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I hereby declare that I have read and understood the regulations governing the submission of the Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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ABSTRACT

Competition law is an integral building block in the attainment of regional integration, with Regional Economic Communities (RECs) on the continent making specific provision for competition policy in their founding and developmental agreements. However, in the Southern African Development Community (SADC), the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA), Partner and Member states have implemented competition law in varying degrees, in some cases there is a complete vacuum.

In this paper I wish to analyse the development and implementation of competition law in the respective regions, by dissecting the manner in which the regions have gone about promoting competition law in the regions, I shall further analyse the domestic development of competition law in some of the Partner and Member States.

Due to the voluntary nature of the RECs some Member and Partner States of SADC and the EAC are also members of COMESA, this creates a multiplicity of regional obligations as well as domestic obligations. In light thereof I will further analyse the effect of overlapping membership of RECS, and whether it creates any unintended problems, and if so, how this has been dealt with or can be dealt with.

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FIRST CHAPTER

INTRODUCTION AND BACKGROUND

The interplay between competition law and trade liberalisation is an important relationship, and several scholars and economists have argued that the two cannot exist in isolation.[1]

'Trade models with imperfectly competitive markets show that free trade will not always maximize national welfare. Instead, trade barriers or other government measures may assist local firms to exploit, exercise or extend their market power, often at the expense of the welfare of foreign countries'.[2]

The interaction of competition law and trade law is unavoidable in a system where cross border trade is not only a reality but is championed by sovereign states and regional bodies. They recognise that the environment where such trade occurs must not be anticompetitive and must be regulated by laws that will assist in the achievement of a truly efficient Free Trade Area (FTA). I do not intend to delve into an analysis of the benefits of both trade and competition law independently in the context of an efficient market, and the paper will be premised on the assumption of the inherent benefits of the two principles in the context of a fair and beneficial market to both consumers and business.

The liberalisation of trade opens markets to corporations by allowing them to have a far greater physical reach than where they may have their principal place of business, this then also provides consumers with far greater access to goods and services which their country of residence may not be able to offer. However, for corporations to venture into the unknown, certain conditions must exist to mitigate their risks, such as reduced unfair marketplace practices and breaking down barriers of entry. This further creates employment opportunities and greater participation in the economy.

One such element for a functioning market is the existence of a competition regime and legislation that is regulated in an open, transparent and efficient manner, thereby allowing

[1] Chris Noonan *The Emerging Principles of International Competition Law* (2008) 144.
[2] Ibid at 143.

corporations to weigh their options before embarking on a cross border venture or transaction. Arguably competition law is more to the benefit of consumers, by creating a competitive market, it leads to greater choice in goods and services to consumers, thereby leading to lower prices, innovation, and a higher standard of goods and services, amongst other benefits.[3]

Throughout history there has been a global trend in the increase of countries passing domestic competition legislation, numerous developing countries are slowly catching up with their developed counterparts and borrowing from their experiences and applying said competition law principles into their domestic arena, with their own realities taken into consideration. Developing countries like developed countries must also contend with the issue of ensuring that fledgling domestic industries are not overpowered and consumed by established foreign corporations due to mergers, cartels, and abuse of dominance and other potentially anticompetitive conduct. This requires a high level of cooperation and understanding between Member States to ensure that mutually beneficial solutions are found and effective measures for the resolution of disputes are implemented.

The focus of this paper will be on the implementation of competition laws in the Southern African and the East African economic regions, in terms of obligations imposed on Member and Partner States through the various protocols and legislation, and how overlapping membership in Regional Economic Communities (RECs) has a bearing on the Member and Partner States. The final chapter shall analyse the move to a Continental Free Trade Area (CFTA) and how this will affect competition laws in the respective RECSs.

Southern African Development Community overview

The Southern African Development Community (SADC) encompasses 16 Member States, namely the Republic of Angola, the Republic of Botswana, Democratic Republic of Congo, the Kingdom of Lesotho, the Republic of Malawi, the Republic of Madagascar, the Republic

[3] Christopher Garrett Lehrer 'Ensuring Competition Law Enforcement under International Trade Agreements', in *Transnational Law & Contemporary Problems* (2017) Vol.26(2).449-471.

of Mauritius, the Republic of Mozambique, the Republic of Namibia, the Republic of Seychelles, the Republic of South Africa, the Kingdom of Eswatini, the United Republic of Tanzania, the Republic of Zambia, the Republic of Zimbabwe and most recently the Union of the Comoros.[4]

In an effort to promote regional trade and the promotion of a FTA, the Protocol on Trade in the Southern African Development Community (SADC) Region (the SADC Trade Protocol) was signed by Member States in Maseru, Lesotho on the 1st of August 1996.[5] Under Articles 36 and 37 of the SADC Trade Protocol, Member States were obliged to ratify the SADC Trade Protocol in terms of their respective domestic processes and procedures, with the SADC Trade Protocol coming into effect within 30 days of the deposit of the instruments of ratification of at least two-thirds of the Member States.

Under the SADC Trade Protocol, SADC has committed to promote the regional trade of goods amongst Member States, by amongst other things the elimination of tariffs and the elimination of non-tariff barriers that may hinder the goal of a functional FTA, furthermore SADC endeavours to create an environment in the region that is conducive to the free trade of goods in the region.

The need for effective competition laws in the region, as well functioning competition authorities is necessitated by the numerous corporations that either have a footprint by way of subsidiaries or branches in numerous countries, or purely through the provision of goods in different Member States. The multinational operations of these corporations require collaboration and assistance from the Member States where any anti-competitive practices may occur, and the Member States where the company has its registered head office and operates its business. To create such a conducive environment Article 25 of the SADC Trade Protocol, stipulates that:

'Member states shall implement measures within the Community that prohibit unfair business practices and promote competition'.

[4] SADC Member States *https://www.sadc.int/member-states*/ accessed on 10 September 2018.
[5] Protocol on Trade in the Southern African Development Community (SADC) Region 1996.

With the intention of providing practical means to implement Article 25 of the SADC Trade Protocol, the SADC Declaration on Regional Co-operation in Competition and Consumer Policies (the SADC Competition Declaration) was published and signed by Member States on the 08th of September 2009.[6] Under the Southern African Development Community Secretariat (SADC Secretariat) the aim is to create dialogue and cooperation amongst Member States on issues of competition law, and to promote the domestic implementation of competition laws. To achieve this, the SADC Secretariat established a standing Competition and Consumer Policy and Law Committee.[7]

The SADC Secretariat obtains its powers from the Treaty of the Southern African Development Community (SADC Treaty).[8]The SADC Treaty is the governing agreement for the formation and establishment of SADC and was signed by Member States in Windhoek, Namibia on the17th of August 1992.The SADC Secretariat is the Principal Executive Institution of SADC and has its head offices in Gaborone, Botswana, it possesses far-reaching powers and responsibilities in the organisation, it is responsible for all programmes of SADC including the coordination and management of said programmes as well as strategic planning facilitation.[9]

The head of the SADC Secretariat is the SADC Executive Secretariat, the current SADC Executive Secretariat is Dr. Stergomena Lawrence Tax of the Republic of Tanzania and has held the position since 2013 following the 33rd meeting of The SADC Summit of Heads of State and Government in Lilongwe, Malawi.[10]

Member States have implemented competition laws in varying degrees over time, and in most cases not due to the obligations under Article 25. I will specifically consider the implementation of competition laws and the establishment of competition authorities in the Republic of South Africa, the Republic of Botswana and the Kingdom of Lesotho, and

[6] SADC Declaration on Regional Co-operation in Competition and Consumer Policies 2009.
[7] Competition Policy *https://www.sadc.int/themes/economic-development/trade/competition-policy/* accessed on 12 November 2018.
[8] The Treaty of the Southern African Development Community, 1992 as amended
[9] SADC Secretariat *https://www.sadc.int/sadc-secretariat/* accessed on 12 November 2018.
[10] Executive Secretary *https://www.sadc.int/sadc-secretariat/sadc-executive-management/executive-secretar/* accessed on 12 November 2018.

analyse the general steps taken by the SADC Secretariat in conjunction with the Member States to implement competition laws in the region.

East African Community overview

The East African Community (EAC) encompasses 6 Partner States being the Republic of Kenya, the Republic of Burundi, The United Republic of Tanzania, the Republic of Rwanda and the Republic of South Sudan.[11] Like SADC, the implementation of competition law in the various Partner States differs. However, unlike SADC the EAC issued legally binding regional competition legislation, as well as the formation of a regional competition agency. The East African Community Competition Act (EAC Competition Act) was enacted by the East African Legislative Assembly in 2006, following the adoption of a competition policy in 2004 by the Council of Ministers of the EAC.[12]

In 2010 the Council of Ministers adopted the East African Community Competition Regulations (the EAC Competition Regulations), the EAC Competition Act came into effect on 25 January 2015. In terms of Section 25 of the EAC Competition Act, the East African Community Competition Authority (EAC Competition Authority) was formed.

There is a stark difference in the manner in which competition law has been implemented in the SADC region, the EAC has been able to enact a piece of legislation that is binding on all Partner States for cross-border transactions, with the purpose of achieving greater harmonisation in the region. Whereas SADC has focused more on cooperation between Member States, and their respective competition authorities, I will deal with the respective RECs in more detail below.

[11]Partner States *https://www.eac.int/eac-partner-states accessed on* 14 November 2018.
[12] Joyce Karanja-Ng'ang'a "EAC Competition Law" in Emmanuel Ugirashebuja, John Eudes and Ruhangisa Tom Ottervanger *East African Community Law: Institutional, Substantive and Comparative EU Aspects* 2017 433 – 453.

Common Market for Eastern and Southern Africa (COMESA) overview

Some Member States and Party States are members of both the EAC or SADC and the Common Market for Eastern and Southern Africa (COMESA) which is a Free Trade Area (FTA) that covers both Southern and Eastern Africa. COMESA like SADC and the EAC imposes certain competition law obligations on its members which I will deal with in detail in chapter 4. Since each individual REC creates obligations on its members, the obligations may conflict with each other or create duplication of obligations, additionally, each Member and Partner State may have domestic legislation which they must adhere to.

The purpose of this paper is to analyse the development of competition law in the respective RECs and FTAs, and to focus on some of the Member and Partner States, and how far they have come in developing competition law domestically, and how this influences their regional obligations. As stated above, being a member of multiple RECs has the potential of creating conflict or being overly burdensome on a Member or Partner State, I shall consider whether the current dispensation actually creates any problems for Member and Partner States, and whether there are mechanisms in place to deal with such conflicts or whether the answer lies in the implementation of the African Continental Free Trade Area.

Regional economic integration in Africa

Before delving into the development of competition law in SADC, the EAC and COMESA, I want to give a brief background on the evolution of regional economic integration on the continent. Whilst Member and Partner States were developing regional integration in their respective regions, they were further involved in further developments on the continent.

Under the auspices of the Organisation of African Unity (OAU), the Predecessor of the African Union (AU), on 20 July 1979 the Assembly of Heads of State and Government at their Sixteenth Ordinary Session in Monrovia Liberia, issued the Monrovia Declaration of Commitment of the Heads of State and Government, of the Organization of African Unity on Guidelines and Measures for National and Collective Self-Reliance in Social and Economic

Development for the Establishment of a New International Economic Order (Monrovia Declaration).[13] The Monrovia Declaration determined that Member States were to develop and restructure their economic and social goals, to establish a solid domestic and intra-African base that is self-sustaining and self-reliant.[14] The commitments that Member States made under the Monrovia Declaration were with the purpose of achieving an African Common Market, which would eventually lead to the formation of the African Economic Community (AEC).[15]

On the 29th of April 1980 the Monrovia Declaration was followed by the adoption of the Lagos Plan of Action for the Economic Development of Africa 1980 – 2000 (Lagos Plan). The Lagos Plan was adopted at the 2nd Extraordinary Summit of the Assembly of Heads of State and Government of the Organisation of African Unity.

The Lagos Plan carried on from the objectives of the Monrovia Declaration and emphasised the need for cooperation in sectors such as agriculture, the environment, food production, human resource development and the eradication of illiteracy.[16] In the pursuit of achieving industrial development the Lagos Plan emphasised competition law principles such as, *'free access to developed countries' markets for the industrial products of Member States through the removal of protectionist tariff and non-tariff barriers.'*[17] The Lagos Plan eventually led to the adoption of the Final Act of Lagos in 1985 (Lagos Act).

The objectives of the Lagos Plan and Final Act of Lagos would eventually lead to the Treaty Establishing the African Economic Community in June 1991, during the 27th Ordinary Session of the Assembly of Heads of State and Government of the OAU in Abuja Nigeria.[18] In terms of the Treaty Establishing the African Economic Community (AEC Treaty), the objectives of the AEC were to promote economic, social and cultural development, and the

[13] OAU Assembly of Heads of State and Government 16th Ordinary Session, Monrovia, Liberia, 17-20 July 1979; AHG/ST.3(xvi) Rev.1.
[14] Ibid.
[15] OAU Assembly of Heads of State and Government 16th Ordinary Session, Monrovia, Liberia, 17-20 July 1979; AHG/ST.3(xvi) Rev.1.
[16] Lagos Plan of Action for the Development of action for the economic development of Africa 1980 – 2000.
[17] Ibid paragraph 73(g)
[18] African Economic Community *http://www.dirco.gov.za/foreign/Multilateral/africa/aec.htm* accessed on 06 June 2019.

integration of African economies, coordinate and harmonise policies amongst current and future communities to foster the gradual establishment of the AEC.

The objectives of the AEC further included realising trade liberalisation, by the removal of customs duties and non-tariff barriers, therefore the importance of competition law has always played a role in regional integration on the continent.[19] The OAU would eventually evolve, and become the AU on 11 July 2000 following the passing of the Constitutive Act of the African Union, in Lome Togo and was launched in 2002 in Durban South Africa. One of the reasons for the passing of the Constitutive Act of the African Union was to accelerate the implementation of the AEC Treaty in terms of its preamble.[20]

The purpose of this paper is not to give an in-depth analysis of the development of regional and continental integration in Africa, but it is in this context that the development of competition law by Member States, Partner States, and RECs must be understood.

[19] Treaty Establishing the African Economic Community 1991.
[20] Constitutive Act of the African Union 2000.

SECOND CHAPTER
INTERPLAY BETWEEN INTERNATIONAL TRADE LAW AND COMPETITION LAW IN SADC

Competition and Consumer Policies and regional cooperation in SADC

Considering the importance of competition law, SADC in its Protocol on Trade felt the need to include a provision that would expressly state the importance of competition law in the attainment of an effective FTA. Article 25 of the SADC Protocol on Trade is the cornerstone of this obligation in the SADC region, it stipulates as follows:

"Member states shall implement measures within the Community that prohibit unfair business practices and promote competition".[21]

Article 25 does not prescribe how the above goal shall be achieved nor does it give any guidelines, it is therefore in this context that the SADC Competition Declaration came to be. The SADC Competition Declaration was introduced to provide guidelines and more context to the general provision in Article 25, the preamble thereto states that *'Member States shall implement measures within the Community that prohibit unfair business practices and promote competition'*[22] The understanding being that a *'framework of trade co-operation among Member States based on equity, fair competition and mutual benefit will contribute to the creation of a viable Development Community in Southern Africa.*[23]

The SADC Competition Declaration acknowledges the reality that different Member States have developed competition and consumer laws in varying degrees, with some countries not having any competition legislation in place.

[21] Protocol on Trade in the Southern African Development Community (SADC) Region 1996 as amended
[22] SADC Declaration on Regional Co-operation in Competition and Consumer Policies 2009.
[23] Ibid.

As stated above due to the aim of achieving an efficient FTA and the reality of cross border transactions, the SADC Competition Declaration lays a foundation for Member States to adhere to by laying out in some detail in its preamble the importance of having such structures in place. Before considering the practical steps that must be taken the SADC Competition Declaration paints a picture of why having robust competition and consumer legislation is of paramount importance. But despite Member States signing the SADC Competition Declaration on 08 September 2009, in Kinshasa, Democratic Republic of Congo (DRC), there has been little movement by some Member States.

For effective integration, a high level of cooperation is required between Member States, paragraph 1 of the SADC Competition Declaration deals with how effective cooperation can be attained between the Member States in the context of competition law, paragraph 1 states that a system of effective cooperation shall be established in respect of consumer and competition laws, and Member States shall take necessary steps to adopt, strengthen and implement such laws, the provision caters for both Member States that have existing legislation in place, and those that are yet to do so. The SADC Competition Declaration creates a positive obligation on Member States. Therefore, the passing of competition legislation is not optional. In the quest to attain cooperation amongst Member States the SADC Competition Declaration requires that sufficient resources be provided to the SADC Secretariat to achieve their objectives and for there to be effective enforcement measures available, by means of financial, human or other resources.

Member States are further required to ensure that domestic legislation and policies do not hinder the cooperation required.[24] It was not envisaged that such cooperation would happen immediately after the signing of the SADC Competition Declaration, but there would rather be a gradual phasing in of the, with the ultimate goal being a harmonised regional competition and consumer framework.

Paragraph 2 of the SADC Competition Declaration makes provision for the establishment of a standing Competition and Consumer Policy and Law Committee (the CCOPOLC) by the SADC Secretariat, the CCOPOLC is responsible for the establishment of a system of cooperation between Member States in the realm of competition law in the region.

[24] SADC Declaration on Regional Co-operation in Competition and Consumer Policies, para 1.

In the exercise of its functions the CCOPOLC must have due regard to several factors which are prescribed in the SADC Competition Declaration, as well as the developmental needs and other commitments which the Member States may have in relation to competition policies. Paragraph 2 creates certain obligations for the CCOPOLC, these can be summarised as follows:

- An obligation to foster cooperation and open the channels of dialogue between the relevant competition authorities in the Member States. The aim of which being to reach some commonality on competition policies, laws, principles and a greater understanding of each Member States realities.
- Foster cooperation and dialogue on policies relating to consumer protection, and to facilitate commonality of policies amongst Member States.
- To facilitate the provision of resources and technical assistance programmes for the development of consumer and competition policies.
- Facilitate and coordinate mechanisms to deal with the international effects of anticompetitive practices and facilitate the coordination of negotiating positions with third parties.
- Consider the link and interplay between trade, competition, and consumer protection policies in promoting growth and the alleviation of poverty in the region.
- Cooperate with relevant authorities both in the region and internationally, and where possible and appropriate find commonality in ways to deal with competition and consumer protection matters.
- Assist in the preparation and provision of advocacy programmes and studies on constraints on competition, regional and international competitiveness, the impact of cartels and other anticompetitive practices.
- In all this have due regard to the United Nations (UN) Set of Principles on Competition, as a basis to reaching commonality in international cooperation in competition policy, whilst taking regional development dimensions and realities into consideration. [25]

[25] SADC Declaration on Regional Co-operation in Competition and Consumer Policies, para 2.

The final and third paragraph of the SADC Competition Declaration deals with the role and responsibilities of the SADC Secretariat in the context of competition and consumer regional policies.
I will summarise these responsibilities as above, the SADC Secretariat shall:

- Facilitate the formation of competition authorities in the Member States, where no such authorities exist, assisting in the harmonisation of domestic laws and utilising the best practices of established competition authorities.
- Facilitate competition and consumer protection advocacy programmes, involving the sensitisation of governmental officials in the Member States, such as parliamentarians, policymakers and the judiciary, this obligation extends to the business community as well as the general public on issues relating to competition and consumer policies.
- To facilitate the provision of resources and technical assistance in support of the implementation of consumer and competition policies in Member States.
- Facilitate the preparation and undertaking of studies on constraints on competition, regional and international competitiveness, the impact of cartels and other anticompetitive practices.
- Develop a programme for the implementation of the SADC Competition Declaration and report the progress thereof to the government ministers of the Member States responsible for Trade and Industry.
- Mobilise human and financial resources for the implementation of the above-stated programme from Member States and International Cooperating Partners, such as the European Union (EU), UN Conference on Trade and Development and Commonwealth Secretariat.[26]

The SADC Competition Declaration creates a framework for Member States as well as positive obligations, which on the face of it do not seem too onerous, and further considering the nine years that have passed since its coming into effect, countries such as the Kingdom of Lesotho are yet to enact competition legislation, this will be dealt with in more detail below.

[26] SADC Declaration on Regional Co-operation in Competition and Consumer Policies, para 3.

The CCOPOLC together with SADC Secretariat in the interim has not been playing a waiting game in terms of their obligations under the SADC Competition Declaration, steps have been taken to assist and facilitate the development of competition policies in the region. On 26 May 2016 during the 7th meeting of the SADC Technical Committee on Competition and Consumer Policy and Law, in Gaborone Botswana, the heads of competition authorities in Member States signed the Memorandum of Understanding Amongst Competition Authorities of the Member States of the Southern African Development Community on Cooperation in the Field of Competition Policy, Law and Enforcement (SADC Competition MOU) on the cooperation between the agencies in the region on issues of competition policy, law and enforcement.[27] The competition authorities have agreed to share information on cases, the coordination of cases, the harmonisation of rules and procedures for dealing with cases and an undertaking to conduct joint capacity building and research activities.[28]

The SADC Competition MOU in its preamble states that the desire for SADC is *'to enhance the effective enforcement of our competition laws by creating a framework that provides for cooperation between our respective competition authorities'*[29] it states amongst other things that this shall be attained through the exchange of information and views, organising joint workshops, conferences, and seminars and other capacity-building initiatives, develop annual working plans and the establishment of a Joint Working Committee comprising of representatives from the competition authority of each Member State. The Joint Working Group may propose the establishment of working groups for joint research on matters of common interest.[30]

Over and above the SADC Competition MOU, Member States may also enter into bilateral agreements with other Member States, two examples of such bilateral MOU were entered into by the Republic of South Africa with the Republic of Namibia and the Republic of Mauritius.[31]

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[27] https://www.sadc.int/news-events/news/competition-authorities-sadc-member-states-signed-memorandum/ accessed on 02 December 2018.
[28] *Ibid.*
[29] Memorandum of Understanding Amongst Competition Authorities of the Member States of the Southern African Development Community on Cooperation in the Field of Competition Policy, Law and Enforcement 2016.
[30] *Ibid.*
[31] Mfundo Ngobese Alex Kühn 'Regional competition enforcement: Co-operation between SADC competition authorities in the investigation of cross-border cartels' at 6 available at *http://www.compcom.co.za/wp-content/uploads/2017/09/Cooperation-between-agencies-in-the-SADC-region-draft-1.pdf*.

The Competition Commission of South Africa and the Namibian Competition Commission entered into the Memorandum of Understanding between the Competition Commission of South Africa and the Namibian Competition Commission in the Field of Competition Law, Enforcement and Policy (RSA-Namibia MOU) on 11 November 2015, in Durban, South Africa.[32] The purpose the RSA-Namibia MOU is for both parties to cooperate in terms of enforcement activities, involving the same or related matters, and such cooperation must be line with the domestic legislation of both parties.[33]

On the 13th of October 2016 the Competition Commission of South Africa and the Competition Commission of Mauritius, entered into the Memorandum of Understanding between the Competition Commission of Mauritius and Competition Commission of South Africa in the Field of Competition Law, Enforcement and Policy,[34] the MOU has an identical cooperation clause to the RSA-Namibia MOU.

The hope is that the signing of the SADC Competition MOU will assist competition authorities in the respective Parties that have signed it, to cut the red tape, and reduce the duplication of work on cases, delays and obstacles for corporations that intend to merge, reduce gaps in information that is available to the competition authorities which will lead to some conformity in how cases are analysed.[35]

The SADC Competition MOU was only signed by the Member States that have existing competition authorities in place, these are the Republic of Malawi, the Republic of Mozambique, the Republic of Namibia, the Republic of Botswana, the Republic of Seychelles, the Republic of Mauritius, the Republic of South Africa, the Kingdom of Eswatini, the United Republic of Tanzania and the Republic of Zambia.[36] The Union of the Comoros had not become a Member State at the time of the signing of the SADC

[32] Memorandum of Understanding between the Competition Commission of South Africa and the Namibian Competition Commission in the Field of Competition Law, Enforcement and Policy 2016.
[33] Ibid Article 2.
[34] Memorandum of Understanding between the Competition Commission of Mauritius and Competition Commission of South Africa in the Field of Competition Law, Enforcement and Policy 2016.
[35] Ibid.
[36] https://www.sadc.int/news-events/news/competition-authorities-sadc-member-states-signed-memorandum/ accessed on 02 December 2018.

Competition MOU. The Member States that did not sign the MOU were the Kingdom of Lesotho, the Republic of Angola, the DRC, the Republic of Zimbabwe and the Republic of Madagascar.[37]

This development was a giant leap towards the goal envisaged in Article 25, as prior to this no such agreement had been in place in relation to competition and consumer policies. Prior to the signing of the SADC Competition MOU steps that were taken to further facilitate cooperation between Member States, this was done through the formation of three working groups, these were the SADC Mergers Working Group, which is chaired by Botswana, the SADC Cartels Working Group, which is chaired by the Republic of Zambia and Republic of South Africa, as well as the SADC Research Working Group which is chaired by the Republic of South Africa. The above three working groups were established in July 2015.[38]

On 14 December 2016 during an Extraordinary Meeting of the CCOPOLC in Pretoria, South Africa, competition authorities approved and adopted a framework on the cooperation on mergers and cartel investigations (SADC Mergers and Cartels Frameworks) in the region.[39] The adoption of the SADC Mergers and Cartels Frameworks aims to improve the cooperation amongst Member States to reduce the harmful effects of cartels and to regulate cross border mergers. The SADC Cartels Working Group has separate sub-groups that perform different functions, the one group is the Legal Frameworks group, this group is chaired by South Africa, Namibia and Botswana, the other group is the Investigative Techniques group that is chaired by the Republic of Zimbabwe, Republic of South Africa and, Republic of Mauritius.[40] The mandates of the group allow for practical steps to be taken to better equip the CCOPOLC and Member States, and have both received training including a session for the SADC Cartels Working Group in July 2016 on investigative techniques, that was

[37] Memorandum of Understanding Amongst Competition Authorities of the Member States of the Southern African Development Community on Cooperation in the Field of Competition Policy, Law and Enforcement
[38] Mfundo Ngobese Alex Kühn 'Regional competition enforcement: Co-operation between SADC competition authorities in the investigation of cross-border cartels' at 6 available at *http://www.compcom.co.za/wp-content/uploads/2017/09/Cooperation-between-agencies-in-the-SADC-region-draft-1.pdf*.
[39] Botswana Competition Bulletin Issue 6 Volume 4 2016/17 available at *https://www.competitionauthority.co.bw/sites/default/files/Botswana%20Competition%20Bulletin%20Issue%206%20Volume%204.pdf*
[40] Mfundo Ngobese Alex Kühn 'Regional competition enforcement: Co-operation between SADC competition authorities in the investigation of cross-border cartels' at 6 available at *http://www.compcom.co.za/wp-content/uploads/2017/09/Cooperation-between-agencies-in-the-SADC-region-draft-1.pdf*.

administered by the Competition Division of the Organisation for Economic Co-operation and Development (OECD).[41]

Significant strides have been taken to promote cooperation in the SADC region. It has however taken a very long time to get here with a long road to still travel. However, the building blocks are there. Differing developments in domestic competition and consumer legislation is very multifaceted issue, the reasons vary from financial constraints, lack of competent human resources as well as political instability. I will not analyse the development of all SADC Member States in terms of their competition legislation and policies, as well as the existence of a competition authority. An analysis of competition law has been implemented in the Republic of South Africa, the Republic of Botswana and the Kingdom of Lesotho will demonstrate how the different Member States are at different junctures in their competition law journey.

The Republic of South Africa

Of all the SADC Member States, South Africa has the most developed competition jurisprudence and policies, like all legislation in South Africa competition legislation, must be in line with the provisions of the Constitution of 1996. Most modern-day competition legislation has its roots in the American competition law, a large degree of competition law finds its genesis in the Sherman Antitrust Act of 1980, this is also true of South Africa. In brief, the historical development of the current Competition Act 89 of 1998 (1998 Competition Act) is explained below.

In 1923 the South African parliament enacted the Board of Trade and Industries Act 28 of 1923, the powers of the Board were to advise the state on issues of economic and competition policies, through this process South Africa enacted its first piece of competition legislation, which was the Regulation of Monopolistic Conditions Act 24 of 1955.[42] This piece of legislation was more administrative in nature and therefore had its weaknesses in fully governing the landscape of competition law. Vast powers were granted to the relevant

[41] Ibid.
[42] David Unterhalter, Isabel Goodman, Patrick Smith, Paula Youens, Luke Kelly, *Principles of Competition Law in South Africa*,2017

minister to declare certain activities as uncompetitive, such decisions at times carried criminal sanctions, which led to the legislation being utilised as a political tool.[43] Regulation of Monopolistic Conditions Act gave the Minister the power the declare certain conduct as prohibited after informing Parliament, these were very extensive powers that were provided the Executive.[44]

Due to its short comings, in 1975 the president of the Republic of the Republic of South Africa appointed the Mouton Commission to evaluate the countries competition policies, this led to a report being produced in 1978, the report recommended that a new piece of legislation be enacted to, and this culminated in the enactment of the Maintenance and Promotion of Competition Act 96 of 1979 (1979 Competition Act).[45] The legislation introduced a Competition Board that was responsible for the review or merger transactions, analysing monopolies, as well as other anticompetitive practices, but like its predecessor it merely advised the state, and its enforcement powers were limited. Under this legislation a mergers control system was introduced, however like most things during Apartheid, the procedure and policies were not transparent, and again heavily politicised. The Competition Board was not independent of the Executive, and the minister retained most of the powers he held under the predecessors to the 1979 Competition Act.[46]

The Competition Board existed into the advent of democracy, which led to it having greater independence, however with all the changes that were being introduced into the country and a move to a democratic dispensation, into too had to change. Considering the countries past of exclusion and mass inequality the 1998 Competition Act had to consider numerous socio-economic issues which other developed countries had not had to consider, public interest underpinned a lot of the provisions of the 1998 Competition Act.[47]

The 1979 Competition Act must be understood in the South African context of large multinational corporations operating under a system whereby politicians held extensive powers to dictate the rules, and the implementation of the rules. The decision of the

[43] *Ibid.*
[44] David Lewis, 'Enforcing Competition Rules in South Africa: Thieves at the dinner table' (2013) at 16.
[45] David Lewis, 'Enforcing Competition Rules in South Africa: Thieves at the dinner table' (2013) at 16.
[46] Ibid pg 17.
[47] Goodman, Isabel, Smith, Patrick, Youens, Paula, Kelly, Luke, Unterhalter, David, Title: Principles of Competition Law in South Africa 2017.

Competition Board was merely advisory in nature as the Minster held ultimate authority and decision-making powers on fundamental matters.[48] The independence of the Competition Board was greatly hindered by the political powers of the Minster. The 1998 Competition Act brought with it greater powers to the Competition Board, which removed the veto powers of the Minister, with the eventual repeal of the 1979 Competition Act the Competition Board also made way for a new dawn, and the introduction of the Competition Commission and the Competition Tribunal.[49]

Under this legislation a mergers control system was introduced, however like most things during Apartheid, the procedure and policies were not transparent, and again heavily politicised. The Competition Board existed into the advent of democracy, which led to it having greater independence, however with all the changes that were being introduced into the country and a move to a democratic dispensation, into too had to change. Considering the countries past of exclusion and mass inequality the 1998 Competition Act had to consider numerous socio-economic issues which other developed countries had not had to consider, public interest underpinned a lot of the provisions of the 1998 Competition Act.[50]

To further understand this point of the interplay between socio-economic considerations one must consider the preamble of the 1998 Competition Act, which states as follows,*'.... the economy must be open to greater ownership by a greater number of South Africans. That credible competition law, and effective structures to administer that law, are necessary for an efficient functioning economy. That an efficient, competitive economic environment, balancing the interests of workers, owners and consumers and focussed on development, will benefit all South Africans. '*[51]

The 1998 Competition Act introduced the Competition Commission in terms of section 19 thereof; the current Commissioner is Mr Tembinkosi Bonakele,[52]The Competition Commission is the competition authority in South Africa, and its powers are to investigate

[48] David Lewis, 'Enforcing Competition Rules in South Africa: Thieves at the dinner table' (2013) at 17.
[49] David Lewis, 'Enforcing Competition Rules in South Africa: Thieves at the dinner table' (2013) at 23.
[50] Ibid.
[51] Act 89 of 1998.
[52] Tembinkosi Bonakele, Commissioner *http://www.compcom.co.za/profile-of-mr-tembinkosi-bonakele/* accessed on 05 December 2018.

contraventions, implement competition measures, authorise mergers and other issues ancillary to competition law.[53] The powers of the Competition Commission are not purely advisory and it has far greater powers than the Competition Board had.

The 1998 Competition Act further established the Competition Tribunal, the Tribunal is responsible for the adjudication of contraventions in terms of the 1998 Competition Act, appeals and reviews from the Competition Commission.[54] Appeals from the Competition Tribunal can be lodged Competition Appeal Court which was also established under the 1998 Competition Act.

The 1998 Competition Act was amended following the signing into law of the Competition Amendment Bill on 13 February 2019 by President Cyril Ramaphosa.[55] I do not intend on analysing the amendments to the 1998 Competition Act, however a significant amendment with regard to cross border transactions is the inclusion of Section 18A. In terms of Section 18A, the President must constitute a Committee responsible for determining whether a merger whereby a foreign entity acquires a local entity may have a negative effect on national security interests.[56]

The President must identify and publish a list of national security interest which must be considered upon receipt of notification of such a merger, the Committee is provided with the powers to decline the merger, the decision taken by the Committee must be provided to the National Assembly with detail as to why the decision was taken.[57] Section 18A further obliges the President to issue regulations to provide guidance on process and procedure on the implementation of the section.

<u>The Republic of Botswana</u>

[53] Act 89 of 1998, s 21.
[54] Act 89 of 1998, s27.
[55] Competition Amendment Bill signed into law, *https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-competition-amendment-bill-signed-into-law.html* accessed on 09 July 2019.
[56] Act 89 of 1998 s18A.
[57] Ibid.

Botswana first established a Competition Authority in 2009 through the enactment of the Competition Act 17 of 2009, the Competition Authority is a parastatal and falls within the Ministry of Trade and Industry in Botswana.[58] The current chairperson of the Competition Authority is Dr. Onkemetse Tshosa. The Competition Act 17 of 2009 will soon be repealed by the Competition Act 17 of 2018, the 2018 act was assented to by President Mokgweetsi Masisi, and the Ministry of Investment, Trade and Industry shall in due course adopt regulations. The act will become effective once gazetted by parliament. Section 4 of the 2018 Act stipulates that the Competition Authority shall continue to exist and shall continue with its duties but will however be renamed the Competition and Consumer Authority.[59]

Section 5 of the 2018 act stipulates that the Competition and Consumer Authority *'shall be responsible for the prevention of, and redress for, anticompetitive practices in the economy, and the removal of constraints on the free play of competition in the market.'* [60] The act further states that the Competition and Consumer Authority shall be responsible for advising the Minister on International agreements relevant to competition matters, the governing body of the Competition and Consumer Authority is the Competition and Consumer Board which is responsible for providing general policy guidance and providing direction on the affairs of the Competition and Consumer Authority.

Similarly to the South African position, the 2018 act establishes a Competition and Consumer Tribunal to adjudicate any breached of the competition legislation. The legislation however does not create a specialised appeal court, any appeals on decisions of the Competition and Consumer Tribunal must be made to the High Court.

<u>The Kingdom of Lesotho</u>

As stated above the Kingdom of Lesotho does not currently have any specific competition legislation, nor does it have a specialised competition authority. Over the years there have

[58] https://www.competitionauthority.co.bw/ accessed on 05 December 2018.
[59] Act 17 of 2018.
[60] *Ibid* section 5.

been attempts and drafts that never made it passed draft stages. Examples of this are the Competition Policy of 2007 and the Competition Bill of 2009 which were never adopted.[61]

Other than the obligation created under the SADC Competition Protocol read with the SADC Competition Declaration, there is domestic legislation that requires that such a body exists. In terms of Section 110 (7) of the Companies Act of 2011 states follows:

"A merger shall not be effective unless the body responsible for competition policy and law has been consulted and concurred."[62]

Despite the above provision, Lesotho for a long time did not have a body that dealt with competition law, the drafters of the Companies Act envisaged that such a body would be in place in due time, however this never happened, as such Section 110 was treated as a suspended provision until the competition bill became an Ac which had left a gap in the law, however five years later the Central Bank of Lesotho (CBL) issued the Financial Institutions (Mergers and Transfers of Assets and Liabilities) Regulation of 2016 (Merger Regulation).[63]

In terms of regulation 4.1 of the Merger Regulation, '*a merging or transferor institution shall not effect a merger or transfer of assets and liabilities unless a written application has been made which shall be in the form set out in Schedule 1 and approved by the Commissioner under these regulations'* [64]

Therefore, the Kingdom of Lesotho does possess regulations that govern mergers, Schedule 2 of the Merger Regulation further stipulates that the *"CBL will not approve a transaction that would result in substantiality adverse effects that could result in the creation of a cartel or monopoly."*[65] But there is nothing more than this in the realm of competition law, which is unfortunate considering the Competition Policy of 2007 and the Competition Bill of 2009 dies a slow death, and it is unclear as to why this happened.

In July 2018 the Minister of Trade and Industry in Lesotho, Mr Tefo Mapasela indicated that the process to enact competition legislation has commenced, the process will include the

[61] *https://unctad.org/en/PublicationsLibrary/diaepcb2013d6_en.pdf* accessed on 05 December 2018.
[62] The Companies Act 18 of 2011.
[63] Legal notice No.52 of 2016.
[64] Ibid.
[65] Ibid.

establishment of a competition commission, the minister indicated that a competition bill was tabled in parliament in 2017, in confirming the importance of having a functioning competition law and commission, the minister stated as follows, "There are many cases of unfair competitive practices daily in the market place which we want to curb through this law."[66]

Lesotho is currently in the process of negotiating security, economy and legal reforms which were recommended by SADC, as a means of ending years of political instability and economic stagnation. On 04 July 2019 all stakeholders signed a memorandum of understanding that shall lead to the establishment of the Lesotho Reforms Authority.[67] It is in this backdrop, and the utterances of the Minister that we can hope that in the near future the Mountain Kingdom will catch up with its counterparts in SADC and adhere to its obligations in terms of Article 25.

[66] https://lestimes.com/competition-laws-beckon-for-lesotho/.
[67] *https://ewn.co.za/2019/07/05/ramaphosa-hails-signing-of-lesotho-reform-mou-as-milestone* accessed on 11 July 2019.

THIRD CHAPTER

COMPETITION LAW AND REGIONAL INTEGRATION IN THE EAST AFRICAN COMMUNITY

East African Community history

Having analysed how competition law has developed in SADC I will consider how it has developed in the East African Community (EAC), I will touch on all the partner States, however my emphasis will be on how competition law has developed in the Republic of Kenya and the United Republic of Tanzania, and how the respective legislation of each jurisdiction interplays with the regional legislation.

Prior to the formation of the EAC, the Republics of Kenya, Uganda and Tanzania had numerous regional integration agreements, which included the Customs Union between Kenya, and Uganda in 1917, which was later joined by Tanganyika (now the United Republic of Tanzania following independence on 29 October 1964) in 1927, The East African Common Service Organisation (1961 - 1967), and the East African Community in 1967 (1967 EAC),[68] which was established following the signing of the Treaty of East African Cooperation.[69] The 1967 EAC was dissolved in 1977 due to amongst other reasons the coming into power of Idi Amin Dada in the Republic of Uganda which led to an effective halt of the 1967 EACs operations, furthermore as stipulated in the preamble of the treaty establishing its successor "the collapse of the East African Community being lack of strong political will, lack of strong participation of the private sector and civil society in the co-operation activities, the continued disproportionate sharing of benefits of the Community among the Partner States due to their differences in their levels of development and lack of adequate policies to address this situation."[70]

[68] History of the EAC *https://www.eac.int/eac-history* accessed on 15 February 2019.
[69]Ibid.
[70]History of the EAC *https://www.eac.int/eac-history* accessed on 15 February 2019.

When the 1967 EAC was dissolved the Partner States signed the East African Community Mediation Agreement (Mediation Agreement) on 14 May 1984 in Arusha Tanzania, the Mediation Agreement stipulated how the assets and liabilities of the 1967 EAC would be distributed, but more importantly Article 14 stipulated that certain institutions established under the 1967 EAC such as the East African Development Bank would continue to exist as joint institutions,[71] furthermore Article 14.2 stipulated that the States would continue to "explore and identify further areas for future co-operation and to work out concrete arrangements for such co-operation."[72]

In light thereof, the three countries continued to pursue regional integration amongst each other by the further negotiations, which would eventually lead to the EAC we know today.

The EAC like SADC is a regional intergovernmental organisation with its head offices in Arusha Tanzania and is made up of six Partner States and not Member States like SADC. The current Partner States of the EAC are the United Republic of Tanzania, the Republic of Burundi, the Republic of Uganda, the Republic of Kenya, the Republic of Rwanda and the Republic of South Sudan. [73] The original Partner States of the EAC were the Republics of Tanzania, Uganda, and Kenya, following the signing of the Treaty for the Establishment of the East African Community (EAC Establishment Treaty) on 30 November 1999 in Arusha Tanzania, and subsequent ratification and coming into effect on 7 July 2000.[74] The Republics of Rwanda and Burundi followed suit on 1 July 2007, and lastly, the Republic of South Sudan that became a full Partner State on 05 September 2016.

Competition law in the EAC

Under the EAC Establishment Treaty, in terms of Article 75, the Partner States agreed that a Customs Union would be established, and a Protocol would be drafted that would provide particulars about the Customs Union and its functions.[75] Article 75 of the EAC Establishment Treaty states that amongst other things the Protocol would give details as to how competition law would be dealt with in the region. Article 83 of the EAC Establishment Treaty further

[71]History of the EAC *https://www.eac.int/eac-history* accessed on 15 February 2019.
[72] East African Community Mediation Agreement 1984.
[73] Overview of EAC *https://www.eac.int/overview-of-eac* accessed on 15 February 2019.
[74] Ibid.
[75] Treaty for the Establishment of the East African Community 1999, Article 75.

stipulated that Partner States would *'liberalise their financial sectors by freeing and deregulating interest rates with a view to achieving positive real interest rates in order to promote savings for investment within the Community and to enhance competition and efficiency in their financial systems*.'[76]

This led to the signing of the Protocol on the Establishment of the East African Customs Union (Customs Union Protocol) which was signed by the presidents of the Republics of Kenya, Tanzania and Uganda (founding Partner States) on 02 March 2004. Article 21 of the Customs Union Protocol deals with competition in the region and stipulates that '*the Partner States shall prohibit any practice that adversely affects free trade including any agreement, undertaking or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Community.'*[77] Article 21(3) further stipulated that the implementation of article 21 shall be in accordance with East African Community competition law and policy.

The above stated East African Competition Policy was adopted in 2004 by the East African Community Council of Ministers (EAC Council of Ministers).[78] The EAC Council of Ministers was established under Article 9 of the EAC Establishment Treaty, it is made up of ministers that are responsible for regional cooperation in each of the Partner States or any other ministers the Partner States may wish to elect, the role of the EAC Council of Ministers is to monitor, implement and review programmes that have been set up by the EAC in the attainment of regional integration and implementation of the policies of the EAC.[79]

Following the adoption of The East African Community Competition Policy, the East African Community Legislative Assembly (the EAC Assembly) which was established in terms of section 9 of the EAC Establishment Treaty, enacted the East African Community Competition Act of 2006 (EAC Competition Act), following its publication in the East

[76] Treaty for the Establishment of the East African Community 1999, Article 83.
[77] Protocol on the Establishment of the East African Customs Union 2004.
[78] Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Available at *http://www.jstor.org/stable/10.1163/j.ctt1w76vj2.*
[79] https://www.eac.int/press-releases/153-legal-judicial-affairs/922-36th-meeting-of-the-eac-council-of-ministers-underway-in-kampala,-uganda

African Gazette in September 2007.[80] The EAC Competition Act was the culmination of the objectives espoused in the provisions of the EAC Establishment Treaty and the Customs Union Protocol. The objectives of the EAC Completion Act in section 3 stipulate that:

'The objects of the competition policy and practice in the Community shall be to:

(a) enhance the welfare of the people in the Community by:

i) protecting all market participants' freedom to compete by prohibiting anti-competitive practices;

ii) protecting the opening of Partner States' markets against the creation of barriers to interstate trade and economic transactions by market participants;

iii) guaranteeing equal opportunities in the Community to all market participants in the Community, and especially to small and medium-sized enterprises;

iv) guaranteeing a level playing field for all market participants in the Community by eliminating any discrimination by Partner States on the basis of nationality or residence;

v) providing consumers access to products and services within the Community at competitive prices and better quality;

vi) providing incentives to producers within the Community for the improvement of production and products through technical and organizational innovation;

vii) promoting economic integration and development in the Community;

(b) enhance the competitiveness of Community enterprises in world markets by exposing them to competition within the Community;

(c) create an environment which is conducive to investment in the Community;

(d) bring the Community's competition policy and practice in line with international best practices;

(e) strengthen the Partner States' role in relevant international organizations."[81]

The EAC Competition Act is entrusted with protecting the rights of market participants, creating an environment conducive to investment and promoting economic integration in the EAC.[82] The EAC Competition Act endeavours to achieve the above goals by prohibiting

[80] Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. 434 available at *http://www.jstor.org/stable/10.1163/j.ctt1w76vj2*.
[81] S 3 of the East African Community Competition Act of 2006.
[82] S 3 of the East African Community Competition Act of 2006.

market conduct which may have the effect of being anti-competitive, such as collusive practices, barring access to markets, abuse of market dominance, and creates punishable offences for non-compliance. It further provides guidelines to be followed when entering into certain transactions such as mergers and acquisitions and the provision of subsidies by Partner States.

In terms of section 4 of the EAC Competition Act, the provisions of the Act will apply to all economic activities and transactions that have cross-border effect.[83] Purely domestic transaction remain within the full jurisdiction of the Partner States and their domestic legislation, the regional application of the EAC Competition Act is a great distinction to the competition law obligations of SADC, which do not impose any cross-border binding obligations, but rather more concerned with cooperation amongst Member States.

Section 37 of the EAC Competition Act makes provision for the establishment of the East African Community Competition Authority (the EACCA), which is constituted by one Commissioner from each Partner State and appointed by the EAC Council of Ministers.[84] The EACCA is responsible for prescribing its own rules of conduct, and has "all powers express and implied necessary for and conducive to the implementation and enforcement of the East African Community Competition Law".[85] These include the gathering of information, investigations, subpoena evidence, which includes powers of search and seizure of documents and to issue legally binding findings.[86] Non-compliance with an order of the EACCA is an offence under the EAC Competition Act, and a person may be held liable for a fine, imprisonment or a combination of the two. From the above, it is clear that the intention of the Partner States was to create a body with far-reaching powers and the power of enforcement.

Such far-reaching powers have the potential to step on the toes of the sovereignty of the Partner States, therefore it was a requirement that all Partner States buy into the idea of the EACCA and fully support its endeavours, which in principle must be commended. This is

[83] S 4 of the East African Community Competition Act of 2006.
[84] Ibid s 37.
[85] Ibid s 42.
[86] *Ibid.*

confirmed in section 43 of the EAC Competition Act, which stipulates that *'the Authority and the Partner States shall mutually co-operate in the implementation of the East African Community Competition Law. The Partner States shall support the activities of the Authority.'*[87]

Other than the formation of the EACCA, section 9 of the EAC Establishment Treaty established the East African Community Court of Justice (the EAC Court), the EAC Court is granted the powers to hear appeals hear where any person or a Partner State is dissatisfied with a decision of the EACCA.[88] The EACCA is also empowered to refer certain matters to the EAC Court. Despite the enactment of the EAC Competition Act in 2006, its effectiveness was still a long way away.[89] The EACCA is granted exclusive jurisdiction to make any determination on a violation of the EAC Competition Act, and these decisions are binding on Partner States and their domestic courts and authorities. The Partner State's enforcement authorities are compelled to enforce decisions of the EACCA, however if there is disagreement between the EACCA and the domestic courts and authorities of a Partner State, such disagreement must be brought before the EAC Court.[90]

Section 49 of the EAC Competition Act stipulates that the EAC Council of Ministers may make regulations for the efficient implementation of the provisions of the EAC Competition Act.[91] On the back of this provision the EAC Council of Ministers enacted the East African Community Competition Regulations of 2010 (EAC Competition Regulations).[92] The EAC Competition Regulations provide a practical framework for the operation of the EAC Competition Act as well as the duties and functions of the EACCA.

The EAC Competition Act only came into force on the 1st of December 2014 following the issuing of a gazette by the EAC Council of Ministers. But there was further delay in its operationalisation, due to the delay in constituting the EACCA and other factors. The EACCA was only established in 2016, following the swearing in of 5 commissioners in

[87] S3 of the East African Community Competition Act of 2006.
[88] Ibid s 24(2).
[89] *Ibid.*
[90] Ibid s 45.
[91] S49 of the East African Community Competition Act of 2006.
[92] Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. 434 available at *http://www.jstor.org/stable/10.1163/j.ctt1w76vj2.*

November 2016.[93] At the 33rd Meeting of the Council of Ministers on 29 February 2016, the nominees of the Partner States were approved by the EAC Council of Ministers, their terms and conditions were approved at the 34th Meeting of the Council of Ministers in terms of section 38(6) of the EAC Competition Act.[94] The appointed Commissioners were Innocent Habarugira if the Republic of Burundi, Francis Kariuki of the Republic of Kenya, Frederick Ringo of the United Republic of Tanzania, Didas Kayihura of the Republic of Rwanda and Sam Watasa of the Republic of Uganda.

The establishment of the EACCA and the appointment of the Commissioners was a big step in the operationalisation of the EAC Competition Act together with EAC Competition Regulations. The delays in the implementation of the regional legislation can also be attributed to stagnation in some of the Partner States passing, and implementing domestic competition legislation, to date only the Republic of Kenya and the United Republic of Tanzania have competition legislation as well as competition authorities in place, I will however deal with domestic competition legislation later in the this chapter.

By having a regional authority that has the power to set standards as well as enforcing them, there should be greater accountability amongst Partner States, with less potential for political involvement, additionally the Commissioners and support staff of the EACCA are made up of people from all Partner States, there is greater room for an independent body that has as its most important objective the existence of a well-functioning competitive region, and strict adherence to the legislation.

The delay in the establishment of the EACCA can be attributed amongst other things to the lack of financial support from Partner States to set up the EACCA and the provision of resources, both financial and non-financial.[95] There were further issues with jurisdictional conflicts between domestic and regional competition policies that would have led to

[93] Vellah Kedogo Kigwiru 'Cross-border Competition Enforcement in Africa: Development's, Opportunities, Challenges and the way Forward' available at *http://www.compcom.co.za/wp-content/uploads/2017/09/CROSS-BORDER-ENFORCEMENT-IN-AFRICA.pdf.*

[94] Five Commissioners of the EAC Competition authority sworn in at the EAC *https://www.eac.int/press-releases/605-1048-346-five-commissioners-of-the-eac-competition-authority-sworn-in-at-the-eac* accessed on 15 February 2019.

[95] Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. 435 available at *http://www.jstor.org/stable/10.1163/j.ctt1w76vj2*.

disharmony, which is directly in conflict of the intentions of having a regional body as well as regional legislation. As stated above the powers of the EACCA enjoy exclusive jurisdiction to matters falling within the confines of the EAC Competition Act, therefore this directly limits the powers of domestic authorities and courts.[96] This has led to the slow pace at which the regional legislations implementation took, because without ironing out these issues would have led to ineffectiveness and continuous conflict.

The EACCA was finally operationalised in March of 2018, with its head offices being in Arusha, Tanzania, in its infancy the EACCA has only begun with sector studies on the competitive nature of the regional economy.[97] Despite the length of time it has taken for the EACCA to finally become operational, it is a step in the right direction and over time its implementation of the provisions of the EAC Competition Act will be judged.

The varying stages of domestic implementation of domestic competition legislation as well as the formation of competition authorities is another large stumbling block to the full implementation of regional competition integration. AS stated above the only two Partner States that have specific competition legislation as specialised competition authorities are the Republics of Kenya and Tanzania. This creates difficulty because the EACCA having exclusive jurisdiction on cross border competition matters, in terms of the EAC Competition Act the EACCA relies heavily on the domestic competition authorities to implement its determinations.[98]

To date, all the Partner States of the EAC have competition legislation in place excluding the Republic of South Sudan and the Republic of Uganda. Whereas only the Republic of Kenya and the United Republic of Tanzania have implemented competition legislation, as well as having operational competition authorities in place, to carry out the functions and obligations enclosed in the respective domestic pieces of legislation.[99] The levels of domestic

[96] *https://www.competition.org.za/review/2016/6/7/prospects-for-the-east-african-community-competition-authority* accessed on 15 February 2019.

[97] African Competition Law Developments in 2018 and the outlook for 2019

https://www.lexafrica.com/competition-law-outlook-for-2019/ accessed on 15 February 2019.

[98] S 44(4) of the East African Community Competition Act of 2006.

[99] Vellah Kedogo Kigwiru 'Cross-border Competition Enforcement in Africa: Development's, Opportunities, Challenges and the way Forward' available at *http://www.compcom.co.za/wp-content/uploads/2017/09/CROSS-BORDER-ENFORCEMENT-IN-AFRICA.pdf.*

implementation therefore vary significantly, I will analyse the different levels of implementation of the Partner states below.

The Republic of Kenya

Prior to attaining independence, the colonial government of Kenya issued a Price Control Ordinance which was the first piece of legislation that dealt with anti-competitive dealings, the ordinance was later renamed the Price Control Act, the initial purpose of the legislation was to protect consumers against price increases.[100]

In the 1980s the post-colonial government of Kenya embarked on a process to regularise competition law in the country, which led to the enactment of the Restrictive Trade Practices, Monopolies and Price Control Act, Cap.504 of the Laws of Kenya 1988, (CAP.504) which was promulgated on 19 December 1988, and came into effect on 1 February 1989.[101] Implementation and regulation of Cap.40 was the duty of the Macro Competition regulator (currently known as the Monetary Policy Committee of the Central Bank of Kenya).[102] However Cap.40 had several deficiencies such as not having sufficient enforcement powers, not being a deterrent to anti-competitive behaviour and provided too much power to politicians.[103] However Cap.40 was meant to be a transitional piece of legislation, therefore the government began policies to develop the legislation that governed competition law; the government relied heavily on the jurisprudence of other countries that had far more developed competition law mechanisms in place, including the Republic of South Africa.

Cap.40 was repealed and replaced by the Competition act 12 of 2010 (Kenya Competition Act), the Kenya Competition Act introduced the Competition Authority of Kenya (CAK) and the Competition Tribunal as means to enhance competition policies in the country. The preamble to the Kenya Competition Act states as follows: "An Act of Parliament to promote and safeguard competition in the national economy; to protect consumers from unfair and

[100] Robert Mudida, S Wagura Ndir Itu, 'Thomas Ross Kenya's New Competition Regime' available at *https://www.researchgate.net/publication/281208061_Kenya's_New_Competition_Policy_Regime*
[101] *http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/PeterNjoroge.pdf* accessed on 15 February 2019.
[102] Ibid page 5.
[103] Robert Mudida, S Wagura Ndir Itu, 'Thomas Ross Kenya's New Competition Regime' available at *https://www.researchgate.net/publication/281208061_Kenya's_New_Competition_Policy_Regime*

misleading market conduct; to provide for the establishment, powers and functions of the Competition Authority and the Competition Tribunal, and for connected purposes."[104]

Section 7 of the Kenya Competition Act established the CAK, the CAK is an independent body with its functions being the promotion and enhancement of the Kenya Competition Act, investigating complaints, disseminating knowledge to the public on competition issues, advising the government on issues of competition law and consumer welfare and liaising with other industry bodies.[105] The CAK is further empowered to publish guidelines, standards, and rules on the implementation of the Kenya Competition Act. Like South Africa the competition law dispensation in Kenya is at a very advanced stage in comparison to other Partner and Member States. The CAK is headed by a Director General, the position is currently held by Mr Wang'ombe Francis Kariuki who is also one of the five Commissioners of the EACCA, as per his nomination by the Republic of Kenya and subsequent approval the Council of Ministers.

The CAK is responsible for the investigation of prohibited practices in the Country on its own accord and in response to complaints, which includes the powers to subpoena individuals, entry, search and seizure.[106] Upon a finding of a provision of the Kenya Competition Act, the CAK may restrain the continued practice of the conduct, require the remedy or reversal of an infringement, impose financial penalties or grant any other appropriate relief.[107] However the CAK is not the final decision maker in terms of competition law infringements in the Republic of Kenya, an aggrieved party has the right to appeal a decision of the CAK to the Competition Tribunal, which is a statutory body established under section 71 of the Kenya Competition Act, which is constituted by a chairman and not more than four other members that are appointed by the Minister of Finance.[108]

The Competition Tribunal has the power to make determinations on appeals made to it, including making an order that the matter returns to the CAK for reconsideration, the CAK is however able to appeal a decision of the Competition Tribunal to the High Court.

[104] Competition act 12 of 2010.
[105] Ibid s 9.
[106] Ibid s 30.
[107] Ibid s 36.
[108] Competition act 12 of 2010 s 71.

The United Republic of Tanzania

Like many post-colonial African economies, the Republic of Tanzania's economy was centrally planned, with the state at the centre of most of the economic activity, however in the 1980s the government of Tanzania began a programme of decentralisation through trade liberalisation, and letter through the privatisation of certain state owned institutions.[109] The government of the republic of Tanzania in 1994 enacted a piece of legislation that dealt with competition law that was known as the Fair Trade Practice 04 of 1994 (Fair Trade Practice).[110]

The Fair Trade Practice however had several problems, such as the granting of extensive powers to the Minister of Finance, and not effectively giving guidance as to how the provisions of the legislation would be applied.[111] This then led to the repeal of the Fair Trade Practice, and the passing of the Fair Competition Act 08 of 2003 (FCA), which was The FCA was passed by parliament on 02 April 2003 and was assented to by President Benjamin Nkapa on 23 May 2003,[112] and came into effect on 12 May 2004, following a pronouncement by the Minister of Trade and Industry.[113]

Section 62 of the FCA introduced the Fair Competition Council (FCC), which is the independent body responsible for giving effect to the provisions of the FCA, and to deal with all issues relating to anti-competitive conduct, abuse of dominance and other conduct that would lead to uncompetitive behaviour.[114] Like the CAK the FCC has wide-ranging powers to enforce the provisions of the FCA such as investigative powers, as well the power to make

[109] Fair Competition Commission *http://www.competition.or.tz/index.php?option=com_content&view=article&id=2&Itemid=107* accessed on 15 February 2019.
[110]Eleamani Laltaika 'Legal and Institutional Aspects of Fair Competition in Tanzania' available at *https://www.researchgate.net/publication/309548844_Legal_and_Institutional_Aspects_of_Fair_Competition_in_Tanzania*
[111]Ibid.
[112] Ibid.
[113] The United Republic of Tanzania Fair Competition Tribunal, *https://www.fct.or.tz/about-fct/history* accessed on 15 February 2019.
[114] Fair Competition Commission *http://www.competition.or.tz/index.php?option=com_content&view=article&id=2&Itemid=107* accessed on 15 February 2019.

determinations. The FCC became operational in May 2007.[115] It consists of a Director General, three Commissioners and the Chairman, the current chairman is Prof H Moshi, and the Director-General is Dr. John Mduma.[116]

The FCC may initiate a complaint on its own accord, its decisions may be appealed to the Fair Competition Tribunal which was established under section 83 of the FCA, and the members of the Fair Competition Tribunal are made up of a Chairman and six other members.[117] The current Chairman of the Fair Competition Tribunal is Hon Judge Barke Sehel, and he was appointed to the position on 18 August 2017 by President John Magufuli in consultation with the Chief Justice in terms of section 83(1) of the FCA.[118]

As stated above the Republic of Kenya and the United Republic of Tanzania are the only Partner States with both competition legislation as well as competition authority that deal with issues of competition law domestically.

Competition law development in other Partner States of the EAC:

The Republic of Uganda

The Republic of Uganda currently does not have any competition legislation in place, or a competition authority; however there is the Ugandan Competition Bill 2004.[119] Time will tell whether Uganda will pass specific competition legislation in the near future, however currently there a sector specific pieces of legislation that deal with issues of competition in the specific sectors, these are the Uganda Communications Act 1 of 2013, the Financial Institutions Act, the Petroleum Supply Act, and the Insurance Act.[120]

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[115] *http://www.competition.or.tz/PUBLISHE_DOCUMENTS/Newsletters/Nws_jan_mar_2011.pdf* accessed on 15 February 2019.

[116] Fair Competition Commission, *http://www.competition.or.tz/index.php?option=com_content&view=article&id=5&Itemid=11,* accessed on 15 February 2019.

[117] Fair Competition Act 08 of 2003 s 83

[118] The United Republic of Tanzania Fair Competition Tribunal *https://www.fct.or.tz/about-fct/members,* accessed on 15 February 2019.

[119] *http://www.bowmanslaw.com/wp-content/uploads/2016/12/Guide-Competition-3.pdf* accessed on 15 February 2019.

[120] Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. 435 available at *http://www.jstor.org/stable/10.1163/j.ctt1w76vj2*.

The Uganda communications Act has a chapter on "Fair Competition and Equality of Treatment"; under the act the responsibility of ensuring fair competition and equality among all operators in any business or service relating[121] to communication, is in the hands of the Uganda Communications Commission (UCC) established under section 4 of the act. As stated, the applicability of the Uganda Communications Act is limited to conduct in the arena of communication and does not have applicability in other spheres of commercial life in the country.

The Republic of Burundi

In the Republic of Burundi the legislation that governs competition law is the Competition Act, Law No. 1/06 of 25 March 2010, the legislation has been enacted however is of no effect as the government has not yet set up a Competition Commission.[122] Once the Competition Commission is set up the Act will become effective, it is a positive step that a piece of legislation exists and has gone beyond the phase of a Bill.

The Republic of Rwanda

The Republic of Rwanda passed the Competition Act No. 36/2012 which came into effect on 21 September 2012. However, the government has not yet established the Rwanda and Inspectorate Authority as required by act.[123] In the interim, the Ministry of Trade and Industry is enforcing the legislation.[124]

The Republic of South Sudan

The Republic of South Sudan currently does not have either a competition legislation of a competition authority, however the government of South Sudan has already begun on the journey to attaining competition legislation, this includes a visit to the Competition authority of Botswana on a bench marking mission on competition laws and their implementation.[125]

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[121] Uganda Communications Act 1 of 2013.
[122] Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. 436 available at *http://www.jstor.org/stable/10.1163/j.ctt1w76vj2.*
[123] *http://www.bowmanslaw.com/wp-content/uploads/2016/12/Guide-Competition-3.pdf* , accessed on 15 February 2019.
[124] Ibid.
[125] *https://www.competitionauthority.co.bw/south-sudan-benchmarks-competition-authority,* accessed on 15 February 2019.

To date only the Republic of Kenya and the Republic of Tanzania have domestic competition legislation in place was well as an operational competition authority, whereas all Partner states but the Republics of Uganda and South Sudan have competition legislation in place.

Progress of implementation in the EAC and SADC

This disconnect between the aims of the EAC and the implementation of competition legislation in the Partner States does not bode well for the effective implementation of the EAC competition Act, the EAC Act became law in 2007 but only became effective in 2014, the Commissioners of the EACCA were only appointed in 2016 and the EACCA only became operational 11 years of the publication of the EAC Competition Act in March 2018. Most of the Partner States delays in implementing their domestic legislation will only extend the length of time it will take for the EACCA to become fully operational, as its duties and functions are currently limited to sector studies and investigations into firms and trade association's infringements and price fixing activities that harm consumers.[126] There has no communication with the public in terms of when complaints can be lodged.

The slow rate at which the Partner States excluding the Republic of Kenya and the Republic of Tanzania are reaching their domestic obligations is a hindrance to the EACCA fully reaching the goals set out in the EAC Competition Act; it creates uncertainty for consumers and investors both foreign and international. There is unfortunately no direct obligation that all Partner States must have domestic competition laws and competition authorities in place. However, the EAC Competition Act read with the EAC competition Regulations lean on the domestic authorities especially in the context of enforcement of determinations. One could however argue that having a direct obligation would not change much, taking into consideration the obligations under Protocol 25 of the SADC Trade Protocol, which has not been fully complied with by some Member States.

However what is clear is that the Partner States are taking steps to enact legislation and to set up competition authorities, but it has taken far too long to get here, and in most cases it appears that the lack resources to empower the Partner States to have the necessary

[126] *https://www.theeastafrican.co.ke/business/East-Africa-competition-watchdog-operations-market-studies/2560-4361580-1rqaquz/index.html*, accessed on 15 February 2019.

infrastructure and to train and appoint qualified personnel has been the main stumbling block. Furthermore, once the legislation is passed and the institutions set up, there has in the past been further delay in operationalising the legislation and the competition authorities, which may boil down to political will.

But in my analysis of the EAC and the strides that have been made, what has been achieved thus far must be celebrated, the ability to rally around one common goal and enact a piece of legislation that limits one's sovereign power is not an easy feat. It is far more than what SADC has been able to achieve, not to say regional integration can only be achieved by the passing on regional legislation, however it makes the work of the regional authority easier by having one point of reference, as opposed to numerous pieces of legislation that may conflict or that may be interpreted differently by different jurisdictions, potentially in favour of one's state.

The benefit of having the other Partner States, and other jurisdictions that have developed competition legislation is that the Partner States that are still in the process of enacting their own legislation can learn from mistakes done by others and may avoid several of the teething problems. The hope is that in the near future the remaining Partner States will have fully operational competition legislation and fully equipped and functional competition authorities, once this hurdle has been passed the EACCA can fully conduct its duties and obligations under the EAC Competition Act.

Other steps that were taken to further the goal of cooperation amongst African states include the formation of the African Competition Forum (ACF) on the 3rd of March 2011 in Nairobi, Kenya, the launch of the ACF brought together representatives of 23 national and regional originations from all over the world,[127] countries that were represented included those that do not have competition authorities in place, the aim of the ACF is to support African countries to resource and implement their competition legislation, enhancing enforcement mechanisms and developing functional competition authorities, it is an informal network that creates an environment for cooperation. A Steering Committee was appointed at the Forum, it was made up of the heads of the competition authorities of some of the members of the ACF, Uhuru

[127] *http://www.compcom.co.za/wp-content/uploads/2014/09/ACF-Launch-Conference-press-release-final.pdf*

Kenyatta who was at the time the deputy president of the Republic of Kenya said the following in his keynote speech at the launch of the ACF:

"This forum is important because it provides a platform for mobilsing and harnessing experiences and ideas in competition regulation. This is necessary for improving our management of the competition policy and law so as to deepen our gains from the local, regional and international liberalised markets, which is very pertinent to out initiatives of reducing poverty on the continent of Africa,"[128]

The first chairperson of the Steering Committee was Mr Francis Kariuki of the Republic of Kenya, the current chair is Mr Tembinkosi Bonakele of the Republic of South Africa. The ACF continues to be a resource to competition authorities and its membership continues to grow, it regularly holding workshops. It is organisations such as these that foster greater cooperation and a sharing of ideas on the continent. Initiatives such as this are meant to assist both Member and Partner States of SADC and EAC, and other African States that are yet to implement legislation and establish competition authorities

Some Partner States and Member States of SADC are also members of the Common Market for Eastern and Southern Africa (COMESA), which creates further obligations on these states, as well as potential confusion as to the relevant legislation to consider at times. In the next chapter, I will consider the interplay between COMESA, SADC and the EAC in the context of competition law and regional integration.

[128] *http://www.compcom.co.za/wp-content/uploads/2014/09/ACF-Launch-Conference-press-release-final.pdf.*

FOURTH CHAPTER:
COMPETITION LAW INTERPLAY BETWEEN COMESA, the EAC and SADC

COMESA History and background

COMESA is a FTA that was established on 8 December 1994; prior to its adoption as a FTA its status was that of a Preferential Trade Area (PTA) which was established in 1981.[129] The PTA came into being following the signing of the Treaty establishing the Preferential Trade Area for Eastern and Southern Africa States (PTA Treaty) on 21 December 1981, and its coming in to force on 30 September 1982.[130]

The formation of COMESA as a FTA was as a result of the provisions of the (PTA), which intended that the PTA would within 10 years of its existence develop into a FTA. The FTA came into effect on 8 December 1994 following the signing of the Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty).[131]COMESA is currently the largest regional economic community on the continent working hand in hand with other regional trade areas in Africa such as SADC and the EAC, which will be the focus of this chapter.[132]

COMESA currently has 21 Member States which are the Republic of Sudan, the Kingdom of Eswatini, the Republic of Uganda, the Republic of Burundi, the Union of Comoros, the Republic of Djibouti, the Democratic Republic of the Congo, the Republic of Seychelles, the Republic of Zambia, the Arab Republic of Egypt, the Federal Republic of Ethiopia, the Republic of Kenya, the State of Libya, the Republic of Madagascar, the Republic of Mauritius, the Republic of Malawi, Rwanda, the Republic of Zimbabwe, the Federal Republic of Somalia, the State of Eritrea, and the Republic of Tunisia.[133] Since its inception, some members left COMESA these are the Kingdom of Lesotho, the Republic of

[129] *http://www.dirco.gov.za/foreign/Multilateral/africa/comesa.htm*, accessed on 20 March 2019.
[130] *https://www.tralac.org/resources/by-region/comesa.html*, accessed on 20 March 2019.
[131] Ibid.
[132] *http://www.dirco.gov.za/foreign/Multilateral/africa/comesa.htm*, accessed on 20 March 2019.
[133] *https://www.comesa.int/comesa-members-states/*, accessed on 20 March 2019.

Mozambique, The Republic of Tanzania, the Republic of Namibia[134] and the Republic of Angola which suspended its membership in 2007.[135]

The reasons for the withdrawal from COMESA vary for both political and economic reasons, the Republic of Tanzania withdrew its membership in 2000 due to amongst other issues the reduction of import tariffs, the government was of the opinion that the removal of tariffs would hinder its industrial development; the government relied significantly on the revenue from trade tariffs.[136] For smaller economies that rely on import tariffs the reduction of said tariffs was in conflict with the governments sovereign goals. At the time the Republic of Tanzania was negotiating to become a Partner State of the EAC, and deemed its policies as being more in line with its own, and more beneficial to the people of Tanzania.

Whereas the Republic of Angola suspended its membership of COMESA due to the duplication of its obligations and responsibilities under COMESA and SADC.[137] Similarly, in Namibia, the government and economists in the country questioned membership of multiple RECs, some of the issues that they raised were the competing and overlapping obligations under both RECSs,[138]

The government commissioned the Namibian Economic Policy Research Unit (NEPRU) to conduct an analysis of the benefits of continued membership of COMESA, considering its membership of SACU and SADC. The final report recommended that the Republic of Namibia leave COMESA, and on 15 May 2003 cabinet resolved to terminate membership of COMESA.[139]

COMESA's goal of achieving developmental regional integration in the region is based on a focus on establishing large economic and trade blocs that can break barriers smaller Member States would have in their economic pursuits. The aims and objectives of COMESA are

[134] *https://www.crwflags.com/fotw/flags/int-coms.html*, accessed on 20 March 2019.
[135] *http://www.igd.org.za/jdownloads/Occasional%20Papers/igd_op_57.pdf*, accessed 20 May 2019.
[136] Suleiman Haji Suleiman 'Why Tanzania Withdrawn Its Membership from the Common Market for Eastern and Southern Africa Comesa?' (International Affairs and Global Strategy Vol.69, 2019.)
[137] *http://www.igd.org.za/jdownloads/Occasional%20Papers/igd_op_57.pdf*, accessed 20 May 2019.
[138]Dirk Hansom, Jonathon Adongo, Calicious Tutalife 'Namibia's withdrawal from COMESA: A Case Study of Successful Policy Research in Namibia', available at *https://www.ean.org.na:8080/xmlui/bitstream/handle/123456789/1594/NWP101%20Successful%20policy%20research%20namibia%20withdrawal%20comesa%202005.pdf?sequence=1&isAllowed=y*
[139] Ibid pg 12

stated in section 3 of the COMESA Treaty, which stipulates amongst other things that its objectives shall be *'to promote joint development in all fields of economic activity and the joint adoption of macro-economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its Member States'* and *'to attain sustainable growth and development of the Member States by promoting a more balanced and harmonious development of its production and marketing structures.'*[140]

The body responsible for policy making and ensuring it's aims and objectives are met is the Authority of the Common Market (the COMESA Authority), another important body within COMESA is the Secretariat of the Common Market (the COMESA Secretariat) which is headed by a Secretary General, the current Secretary General is Mrs Chileshe Mpundu Kapwepwe of the Republic of Zambia, she is the first female Secretary General of COMESA.[141] The COMESA Secretariat is responsible for the daily running of COMESA, and has its head office in Lusaka, Zambia. Another integral body within COMESA is the Council of Ministers of the Common Market (COMESA Council) which is made up of ministers from the respective Member States as appointed by the Member States, its functions are to monitor and review COMESA initiatives, make recommendations to the COMESA Authority, make regulations, issue directives and give opinions on the COMESA Treaty amongst other things.[142] All the above bodies within COMESA were established in terms of Article 7 of the COMESA Treaty and obtain their powers and functions from the COMESA Treaty itself.

An FTA was only fully established on 31 October 2000 by COMESA between the Republic of Djibouti, the Arab Republic of Egypt, the Republic of Kenya, the Arab Republic of Madagascar, the Arab Republic of Malawi, the Arab Republic of Mauritius, the Arab Republic of Sudan, the Arab Republic of Zambia and the Arab Republic of Zimbabwe. The above members eliminated their customs duties on products originating in COMESA; this will in time be followed by the elimination of other non-tariff barriers to regional

[140] Treaty Establishing the Common Market for Eastern and Southern Africa at section 3.
[141] *https://www.newtimes.co.rw/business/zambias-kapwepwe-new-comesa-secretary-general,* accessed on 20 March 2019.
[142] Treaty Establishing the Common Market for Eastern and Southern Africa at Article 9.

integration.[143] I will not go into more detail about the inner working of COMESA and its history but will focus on the competition law obligations set out by the body, and how these affect Member and Party States of SADC and the EAC.

Competition policy under COMESA

Article 55 of the COMESA Treaty is the competition law provision of COMESA and stipulates that *'the Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.'*[144] Article 55(3) further stipulates that the Council must enact regulations to regulate competition amongst the Member States.

It is in terms of the above Article 55(3) and the powers granted to the COMESA Council under Article 9, the COMESA Council in 2014 enacted the COMESA Competition Regulations.[145] The COMESA Competition Regulations give direct guidance to Member States on their obligations to give effect to competition policies, and eradicating anticompetitive conduct amongst Member States. The COMESA Competition Regulations apply to all economic activities of public or private persons within COMESA, with some exceptions.[146] Article 6 of the COMESA Competition Regulations established the COMESA Competition Commission, its functions include the application of the COMESA Competition Regulations, monitoring and investigating anti-competitive commercial activities, mediation of disputes and assisting Member states with the promotion of local competition laws and the establishment of competition institutions.[147]

The COMESA Competition Regulations are intended to provide regulation in the region whilst respecting the sovereignty of the Member States. There is an emphasis on cooperation amongst Member states and with the COMESA Commission, Article 7(2)(c) stipulates that

[143] *https://www.comesa.int/overview-of-comesa/*, accessed on 20 March 2019.
[144] Treaty Establishing the Common Market for Eastern and Southern Africa at Article 55.
[145] COMESA Competition Commission Background, *https://www.comesacompetition.org/?page_id=375*, accessed on 20 March 2019.
[146] COMESA Competition Regulations 2004 at art 3.
[147] Ibid at Art 7.

the COMESA Commission shall *'help Member States promote national competition laws and institutions, with the objective of the harmonisation of those national laws with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market.'*[148] Therefore the purpose of the COMESA Commission is not to usurp the powers and functions of domestic authorities, but rather to work in cooperation with them.

The COMESA Competition Regulations regulate anti-competitive practices such as abuse of a dominant position, provides rules as to how mergers are to be conducted, and rules on consumer protection. The COMESA Competition Regulations are fairly comprehensive, but in terms of Article 39, COMESA went a step further and issued the COMESA Competition Rules 2004, which are more in depth and specific. COMESA has enacted a piece of competition legislation that applies to all Member States in the same vein as the EAC, and it goes further than the obligations imposed by SADC which are general obligations of cooperation. The COMESA Competition Rules deal with operational issues of the COMESA Competition Commission, the provide details as to some of the obligations imposed by the COMESA Competition Regulations on the respective bodies within COMESA and the respective Member States.

Article 5 of the COMESA Competition Regulations creates an obligation on all Member States to take appropriate measures to ensure the fulfilment of the COMESA Competition Regulations, and actions taken by the COMESA Competition Commission.[149]

As stated earlier there are some COMESA Member States that are also Member and Partner States of the EAC or SADC, this means that some of these countries would have obligations imposed by domestic legislation as well two different regional blocs, this multitude of obligations under the relevant pieces of legislation have the potential of creating some uncertainty and friction. The question is whether commercial entities will be obliged to comply with all these obligations? Some of these competition law obligations have either not

[148] COMESA Competition Regulations 2004.
[149] Ibid Art 5.

come into effect or are in their infancy, therefore it seems time will tell how they will play out practically.[150]

An example of this potential friction and administrative burden is with regard to mergers, to take the Republic Kenya as an example, which is a member of both COMESA and the EAC. If a Kenyan transacting party and a Tanzanian transacting party, that both operate in numerous COMESA states, enter into a merger transaction. Would the Kenyan company be obliged to give notice of the merger to the Competition Authority in Kenya in terms of section 43 of the Competition Act, the East African Community Competition Authority in terms of section 11 of the EAC Competition Act, and lastly the COMESA Commission COMESA in terms of Article 24 of the Competition Regulations?[151]

This clearly creates a situation whereby a single transaction is governed by numerous regional and domestic legislation amongst Member and Partner States that are party to the same agreements, with one of aims of a FTA being to ease the burden of doing business in the respective regions, the above scenario does not bode well, there are other situations that are far more complex and onerous than a notification, and may have financial implications by way of payment of fees, or general subsequent incidental costs that would attach to the transaction. There is clearly a need for these types of situations to be corrected by way of legislation and or inter-regional/governmental arrangements.

COMESA-EAC-SADC Tripartite Free Trade Area

Over time greater strides were taken to promote more FTAs on the continent, and it is this vein that the EAC, SADC, and COMESA began to take steps to establish the COMESA-EAC-SADC Tripartite Free Trade Area (Tripartite FTA). On the 22nd of October 2008 in Kampala, Uganda, the Member and Partner States (for ease I shall use the term Member States) of the respective Regional Economic Communities (RECs) met for a summit to

[150]Implications for Investors in east Africa as East African Community Appoints 5 New Competition commissioners, *https://www.bowmanslaw.com/insights/competition/implications-investors-east-africa-east-african-community-appoints-five-new-competition-commissioners,* accessed on 20 March 2019.
[151] Joyce Karanja-Ng'ang'a 'EAC Competition Law' in Emmanuel Ugirashebuja, John Eudes and Ruhangisa Tom Ottervanger *East African Community Law: Institutional, Substantive and Comparative EU Aspects* 2017 433 – 453 at 437.

discuss having a single tripartite FTA encompassing all three of the RECs, the intention being to further strengthen cooperation and economic integration. This was followed by the second summit which was held in Johannesburg, South Africa on 12 June 2011, a declaration was signed by the Heads of State which launched the negotiations of the Tripartite FTA.[152]

As part of the strategy for the formation of the Tripartite FTA, the main pillars contained in the Vision and Strategy document were Market Integration, Infrastructure Development, and Industrial Development.[153]

Following the signing of the declaration at the Tripartite Summit in Johannesburg, the Heads of State of the Member States met in Sharm El Sheikh, Egypt on the 10th of June 2015 at the Third Tripartite Summit. This Summit led to the official launch of the Tripartite FTA. The agreement covered 26 Member States across the three RECs, but this was later increased to 27 Member States following the inclusion of South Sudan.[154] The Member States signed the Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area (FTA Declaration) on 10 June 2015. The FTA Declaration was followed by the Agreement Establishing a Tripartite Free Trade Area among the COMESA, the EAC, and SADC (FTA Agreement), which to date has been signed by 22 of the 27 Member States and will come into effect once ratified by 14 Member States of the Tripartite FTA.[155]

The current Chairperson of the Tripartite FTA is Mrs Chileshe Mpundu Kapwepwe of the Republic of Zambia, who is also the Secretary General of COMESA. In terms of Article 4 of the FTA the objectives of the FTA are to *'promote economic and social development in the Region, create a large single market with free movement of goods and services to promote intra-regional trade, enhance the regional and continental integration processes and build a strong Tripartite Free Trade Area for the benefit of the people of the Region.'*[156]

The implementation of the FTA was staggered to allow for Member States to negotiate outstanding issues, the FTA took a phased approach to give effect to the provisions of the

[152] Tripartite Cooperation, *https://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/*, accessed 20 March 2019.
[153] *Ibid.*
[154] *https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html*, accessed 20 March 2019.
[155] *https://www.tralac.org/news/article/13158-south-africa-on-ratification-of-the-comesa-eac-sadc-tripartite-free-trade-area-tfta.html*, accessed 20 March 2019.
[156] Agreement Establishing a Tripartite Free Trade Area among the COMESA, EAC and SADC, Article 4.

FTA Agreement, and this is in terms of Article 44 and 45. Article 45 of the FTA agreement stipulates that negotiations shall be held to endeavour to conclude specific protocols within 24 months of the entry into force of the FTA Agreement. Article 45(1)(b) relates to the conclusion of a protocol on Competition Policy.[157] The other areas concerning which protocols must be entered into are, trade in services, cross-border investment, trade and development, and intellectual property rights, the Member States may also enter into protocols in other spheres.[158]

To date only the Arab Republic of Egypt and the Republic of Uganda have ratified the FTA Agreement, ratification is still required by 12 more Member States, steps by Member States such as the Republic of South Africa have been taken to have the FTA Agreement ratified.[159] Once the FTA Agreement has been ratified, the hope is that the process to conclude competition policies will be concluded soon thereafter. Any confusion and administrative burdens currently in existence will hopefully be ironed out; however, what is clear is that the need for efficient competition policy in the realm of regional integration has been accepted as being of paramount importance. In the next chapter, I will deal with the developments on the continent on the establishment of a continental free trade area (CFTA), and the potential for providing clarity and guidance on the above-stated issues created by of overlapping competition law obligations imposed by numerous RECs.

African Continental Free Trade Area

Over the years there have always been calls for liberalising trade on the continent and the establishment of a CFTA, or in the case of the late Libyan leader Muammar Gaddafi, former Zimbabwean president Robert Gabriel Mugabe and others the establishment of a solitary African state. Upon his appointment as the chairperson of the AU the late Libyan leader declared "I shall continue to insist that our sovereign countries work to achieve the United States of Africa."[160] Whilst the notion of a sovereign state remains a controversial one that is

[157] Agreement Establishing a Tripartite Free Trade Area among the COMESA, EAC and SADC, Article 45.
[158] Ibid.
[159] Portfolio Committee on Trade and Industry presentation on 21 AUGUST 2018 on the ratification of the Agreement Establishing a Tripartite Free Trade Area among the COMESA, EAC and SADC
[160] *https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/4436541/Muammar-Gaddafi-vows-to-create-United-States-of-Africa.html accessed*, accessed on 15 June 2019.

unlikely to gain any traction in the near future, greater strides were taken to establish a continental free trade area. On the 30th[th] of January 2012 in Addis Ababa, Ethiopia,[161] the 18th Ordinary Session of the Assembly of Heads of State and Government of the African, a Declaration on Boosting Intra African Trade and the Establishment of a Continental Free Trade Area (BIAT Declaration) was passed.[162] The BIAT Declaration decided to "Establishment of the Continental Free Trade Area (CFTA) by 2017 with the option to review the target date according to progress made."[163] The BAIT Declaration further endorsed the "Framework, Road Map and Architecture for Fast Tracking the establishment of the Continental Free Trade Area (CFTA)".

The Member States failed to meet the proposed deadline of 2017, on the 21[st] of March 2018 leaders of the African states met for an Extraordinary Summit on the African Continental Free Trade Area, in Kigali Rwanda. At the Summit the Agreement Establishing the African Continental Free Trade Agreement (the CFTA Agreement) was presented to Member States for signature, however only 44 of the 55 Member States signed the CFTA Agreement.[164] An additional five Member States (the Republic of South Africa, the Kingdom of Lesotho, The Republic of Namibia, Republic of Burundi, the Republic of Sierra Leone) signed the African Agreement at the 31st African Union Summit on the 2[nd] of July 2018.[165] The Republic of Guinea-Bissau signed the African CFTA Agreement on the 08[th] of February 2019 and the Republic of Botswana and the Republic of Zambia signed on the 10[th] of February 2019.[166] The three Member States that are yet to sign the CFTA Agreement are the Federal Republic of Nigeria, the Republic of Benin and the State of Eretria.[167]

In terms of Article 23 of the CFTA Agreement, the CFTA Agreement, Protocols on Trade in Goods, Trade in Services and Protocol on Rules and Procedures on Settlement of Disputes would come into effect upon 22 Member States depositing their instruments of ratification,[168] this occurred on 30 May 2019 which was 30 days after the 22[nd] Member State (the Sahawari

[161] https://www.tralac.org/resources/by-region/cfta.html.
[162] Declaration on Boosting Intra African Trade and the Establishment of a Continental Free Trade Area.
[163] Ibid at article 6.
[164] https://www.tralac.org/resources/by-region/cfta.html
[165] https://www.tralac.org/news/article/13216-sa-signs-african-continental-free-trade-area-agreement.html
[166] *https://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA%20%287%29.pdf*, accessed on 15 June 2019.
[167] Ibid.
[168] Agreement Establishing the African Continental Free Trade Agreement, art 23.

Arab Democratic Republic) deposited its instrument of ratification, to date 24 Member states have ratified the CFTA Agreement with more expected to deposit their respective instruments of ratification with the Depository.[169]

The implementation of the African Continental Free Trade Area (ACFTA) is a phased process and is further dependent on the agreement on the relevant schedules of concessions, phase 1 having been completed, the first phase dealt with the creation of a single market for the trade in goods, services and creating a dispute resolution mechanism.[170] The second phase of negotiations which is where the most effort is required deals with intellectual property rights, investment and competition policy within the CFTA.[171] The AU appointed H.E. Mahamadou the president of the Republic of Niger to be the Leader of the ACTFA, he has been tasked with providing an update on the progress of phase 2 at the 12th Extraordinary Session of the Assembly of the Union on the ACFTA on the 7th of July 2019.[172]

The AU Assembly has further requested that the African Union Ministers of Trade conclude the negotiations relating to the obligations imposed by Article 7, namely the Protocols on Intellectual Property, Investments and Competition Policy including the legal texts by January 2021, this date will however depend on the current progress.[173]

The CFTA Agreement provides for the objectives that the AU intends on achieving with the ACFTA, Article 3 of the CFTA Agreement stipulates that amongst other things the objectives of the ACFTA are to create a single liberalised market for goods and services, contribute to the free movement of capital and people on the continent, facilitate investments on the back of initiatives of the RECs, and more importantly with regard to this paper, "resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration process."[174] Article 4 further goes on to list specific objectives to realise the objectives of Article 3, and one of these objectives is the cooperation on

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[169] *ttps://au.int/sites/default/files/treaties/36437-sl-AGREEMENT%20ESTABLISHING%20THE%20AFRICAN%20CONTINENTAL%20FREE%20TRADE%20AREA%20%287%29.pdf*, accessed on 15 June 2019.
[170]The African Continental Free-Trade Area I- An Introduction to AFCFTA, *https://hsf.org.za/publications/hsf-briefs/the-african-continental-free-trade-area-i-2013-an-introduction-to-afcfta*, accessed on 20 June *2019*.
[171]Agreement Establishing the African Continental Free Trade Agreement, art 7.
[172] https://www.tralac.org/resources/by-region/cfta.html.
[173] Ibid.
[174] Agreement Establishing the African Continental Free Trade Agreement, art 3.

competition policy. The scope of the CFTA Agreement in Article 6 further makes specific reference to the CFTA covering competition policy, the passing of a Protocol on competition Policy will form an important part of the CFTA Agreement. In the process of negotiations on phase 2, three separate working groups have been established for the three different areas of concern, namely Investments, Intellectual Property Rights and Competition Policy.

In terms of the report by H.E. Mahamadou at the 32nd Ordinary Session of the Assembly of the Union on 11 February 2019, the intended conclusion of phase 2 negotiations and the adoption of the respective legal instruments is January 2020, however H.E. Mahamadou requested an extension to June 2020.[175] A decision by the Assembly as the 32nd Ordinary Session of the Assembly of the Union held that the phase 2 negotiations must be completed and the draft legal texts on Competition Policy, Intellectual Property Rights and Investments would be submitted by January 2021. The CFTA Agreement has made specific reference to the resolution of issues brought about by overlapping membership of RECs, we are therefore hopeful that the working group tasked with drafting a Competition Policy will remove all ambiguity, and unintended burdensome obligations imposed by the numerous RE

[175] Report on the African Continental Free Trade Area, 32nd Ordinary Session of the Assembly of the Union, 10-11 February 2019, Addis Ababa, Ethiopia.

FIFTH CHAPTER
CONCLUSION

Africa is embarking on a journey of great magnitude to integrate economic activities on the continent, to reduce the difficulty of doing business on the continent, to make movement on the continent easier and to assist countries to achieve their developmental goals which it so the benefit of the continent as a whole. However, for this to occur certain mechanisms must be in place and one such mechanism as I dealt with above is a functioning competition law regime.

The EAC, SADC and COMESA have all taken great strides in passing Treaties, Protocols, Declarations, Acts, Regulations and Rules in the pursuit of ensuring that competition laws are passed in the respective Partner and Member States, this is an indication that the respective RECs are well aware of the importance the competition law has on regional integration as well as domestic economic development. Unfortunately to fully achieve the goals espoused in the regional legislation and commitments, it is near impossible for any development without the respective Member and Partner States enacting domestic legislation and establishing competition law authorities and regulators.

The length of time in both the EAC and SADC to get to where we are now has been very long, and the reasons thereof are complex and not easy to solve, one issue being financial resources which is not an easy fix considering all other obligations Member and Partner States have, and possibly in some instances a lack of political will. Despite the problems highlighted above, in one way or another all Member States and Partner States have taken steps to remedy the situation, at this juncture it seems that we will have to wait and see what developments we see overtime. The regional bodies I believe have a greater duty to exert pressure on their fellow Member and Partner States to ensure that all affected are on par. Due to the sovereign powers and respect amongst Member and Partner States, the RECs cannot force implementation.

The SADC model of cooperation, I believe creates less of an obligation on Member States as there is no regional competition legislation. Several Member and Partner States have taken great strides in implementing domestic competition legislation. The SADC Competition

Declaration is more focused on cooperation, with the end aim being harmonisation of the respective domestic pieces of legislation and the establishment of a regional framework in the region. Taking the issue of sovereignty into consideration this approach is understandable, and

Whereas the EAC has enacted legislation that is expressly applicable to all Partner States in relation to cross border transactions, COMESA operates on a similar basis thereby creating legally binding obligations that apply across several jurisdictions where the transactions are of a cross-border nature and having an effect within the region. I have not considered the best practice between the approaches of SADC and EAC in this paper, but rather considered the steps taken in each region. In conclusion what is clear is that numerous have been taken by Partner and Member States, despite this being done over a protracted length of time, but what is of importance is that there is clear willingness and acceptance of the role competition law plays in regional integration, one only hopes that those Partner and Member States that have not enacted domestic legislation will do so in the near future, as this lack of domestic implementation hinders that broader goals of the respective RECs.

Despite the good intentions of the respective RECs to enact competition law policies in their regions, overlapping membership of multiple RECs as well as having to comply with one's own domestic obligations has created administrivia burdens and potentially conflicts in obligations. There do not seem to be any answers as to how this would be dealt with in terms of current pieces of legislation. However with the establishment of the ACFTA and specific legislative provision being made to resolve multiple and overlapping memberships of RECs, the hope is that once the Competition Policy is enacted clarity will be provided as to how this will be dealt with, it may require amendments to domestic legislation as well as the respective RECs regional competition legislation.

The ACFTA is a very ambitious endeavour and its success can in only determined in years to come, however a consistent theme in regional integration attempts on the continent has made provision for cooperation and harmonisation in competition policies, the manner and degrees may differ between the RECs, however competition policies are at the heart of all the developments on regional integration on the continent.

BIBLIOGRAPHY

Primary Sources

Statutes

1. Protocol on Trade in the Southern African Development Community (SADC) Region 1996.
2. SADC Declaration on Regional Co-operation in Competition and Consumer Policies 2009.
3. The Treaty of the Southern African Development Community, 1992 as amended
4. OAU Assembly of Heads of State and Government 16th Ordinary Session, Monrovia, Liberia, 17-20 July 1979; AHG/ST.3(xvi) Rev.1.
5. Lagos Plan of Action for the Development of action for the economic development of Africa 1980 – 2000.
6. Treaty Establishing the African Economic Community 1991.
7. Constitutive Act of the African Union 2000.
8. Memorandum of Understanding Amongst Competition Authorities of the Member States of the Southern African Development Community on Cooperation in the Field of Competition Policy, Law and Enforcement 2016.
9. Memorandum of Understanding between the Competition Commission of South Africa and the Namibian Competition Commission in the Field of Competition Law, Enforcement and Policy 2016.
10. Memorandum of Understanding between the Competition Commission of Mauritius and Competition Commission of South Africa in the Field of Competition Law, Enforcement and Policy 2016.
11. Competition Act 89 of 1998 (South Africa)
12. Competition Act 17 of 2018 (Botswana)
13. The Companies Act 18 of 2011 (Lesotho).
14. Legal notice No.52 of 2016 (Lesotho).
15. East African Community Mediation Agreement 1984.
16. Treaty for the Establishment of the East African Community 1999.
17. Protocol on the Establishment of the East African Customs Union 2004.
18. East African Community Competition Act of 2006.

19. Competition act 12 of 2010 (Kenya).
20. Fair Competition Act 08 of 2003 (Tanzania).
21. Treaty Establishing the Common Market for Eastern and Southern Africa 1994.
22. COMESA Competition Regulations 2004.
23. Agreement Establishing a Tripartite Free Trade Area among the COMESA, EAC and SADC.
24. Declaration on Boosting Intra African Trade and the Establishment of a Continental Free Trade Area.
25. Agreement Establishing the African Continental Free Trade Agreement 2018.
26. Report on the African Continental Free Trade Area, 32nd Ordinary Session of the Assembly of the Union, 10-11 February 2019, Addis Ababa, Ethiopia.

Secondary Sources

Books

1. Chris Noonan The Emerging Principles of International Competition Law (2008)
2. Christopher Garrett Lehrer 'Ensuring Competition Law Enforcement under International Trade Agreements', in Transnational Law & Contemporary Problems (2017) Vol.26(2).449-471.
3. David Unterhalter, Isabel Goodman, Patrick Smith, Paula Youens, Luke Kelly, Principles of Competition Law in South Africa 2017
4. David Lewis, Enforcing Competition Rules in South Africa: Thieves at the dinner table

Journals/Articles

1. Joyce Karanja-Ng'ang'a "EAC Competition Law" in Emmanuel Ugirashebuja, John Eudes and Ruhangisa Tom Ottervanger *East African Community Law: Institutional, Substantive and Comparative EU Aspects* 2017 433 – 453.
2. Mfundo Ngobese Alex Kühn 'Regional competition enforcement: Co-operation between SADC competition authorities in the investigation of cross-border cartels'

3. Ugirashebuja, E., Ruhangisa, J., Ottervanger, T., & Cuyvers, A. (Eds.). (2017). *East African Community Law: Institutional, Substantive and Comparative EU Aspects*. Available at *http://www.jstor.org/stable/10.1163/j.ctt1w76vj2.*
4. Vellah Kedogo Kigwiru 'Cross-border Competition Enforcement in Africa: Development's, Opportunities, Challenges and the way Forward' available at *http://www.compcom.co.za/wp-content/uploads/2017/09/CROSS-BORDER-ENFORCEMENT-IN-AFRICA.pdf.*
5. Robert Mudida, S Wagura Ndir Itu, 'Thomas Ross Kenya's New Competition Regime' available at *https://www.researchgate.net/publication/281208061_Kenya's_New_Competition_Policy_Regime.*
6. Suleiman Haji Suleiman 'Why Tanzania Withdrawn Its Membership from the Common Market for Eastern and Southern Africa Comesa?' (International Affairs and Global Strategy Vol.69, 2019.)
7. Dirk Hansom, Jonathon Adongo, Calicious Tutalife 'Namibia's withdrawal from COMESA: A Case Study of Successful Policy Research in Namibia'
8. Eleamani Laltaika 'Legal and Institutional Aspects of Fair Competition in Tanzania' available at *https://www.researchgate.net/publication/309548844_Legal_and_Institutional_Aspects_of_Fair_Competition_in_Tanzania.*

Articles and newspaper reports obtained from the internet

1. *https://www.sadc.int/member-states/.*
2. *https://www.sadc.int/themes/economic-development/trade/competition-policy/.*
3. *https://www.sadc.int/sadc-secretariat/.*
4. *https://www.sadc.int/sadc-secretariat/sadc-executive-management/executive-secretar/.*
5. *https://www.eac.int/eac-partner-states.*
6. *https://www.eac.int/eac-partner-states.*
7. *http://www.dirco.gov.za/foreign/Multilateral/africa/aec.htm.*

8. https://www.sadc.int/news-events/news/competition-authorities-sadc-member-states-signed-memorandum/.
9. Botswana Competition Bulletin Issue 6 Volume 4 2016/17 available at *https://www.competitionauthority.co.bw/sites/default/files/Botswana%20Competition%20Bulletin%20Issue%206%20Volume%204.pdf*
10. *http://www.compcom.co.za/profile-of-mr-tembinkosi-bonakele/.*
11. *https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-competition-amendment-bill-signed-into-law.html.*
12. https://www.competitionauthority.co.bw/.
13. *https://unctad.org/en/PublicationsLibrary/diaepcb2013d6_en.pdf.*
14. https://lestimes.com/competition-laws-beckon-for-lesotho/.
15. https://ewn.co.za/2019/07/05/ramaphosa-hails-signing-of-lesotho-reform-mou-as-milestone
16. https://www.eac.int/eac-history.
17. *https://www.eac.int/overview-of-eac*
18. *https://www.eac.int/press-releases/605-1048-346-five-commissioners-of-the-eac-competition-authority-sworn-in-at-the-eac.*
19. https://www.lexafrica.com/competition-law-outlook-for-2019.
20. *https://www.fct.or.tz/about-fct/history.*
21. *http://www.competition.or.tz/index.php?option=com_content&view=article&id=5&Itemid=11.*
22. *http://www.bowmanslaw.com/wp-content/uploads/2016/12/Guide-Competition-3.pdf.*
23. *https://www.competitionauthority.co.bw/south-sudan-benchmarks-competition-authority.*
24. *http://www.compcom.co.za/wp-content/uploads/2014/09/ACF-Launch-Conference-press-release-final.pdf.*
25. *http://www.dirco.gov.za/foreign/Multilateral/africa/comesa.htm*
26. *https://www.comesa.int/comesa-members-states.*
27. *https://www.tralac.org/resources/by-region/comesa.html.*
28. *http://www.igd.org.za/jdownloads/Occasional%20Papers/igd_op_57.pdf.*
29. *https://www.comesa.int/overview-of-comesa/.*
30. *https://www.comesacompetition.org/?page_id=375,.*

31. *https://www.bowmanslaw.com/insights/competition/implications-investors-east-africa-east-african-community-appoints-five-new-competition-commissioners.*
32. *https://www.sadc.int/about-sadc/continental-interregional-integration/tripartite-cooperation/,*
33. *https://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/4436541/Muammar-Gaddafi-vows-to-create-United-States-of-Africa.html accessed.*