge with Honeywell International, a leading firm in the production of avionics including navigating equipment, certain non-avionic products, engines for corporate jets and engine starters. The European Commission blocked the merger on the grounds that—

> "the combination of the two companies' activities would have resulted in the creation of dominant positions in the markets for the supply of avionics, non-avionics and corporate jet engines, as well as to the strengthening of GE's existing dominant positions in jet engines for large commercial and large regional jets … Such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. This would have the effect of foreclosing competitors, thereby eliminating competition in these markets, ultimately affecting adversely product quality, service and consumers' prices."[43]

The United States on the other hand approved the same merger on the grounds that the merger would lower prices and hence be pro-competitive because GE's engines and Honeywell's avionics complemented each other.[44] Some US antitrust officials said that the European Commission blocked the merger because the Commission was protecting GE and Honeywell's competitors instead of protecting competition.[45] This shows the difference in the reasoning of the EU and US in applying competition law.

1.2*(c) Fair competition theory*

This theory incorporates both the output limitation theory and the open market theory, but it goes further to include unfair competition in its general framework. Unfair competition is the notion of an unfair playing field in which producers or 'economic agents' are not equal, some have greater power and more advantages than others. Therefore, the unfair competition

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[41] Ibid at 11.
[42] *General Electric/Honeywell v Commission* (2001) Case No. COMP/M.2220 (2001).
[43] European Commission **'**The Commission prohibits GE's acquisition of Honeywell' Press release IP/01/939 **(**03/07/2001)' available at *http://europa.eu/rapid/press-release_IP-01-939_en.htm* accessed on 2 January 2014.
[44] Fox op cit note 11 at 12.
[45] Ibid.

component of this competition policy is perceived to protect competitors from competition itself and most of the developed jurisdictions are against this school of thought.[46]

This theory represents the stance advocated by developing countries. Kyu-Uck Lee, the then chairman of the Competition Advisory Board for the Korean Fair Trades, explained the stance as follows:[47]

> "In a developing economy where, incipiently, economic power is not fairly distributed, competition policy must play the dual role of raising the power, within reasonable bounds of underprivileged economic agents to become viable participants in the process of competition on the one hand, and of establishing the rules of fair and free competition on the other. If these two objectives are not met, unfettered competition will simply help a handful of privileged big firms to monopolise domestic markets that are usually protected through import restrictions. This will then give rise to public dissatisfaction since the game itself has not been played in a socially acceptable, fair manner."[48]

He further concluded that—

> "without fairness, freedom alone may not achieve the desirable outcomes expected from competition, especially in developing economies where unfair elements can be exacerbated by competition … Similarly the notion of competition itself differs in countries with different social and cultural traditions and conditions. Therefore, it is essential that competition authorities in various countries be able to better understand each other's stance and policy environment in searching for global rules of the economic game."[49]

In addressing the issues facing developing countries, Nam-Kee Lee[50] also explained that so long as developing countries need economic growth their governments cannot willy-nilly adopt non-intervention strategies to let the market run its course. Developing countries will always be concerned with the state of competitiveness between domestic businesses.[51] Therefore it is not advisable for developing countries to adopt competition policies that are on a par with those of developed countries because their markets and businesses are not as mature and competitive as those of developed economies.[52]

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[46] Ibid at 15.
[47] Quoted by Fox op cit note 13 at 407.
[48] Fox op cit note 13 at 407.
[49] Ibid at 408.
[50] Former Chairman of the Korea Fair Trade Commission.
[51] Fox op cit note 13 at 409.
[52] Ibid.

1.3 ADVANTAGES OF COMPETITION LAW FOR DEVELOPING COUNTRIES

Developing countries have unique circumstances as they are restrained by inherent problems such as poverty, poor infrastructure, weak capital markets, lack of industrial and technological development, and the presence of monopolies.[53] It is due to these impediments that the economies of developing countries are handicapped, forcing them to devise means to solve these problems. It is in this arena that competition policy plays an important role in developing countries. The careful formulation of competition policy and the adoption of competition laws can have positive economic effects.

1.3*(a) The positive effect of sound competition law on the wellbeing of consumers and producers*

It is common knowledge that most developing countries are faced with serious challenges arising from poverty and low standards of living. This requires that goods and services in these countries be priced as low as possible so that even the poorest of the people can afford to buy them.[54] The presence of competition law that prohibits anticompetitive activity, such as price-fixing or output-restricting agreements, enhances the creation of an environment in which the price of goods and services is reduced.[55]

Through regulating the market, competition law promotes wealth creation and job creation. It is often argued that competition law and policy contribute to the entry of new players into the market.[56] It is through the entry of these new players that it produces an environment where jobs are generated.

1.3*(b) The influence of sound competition law and policy on the decision of investors*

Another positive economic effect of the careful formulation of competition law and policy is the role that it plays in investment decisions and the procurement of foreign direct investment (FDI). FDI is vital to economic growth, technological development, improvement in quality of

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[53] Dina I Waked 'Competition law in the developing world: the why and how of adoption and its implications for international competition law' at 70 available at *http://www.icc.qmul.ac.uk/GAR/GAR2008/Full%20version.pdf* accessed on 23 December 2013.
[54] Maher M Dabbah *International and Comparative Competition Law* (2010) at 301.
[55] Chris Noonan *The emerging principles of international competition law* (2008) at 64.
[56] Du Plessis, Lurie and van Buuren op cit note 7 at 16.

goods and services, an increase in employment opportunities and boosts the country's entry into the world market. [57]

Yet, in most developing countries there is a problem with a lack of foreign capital inflow because there are, for a variety of reasons, a limited number of foreign companies and firms willing to establish themselves in developing countries.[58] The adoption of sound competition policies and law is one of several factors that encourage foreign investors to establish themselves in the developing countries,[59] particularly if competition is regulated in a similar fashion as it is regulated in major jurisdictions such as the US and European Union.[60] For instance, the implementation of competition law in Tanzania has had a positive effect on the country's level of investment, productivity and export performance.[61]

1.3*(c) The effect of sound competition law on economic development*

It is sometimes argued that competition law enhances economic development. The proponents of this argument point to various case studies that have found a link between the creation of a strong competition regime and the level of per capita GDP and economic growth. In addition, the World Bank, the UNCTAD and OECD have endorsed the view that competition policies are actually drivers of economic development.[62]

As a result of globalisation and improved cross-border economic relations domestic markets of developing countries have opened to the world. So they have become exposed to the negative impact of international cartels and abuse of dominance by foreign firms. Research has shown that overpricing from international cartels has a negative effect on developing countries and their economic development. Competition law is then necessary to counter these anticompetitive activities and the effect they have on domestic markets and the economy at large.[63]

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[57] Dabbah op cit note 54 at 299.
[58] Vivek Ghosal and Siddhartha Mitra 'Adoption and reform of competition laws and their enforcement: a cross-country perspective' in Pradeep S Mehta (ed) *Evolution of competition laws and their enforcement: a political economy perspective* (2012) at 2.
[59] Epiphany Azinge and Laura Ani *Competition law and policy in Nigeria* (2012) Nigeria Institute of Advanced Legal Studies at 4.
[60] Dabbah op cit note 54 at 300.
[61] Du Plessis, Lurie and van Buuren op cit note 7 at 12.
[62] Kathryn McMahon 'Competition law and developing economies: between informed divergence and international convergence' in Ariel Ezrachi (ed) *Research handbook on international competition law* (2012) at 210.
[63] Ibid at 211.

On the other hand, there are those who argue that this correlation between competition law and economic growth is not valid. They claim that the extent of economic growth that is experienced by a country as a result of implementing competition law is largely dependent on its level of economic development prior to adopting the law. So competition law has little to contribute to the economic growth of a country. [64]

Another argument that refutes the link between competition law and economic growth is that if there is aggressive enforcement of competition law in a developing economy then it is likely to restrict activities that in normal instances may not be considered anticompetitive. The nature and scope of the law may be too stringent.[65] This may discourage investment because investors might not be willing to deal with very aggressive competition law and hence choose to invest elsewhere. This as a result may stunt growth of a country's economy.[66]

However, despite these sceptic opinions still one cannot take away the effect that competition law and policy has on economic development.

1.4 RATIONALE FOR THE IMPLEMENTATION OF COMPETITION LAW IN DEVELOPING COUNTRIES

Many developing countries have taken the initiative to become proactive in their efforts to strive for the benefits of competition law and policy. As a result competition law and policy are considered to be a priority for the executive and legislative branches of a country.[67] This has then resulted in the sudden explosion of competition law in the developing world as now almost every developing country has a competition policy in place.

The reason behind this sudden explosion of competition law, especially in developing countries, is that, firstly, developing countries face international pressure from their trading partners and international organisations to enact competition laws. Their major trading partners are often developed countries such as the European Union, Unites States and Japan. In order for any state to become a party to a trade agreement with the EU, it may be faced with the condition that it adopt competition law. If the country entering the agreement does not have the competition law concerned, it would have to promulgate the law concerned in order to become

[64] Waked op cit note 53 at 74.
[65] Ibid at 76.
[66] Ibid.
[67] Dabbah op cit note 54 at 289.

a party to the agreement.[68] The same applies to application for loans or grants from international institutions: developing countries are sometimes required to adopt competition law first as a pre-condition for obtaining the loan.[69] For instance, Indonesia and Zambia adopted antitrust laws as part of structural adjustment programs that were financed by the IMF and the World Bank.[70]

Furthermore, the inherent characteristics of developing economies have made them susceptible to anticompetitive activities such as abuse of dominance due to the existence of monopolies; hence enhancing the need for competition law in these countries. The monopolies are formed as a result of the existence of fragmented and scattered market that make it difficult for upcoming market players to grow and gain a foothold.[71]As a result they eventually either die out or remain stagnant. This leaves a few large players present in the market because it is only the big players with large capital bases that can survive such market conditions because they have the means which others do not. This creates an environment for the creation of monopolies and the presence of monopolies in turn may lead to abuse of dominance which is a serious threat to consumer welfare.[72]

Furthermore markets in developing economies are faced with the problem of low demand due to the low purchasing power of the population as a whole. This has a negative effect on the number of firms that can operate in the market because their survival in such a market becomes difficult. This too encourages the development of monopolies.[73]

In the past, the economies of many developing countries were planned by the state. Today most have now adopted market-oriented economies. However, to some extent there is still a high degree of state intervention. Many state-owned enterprises are monopolistic by nature and therefore there is a form of favouritism with privileges being granted to these enterprises by the government.[74] This gives them advantages over other players in the market and in turn pose as a challenge to new competitors entering the market. In addition, if the state privatises these monopolies and liberalises its policies, the state monopolies are sold to private

[68] Anu Bradford 'Antitrust law in global markets' in Einer Elhauge (ed) *Research handbook on the economics of antitrust law* (2012) at 286.
[69] Ibid.
[70] Bradford op cit note 68 at 286.
[71] McMahon op cit note 62 at 221.
[72] Dabbah op cit note 54 at 298.
[73] Waked op cit note 53 at 78.
[74] Du Plessis, Lurie and van Buuren op cit note 7 at 5.

entities that continue to maintain their monopolistic position in the market.[75] Thus, the only thing that changes is the shift in monopoly status from the government to the private enterprise.

Another difficulty that is particular to developing economies is that they tend to have undeveloped credit markets. This creates a difficulty for producers who need to acquire financial capital.[76] This capital shortage hinders new entities from entering the market and therefore some sectors and industries are characterised by a few large enterprises that enjoy a *de facto* monopolistic position.[77] Such enterprises may even be in a position to use their profits to accumulate financial resources that are likely to prevent other firms from entering the market.[78]

Another reason for the explosion of competition law in developing countries is that most of the countries have become aware of the harmful effects caused by having state controlled economic policies.[79] This has caused them to modify their centrally-controlled economies by adopting market-oriented policies that promote privatisation in certain sectors of their economies, and that promote trade liberalisation and foreign direct investment.[80] These changes have led to a greater degree of transparency in these developing countries with a more equitable business atmosphere that supports competition in a market where both domestic and foreign investment can flourish. These changes were brought about by the enactment of laws and the formulation of economic policies that are key to the transformation process, viz. the adoption of competition law and policy in these developing countries.[81]

Developing countries needed to adopt competition law in order to nurture and encourage innovation and invention. Since competition law ensures a competitive environment in the economy, firms are then prompted to be entrepreneurial and innovative so as to survive in the market and have a competitive edge over their rivals.[82]

To a certain extent competition law is introduced to protect infant industries from potential abuse by dominant and powerful firms in the market. This contributes to the growth of industry in developing countries because competition law is likely to restrict the powerful

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[75] Waked op cit note 53 at 79.
[76] Noonan op cit note 55 at 75.
[77] Philippe Brusick and Simon J Evenett 'Should developing countries worry about abuse of dominant power? (2008) 2 *Wisconsin Law Review* at 276.
[78] Ibid.
[79] Bradford op cit note 68 at 285.
[80] Dabbah op cit note 54 at 297.
[81] Ibid.
[82] Martyn Taylor *International competition law: a new dimension for the WTO?* (2006) at 21.

industries from unfairly denying these new enterprises access to markets and scarce resources, hence giving them a chance to thrive. And it is well-known that the more a country is industrialised the more its economy strengthens.[83]

1.5 COMPETITION LAW MODELS ADOPTED BY DEVELOPING COUNTRIES

As stated earlier, the type of competition legislation enacted by developing countries has mostly been drafted by referring to the competition law regimes of developed countries and the competition rules developed by international organisations. (In most cases the rules of international organisations are developed by drawing on the experiences of developed countries.)[84] It is likely that developed countries expect or even oblige developing countries to adopt competition laws similar to their own when developing countries seek to conduct economic relations with them. This is sometimes known as approximation of laws.[85] As stated above, the jurisdictions that developing countries mostly model their competition laws on are the US and EU competition-law models. It is likely these communities put pressure on developing countries to do so in order to make it easier for US and EU firms to operate in these developing countries.[86] Some policy makers say that the EU and US models are not ideal for developing countries to follow.[87]

Also as previously mentioned, developing countries also tend to incorporate the competition rules and models that have been created by international organisations. For instance, the World Bank has its own model that it published in 1999. This model focuses more on economic efficiency and consumer welfare objectives and tends to refer occasionally to the experiences of developed countries such as the US, Canada and France.[88] In addition, UNCTAD has a model; its latest model was published in 2003. It is different from the World Bank's model since it contemplates the experiences of the individual country seeking assistance and includes broader developmental objectives.[89] So countries can adopt either of the two. But they are not easy to enforce either because their objectives are broad, and the

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[83] Du Plessis, Lurie and van Buuren op cit note 7 at 12.
[84] Dabbah op cit note 54 at 290–291.
[85] Ibid at 294.
[86] Ibid.
[87] Ibid at 295.
[88] Cassey Lee 'Model competition laws' in Paul Cook, Raul Fabella and Cassey Lee (eds) *Competitive advantage and competition policy in developing countries* (2007) at 31.
[89] Ibid.

broader the objectives of a competition law are the more difficult it becomes to enforce such a law.[90]

In this regard, several debates have emerged as to whether the competition law models of the US and EU that developing countries have simulated are relevant to their markets at all. Alternatively, it is questioned whether it is better that developing countries develop their own distinct competition laws based on their particular developmental needs. There are two opposing views on this: on one side there are those who are of the opinion that adopting competition law models of these advanced jurisdictions can be beneficial because advanced economies have a wealth of experience in competition law enforcement; their models can be of assistance to these emerging economies especially on matters concerning the conceptual framework and methods used to assess market power, efficiencies and damages.[91]

On the other hand there are those who are of the opinion that the competition laws of developed countries have been created in relation to the nature of their economies, which are advanced and dynamic economies, hence their specific patterns and consideration might not necessarily be ideal for the small and emerging market economies of developing countries.[92] Thus, it is imperative for developing countries to consider their unique conditions and challenges, so as to develop competition law that addresses their respective local needs[93] and correlates with their local environments. With that in mind they need to consider factors like stage of economic development, legal and administrative traditions as well as their political realities.[94]

As it was explained by De Leon, transplanting competition law from advanced economies to developing countries can only be partially successful. For that reason, it is important to understand the social, economic and political background of the respective countries because the competition law that is formulated will be more appropriate and can be enforced more effectively.[95] For instance if social and economic factors are ignored then it is possible that a situation could arise in which a local institution or social condition may clash

[90] Ibid at 41.
[91] Ghosal and Mitra op cit note 58 at 1.
[92] Dabbah op cit note 54 at 305–306.
[93] Waked op cit note 53 at 80.
[94] Dabbah op cit note 54 at 307.
[95] Ghosal and Mitra op cit note 58 at 2.

with the business culture which has been shaped by competition policy and law. Business may be undermined.[96]

In this dissertation it is argued that this line of reasoning is correct. It is not practical and beneficial to have a one size-fits-all-design of competition law; and the needs of developing countries are different. For example, developing countries are known to have less efficient production therefore in assessing the effects of competition on their markets the focus should be on appraising productive efficiency rather than allocative efficiency and economies of scale.[97]

Eleanor Fox in one of her papers raised the question: what is the best competition-law perspective for developing countries, looking from the inside out?[98] In the paper she sketched six competition law models that developing countries could consider as guides to assist them in developing their competition law. The first model she suggested is the US model which uses antitrust law purely as a tool for efficiency. Competition law is kept to a minimum with antitrust law being used to curb the activities of cartels.[99]

The second model is founded on the same principles as the US model, as it regards antitrust law as an instrument to strictly prohibit inefficient transactions. But it contains slight modifications in its rules so as to comply with the market realities of developing countries.[100]

The third model is the EU model which not only looks at whether a firm's activities will reduce output and raise price, and therefore create inefficiency, but also whether market actors create market barriers and inhibit access and the entry of other players onto the market.[101] This model is broader than the US model.

The fourth model resembles the South Africa model and that of other developing jurisdictions. It is a blend of the EU principles of openness and access to markets.[102]

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[96] John Stanley Metcalfe and Ronnie Ramlogan, 'Competition and the regulation of economic development' in Paul Cook, Raul Fabella and Cassey Lee (eds) *Competitive advantage and competition policy in developing countries* (2007) at 21.
[97] Bradford op cit note 68 at 293–294.
[98] Eleanor M Fox 'Competition, development and regional integration: in search of a competition law fit for developing countries' in Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michal Gal and David Gerber (eds.) *Competition policy and regional integration in developing countries* (2012) at 18.
[99] Ibid at 12.
[100] Ibid at 15.
[101] Ibid.
[102] Ibid at 16.

The fifth model is a model that explicitly introduces the value of fairness to local market actors.[103] It extends antitrust legislation beyond the role of helping markets work efficiently, as it also focuses on equity for and participation of people. [104] This model will mostly appeal to countries whose local populations have been excluded from fair market participation.[105]

The last alternative is for each nation to invent its own distinct model in the light of its own needs.[106]

Of these six models, the central theme of this dissertation is to answer the question that Eleanor Fox raise about the most suitable competition-law model for developing countries. This dissertation answers the question with reference to Tanzania as a case study.

[103] Ibid at 12.
[104] Ibid at 16.
[105] Ibid at 16.
[106] Ibid at 14.

CHAPTER 2

EVOLUTION OF COMPETITION POLICY AND LAW IN TANZANIA

Tanzania is currently one of the fastest growing economies in Africa; and it is the second largest economy in East Africa after Kenya. This growth has been achieved based on the growth of tourism, mining activities and the recent discovery of immense natural gas reserves; as well as managing to regulate inflation.[107] This rapid growth may suggest wealth. That is not so as it still has a low per capita income. According to the World Bank data[108] Tanzania has a GDP of about US$ 33.23 billion against a population of 44.928 million[109]; making its GDP per capita to be about US$ 740, thus making Tanzania one of the least developed countries (LDC) in the world. By virtue of this, Tanzania has been confronted by many socioeconomic problems for the past three or more decades. These problems include a weak economy, high poverty levels, inadequate infrastructure network and poor social services. As a result of these problems, and the effects that they have on the country and its people, Tanzania has for many years pursued economic growth and sustainable development as a way to rid itself of these problems.

Over the years since its independence Tanzania has undergone several economic policy transformations, all in the spirit of searching for the best economic policy through which to alleviate Tanzania's economic crises. For example, when Tanzania obtained independence it inherited a free market economy from the colonial government. Within a few years the post-independence administration had transformed Tanzanian economy into one that was centrally controlled. But unfortunately central control failed to live up to the country's expectations. Central control crippled the economy forcing Tanzania to liberalise her markets in order to salvage what was left of the commerce and industry and adopt free market strategies.[110] It is within the context of this economic transformation and its reversal that the evolution of

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[107] Ryan Hoover 'Africa's 7 hottest economies: and how you can invest in each one' available at *http://www.investinginafrica.net/2014/06/africas-fastest-growing-economies/* accessed on 3 August 2014

[108] World Bank data on Tanzania, available at *http://data.worldbank.org/country/tanzania* accessed on 29 August 2014.

[109] The National Bureau of Statistics reports that according to the 2012 census, the population in Tanzania is 44, 928,923. These statistics are available at *http://50.87.153.5/~eastc/sensa/index.php/home/BookOneDo* accessed on 29 August 2014.

[110] Frederick S Ringo 'Why do countries adopt competition laws? the Tanzanian case' in Pradeep S Mehta (ed) *Evolution of competition laws and their enforcement* (2012) at 180.

competition law in Tanzania can be traced through its passage of trial and error, action and reaction in an effort to reach the goal of sustainable development.[111]

2.1 POLITICAL AND SOCIO-ECONOMIC BACKGROUND

Tanzania attained its independence from the British colonial administration in 1961 when its economy was characterised as liberal and the private sector was seen as a crucial engine for economic growth.[112] Therefore in this period the economy was open. Foreign trade was a priority because the government collected most of its revenue from exports. The government applied import substitution policies which encouraged investment programmes by targeting capital intensive industrial sectors and infrastructure projects.[113] This led to macroeconomic stability in Tanzania; inflation was low and there was steady, yearly growth of per capita income.[114]

In 1967, Tanzania adopted principles of socialism which were introduced through a policy document called the Arusha Declaration, advocated by the then Tanzanian president Julius Nyerere.[115] The main motivation for the introduction of this policy of African socialism was the observation that inequality had increased in the society together with stagnation in industrial growth and an increase in external dependency.[116] So to stem the tide of these harmful trends the government decided to change the structure of the economy through instituting a total state control of the economy.[117] To establish state control, the government employed policy instruments such as the centralisation of decision-making; the nationalisation of all major private companies (for example, banks and key industrial concerns); governmental control over all major resources; and the strict control of prices and trade.[118] One of the major reasons given for price control was to keep a check on monopolies. A price-control system was introduced by the Regulation of Prices Act, 1973 which was administered by the National Price Commission.[119] Furthermore, import substitution was implemented for the purpose of reducing

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[111] Ibid.
[112] Ringo op cit note 110.
[113] Organisation for Economic Cooperation and Development *OECD Investment policy reviews: Tanzania* (2013) at 24, available at http://dx.doi.org/10.1787/9789264204348-en accessed on 3 January 2014.
[114] Arne Bigsten & Anders Danielsson 'Is Tanzania an emerging economy?' (1999) at 9, available at http://www.oecd.org/countries/tanzania/2674918.pdf accessed on 20 January 2014.
[115] Ringo op cit note 110.
[116] Bigsten & Danielsson op cit note 114 at 9.
[117] Ibid.
[118] OECD op cit note 113.
[119] Flora Musonda 'Tanzania' (2003) *CUTS international competition regimes in the world – a civil society report* at 288, available at http://competitionregimes.com/pdf/Book/Africa/56-Tanzania.pdf accessed on

trade dependency.[120] There was a heavy government presence in the economy through state-owned monopolies[121] and international trade and private retail trade were confined to state agencies.[122]

This central control had negative effects on Tanzania's economy. Its export rate declined and this was aggravated by price controls, import quotas, rationing, administrative resource allocation and the use of permits to control the movement of goods and services.[123] The nationalisation of key economic sectors such as banking, insurance, pension funds, national retailers, agricultural processing and the transport system resulted in a highly concentrated and monopolised industrial structure that was not generating the wealth it was intended to generate.[124]

As a result of socialism, Tanzania experienced a major ongoing economic crisis from 1979 to 1985. Infant industries had failed; they were unable to meet local demand; their internal capacity was limited; there was, inadequate resource mobilisation and the allocation of resources was inefficient. Private sector activities declined as did foreign direct investment (FDI).[125] Furthermore, owing to the fact that the state took over all key industrial sectors, there was a lack of accountability, and a lack of recapitalisation and innovation.[126] This led to serious macroeconomic hardships in Tanzania.[127] Consequently, inflation increased; there was a scarcity of essential goods and services; and the GDP growth rate fell drastically.[128] For that reason, as a way to rescue the economy of the country, the government introduced the National Economic Survival Plan in 1981. Its aim was to increase investment in the agricultural sector in order to boost the economy.[129] The National Economic Survival plan had failed to turn the situation around.

In 1985 the economic downturn began to spiral out of control. At this point Tanzania resorted to liberalisation strategies to arrest the situation. It implemented measures such as

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21 December 2013.
[120] OECD op cit note 113.
[121] Ringo op cit note 110.
[122] Bigsten & Danielsson op cit note 114 at 10.
[123] Ringo op cit note 110.
[124] UNCTAD and Thulasoni Kaira 'Voluntary peer review of competition law and policy: United Republic of Tanzania' (2012) at 3, available at *http://unctad.org/en/PublicationsLibrary/ditcclp2012_Tanzania_en.pdf* , accessed on 2 December 2013.
[125] Ringo op cit note 110 at 181.
[126] UNCTAD op cit note 124.
[127] Ringo op cit note 11 at 181.
[128] Ibid.
[129] OECD op cit note 113 at 25.

devaluation and import liberalisation.[130] Moreover, under the influence of the Bretton Woods Institutions (the IMF and the World Bank) the country went on to adopt the Structural Adjustment Programme (SAP) created by these institutions as a way to rescue its economy. In addition to the SAP Tanzania implemented other programmes that laid the foundation for market reformation such as the Economic Recovery Programme and the Economic and Social Action Program of 1986 and 1989 respectively.[131] On account of these various programmes, there was a huge shift in the economic environment of Tanzania — the introduction of open market policies, the deregulation of investment and the replacement of entry restrictions in most economic sectors.[132] The state was no longer the central economic player and this made official the demise of socialism in Tanzania.[133]

By the mid-1990s Tanzania's economy had undergone a total reformation, for instance all the major state firms and state monopolies had been privatised, there was improvement in the weak infrastructure systems and the investment environment became more accessible as private companies started investing more in the retail, tourism, transport, communication and mining sectors.[134] These economic reforms yielded positive results as Tanzania experienced growth in its GDP per capita, as well as a strong recovery in its construction, trade and transport industry with the latter being a necessary ingredient in the creation of a viable market economy.[135]

Nonetheless, despite all these improvements in the economy there still were several economic sectors that lagged behind due to the government failing to effectively manage the economy and implement its reforms successfully.[136] As a result, problems such as an unequal distribution of wealth with prevalent abject poverty; a collapse in local industries; high concentration levels in the markets, which were small and fragmented markets; an inadequate provision of public services; a high level of corruption bedevilled the country.

On the account of all these issues, it then became imperative for the government to conceive a plan that would alleviate these persistent problems and by stimulating growth and development. The plan was to devise a new economic and social development vision, since the

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[130] Bigsten & Danielsson op cit note 114 at 12.
[131] Ibid at 13.
[132] OECD op cit note 113 at 25.
[133] Ringo op cit note 110 at 182.
[134] Ted Dagne 'Tanzania: background and current conditions' *Congressional research service reports* (2011) at 3, available at http://www.fas.org/sgp/crs/row/RS22781.pdf , accessed on 5 December 2013.
[135] Bigsten & Danielsson op cit note 114 at 15.
[136] Ibid.

previous developmental policies failed yet again to advance the country to a higher level of development despite the government's good intentions.[137] As a result, the Planning Commission conceived the Tanzania National Development Vision 2025 in 1995. Its aim was to transform Tanzania into a middle-income country within one generation. The vision was to achieve a robust and competitive economy together with sustainable development for the benefit of the people.[138] The development of a competitive economy was the means to an end: the National Vision sought to create a developed society with a good quality of life in which abject poverty would be completely eradicated. This would require immense economic transformation from a low-productivity agricultural environment to a semi-industrialised society.[139] It also needed a country whose economy was highly competitive, dynamic and highly productive.[140] Such a transformation would ultimately lead to sustainable development.[141]

In order to realise this Development Vision, the government developed other important national documents and policies that would help it achieve the National Vision. These documents and policies included the Sustainable Industries Development Policies (1996–2020); the National Strategy for Growth and Reduction of Poverty (NSGRP);[142] the National Trade Policy for a Competitive Economy and Export Led growth of 2003; Tanzania Mini-Tiger Plan 2020; and the Millennium Development Goals.[143]

2.2 THE DEVELOPMENT OF COMPETITION POLICY AND LAW

As mentioned earlier, as a result of socialism Tanzania faced serious economic recession in the mid-1970s. As a way to rescue the economy Tanzania was forced to undergo an intensive structural adjustment programme which incorporated, as mentioned above, strategies such as

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[137] UNCTAD 'Voluntary peer review of competition law and policy: a tripartite report on the United Republic Of Tanzania – Zambia – Zimbabwe' (2012) at 33, available at http://unctad.org/en/PublicationsLibrary/ditcclp2012d1_Comparative_Report_en.pdf , accessed on 1 June 2014.
[138] Ibid.
[139] Tanzania National Development Vision 2025 at 2, available at http://www.tzonline.org/pdf/theTanzaniadevelopmentvision.pdf , accessed on 3 April 2014.
[140] Ibid.
[141] Ibid at x.
[142] Also referred to as 'Mpango wa Pili wa Kukuza Uchumi na Kuondoa Umaskini Tanzania' (MKUKUTA) in the Tanzanian lingua franca.
[143] UNCTAD op cit note 137 at 34.

the devaluation of the shilling; the removal of restriction on imports, interest rates and exchange controls; and the retrenchment of staff.[144]

This economic restructuring caught Tanzanians off guard. They had not prepared themselves to deal with the consequences that followed in the wake of trade liberalisation and globalisation as a whole.[145] The country witnessed the collapse of local industries that were faced with competition from foreign products as a result of the increase in importation.[146] It was these unforeseen challenges that compelled Tanzania to establish competition policy and law.

In 1993 Parliament requested the government to devise strategies for managing a market economy in a way that would be less chaotic. Ever since Tanzania had adopted a free market economy (from 1986) there were no safeguards to protect consumers.[147] As a result of the demands of certain members of Parliament the government set up a Task Force whose function it was to conduct an assessment of respective world practices and legal frameworks so as to propose an appropriate solution for Tanzania.[148] This resulted in the birth of the Fair Trade Practices Act 4 of 1994 (hereinafter FTPA), which was the first competition legislation promulgated in Tanzania. This legislation set out the rules for consumer protection; it regulated monopolies; and it prohibited unfair business practices and misleading or deceptive conduct in the market.[149]

However, after the FTPA was implemented some of its weaknesses emerged. In addressing the Act's shortcomings, it became advisable to repeal the Act altogether and replace it with another. Hence in 2003 Parliament passed a new competition law Act known as the Fair Competition Act 8 of 2003 which still prevails today.

Although the FTPA has been repealed, it governed competitive practices in Tanzania for nearly a decade. In order to understand the reason why it had to be repealed and to assess the role of the current Fair Competition Act it is necessary to consider the provisions of the FTPA in some detail against the background of competition policy generally.

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[144] Ibid at 38.
[145] Ringo op cit note 110 at 182.
[146] Bigsten & Danielsson op cit note 114 at 15.
[147] Musonda op cit note 119 at 288.
[148] Ringo op cit note 110 at 182.
[149] Godius Kahyarara 'Competition policy spurs economy-wide gains: legislation on competition brings productivity and business investment in Tanzania' (2008). *Competition and development: the power of competitive markets* at 2, available at http://www.idrc.ca/EN/Documents/competition-policy-spurs-economy-gains.pdf accessed on 24 January 2014.

2.2*(a) The necessity for competition policy and law in Tanzania*

The need for competition policy in Tanzania is not very different from the necessity for competition regulation in most African countries. However, in the case of Tanzanian with its history of socialism, its industrial structure was less competitive than that of some other African countries. In addition, it has, and still has, a very large informal sector. Competition policy is aimed at addressing these two issues. The informal sector in Tanzania is predominantly composed of micro, small and medium-sized enterprises (SMEs). These are usually unregistered businesses which are not clearly structured, and are involved in either agricultural production or wholesale/retail trade.[150] They often play the role of downstream suppliers of the products of the large dominant firms.[151] They comprise the numerous small businesses found along the streets and even in homes where shops can be found in the suburbs.[152]

However, despite their informality they do contribute significantly to the distribution of output from different sectors of the economy. The main problem with these informal SMEs is that they seldom develop into larger enterprises; they tend to maintain their informality over time because of cumbersome government regulations. In addition, high entry costs into the formal sector inhibit their expansion.[153]

Like all other policies in the country, the objective of competition policy is informed by the goals of the National Development Vision 2025; the Sustainable Industries Development Policies; the National Strategy for Growth and Reduction of Poverty; and the National Trade Policy, viz, to ensure poverty reduction and increase income distribution by having an export led domestic economy and sustainable development.[154]

In addition, competition policy aims at ensuring that there is free access to markets, freedom of trade and freedom of choice in the economy as this helps to protect consumers from the negative effects of monopolistic practices in the market.[155] In a country whose large population experiences poor living conditions with some even being unable to meet their daily basic needs, it is imperative that the goods and services available on the market be as low as possible. The 2013 Human Development Report of the United Nations Development

[150] David Lewis (ed) *Building new competition law regimes: selected essays* (2013) at 136.
[151] Ibid.
[152] Ibid at 132.
[153] Ibid at 136.
[154] UNCTAD op cit note 137 at 39.
[155] Ibid.

Programme reported that some 67.9 per cent of the population in Tanzania lives below the income poverty line and 33.4 per cent live in severe poverty.[156]

So protecting consumers against anticompetitive practices is necessary. There is justification for the view that competition law and policy is effective. Recent study conducted by a Tanzanian academic Godius Kahyarara, shows that efforts to protect consumers against anti-competitive practices have yielded positive results: productivity and business investments have increased, boosting economic performance as a whole.[157]

2.3 THE FAIR TRADE PRACTICES ACT

As stated above, the FTPA was the first competition Act to be enacted in Tanzania and it borrowed heavily from the competition law provisions of other countries such as Australia, Jamaica, Kenya and Canada.[158] The Act applied to all private and public businesses that were involved in the production and distribution of goods and services in Tanzania. It applied exclusively to Tanzania so it did not have an extraterritorial application.[159] Its purpose was to encourage competition in the economy by:

- prohibiting restrictive trade practices;
- regulating monopolies,
- regulating concentrations of economic power and
- controlling prices in order to protect consumers, and
- to provide for other related matters.[160]

The purposes of the FTPA could basically be summarised as encouraging competition while providing for the protection of consumers. But before considering the way in which the FTPA sought to provide this regulation and control, it is necessary to consider some of these anti-competitive practices in more detail.

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[156] United Nations Development Programme *Rise of the south: human progress in a diverse world — United Republic of Tanzania* Table E at 5, available at http://hdr.undp.org/sites/default/files/Country-Profiles/TZA.pdf, accessed on 20 May 2014.
[157] UNCTAD op cit note 137 at 39.
[158] Ringo op cit note 110 at 182.
[159] CUTS Centre for International Trade, Economics and Environment and Economic *Competition law and policy: a tool for development in Tanzania* (2002) at 30, available at http://www.cuts-international.org/tanzania-report.pdf , accessed on 8 February 2014.
[160] Preamble of Act 4 of 1994.

2.3*(a) Restrictive trade practices*

These refer to those activities that have the effect of reducing or eliminating fair competition in the market as well as reducing the opportunity for people to acquire goods and services at a fair market price.[161] Examples of restrictive trade practices include: anticompetitive trade agreements, refusal or discrimination in supply, predatory trade practices and collusive tendering and bidding. Each of these anti-competitive practices is discussed in more detail below.

Anticompetitive trade agreements are agreements that are entered between competitors (horizontal agreements) or between a buyer and a seller (vertical agreements) that result in restricting or eliminating free competition in the market.[162] Examples of anticompetitive trade agreements include: agreements between competitors to sell goods or perform services at prices or on terms agreed between themselves (price fixing);[163] agreements between wholesalers or manufactures to sell goods to retailers on the condition that the retailers will resell the goods at prices that are set by those manufacturers or wholesalers (resale price maintenance);[164] agreements to 'limit or restrict the output or supply of goods' and agreements to 'allocate territories or markets for the disposal of goods'.[165] These agreements were unenforceable under the law therefore no person could bring a suit against another person for failing to adhere to the terms of any of these types of agreements.[166]

Discrimination in supply is the act where 'a person sells or supplies goods or services to another person under conditions that are less favourable than those at which he usually sells or supplies to other people'.[167] Less favourable conditions could be conditions such as: imposing a higher price on the goods or services, late delivery of goods or services or providing less favourable credit terms.[168]

Predatory trade practices are those activities conducted by a person with the intention of:

- inhibiting a person from establishing a business in the country or driving a competitor out of business;

[161] Section 15 of Act 4 of 1994.
[162] CUTS op cit note 159 at 30.
[163] Section 16(1)*(d)* of Act 4 of 1994.
[164] Section 16(1)*(e)* of Act 4 of 1994.
[165] Section 16(1)*(i)* of Act 4 of 1994.
[166] Section 16(2) of Act 4 of 1994.
[167] Section 18(1) of Act 4 of 1994.
[168] Section 18(2) of Act 4 of 1994.

- inducing a competitor to sell his assets or to merge with another party be it a third party or the offender himself;
- inducing a competitor to shut down his manufacturing facility or outlet either temporarily or permanently or to prevent him from establishing such facility or outlet in the country; or
- inducing a competitor to stop producing or trading in goods or services.[169]

Collusive tendering is when two or more competitors tender for the supply or purchase of goods or services at prices agreed between them, or when they agree to abstain from tendering for the supply or purchase of goods or services.[170] Collusive bidding is the act of competitors agreeing between themselves the price that they are going to bid for any good in an auction or where they agree among themselves to abstain from bidding in an auction.[171]

2.3*(b) Unwarranted concentrations of economic power*

It was the Minister of Industry and Trade's obligation to review the structure of production and distribution of goods and services in the country so as to determine where concentrations of economic power existed and also to identify unwarranted concentration of economic power.[172] An unwarranted concentration of economic power was deemed to be prejudicial to the public interest if it resulted in unreasonably increasing the costs of production or distribution of goods or the provision of any service; increasing the price of goods; restricting competition in the economy; or if it resulted in the deterioration of quality of good or services.[173] In this respect, it is safe to say that under the FTPA a monopoly was acceptable if it did not appear to be against the public interest. Monopolies were not prohibited per se.[174]

An investigation on unwarranted concentrations of economic power would be launched at the Minister's request[175] or sometimes of the Commissioner's own accord. After concluding the investigation the Commissioner was obliged to send a report of his findings to the Minister.[176] Upon receiving the Commissioner's report, the Minister would then make an order requesting the person holding an unwarranted concentration of economic power to dispose his

[169] Section 20(1) of Act 4 of 1994.
[170] Section 21(1) of Act 4 of 1994.
[171] Section 22(1) of Act 4 of 1994.
[172] Section 31 of Act 4 of 1994.
[173] Section 31(4) of Act 4 of 1994.
[174] CUTS op cit note 159 at 33.
[175] Section 31(2) of Act 4 of 1994.
[176] Section 31(5) of Act 4 of 1994.

interests in the business (either by selling all or part of his beneficial interest) as deemed necessary to remove the unwarranted concentration.[177] If a person did not comply with the Minister's order then the court could compel the person to comply and if he, she or it did not then they were liable to a fine.[178]

2.3*(c) Unauthorised mergers*

A merger or takeover is a transaction which involves the acquisition or disposition of any shares or assets of a transferor company[179] to the transferee[180] giving the transferee controlling power in that company.[181] An unauthorised merger is a merger between two or more enterprises that are involved in a similar business or supply substantially similar services without the prior authorisation of the Minister.[182] The ramifications of engaging in an unauthorised merger were that the merger would not have any legal effect and thus any obligations that were imposed on the parties to the merger or takeover were not enforceable under the law.[183]

According to the merger procedures the first requirement was that a party to the merger apply to the Commissioner for an order to authorise that merger or takeover.[184] Thereafter the Commissioner would undertake an investigation and evaluate the merger in terms of whether it would be advantageous or detrimental to the market to the extent of reducing competition.[185] After conducting the evaluation the Commissioner would then make recommendations to the Minister as to whether to authorise the merger or not but it was the Minister who had the final say.[186] So the Minister had the mandate to make a decision that was completely different from the Commissioner's recommendations and the Minister's decision would be the one that would prevail.

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[177] Section 32 of Act 4 of 1994.
[178] Section 34 of Act 4 of 1994.
[179] A transferor company is a company whose shares are being either acquired or disposed of under a merger.
[180] A transferee is a person who proposes to acquire shares in a company or a portion of a business or the assets of a business.
[181] Section 30(1) of Act 4 of 1994.
[182] Section 35(1) of Act 4 of 1994.
[183] Section 35(2) of Act 4 of 1994.
[184] Section 36 of Act 4 of 1994.
[185] Section 38 of Act 4 of 1994.
[186] Section 39 of Act 4 of 1994.

2.3*(d) Regulation and display of prices*

The FTPA entrusted the Minister with the power to regulate prices, this meant that he had the mandate to fix the maximum or minimum prices at which goods could be sold, or to fix maximum and minimum service charge for any service offered.[187] With such powers the Minister was able to prohibit a person from increasing prices of goods that he sold above the ordinary prices that he normally charged for those goods.[188] These powers of the Minister raised many concerns because it was said that a Minister with discretionary power to control prices is against the principles of having a liberal economy and against the essence of what competition is all about.[189]

2.3*(e) Consumer protection*

The FTPA had provisions pertaining to the protection of interests of consumers, of which in most cases these were found in separate consumer protection legislation.[190] Among the practices that were prohibited by the FTPA with regard to consumer protection were misleading or deceptive conduct,[191] unconscionable conduct,[192] false or misleading representation,[193] bait advertising[194] and harassment and coercion.[195]

The FTPA further provided for other consumer protection measures such as the adherence to product safety standards;[196] the provision of product information such as a product's composition, its contents, methods of manufacturing etc.;[197] compulsory product recall if the products were considered to fall short of the required standard and were likely to injure people.[198] The Minister was the one with the final authority to declare goods either safe or unsafe and hence to impose a ban on the goods,[199] or require a manufacturer of supplier to recall its offending product.

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[187] Section 53(1) of Act 4 of 1994.
[188] Ibid.
[189] CUTS op cit note 159 at 34.
[190] Ibid.
[191] Section 52(1) of Act 4 of 1994.
[192] Section 53(1) of Act 4 of 1994.
[193] Section 54 of Act 4 of 1994.
[194] Section 58 of Act 4 of 1994.
[195] Section 61 of Act 4 of 1994.
[196] Section 64 of Act 4 of 1994.
[197] Section 65 of Act 4 of 1994.
[198] Section 67 of Act 4 of 1994.
[199] Section 64(5) of Act 4 of 1994.

2.3*(f)* *Institutional framework*

The FTPA provided for the appointment of a Trade Practices Commissioner and the establishment of a Trade Practices Tribunal. The Commissioner was responsible for ensuring that the functions of the FTPA were properly managed, controlled and carried out efficiently.[200] The Commissioner's duties included: conducting investigations on anticompetitive activities; prosecuting offenders and imposing penalties on them; and developing public awareness on competition matters.[201] The Commissioner had the mandate to conduct investigations on his own accord or by instructions from the Minister, but the final decision with regard to the action that was to be taken lay with the Minister.[202] The decisions of the Commission were appealable to the Trade Practices Tribunal.

The Trade Practices Tribunal was established by virtue of s 4 of the FTPA. It was composed of a Chairman who had to be a person holding high judicial office (i.e., a Judge of the High Court or Court of Appeal) and appointed by the President; and another two to four members appointed by the President after consultation with the Attorney General.[203] The tribunal had an appellate jurisdiction and the jurisdiction to inquire into matters brought before it, and gave orders according to the FTPA's provisions.[204] In determining appeals the Tribunal could confirm, modify or reverse the order appealed against or any part of that order.[205]

2.4 WEAKNESSES OF THE FAIR TRADE PRACTICES ACT

The establishment of the FTPA marked an important milestone in Tanzania. In spite of the fact that it was eventually repealed, research has shown that after the introduction of the FTPA the performance of firms increased on many levels. For instance, firms became about 50 per cent more productive than before and investment in new firms increased by 100 per cent.[206]

The FTPA conformed to the National Development Vision. One of this plan's visions was to ensure that Tanzania had a strong and competitive economy by 2025 so as to help it cope with the challenges of development, and be able to adapt to the market and technological

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[200] Section 3 of Act 4 of 1994.
[201] CUTS op cit note 159 at 38.
[202] Ibid at 40.
[203] Section 4 of Act 4 of 1994.
[204] Section 6 of Act 4 of 1994.
[205] Section 12(3) of Act 4 of 1994.
[206] Kahyarara op cit note 149 at 3.

conditions in the regional and global economy.[207] The adoption of FTPA was a crucial step towards achieving that vision.

In spite of the important role that the FTPA played in plans for national development, its design and implementation needs to be examined in the light of its purpose. A few years after the FTPA had been put into effect, the extent of its flaws prompted the view that it needed to be amended.[208] Some of the identified weaknesses of the FTPA that had to be overcome through a new Act included the following, and were related to the disproportionate amount of power and discretion accorded to the Minister of Industry and Trade.

The Minister was allowed to fix prices which were the subject matter of the previous Price Control Act of 1973.[209] According to s 42 of the FTPA the Minister had the power to fix the maximum price of goods for either retail sale or wholesale from time to time or even fix the maximum service charge that may be made for any service. He could even prohibit a person carrying on business from increasing the price of the goods he sells in the course of business.[210] This interfered with the whole concept of having a free and fair market because the Minister always interfered with the market process and hence he did not let the market operate freely. This was against international best practices and against what competition law stands for.

The Minister's power to approve mergers depended almost solely on his own discretion. Section 39 provided that the Commissioner would conduct the investigation into a merger and would evaluate whether it should be approved or not, thereafter he would send his recommendations to the Minister but the Minister was not bound to accept the Commissioner's recommendations. He had the final say on whether to grant the merger or not. As a result, some scholars argued that the Competition Commission was operating under the Minister's mandate alone. It made the Commission appear ineffectual.[211]

The FTPA did not provide for the independence, autonomy and accountability of the competition implementing institutions.[212] For instance, the Minister made rules governing the manner in which an appeal could be made to the tribunal. He determined the procedure that should be used by the Tribunal on hearing an appeal as well as the manner in which the tribunal

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[207] The Tanzania Development Vision 2025 op cit note 139 at 5.
[208] Ringo op cit note 110 at 183.
[209] Ibid.
[210] Section 42(1)*(c)* of Act 4 of 1994.
[211] Nicholas Nditi *Consumer protection law and practice: its relevance and reality in a developing economy with special reference to Tanzania* (published PhD thesis, Toronto University, 1987) 23.
[212] Ringo op cit note 110 at 184.

should be convened and where and when the sittings of the hearing should be held.[213] This was supposed to be the job of the tribunal but with the involvement of the Minister it clearly inhibited the objective of the authorities to stay independent from the government and other bodies.

An interview published in CUTS and conducted before the new Act was promulgated confirmed that the Commission's budget was determined and managed by the Ministry of Industry and Trade before it was submitted to Parliament.[214] The remuneration and allowances of the members of the Tribunal together with their staff were all determined by the Minister. This therefore diminished their independence and inhibited them from carrying out their functions.

The FTPA provided very vague and unclear details about the appointment of the Commissioner. Section 3, which provided for the appointment of the Trade Practices Commissioner and his officers, did not specify a procedure for the appointment of this Commissioner and by whom the decision as to his appointment was to be made.[215] The selection criteria were unclear. This was an important matter that needed to be disclosed in a new Act.

2.5 THE REPEAL OF THE FAIR TRADE PRACTICES ACT

As a result of its shortcomings, the Government was advised to amend the FTPA so as to update its various provisions and bring them in line with the then enacted regulatory Acts such as the Energy and Water Utilities Regulatory Act (EWURA) of 2001 and the Surface and Marine Transport Regulatory Act (SUMATRA) of 2001.[216] The main changes that were brought in the new Act included the renaming of the FTPA. The new Act was called the Fair Competition Act 4 of 1994. It established an agency known as the Fair Competition Commission (FCC) that would be the primary decision-maker on competition issues which had previously been the role of the Trade Practices Commissioner. The FCC was to become an independent body and stand on its own unlike the Trade Practitioners Office under the FTPA, which had been a department of the Ministry of Industry and Trade.[217]

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[213] Section 10 of Act 4 of 1994.
[214] CUTS op cit note 159 at 43.
[215] Ringo op cit note 110 at 183.
[216] Musonda op cit note 119 at 289.
[217] Ibid.

In spite of these changes, in 2001 Parliament proposed that the Fair Competition Act 4 of 1994 be repealed and replaced with a new legislation that will be in line with international best practices.[218] So in 2003 the Parliament of Tanzania enacted a new competition Act known as the Fair Competition Act (FCA) of 2003 that attempted to correct many more of the inadequacies exposed by the operation of the FTPA.[219] The 2003 Act only came into effect in 2006.[220]When it did, it signified a ground-breaking moment in the efforts to protect competition in Tanzania; it represented a significant improvement on the FTPA.

[218] Musonda op cit note 119 at 289.
[219] Ringo op cit note 110 at 184.
[220] Ibid at 187.

CHAPTER 3

THE CURRENT COMPETITION ACT OF TANZANIA

The Fair Competition Act 8 of 2003 (hereinafter referred to as the FCA) was passed by the Parliament on 2 April 2003 and assented by the President on 23 May 2003, but only came into force officially in 2006.[221] The FCA is 'a two tier legislation (*sic*) that provides for protection of competition and consumer protection issues.'[222] The purpose of the FCA is to enhance the welfare of Tanzanians by promoting and protecting effective competition in the market and also to prevent any unfair and misleading market conduct from taking place in order to: increase efficiency in the production, distribution and supply of goods and services; promote innovation; maximise the efficient allocation of resources; and protect consumers.[223]

3.1 THE SCOPE OF THE LAW

The FCA applies to private firms, as well as state and local government bodies in the mainland of Tanzania to the extent that they are engaging in trade.[224] The state, state institutions and local government bodies are regarded as engaging in trade if, among other things, they are involved in the selling or acquiring of a business or a part of a business or an asset of a business.[225] However, if the state commits an offence under the FCA it will not be liable to prosecution or penalties because it enjoys immunity.[226] This immunity does not apply to the state institutions and local government; they will be held liable if they commit offences under the FCA.

Moreover, the FCA even applies to activities that take place outside of the Tanzanian domestic economy so long as those activities are conducted by a person who is either a Tanzanian citizen or resident; or a company incorporated or carrying business in Tanzania; or

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[221] Musonda op cit note 119 at 289
[222] Geoffrey Mariki, Director General, Fair Competition Commission (FCC) Inaugural Statement, Online Newsletter, no 0001 January— March 2011, available at http://www.competition.or.tz/fcc_files/public/fcc_newsletter_jan_-_mar_2011.pdf , accessed on 26 February 2014.
[223] Section 3 of Act 8 of 2003.
[224] Section 6(1) of Act 8 of 2003.
[225] Section 6(3) of Act 8 of 2003.
[226] Section 6(2) of Act 8 of 2003.

a person who supplies or acquires goods or services into or within Tanzania; or any person who is involved in acquiring shares or assets outside of Tanzanian with the acquisition ultimately resulting in the change of control of a business or an asset of a business in Tanzania.[227] This is referred to as the extraterritorial application of the FCA.

3.2 THE INSTITUTIONAL FRAMEWORK

The institutions that have been established for ensuring the enforcement of competition law are: the Fair Competition Commission (hereinafter referred to as the FCC); the Fair Competition Tribunal (hereinafter referred to as the FCT); and the National Consumer Advocacy Council. The members of these different institutions are appointed by the government either by the President or Minister of Industry and Trade, but in all they are required to act independently when executing their duties.[228]

3.2*(a) Fair Competition Commission (FCC)*

The FCC was established under s 62 of the FCA; it acts as a court of first instance and does most of the work (enforcement and advocacy).[229] It is an independent body that is to exercise its powers and perform its functions independently and impartially without fear and favour.[230] The decisions of the FCC can be appealed to the FCT with the exception of consumer related cases which are appealed to ordinary courts.[231] The FCC is comprised of five members: a chairman appointed by the President; three non-executive members appointed by the Minister of Industry and Trade and the Director General appointed by the Minister as well.[232] The members of the FCC have to be people with knowledge of or experience in industry, commerce, economics, law, public administration or other related fields.[233]

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[227] Section 7 of Act 8 of 2003.
[228] Fair Competition Commission (FCC) 'Guidance on Competition Law' (2006), available at *http://www.competition.or.tz/download.php?list.9* at 1, accessed on 21 January 2014.
[229] Fair Competition Commission, available at *http://www.competition.or.tz/info.php?extend.118* , accessed on 21 January 2014.
[230] Section 62(2) of Act 8 of 2003.
[231] UNCTAD op cit note 124 at 13.
[232] Section 62(6) of Act 8 of 2003.
[233] Section 63(5) of Act 8 of 2003).

The enforcement functions of the FCC include: promoting and enforcing compliance with the FCA[234]; investigating various competition impediments like market entry and exit barriers in the economy;[235] investigating policies, procedures and programmes of regulatory authorities so as to assess their effects on competition and consumer welfare;[236]and participating in deliberation and proceedings of the government, regulatory authorities and other bodies in matters pertaining to competition and consumer welfare.[237] Its advocacy functions include: promoting public knowledge and awareness of the FCA and the functions of the FCC;[238] carrying out inquiries, studies and research in competition and consumer protection matters;[239] representing Tanzania at international meetings concerned with competition;[240] and consulting with competition authorities of other countries.[241]

The FCC certainly is tasked with many responsibilities and so if it is to be effective and efficient it is vital that it prioritise its responsibilities. Section 65(3) of the FCA provides that the chairman of the FCC in consultation with other members of the FCC will from time to time determine the level of priority to be given to any of its functions and activities for the effective and efficient administration of the FCA.[242]

In order to carry out all its functions the FCC requires a sizeable budget. To attain its budget, the FCC collects funds from different sources such as: the regulatory authorities that is, the Energy and Water Utilities Regulatory Authority (EWURA), the Surface and Marine Transport Regulatory Authority (SUMATRA), the Tanzania Communications Regulatory Authority (TCRA) and the Tanzania Civil Aviation Authority (TCAA) for the work which FCC does for them. It also obtains funds from Parliament, and from the moneys it collects from fines that it has the power to impose or from merger filing fees and other fees. Lastly, it may receive grants or donations.[243]

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[234] Section 65(2)*(b)* of Act 8 of 2003.
[235] Section 65(2)*(g)* of Act 8 of 2003.
[236] Section 65(2)*(h)* of Act 8 of 2003.
[237] Section 65(2)*(i)* of Act 8 of 2003.
[238] Section 65(2)*(c)* of Act 8 of 2003.
[239] Section 65(2)*(e)* of Act 8 of 2003.
[240] Section 65(2)*(m)* of Act 8 of 2003.
[241] Section 65(2)*(l)* of Act 8 of 2003.
[242] Section 65(3) of Act 8 of 2003.
[243] Section 78(1) of Act 8 of 2003.

3.2*(b) Fair Competition Tribunal (FCT)*

The FCT is a semi-judicial body established under section 83(1) of the FCA. It is responsible for hearing appeals from decisions made by the FCC and the regulatory authorities. The FCT consists of a chairman, who is a Judge of the High Court appointed by the President after consultation with the Chief Justice. He serves on a part-time basis. There are six other members appointed by the President after consultation with the Attorney General; they also serve on part-time basis.[244]

The meetings of the FCT require a quorum of at least the chairman and two other members.[245] The difficulty with this requirement is that in the absence of the chairman a FCT meeting cannot take place. The FCT does not have a vice-chairman and unfortunately the members do not have the power to appoint a chairman even for meeting purposes.[246]

The FCT's judgments or orders are deemed to be final and will be executed and enforced in the way that orders of the High Court are enforced.[247] The FCT has the jurisdiction to hear and determine appeals under Part XI of the FCA (which are appeals against the decisions of the FCC) and to carry out functions conferred on it under the Energy and Water Utilities Regulatory Authority Act 2001, the Surface and Marine Transport Regulatory Authority Act 2001, the Tanzania Communications Regulatory Authority Act 2003 and the Tanzania Civil Aviation Authority Act 2003.[248] The FCT thus does not have original jurisdiction, it only possesses appellate jurisdiction.

For a person to appeal to the FCT they are required to have a pecuniary and material grievance that arose from a FCC's decision.[249] Moreover a person can appeal against the FCC's decision if it was not made based on the evidence produced; if there was an error in law; if the FCC did not comply with procedures and statutory requirements; or if the FCC did not have the power to make the determination.[250]

If the FCT receives an appeal against an order of the FCC, it will then demand that the order be stayed pending the determination of the appeal.[251] After hearing an appeal, the FCT

[244] Section 83(2) of Act 8 of 2003.
[245] Section 85(6) of Act 8 of 2003.
[246] UNCTAD op cit note 137 at 73.
[247] Section 84 of Act 8 of 2003.
[248] Section 85(1) of Act 8 of 2003.
[249] Section 61(1) of Act 8 of 2003.
[250] Section 61(4) of Act 8 of 2003.
[251] Section 91 of Act 8 of 2003.

will then give its judgment and its judgment may take one of the following forms: it can either affirm the decision of the FCC; it can set aside or amend the decision of the FCC; and it can order the FCC to reconsider the matter to which the appeal relates.[252]

The funds of the FCT come from fees paid to it, funds from the Parliament, funds from the regulatory sectors (ie SUMATRA, EWURA, TCRA, and TCAA) and grants and donations made to it.[253]

3.2*(c) National Consumer Advocacy Council*

The National Consumer Advocacy Council was established under s 92(1) of the FCA. The council consists of not less than five and not more than ten members who are appointed by the Minister of Industry and Trade.[254] It is headed by a chairman and a deputy chairman who are appointed by the Minister and council members respectively. [255]The council members are required to be people who possess the knowledge and understanding of consumer interests as well as the interests of indigent, rural and disadvantaged people; industrial and business people; and government and community organisation.[256]

The council is tasked with the obligation of representing consumers' interests. It must submit its views to the FCC and consult with it, with regulatory authorities and government ministries regarding those consumer interests. It is also tasked with a duty to spread information on matters that are of interest to consumers; to establish and consult with regional and sector consumer committees; and to consult with industry, government and other consumer groups on matters of interest to consumers.[257] The council only has advocacy functions and does not possess enforcement powers. [258]

3.3 ANTICOMPETITIVE TRADE PRACTICES

Under the FCA, competition is defined as the process in which two or more persons attempt to supply or acquire the same or substitutable goods or services to or from persons in the same

[252] Section 61(5) of Act 8 of 2003.
[253] Section 87(1) of Act 8 of 2003.
[254] Section 92(2) of Act 8 of 2003.
[255] Section 92(3) of Act 8 of 2003.
[256] Section 92(5) of Act 8 of 2003.
[257] Section 93 of Act 8 of 2003.
[258] UNCTAD op cit note 137 at 75.

relevant geographical market.[259] The geographical market referred to here is a market in Tanzania and the range of reasonable possibilities for substitution in supply or demand between particular kinds of goods or services, and between suppliers or acquirers of those goods or services.[260]

As mentioned earlier the aim of the FCA is to promote and protect effective competition in the market, and therefore if there is an anticompetitive practice existent in the market that results in harming competition then it has to be prohibited. In determining whether competition is being harmed or not the FCC will base its decision solely on economic analysis; and therefore the FCC will consider if the activity harms competition and not if it harms competitors. Harm suffered by competitors will only be taken into consideration if it may contribute to the harm in the competition process itself.[261]

The anticompetitive practices prohibited by the act are: anticompetitive agreements; misuse of market power; and anticompetitive mergers.[262] The legal standards that apply to these anticompetitive practices line up with international best practices in competition law enforcement, which aim to protect business and consumers from the existence of cartels, monopolies and oligopolies in the market.[263]

3.3*(a) Misuse of market power*

If a person or an enterprise that has a dominant position in the market uses its position of dominance to appreciably prevent, restrict or distort competition in the market then it will be regarded as misusing its market power.[264] A person is considered to have a dominant position in the market if, when acting alone, that person can profitably and materially restrain or reduce competition in that market for a significant period of time; and if it has a market share exceeding 35 per cent.[265] If a person misuses his market power then that person will be liable for the commission of an offence under the FCA.[266]

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[259] Section 5(2) of Act 8 of 2003.
[260] Section 5(4) of Act 8 of 2003.
[261] FCC op cit note 228 at 7.
[262] Ringo op cit note 110 at 184.
[263] Ibid.
[264] Section 10(1) of Act 8 of 2003.
[265] Section 5(6) of Act 8 of 2003.
[266] Section 10(4) of Act 8 of 2003.

3.3*(b) Anticompetitive Agreements*

An agreement is considered to be anticompetitive if the objective, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition.[267] Such agreements will not be enforceable under the law.[268] This provision generally prohibits horizontal agreements and not vertical agreements as, according to the law, vertical agreements are not really regarded as anticompetitive. Section 8(3) provides that agreements can be presumed to be legal (not distorting competition) if none of the parties to the agreement has a dominant position in the market, and if the parties combined market share is less than 35 per cent, or if the parties to the agreement are not competitors.[269]

Agreements that are per se prohibited by the FCA regardless of their effect on competition are: price-fixing agreements between competitors; agreements on collective boycott by competitors; agreements between competitors to restrict output; and agreements on collusive bidding or collusive tendering.[270] These agreements are outright considered to be unlawful and the FCC does not even need to conduct an economic analysis in the case of such agreements.[271]

'Price-fixing agreements' refer to those agreements whose objective is to fix, restrict or control the prices or terms and conditions upon which a party to the agreement shall supply or acquire goods or services in competition with another party to the agreement.[272] Agreements to restrict output are those agreements that aim to restrict or control the production of goods or services that a party to an agreement may supply in competition with another party to that agreement.[273]

'Collective boycott' denotes the act of preventing a party to an agreement from supplying goods or services to another person or acquiring goods or services from another person who is in competition with any other party to the agreement.[274] 'Collusive bidding or tendering' refers to the act of fixing or controlling the prices or terms and conditions for which a party to an agreement is going to bid or tender at an auction or any other tender in competition with any

[267] Section 8(1) of Act 8 of 2003.
[268] Section 8(2) of Act 8 of 2003.
[269] Section 8(3) of Act 8 of 2003.
[270] Section 9(1) of Act 8 of 2003.
[271] FCC op cit note 228 at 7.
[272] Section 9(2)*(a)* of Act 8 of 2003.
[273] Section 9(2)*(c)* of Act 8 of 2003.
[274] Section 9(2)*(b)* of Act 8 of 2003.

other party to the agreement. It also involves preventing a party to an agreement from making a bid or tender at an auction or in any tender or bidding in competition with any other party to the agreement.[275]

Unlike many other countries in Africa, Tanzania's competition law does not provide for criminal sanctions in the case of hard-core cartels.[276]

3.3*(c) Anti-competitive mergers*

A merger is an acquisition of shares, a business or assets either inside or outside Tanzania that results in the change of control of a business or an asset of a business in Tanzania.[277] A merger will be prohibited if it results in strengthening a company's position of dominance in the market.[278]

If a merger is of above a certain threshold amount as set by the FCC, then the parties to the merger will first have to notify the FCC about their intentions before they can proceed with the merging process[279] by filing a notification and paying application fees. [280] The gazetted threshold is 800 million Tanzanian Shillings.[281] After receiving a merger notification the Director of Compliance shall within five days deliver a notice to the filing firm as to whether the filing was complete or incomplete.[282] If the filing was complete then the FCC will decide within 14 days whether it will examine the merger or not, and if it decides to examine the merger then it will prohibit the merger pending the examination.[283] The examination of the merger will be done for a period of 90 days but it can be extended for 30 more days if the need be. [284]

In 2011 M/S PUMA Energy (Tanzania) Investments Ltd wanted to acquire 50 per cent of the issued share capital in BP Tanzania Limited. Therefore PUMA Energy acting pursuant to s 11(2) of the FCA and rule 33(1) of Fair Competition Commission Procedural Rules 2013 notified the FCC of its intention to acquire 50 per cent of the issued share capital in BP

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[275] Section 9(2)*(d)* of Act 8 of 2003.
[276] UNCTAD op cit note 124 at 9.
[277] Section 2 of Act 8 of 2003.
[278] Section 11(1) of Act 8 of 2003.
[279] Section 11(2) of Act 8 of 2003.
[280] Rule 33(1) and (2) Fair Competition Commission Procedure Rules, 2013.
[281] UNCTAD op cit note 137 at 54.
[282] Rule 35(1) Fair Competition Commission Procedure Rules, 2013.
[283] Section 11(3) of Act 8 of 2003.
[284] Rule 36(3) and (4) Fair Competition Commission Procedure Rules, 2013.

(Tanzania) Limited. The FCC thereafter examined the acquisition and when satisfied, decided to approve the acquisition. The remaining 50 per cent interest in BP continued to be held by the Treasury Registrar of the United Republic of Tanzania.[285]

3.3*(d) Exemptions of anticompetitive trade practices*

The FCC may grant exemptions to some of the restrictive trade practices when a party and agreement applies for exemption. An applicant must apply for the exemption of an agreement which falls under the ambit of s 12(1) of the FCA on a prescribed form that is set out in the First Schedule of the FCC Rules.[286] The exemption may be either conditional or unconditional depending on what the FCC deems fit.[287] According to s 12 horizontal agreements may be exempted in order to obtain certain benefits provided that the agreements do not distort competition any more than is reasonably necessary and provided that the public benefits that result from these agreement outweigh the detrimental effects of the agreement.

The exemption shall be granted by the FCC for a period not exceeding five years from the date on which the exemption is granted[288] and it may be revoked by the FCC at any time if the FCC is satisfied that the circumstances since the grant of the exemption have materially changed, or that the exemption was granted on the basis of false or misleading information.[289] Where the FCC intends revoking an exemption granted under s 12(6) of the FCA, it must inform the person concerned in writing of its intentions to do so.[290]

Furthermore, the FCC may grant another exemption known as a 'block exemption'. This exemption may be granted either conditionally or unconditionally to all agreements that fall within a class of agreements that do not contravene s 9, or are not likely to have the effect of appreciably preventing, restraining or distorting competition.[291] Issuing block exemptions is something that the competition authorities may only do when they have accumulated substantial experience of agreements and the ways in which they might harm competition.[292]

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[285] Geoffrey E Mariki, Director General, FCC, Press Statement, 20 July 2011 'FCC approves PUMA's acquisition of BP Shares', available at *http://www.competition.or.tz/fcc_files/public/fcc_approves_pumas_acquisition_of_bp_shares__20110720.pdf*, accessed on 3 February 2014.
[286] Rule 50(1) Fair Competition Commission Procedure Rules, 2013.
[287] Section 12(1) of Act 8 of 2003.
[288] Section 12(3) of Act 8 of 2003.
[289] Section 12(6) of Act 8 of 2003.
[290] Rule 52(1) Fair Competition Commission Procedure Rules, 2013.
[291] Section 12(2) of Act 8 of 2003.
[292] FCC op cit note 228 at 8.

Before the FCC can grant, revoke or vary a block exemption under s 12 it shall conduct an inquiry where necessary for the purpose of carrying out its functions.[293]

Similarly, the FCC may provide a conditional or unconditional exemption to an anticompetitive merger upon application by a party to the merger.[294] An anticompetitive merger may be exempted by the FCC if it results in public benefits that outweigh the detriments caused by the merger, also if the merger does not distort competition any more than is reasonably necessary to attain those benefits.[295] Likewise an anticompetitive merger may be exempted if, in the case of a merger resulting in the change of control of a business, that business faces imminent financial failure and the merger offers the least anti-competitive alternative use of the assets of the business.[296]

The exemption for a merger shall not exceed a period of one year from the date the exemption is granted.[297] For mergers as well, the FCC may revoke the exemption if at any point it is found that the circumstances have materially changed since the grant of the exemption, or if the exemption was granted on basis of false, misleading or incomplete information.[298]

3.4 CONSUMER PROTECTION

As mentioned earlier, the FCA aims to ensure the protection of the consumer's interests as well. In terms of consumer protection, the FCA contains provisions regarding the prohibition of misleading and deceptive conduct, unfair business practices, unconscionable conduct, implied conditions in consumer contracts; manufactures obligations and product safety and product recall. However, according to Musonda 'neither the FCC nor the FCT deals with the adjudication of direct consumer protection related issues. These are dealt with by the Civil Courts.'[299]

3.4*(a)* *Misleading and deceptive conduct*

[293] Section 68 of Act 8 of 2003.
[294] Section 13(1) of Act 8 of 2003.
[295] Section 13(1)*(b)* of Act 8 of 2003.
[296] Section 13(1)*(c)* of Act 8 of 2003.
[297] Section 13(2) of Act 8 of 2003.
[298] Section 13(4) of Act 8 of 2003.
[299] Musonda op cit note 119 at 290.

A misleading conduct is a conduct or an act that misleads the public as to the nature, the manufacturing process, the characteristics, and the suitability for their purpose or the quantity of any goods or service.[300] A person involved in the business of supplying goods or services will be regarded as engaging in a false or misleading representation if: he falsely represents that goods are of a particular standard, quality, model or that they have had a particular history or use; falsely represent that goods are new; falsely represents the price of goods or services; he makes a false or misleading representation with regard to the goods' place of origin; falsely represents that the goods or services have performance characteristics, benefits or uses that they do not have; or makes a false or misleading representation concerning the existence, exclusion, or effect of any condition, warranty, guarantee right or remedy.[301] It is strictly prohibited for any business person to engage in such a conduct.[302]

3.4*(b) Unfair business practices*

The unfair business practices that are prohibited by the FCA include: 'bait advertising'; accepting payment without intending or being able to supply as ordered; and harassment or coercion. 'Bait advertising' is the act of a person advertising the supply goods or services at a specific price while reasonably being aware that he will not be able to supply those goods or services at that price within a reasonable period, and in reasonable quantities considering the nature of the market and the advertisement.[303]

Moreover, if a person accepts payment for goods or services with the intention of not supplying the goods or services, or if he supplies goods or services that are materially different from those paid for, then that person will be committing an offence under the FCA. Furthermore, if that same person accepts payment for goods or services while reasonably being aware that he will not be able to supply the goods or services within a specified or reasonable period then that person shall be liable for committing an offence.[304]

[300] Sections 18 and 19 of Act 8 of 2003.
[301] Section 16 of Act 8 of 2003.
[302] Section 15(1) of Act 8 of 2003.
[303] Section 22(1) of Act 8 of 2003.
[304] Section 23 of Act 8 of 2003.

Additionally, it is prohibited for a person to use physical force or undue harassment or coercion when supplying goods or services to a consumer, or when demanding payment for goods or services from a consumer.[305]

3.4*(c) Unconscionable conduct*

The law prohibits any person from engaging in unconscionable conduct whilst supplying goods or services to another person.[306] In determining whether a person has engaged in unconscionable conduct, the court will consider the following factors: the relative strengths of the bargaining positions of the supplier and the consumer; whether the consumer was required to comply with conditions that were unreasonable for the protection of the suppliers interests; whether the consumer was not able to understand any document presented to him regarding the supply of the goods or services; whether the consumer was exposed to any undue influence or unfair tactics; and the amount for which and the circumstances under which the consumer could have obtained identical goods or services from another person.[307] Nevertheless, in determining if a person has engaged in unconscionable conduct the court will not take into consideration any circumstances that at the time of the contravention were not foreseeable.[308]

3.4*(d) Product safety and information*

It is prohibited for a person to supply consumer goods if the goods do not comply with consumer product safety standards, or if they are declared to be unsafe, or if they are permanently banned under the law.[309] The aforementioned goods are also prohibited from being exported unless the Minister of Industry and Trade has approved the export of such goods.[310] Furthermore, no person is allowed to supply consumer goods if the goods do not comply with consumer product information standards which require that the goods disclose information relating to composition, contents, methods of manufacture, design and packaging as well as be in a form that can help the user of the goods understand the quality, nature or, quantity and value of the goods.[311]

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[305] Section 24 of Act 8 of 2003.
[306] Section 25(1) of Act 8 of 2003.
[307] Section 25(2) of Act 8 of 2003.
[308] Section 25(4) of Act 8 of 2003.
[309] Section 49(1) of Act 8 of 2003.
[310] Section 49(3) of Act 8 of 2003.
[311] Section 50 of Act 8 of 2003.

3.4*(e) Product recall*

If a person supplies goods that are intended or likely to be used by a consumer and it appears to the Minister of Industry and Trade that the goods may cause injury to a person, or that the goods do not comply with safety standards and that the supplier has not taken satisfactory measures to prevent harm to the consumer then the Minister may require the supplier to recall the goods.[312] In recalling the products, the supplier is also required to disclose to the public the nature of defect in the goods, the circumstances in which the use of the goods is dangerous and the procedures for disposing the goods.[313]

3.5 THE POWERS OF THE COMPETITION AUTHORITIES

The FCC is endowed with the power to gather information, conduct investigations and to impose sanctions for violations of the FCA.

3.5*(a) Investigatory powers*

In its investigatory powers, the FCC can hold inquiries and initiate complaints against anticompetitive practice. When it comes to holding inquiries the FCC can conduct an inquiry where necessary if it will help it to carry out its functions.[314] In terms of initiating a complaint or an investigation on an alleged practice, the FCC can initiate it first on its own accord or it can receive information or complaint from any other person[315] and the Director General of the FCC is the one who will decide whether the complaint is to be entertained or not.[316]

Normally, the information collected by the FCC is voluntarily submitted but in some cases a party to a case may refrain or conceal information that may be of crucial importance to the FCC. Therefore, if the FCC has reason to believe that a person is capable of supplying information, producing a document or giving evidence that may assist in the performance of any of its functions then the FCC has the authority to summon a person to furnish the

[312] Section 53(1)*(c)* of Act 8 of 2003.
[313] Section 53(1)*(d)* of Act 8 of 2003.
[314] Section 68 (1) of Act 8 of 2003.
[315] Section 69 (1) and (2) of Act 8 of 2003.
[316] Rule 10(5) Fair Competition Commission Procedure Rules, 2013.

information or produce the documents or appear before the FCC to give oral evidence.[317]

Moreover, if the FCC has reason to believe that a person is in possession or control of any documents that may assist it in the performance of any of its functions, it may apply to the FCT who shall issue a warrant authorising any police officer accompanied by staff of the FCC to conduct a search and make copies or take extracts of documents therein.[318] If the FCC is satisfied that material that it has obtained is of a confidential nature and that its disclosure could adversely affect the competitive position of a person, or that it is commercially sensitive, then the FCC must grant confidentiality for the material.[319]

3.5*(b) Powers to impose sanctions*

As far as powers to impose sanctions and penalties are concerned, the FCC has the mandate to impose fines, compliance orders, compensatory orders and interim orders on offenders.[320]

3.5*(b)(i) Fines*

If the FCC finds a person guilty of committing an offence against the FCA it may impose a fine on that person and the fine shall not be less than five per cent and not more than ten per cent of a company's turnover.[321] If the injured party has suffered damage including loss of income as a result of a person committing an offence under the FCA then the guilty party will be liable to pay a fine on top of any other penalty that has been imposed on him.[322]

For instance, in the case of *Serengeti Breweries Limited (SBL) v Tanzania Breweries Limited (TBL)*[323] after the FCC found TBL guilty of misusing its market power it ordered TBL to pay 5 per cent of its turnover as a fine for the offence which amounted to about TZS 27 billion. The FCC ruled that:

> 'pursuant to section 60(1) and 78(1)*(f)* of the Fair Competition Act, 2003 and Rule 41 of the Fair Competition Procedure Rules, 2009, Tanzania Breweries Limited is ordered to pay a fine of five per cent of its turnover for the year of their latest audited accounts for the offences of

[317] Section 71(1) of Act 8 of 2003.
[318] Section 71(5) of Act 8 of 2003.
[319] Section 76(5) of Act 8 of 2003.
[320] FCC op cit note 8 at 9.
[321] Section 60(1) of Act 8 of 2003.
[322] Section 60(2) of Act 8 of 2003.
[323] *Serengeti Breweries Ltd (SBL) v Tanzania Breweries Ltd (TBL)* 2009 (Case no 2) Fair Competition Commission.

entering into anticompetitive branding agreements with outlet owners and removing Serengeti Breweries Limited posters and signage.'[324]

In another matter the FCC imposed a fine of TZS 3.9 billion on East African Breweries for offloading its shares in Tanzania Breweries Limited without seeking prior authorisation from the FCC.[325]

In the event where a person charged with an offence under the FCA is a body corporate then any person who was a shareholder, director, manager or officer at the time of the commission of the offence will also be charged jointly in the proceedings involving the company. [326] And where the body corporate is convicted of the offence then the director, manager, or officer will also be guilty of the offence unless he can prove that the offence was committed without his knowledge or that he exercised due diligence to prevent the commission of the offence.[327] However, the penalties for such officers are not spelled out in the law.[328]

3.5*(b)(ii) Compliance order*

If the FCC is satisfied that a person has committed an offence or is likely to commit an offence against the FCA (other than Parts VI or VII which deal with implied conditions in consumer contracts and manufacturer's obligation respectively) it may issue a compliance order against that person and anyone else involved in the offence.[329] A compliance order is an order that requires a person to desist from a particular activity that is in contravention with the FCA, or an order for a person to take measures to comply with the FCA.[330]A compliance order must be in writing stating explicitly the grounds for which the order was made, [331] and it must be enforceable as an order of the High Court.[332] If a person fails to comply with the compliance order issued to him then that person will be deemed to have committed an offence,[333] but the FCA does not impose fines for disobeying a compliance order.

For instance, in the case of *Serengeti Breweries Limited v Tanzania Breweries Limited*[334] the FCC issued a compliance order pursuant to s 58(1) and (3) to TBL directing it

[324] UNCTAD op cit note 137 at 61.
[325] UNCTAD op cit note 124 at 11.
[326] Section 60(3) of Act 8 of 2003.
[327] Ibid.
[328] UNCTAD op cit note 124 at 11.
[329] Section 58(1) of Act 8 of 2003.
[330] Section 58(3) of Act 8 of 2003.
[331] Section 58(7) of Act 8 of 2003.
[332] Section 58(9) of Act 8 of 2003.
[333] Section 58(2) of Act 8 of 2003.
[334] *Serengeti Breweries* supra note 323.

to refrain from removing their competitor's point-of-sale materials at the outlets and prohibiting it from entering into anticompetitive branding agreements with outlet owners. Similarly, in the case against Bank of Africa, the FCC issued a compliance order to the bank for failing to notify the FCC about a merger it was involved in. The compliance order required the bank to publish a notice of compliance to the public (in a newspaper) with a report explaining to the public that failure to notify the FCC about the merger had been inconsistent with the FCA's requirements.[335]

3.5*(b)(iii) Compensatory Orders*

If a person engages in any activity prohibited by the FCA (other than under Parts VI or VII dealing with implied conditions in consumer contracts and manufacturer's obligations respectively) and as a result of his activities another person then suffers loss or damage, then the injured person may apply to the FCC for compensatory orders against the person who committed the offence whether or not the person has been convicted of the offence.[336] The aim of a compensatory order is to mitigate the damage or injury that an aggrieved person has suffered. The application for a compensatory order must be made within three years after the loss or damage was suffered or within three years after the applicant became aware of the offence.[337] Examples of compensatory orders include orders requiring the offender to pay money, or to supply goods or services to the injured party for a specific period of time or on specified terms; or an order to terminate or vary the contract or declaring the contract void.[338] If a person fails to comply with compensatory orders issued against him then that person will be committing an offence.[339] Even in this instance the Act does not state the fine that a person is required to pay if he fails to obey the order.

3.5*(b)(iv) Interim orders*

An injured party may apply to the FCC for an interim order in respect of an alleged practice whether or not a hearing of the case has started. The FCC may grant the injured party an interim order if it finds it reasonable to do so considering the evidence of the alleged anticompetitive

[335] UNCTAD op cit note 124 at 10.
[336] Section 59(1) of Act 8 of 2003.
[337] Section 59(2) of Act 8 of 2003.
[338] Section 59(4) of Act 8 of 2003.
[339] Section 59(5) of Act 8 of 2003.

practice, and if it feels that there is a need to prevent serious or irreparable damage to the injured party.[340]

Likewise, the FCC can make interim compliance orders pending the hearing of the case or during investigation if the FCC is of the opinion that there is an imminent danger of substantial damage to a person if a likely offence is committed or there are other reasons for making such an order.[341]

3.5*(c) Statutory limitations*

The FCA also provides for a general limitation of the period during which the FCC may deal with an offence committed against the FCA. Section 60(8) of the FCA states that the FCC may act upon an offence at any time within six years after the commission of the offence (this is the general limitation). Nonetheless, there are certain conducts that have a different statutory limitation from the general one. For instance, according to s 58(5) the FCC can issue a compliance order for an anticompetitive merger within three years. With regard to compensatory orders, the FCC may only issue them within three years after the loss or damage suffered by the applicant, or after the applicant became aware of the offence.[342]

[340] Section 70 of Act 8 of 2003.
[341] Section 58(4) of Act 8 of 2003.
[342] Section 59(2) of Act 8 of 2003.

CHAPTER 4

CRITICAL ANALYSIS OF THE FAIR COMPETITION ACT

In this chapter I will critically analyse and assess some of the core provisions of the Fair Competition Act (FCA). These core provisions encompass the ambit of the FCA, ie, the scope of activities to which the law applies, and all the provisions dealing with restrictive trade practices.

4.1 AMBIT OF THE FCA

4.1*(a)* *Extraterritorial application of the Act*

The question of the extraterritorial application of competition law has been a subject of debate and controversy for many years. Under public international law it is generally accepted that a state may make laws that affect the activities that take place within its territory (the territoriality principle) as well as having the power to regulate the behaviour of its citizens outside its territory (the nationality principle).[343] Within the last decades, the scope of the territoriality principle has been widened significantly, such that it now gives a state the power to exercise jurisdiction over not only activities that arise within its territory but also activities that arise from a foreign country that are completed within its territory (objective territoriality).[344]

The application of the objective territoriality principle has been heavily criticised by different academicians and commentators. The point of criticism is based on the question of whether it is legitimate under economic law to apply the objective territoriality principle to the effects of an agreement entered in another state or an anticompetitive activity conducted in another state.[345] This is because the application of this principle is likely to result in clashes between the different interests of countries and businesses with those of other nationalities. These clashes are then likely to jeopardise diplomatic relations between the countries involved.[346]

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[343] Richard Whish *Competition law* 6ed (2009) at 489.
[344] Ibid.
[345] Ibid.
[346] Rimantas Daujotas Extraterritorial *application of competition law: different angles-same conclusion* (2011) at 3, available at *http://ssrn.com/abstract=1866193* accessed on 25 June 2014.

On the other hand, there are those commentators who believe that applying competition law extraterritorially is a necessary evil. This is because research has shown that cross-border restrictive trade practices involving mergers, cartels and abuses of dominance have the potential to distort trade to the advantage of the perpetrators, eliminate weaker domestic trading partners, stifle entrepreneurship, and ultimately retard economic development. [347] They greatly affect the flow of trade and they hinder the benefits that could come from trade liberalisation and open markets. [348] To avoid the negative effects of these merges and abuses of dominance it is necessary for a competition law to have an extraterritorial reach. Anticompetitive practices need to be countered at a global level.[349] An example can be drawn from a 1997 report by Levenstein and Suslow who reported that the value of 'cartel-affected' imports to developing countries was estimated at US $51.1 billion, an amount which was said to be higher than the amount of US $39.4 billion in foreign aid given to developing countries at the time.[350] These figures raise an alarm as to how anticompetitive activities, even if conducted elsewhere, can actually negatively impact domestic markets.

Moreover, there have also been issues arising from cross-border mergers which, if not critically reviewed, could result in reducing competitiveness. For example, if two transnational companies merge and resulting from the merger this new company ends up possessing excessive market power, this could then have very dire consequences for developing countries. This is because markets in developing countries are usually small, underdeveloped and less competitive, so this merged firm is likely to result in product-monopoly in such a market.[351]

As a result of all these issues, protecting local consumers, industries and businesses from anticompetitive activities that take place overseas has become a priority for many countries, especially if they have underdeveloped economies such as Tanzania. This protection of domestic markets from activities in foreign countries makes extraterritorial application of domestic competition laws an internationally legitimate policy.[352] For that reason, it is

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[347] CUTS *Issues paper on cross-border competition issues in the context of the Doha agenda* at 1, available at*http://www.cuts-international.org/Cross%20Border%20Competition%20Issues.DOC* , accessed on 9 April 2014.
[348] Ibid.
[349] Ibid.
[350] Nelly Sakata 'Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?' at 3, available at *http://www.compcom.co.za/assets/Uploads/events/Fifth-Annual-Conference/African-Regional-cooperation-PaperFinal-27-Sept-11-.pdf* , accessed on 5 November 2013.
[351] CUTS op cit note 347 at 2.
[352] Chris Noonan 'Globalisation, international enforcement and extraterritoriality' in (2009) 5 *Competition Law Review* 2 at 147.

imperative from a developmental perspective for the competition laws of developing countries such as Tanzania to have an extraterritorial reach.

The scope of the FCA's extraterritorial application is broad. It applies, not only to nationals and residents, but also to non-nationals and non-residents.[353] However, up until now Tanzania has not dealt with any matter that has required her to apply her competition law extraterritorially, so no jurisprudence on this issue has been developed as yet. But if such a matter does ever arise it would be very interesting to see how the FCC would approach it in the light of the existing body of Tanzanian jurisprudence dealing with competition law and policy.

In my opinion an appropriate approach for the FCC to follow on the question of the extraterritoriality of the FCA would be determined by an application of the effects doctrine. The effects doctrine is a jurisdictional theory developed by the US antitrust authorities. The essence of this doctrine is that it permits competition authorities to exercise jurisdiction over foreign persons and their foreign conduct if as a result of their conduct there are economic effects experienced on the domestic market.[354] It emerged in 1945 when it was applied in the famous case of *United States v Aluminium Co. of America (Alcoa) et al.*[355] In this case, the US government brought a suit against Alcoa a US aluminium manufacturer for contravening the Sherman Act. Alcoa in collaboration with its subsidiary Canadian company entered into a cartel agreement with other European aluminium manufacturers to control and monopolise the aluminium market. The activities of this cartel took place altogether outside of the US and on that fact, Alcoa contended that the matter was outside US' jurisdiction. The court however stated that 'any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends'. Hence, the court found the agreement in dispute to be 'unlawful though made abroad', as it 'intended to affect imports and did affect them'.

As suggested at the outset of this chapter, there are those who criticise the effects doctrine. It is considered that the doctrine results in an excess of jurisdiction of one country over the affairs of others under public international law. But I believe, that from the point of view of a developing country, the application of the effects doctrine is justifiable. The competition authorities of Tanzania could learn from South Africa on how to apply its

[353] UNCTAD op cit note 137 at 2.
[354] Marek Martyniszyn 'Export cartels: is it legal to target your neighbour? analysis in light of recent case law' in (2012) 15 *Journal of International Economic* Law 1 at 14.
[355] *United States v Aluminium Company of America et al ,* 148 F.2d 416 (2d Cir. 1945).

competition law extraterritorially as South Africa did in the case of *American Natural Soda Ash Corporation (ANSAC) and Another v Competition Commission and Others*.[356]

In the *ANSAC* case the South African competition authorities followed the effects doctrine when they enforced their competition law extraterritorially on a US company. In this case ANSAC a US corporation (made up of five US soda ash producers) that exports soda ash from the United States to other countries including South Africa, was accused of violating South African Competition Act 89 of 1998. ANSAC is in fact a cartel but it is considered to be legal in the US since it is an export-directed cartel and such cartels are exempted under the Sherman Act. [357] The complaint against ANSAC was brought by Botash (a Botswanian producer of soda ash), that accused ANSAC of engaging in restrictive horizontal practices and thus violating s 4 of Act 89 of 1998. ANSAC however argued that its activities did not have negative or deleterious effect within South Africa hence s 3(1) of Act 89 of 1998 which states that the Act is applicable to 'all economic activity within, or having an effect within, the Republic' does not apply to it.

In arriving at its decision, the matter for determination as far as the Competition Appeal Court (CAC) was concerned was not whether the consequences of ANSAC's conduct was criminal or anticompetitive, but whether the conduct complained of had 'direct and foreseeable' substantial consequences within the regulating country, ie, South Africa. Therefore the 'effects' had to be such that they fell within this regulatory framework of the Act, whether anticompetitive or not.[358]

On appeal the Supreme Appeal Court concurred with CAC's decision and in their closing they agreed that the exercise of jurisdiction should not involve a consideration of the positive or negative effects on competition in the regulating country but merely whether there were sufficient jurisdictional links between the conduct and the consequences.[359]

Thence, I think that this jurisprudence applied by South African competition authorities on matters of extraterritorial application of competition law is relatively desirable as it gives the competition institutions greater scope to fully exercise their power in order to ensure that competition is regulated in the most effective way possible. This is an approach that Tanzania

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[356] *American Natural Soda Ash Corporation and Another v Competition Commission and Others* 2005 (3) All SA 1(SCA).
[357] American Natural Soda Ash Corporation and Another v Competition Commission and Others 2005 (6) SA 158 (SCA) on para 1
[358] American Natural Soda Ash Corporation and Another v Competition Commission and Others 2003 (5) SA 633 (CAC) on para 18.
[359] American Natural Soda Ash Corporation supra note 357 at para 29.

should take cognisance of so that if a matter relating to the extraterritorial application of its FCA comes before the FCC it will be armed with an appropriate precedent to follow.

4.1*(b) Application of the Act to the state and state bodies*

Section 6 of the FCA provides that the FCA shall be applicable to the State, state bodies and local government bodies so long as they engage in trade. In spite of the fact that this is what the law states in reality the FCC is not actually permitted to enforce a directive against the State;[360] s 6(2) of the FCA provides that the State shall not be liable to pay fines or penalties or liable to persecution for committing an offence against the FCA. This provision substantially reduces the power of the FCC because if the FCC does not have the mandate to impose penalties or prosecute the State, the State is unlikely to be bound by the provisions of FCA.

In addition, s 6 does not distinguish between 'the State' and 'State bodies' which has caused confusion and ambiguity. However, the question of the distinction has come before the courts. In the case of *Global Outdoor Systems (T) Limited and Seven (7) others v Tanzania National Roads Agency (TANROADS)*[361] the court clarified the distinction between the two. In this case a complaint was brought to the FCC by Global Outdoor Systems and several other outdoor advertising companies against TANROADS (a creature of statute) for granting exclusive permits to only two local advertising firms. In Tanzania, outdoor advertising firms need to be issued permits before they can install billboards and gantries in road reserves all over the country. TANROADS is the body has the authority to issue the permits.

The reason behind TANROADS's actions was that TANROADS intended to start a three-year pilot scheme and in order to monitor the pilot exercise effectively it decided to use only two local outdoor advertising firms capable of covering all twenty regions of Tanzania territory. As a result of the exclusive permits, TANROADS revoked the permits of all other outdoor advertising companies and ordered them to remove all their installed billboards from the road reserve areas within 30 days without taking into consideration their investment certificates which granted them permission to invest in the advertising business in the country.[362] The complainants alleged that the issue of exclusive permits was contrary to the

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[360] UNCTAD op cit note 137 at 42.
[361] *Global Outdoor Systems (T) Limited and Seven Others v Tanzania National Roads Agency* 2009 (1) Fair Competition Commission.
[362] Ibid.

law and for this reason they requested the FCC to cancel TANROADS's revocation of their business permits and its order regarding the billboards. .

In its defence, TANROADS raised preliminary objections on various grounds asserting, among other things, that the subject matter of the application and the complaint did not fall under the FCA; that the FCC did not have jurisdictional competence to adjudicate the application and the complaint; and that TANROADS had no suable legal personality.[363]

In its ruling the FCC expressed satisfaction that TANROADS's alleged conduct, which created barriers for potential market entrants and ousted competitors from outdoor advertising business, was purely a competition issue to be determined by the FCC. TANROADS did engage in trade activities so it fell under the provision of s 6(1) of the FCA. In addition, TANROADS was (and still is) a 'state body' and not 'the state'. For this reason it was not subject to the exemption under s 6(2) of FCA. Furthermore, the permits issued by TANROADS have a commercial value and do not fall under s 6(3)*(b)*(ii) and (iii) of the FCA; and s 96 of the FCA clearly provides that the FCA applies to all persons in all sectors of the economy and shall not be read down, excluded or modified by any other Act, except to the extent that the Act is passed after the commencement of the FCA and expressly excludes or modifies FCA, or by any subsidiary legislation that purports to exclude or modify FCA.[364] Therefore the FCC found TANROADS guilty of committing an offence against the FCA and revoked the exclusive contracts that it had awarded to the two local advertising firms.[365]

4.1*(c)* *Limitations of the Act in the regulated sectors*

In sectors where there are regulatory authorities the FCC does not have the jurisdiction to deal with the competition matters of those sectors.[366] Pursuant to s 96 of the FCA there are four key sector regulators that have exclusive mandates to deal with competition matters within their jurisdictions and they are not bound to seek the approval of the FCC. [367] These regulatory sectors are governed by the following Acts: the Energy and Water Utilities Regulatory Authority Act 11 of 2001 (EWURA Act); the Surface and Marine Transport Regulatory Act 9

[363] Ibid.
[364] UNCTAD op cit note 137 at 42–43.
[365] FCC Press statement 'FCC Overrules TANROADS; Objections to its exclusionary permits to outdoor firms' at 1, available at http://www.competition.or.tz/fcc_files/public/fcc-press_statement-tanroads_eng_version.doc , accessed on 12 March 2014
[366] UNCTAD op cit note 124 at 5.
[367] UNCTAD op cit note 137 at 43.

of 2001 (SUMATRA Act); the Tanzania Civil Aviation Regulatory Authority Act 10 of 2003 (TCAA Act); the Tanzania Communications Regulatory Authority Act 12 of 2003 (TCRA Act).[368]

For instance, under s 20(2) of the EWURA Act, s 19(2) of the TCRA Act, s 40(2) of the TCAA Act and s 19(2) of the SUMATRA Act, these individual authorities are mandated with the power to deal with all competition issues which may arise in the course of the discharge of their functions, and they may investigate and report on those issues, making appropriate recommendations to the Tanzania Bureau of Standards, the FCC or any other relevant authority in relation to: any contravention of the Fair Competition Act, the Standards Act or any other written law; actual or potential competition in any market or regulated services; and any detriment likely to result to the members of the public.

Thus in the light of these provisions, it seems that the FCC merely plays an advisory role as far as competition matters in the regulated sectors are concerned.[369] The law does not make it mandatory for these regulatory authorities to consult with the FCC or refer a competition matter to it before they make their decisions on such matters. But even if they decide to consult the FCC, the FCC does not have the power to override their decisions. This makes it difficult for the FCC to proactively deal with competition matters under these regulated sectors.[370] The FCC's only option is to report decisions that it considers to be unsatisfactory to the Minister. The Minister has the power to direct the relevant regulatory authority to disallow or disapprove the conduct described as irregular or unsatisfactory by the FCC.[371]

In addition, even though the four regulatory authorities Acts do provide for the regulation of their anticompetitive activities, the regulatory authorities tend to concentrate more on 'technical regulations' as opposed to 'competition matters'.[372] Moreover, they do not necessarily have the same vision on competition as the FCC, hence they are unlikely to see the competition effects of some of their decisions.[373] This puts the state of free and fair competition in the market in jeopardy.

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[368] Section 96(3) of the Fair Competition Act 8 of 2003.
[369] UNCTAD op cit note 137 at 44.
[370] Ibid at 46.
[371] Section 96(4) of the Fair Competition Act 8 of 2003.
[372] UNCTAD op cit note 137 at 46.
[373] Ibid.

Besides these regulatory authorities, the government (through other Acts of Parliament) has crop marketing boards (CMBs) whose job is to regulate price of crops. The CMBs are a relic of socialism; they not only play the role of price regulators, they also have the authority to fix prices for major cash crops such as coffee, cotton, cashew nuts and tobacco through minimum price setting arrangements annually. [374] Bearing in mind that the agricultural sector is the sector that employs a majority of Tanzanians, it attracts a great deal of political attention. As yet there has been no clash between the anticompetitive practices of the CMBs and competition policy. If that were to happen, the FCC is most likely to play an advisory role.[375]

4.2 RESTRICTIVE TRADE PRACTICES

4.2*(a)* *Anticompetitive agreements*

Section 8 of the FCA covers anticompetitive agreements. According to the FCC as far as this provision is concerned it should be interpreted and applied as a provision dealing with agreements and not with conduct or behaviour. Therefore the FCC may only enforce section-8 matters when there is an established agreement, and not simply when an offending activity has been identified.[376]

This means that before the FCC can charge a party with committing an offence under s 8 the FCC first needs to prove that the party entered into an agreement with another party; thereafter the FCC may consider whether the party's conduct was anticompetitive.[377] Therefore, even if the FCC's investigation provides evidence of anticompetitive conduct, the FCC will not be able to enforce the provision that has been violated if it is unable to find any evidence of the existence of an agreement. This is problematic as it interferes with the effective enforcement of the law; it places an evidentiary burden on the FCC and causes unnecessary complications.

Additionally, according to s 8 vertical agreements are not regarded as anticompetitive agreements. Section 8(3) provides that an agreement will not be regarded as having the object or effect of appreciably preventing, restricting or distorting competition if the parties to the agreement do not have a dominant position, and if they are not competitors (this refers to

[374] Ibid.
[375] Ibid.
[376] Ibid at 47.
[377] Ibid.

vertical agreements). Allowing vertical agreements to be legal is also problematic because vertical agreements can actually be very anticompetitive. Tanzania should consider revising this provision to treat anticompetitive vertical agreements in the same way as anticompetitive horizontal agreements.

Sections 8 and 9 both provide that if a person acts either intentionally or negligently in contravention to the aforementioned sections (which are both sections on anticompetitive agreements) then they will be guilty of committing an offence under the FCA. This requirement concerning culpa raises the question: if a person unintentionally engages in an anticompetitive agreement will he, she or it not be found guilty of an offence under the FCA?[378]In this regard**,** the section places the onus on the FCC to show and prove that the anticompetitive agreement was entered into intentionally, or negligently as the case may be, before it can charge a person. This is cumbersome and unnecessary analytical process in proving a section-8 case.[379] It needlessly adds to the FCC's burden of proof.

4.2*(b) Misuse of market power*

Abuse of dominance is actually one of the most notorious restrictive trade practices existent in the Tanzanian market, and this is compounded by the presence of many monopolies. For instance in the case of *Serengeti Breweries Ltd (SBL) v. Tanzania Breweries Ltd (TBL),*[380] SBL lodged a complaint with the FCC against TBL about unfair trade practices. SBL alleged that TBL was misusing its market power by removing SBL's signage and posters from retail outlets so as to reduce SBL's visibility amongst consumers. It alleged further that TBL had entered into anticompetitive branding agreements with retail outlet owners for exclusive branding of TBL's products hence restricting competition in the beer industry. During the hearing, the FCC found from the submissions and testimony of witnesses that it was undeniable that TBL had been responsible for removing SBL's point of sale (POS) material in the market. This had forced SBL to replace the POS material so as to restore its visibility. TBL had managed to remove the posters because it was the more powerful company which gave it the sway to easily influence decision in the market.[381]

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[378] UNCTAD op cit note 124 at 6.
[379] UNCTAD op cit note 137 at 50.
[380]*Serengeti Breweries* supra note 323.
[381] Ibid at 44.

Moreover, the FCC found out that TBL had indeed used its dominant position to enter into anticompetitive branding agreements with different outlet owners. These agreements contained conditions that were imposed on the owners of the outlets by TBL. The conditions included the giving of priority to the visibility of TBL products in product displays in bars and the removal of SBL property such as refrigerators and table cloths from their outlets. This was certainly an act of abuse of dominance by TBL.[382] Therefore in its judgment of the case the FCC found TBL liable for misusing its market power and ordered it to pay a fine of 5 per cent of its turnover for that year. The fine amounted to about TZS 27 billion. The FCC declared TBL's agreements with outlet owners null and void; and ordered TBL to refrain from removing SBL's POS material.[383]

As far as abuse of dominance cases are concerned, the FCA covers unilateral conduct only. This means that it regards dominance as dominance by a single firm only.[384] Tanzania could possibly learn from other jurisdictions such as the EU that have incorporated the concept of collective dominance in its competition legislation.[385] Collective dominance is a market situation where more firms, by acting together as if they were a single entity, jointly exert market power. It is a phenomenon that takes place in typically oligopolistic markets.[386] In such cases there is usually a strong link between the market environment and the collusive outcome because if a market has few players it is easy for the few firms to align their strategies without even having to communicate with each other.[387] Since the Tanzanian market has oligopolistic characteristics it will indeed be a great idea for the FCA to incorporate the concept of collective dominance as this will help the FCC catch more abuse of dominance instances and as a result limit such activities in the market.

The FCA does not provide for specific instances that can be regarded as a case of abuse of dominance. On the one hand this could actually play out as a good thing because it affords the FCC a wide canvas to deal with all possible instances of abuse. On the other hand, however, this could be detrimental to the welfare of the Tanzanian market and economy at large because it makes the law less transparent and uncertain for businesses. This uncertainty could ultimately

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[382] UNCTAD op cit note 137 at 49.
[383] Ibid at 53.
[384] Ibid at 51.
[385] Ibid.
[386] Marilena Filippelli 'Collective dominance in competition law' published PhD thesis (2008) at 1, available at *http://e-theses.imtlucca.it/39/1/Filippelli_phdthesis.pdf* , accessed on 10 July 2014.
[387] Ibid at 2.

discourage foreign direct investment and have a negative effect on the economy since it is highly dependent on FDI.[388]

It is my view that for the sake of effectiveness it is best if the FCA establish a closed rather than an open-ended list of abuse of dominance instances. This is because it helps to make the law certain and more reliable. In the long run with Tanzania being a developing country, investments are crucial and most investors are drawn to invest in countries where the laws, policies and regulations are clear and certain so as to provide for assurance. Instead of undefined abuse of dominance possibilities, it would be better to have more open-ended and complex provisions relating to the misuse of market power.

4.2*(c) Mergers*

Section 11 provides the substantive test for a merger review, the provision states that a merger is prohibited if it creates or strengthens a position of dominance in the market. A person is regarded as having a position of dominance in the market if that person has a market share exceeding 35 per cent and when acting alone that person can profitably and materially restrain or reduce competition in that market for a significant period of time.[389] The FCA seems to be taking the approach of a structural paradigm as opposed to a behavioural one as far as mergers are concerned.

Thus from these provisions, we can infer that in analysing a merger so as to decide whether to approve it or prohibit it, the FCC will have to investigate to determine whether the future merged entity will have a market share that exceeds 35 per cent and if it will have the capability of profitably and materially restraining or reducing competition for a significant period of time.[390] These two qualifications are mutually inclusive and therefore this means that even if the FCC, after investigating a merger, proves that the merged entity can profitably and materially affect competition it would not be enough grounds for it to reject the merger as it will also have to be satisfied that the firm's market share exceeds 35 per cent.[391] These qualifications certainly pose a challenge to the FCC because after conducting a merger analysis the FCC may find that the merger will affect competition but the firm's post-merger market

[388] UNCTAD op cit note 137 at 52.
[389] Section 5(6) of the Fair Competition Act 8 of 2003.
[390] UNCTAD op cit note 137 at 54.
[391] Ibid.

share is 34 per cent. Under the law as it stands, the FCC would have to approve the merger in spite of its anticompetitive effect.[392]

For the purpose of curtailing anticompetitive activity it would be best if the FCC could confine itself to a consideration of whether the merger results in profitably and materially affecting competition as a sufficient ground for either rejecting or approving a merger. There should be no need to consider whether the firm's market share is beyond 35 per cent.[393]

[392] Ibid.
[393] Ibid.

CHAPTER 5

CONCLUSION AND RECOMMENDATION

5.1 CONCLUSION

The purpose of this dissertation has been to enquire into the efficiency and effectiveness of Tanzanian competition policy and law. I started off the enquiry by looking at the concept of competition law as a whole. I then discussed in detail the different competing theories that influence and shape competition law models, in particular the three most notable theories of 'output limitation theory', 'open market theory' and 'fair competition theory'. I went on to look at the relevance and significance of competition law particularly to developing countries such as Tanzania. This analysis led to the conclusion that competition policies have a part to play in driving economic development in developing countries, but this can only be achieved if these policies are properly developed and implemented.

In chapter 2 I proceeded to give a brief political and socio-economic history of Tanzania, highlighting the economic structure and the social conditions within the country. It was from this history that I was able to trace the evolution of competition policy and law in Tanzania against the background of the necessity for change in Tanzanian development policy. In finalising this section, I examined Tanzania's first competition law statute and its pitfalls in order to understand why it became necessary to repeal the previous competition law statutes and ushered in a 'new and better' Act.

In the next chapter I examined aspects of that new Act, the FCA, in more detail. I described and discussed in general certain fundamental provisions of the Act. They lie at the core of this dissertation. The objective of my selection of these provisions was to provide for a basic, but fundamental, understanding of the operation of the FCA and its effect on Tanzanian commerce and industry.

Finally, in the fourth chapter, I conducted a critical analysis of some of the core provisions of the FCA that I had described in chapter 3. As a result of this analysis I was able to identify various loopholes and the weaknesses in the FCA. As I discussed the sections of the FCA that give rise to these weaknesses I went a step further, and made suggestions about

modifications and amendments that need to be made to improve the effectiveness of Tanzanian competition law and policy.

5.2 RECOMMENDATIONS

Despite all the shortcomings and challenges identified in the previous chapter, the FCA is still a reasonable piece of legislation as it has to a certain extent played a pivotal role in protecting and monitoring market conditions in Tanzania. It has done this by preventing oppressive market behaviour from holding sway. In so doing it has played a role in maintaining consumer welfare. The competition authorities created under the FCA have contributed to the achievements, albeit that there are loopholes and weaknesses. Through their investigations into anticompetitive activities, and by adjudication and trying cases they have been proactive in creating an environment where free and fair competition in the market is observed.

Nonetheless, the weaknesses and loopholes that I have identified make it necessary to amend existing sections of the FCA and to incorporate new concepts that would make this legislation a more effective tool for achieving its intended aims. With regard to the amendments, among other things, I recommend the following:

- With regard to the FCA's ambit of application to the state and state bodies, the FCC should review the relevant provisions to give the FCC effective control over the trading activities of both the 'state' and 'state bodies'. This review should lead to a broadening of the purview of the FCA to enable the FCC to apprehend many more anticompetitive activities that may be conducted by the state or state bodies.
- The FCC needs to be empowered to deal with competition related issues in all spheres, be it under the FCA, the regulatory authority Acts or any other sector. It should be given the sole power to deal with these matters. All these other institutions, such as the regulatory authorities, should always refer to and consult with the FCC before making their decisions, and the FCC should have the final say. There should be an explicit provision in the FCA that gives the FCC such a mandate, and this should also be incorporated in all other related Acts. This will help to empower the FCC to become more effective in regulating competition.
- Section 8, which is the section on vertical agreements, needs to be amended. It should be amended to provide the FCC with the authority to prohibit vertical agreements that

are anticompetitive. Anticompetitive vertical agreements have the same negative and detrimental effects as anticompetitive horizontal agreements.

- The provisions relating to the abuse of market power should be amended by the legislature and it should incorporate the concept of collective dominance. This will help expand the FCA's reach and hence regulate anticompetitive activities more effectively.

Moreover, for the FCA to be regarded as a successful and effective law then it should reflect and address the needs of Tanzanians. These needs stem from the socio-economic problems that are facing Tanzania as was discussed in previous chapters. Unfortunately, the FCA has not been able to respond to these socio-economic needs. On that note, I recommend that this shortcoming be dealt with in the following way:

- Tanzania should incorporate the concept of equity in its competition policy and law. The notion of fairness, or equity should be applied to protect small- and middle-sized enterprises (SMEs), to reallocate wealth from the rich to the poor, and to regulate business activities such as mergers that are likely to result in the distribution of a disproportionate share of gains on the rich and established.[394] By applying the concept of equity, a balance can be struck between the producers of different sizes in order to keep smaller producers from falling by the wayside while at the same time not acting prohibitively to prevent larger firms from growing and developing. The ultimate goal of achieving an equitable balance is the protection of the marginalised and those who suffer most from unemployment. In this light, Tanzania could possibly learn from other countries like South Africa that has incorporated fairness and equity in their objectives.[395]
- The FCA's objectives need to go beyond merely protecting efficiency in the market and the consumers of those goods. The FCA needs to avowedly pursue a policy of poverty alleviation. As Shadrack Nkelebe[396] enunciated: 'in Tanzania the law has the objective to enhance the welfare of the people … to me this should transcend above consumer welfare'.[397] Things clearly need to change and the legislators needs to start looking at competition policy in a broader perspective. Since poverty alleviation is at the core of Tanzania's objectives, any policy that is established has to complement that goal, and competition policy is no exception.

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[394] Pradeep S Mehta and Taimoon Stewart *Should competition policy & law be blind to equity? the great debate* (2013) at 12.
[395] Ibid at 9.
[396] The Head of Advocacy Department, Fair Competition Commission, Tanzania
[397] Mehta and Stewart op cit note 394 at 52

- One of the ways that competition law can be instrumental in poverty alleviation is by incorporating the protection of informal sector and not merely focusing on competition between established firms. This is because in Tanzania, the informal sector plays a significant role in the economy as it substantially covers critical employment and social welfare gaps. So by specifically providing for the protection of the informal sector, which is unlikely without legislative intervention to be represented during hearings of the FCC, the FCC will play a role in poverty alleviation.

In summary, in a jurisdiction like Tanzania where enhancing economic development and growth is essential, a more expansive competition law is needed. To return, finally, to Eleanor Fox's question that I posed in chapter one:[398] what is the best competition-law perspective for developing countries, looking from the inside out? I would suggest that from Tanzania's position, it should adopt Model 5 described in chapter 1. This model introduces the value of fairness to local market actors by focusing on equity for and participation of the people. It also extends competition law beyond helping markets working efficiently but accommodating other goals. It is submitted that this would be the best competition law model for Tanzania.

[398] Fox op cit note 98 at 18.

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