



**CML5606W LLM (COMMERCIAL LAW)**

**A critique on the investigation and adjudication powers of the Fair Competition Commission and finality clause of the Fair Competition Tribunal in Tanzania: A reflection from Jamaican and South African competition law**

**EDWARD KISIOKI PROSPER**

**PRSEDW002**

**Supervisor**

**Luke Kelly**

**Co-supervisor**

**Judge Dennis Davis**

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## **DEDICATIONS**

This work is dedicated to my mother who first sent me to school, and to my beloved wife for her patience and encouragement and for bearing the whole burden of taking care of the family during my absence. It is also dedicated to my children for their tolerance of the long time without their father's love. May this success bring consolation to the whole family.

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## ABSTRACT

In 2003, Tanzania enacted the new Fair Competition Act which aimed at improving competition in the market. The Fair Competition Act, No 8 of 2003 (FCA) regulates agreements which lessen or weaken competition, cartel conduct, abuse of dominant position, and it also controls the merging of firms. The Act established two regulatory bodies, namely the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT). It vested the FCC with multiple powers (investigation, prosecution and adjudication) and the FCT with a final appellate jurisdiction. While concentration of power in the FCC may be cost-saving to government, it is associated with problems on the side of stakeholders particularly on the question of impartiality, since the FCC is likely to be a judge of its own cause. Likewise, the Constitution of Tanzania provides that the judiciary be the final appellate body in administration of justice, but the FCA vested this power in the quasi-judicial body.

The dissertation criticises the powers of the FCC and FCT. It comprises five chapters. Chapter one introduces the dissertation by giving the background of competition law in Tanzania, the statement of the problem, research questions, reason for selection of the topic and research methodology.

Chapter two covers the conceptual framework of anti-competitive practices. It aims to outline to the reader what amounts to anti-competitive practices as provided by examples of competition law and policies of Tanzania and other jurisdictions, and the challenges of distinguishing acts that lessen competition from acts that favour competition and the welfare of consumers. It questions whether enforcement bodies established under the FCA are adequate to ensure justice in settling competition disputes.

Chapter three focuses on the institutional framework and procedures set up by the FCA. It further examines the approach of the courts, both local and foreign, to the challenges of fair trial in competition disputes. The core discussion is on the partiality of the FCC, right of appeal to ordinary courts and the inadequacy of the remedies available for a party aggrieved by the decision of the FCT.

Chapter four makes a comparative study between South African competition law and Tanzanian competition law. The purpose is to find out whether it is possible to separate investigative functions from adjudicative functions and vest such functions in different bodies, and whether the decisions of specialised enforcement bodies may be appealed in

normal courts of law. The target is to strike a balance between the enforcement of competition law and policy while respecting the principles of natural justice (right to be heard).

Chapter five concludes the dissertation and offers solutions to the drawbacks inherent in the FCA in order to enhance fair access to justice. It recommends that the provisions of the FCA that concentrate too much power in the FCC and introduced finality clauses to the decisions of the FCT should be redrawn to be in line with international and regional instruments and the Constitution regarding a fair trial and the right of unlimited appeal. The chapter also proposes a new institutional structure for enforcing anti-competitive practices in Tanzania.

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## ABBREVIATIONS AND ACRONYMS

CA	Court of Appeal.
CAC	Competition Appeal Court of South Africa.
Cap	Chapter.
CAT	Competition Appeal Tribunal of South Africa.
CC	Competition Commission of South Africa.
CFR	Code of Federal Regulation of USA.
CT	Competition Tribunal of South Africa.
CTR	Competition Tribunal Rule of South Africa.
DSM	Dar es Salaam.
ed(s)	editor(s).
ed	edition.
EWURA	Energy and Water Utility Regulatory Authority.
FCC	Fair Competition Commission of Tanzania.
FCCPR	Fair Competition Commission Procedure Rules, 2010 of Tanzania.
FCTR	Fair Competition Tribunal Rules, 2006 of Tanzania.
FCT	Fair Competition Tribunal of Jamaica.
FTC	Fair Trade Commission of Jamaica.
GN	Government Notice.
ICCPR	International Covenant on Civil and Political Rights.
IMF	International Monetary Fund.
Misc.	Miscellaneous.
PAJA	Promotion of Administrative Justice Act No 3 of 2000.
Para	Paragraph.
POS	Posters and signage.
OECD	Organisation for Economic Co-Operation and Development.
R.E.	Revised Edition.
SA	The Republic of South Africa.
SA Act	Competition Act No 89 of 1998.
SAPs	Structural Adjustment Programmes.
SLC	Substantially Lessen Competition.
SCA	Supreme Court of Appeal of South Africa.
SUMATRA	Surface and Marine Transport Regulatory Authority.

TANROADS	Tanzania National Roads Agency.
TCC	Tanzania Cigarette Company.
TLR	Tanzania Law Report.
UDHR	The Universal Declaration of Human Rights.
UK	The United Kingdom.
UNCTAD	The United Nations Conference on Trade and Development.
USA	The United States of America.

## Chapter One

### 1.1 Introduction

Business needs to be regulated to enhance fairness in a market; therefore there is a need to have a law to control it. The development of industries depends on the law and policy of a specific country. The market may be monopolised by a few individuals, by powerful companies or by the State. In a modern and globalising economy, monopolisation of the market is generally not accepted. However, competition law prohibits abuse of monopoly power and not monopoly per se.<sup>1</sup>

Most of the competition legislation in developing countries including Tanzania originated from developed countries; however, certain modifications are necessary to suit the needs of a particular jurisdiction. Tanzania has enacted competition law to promote a market economy and to protect the welfare of the consumers. Further, it establishes the regulatory bodies to enforce the law which are, in Tanzania the Fair Competition Commission and the Fair Competition Tribunal.

This dissertation makes a critical analysis of the investigation, prosecution and adjudication powers of the Fair Competition Commission and the final appellate jurisdiction of the Fair Competition Tribunal, so as to identify weaknesses in the Fair Competition Act of Tanzania.

### 1.2 Background of Competition law and policy in Tanzania

This section is important to the dissertation for it set out the origin and development of the current competition law and policy in Tanzania.

During colonisation by the British, the economy in Tanzania was monopolised by the private sector. The target of the economy was to collect raw materials to be exported to Europe. The indigenous people could only participate in the economic sector by producing raw materials for the colonialists.

After independence, Tanzania adopted a socialist policy. This culminated in a change from a capitalist to a socialist economic policy whose aim was to bring power and wealth to

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<sup>1</sup> S 10 of the Fair Competition Act No 8 of 2003.

the indigenous people.<sup>2</sup> The state expropriated the major means of production and became a monopoly in the industrial sector,<sup>3</sup> (it became the buyer, distributor and seller of agricultural produce). Tanzania was a socialist country between 1967 and 1986.<sup>4</sup>

The state monopoly had a great impact on the economy of the country in that it hindered competition and caused lack of innovation. In the 1970s and 80s Tanzania underwent an economic crisis. The local industries failed to meet the internal demands. This was as a result of 'limited internal capacity, series of oil price increases, inadequate resource mobilization and inefficient allocation of resources'.<sup>5</sup>

### 1.2.1 Genesis of Competition law in Tanzania

In 1985, Tanzania changed her economic and political policies and legal structures, particularly in the areas of competition rules and principles. In 1986, it underwent tremendous economic changes by embracing the global liberal economy, and a new policy was put in place that encouraged competition in the market. This policy invited private sector investment through the National Investment (Promotion and Protection) Act No 10 of 1990 which established the Investment Promotion Centre, and this was later replaced by the current Tanzania Investment Centre.<sup>6</sup> Public institutions were commercialised to meet the competition in the market. For example, national distribution agencies such as National Milling Corporation and Regional Trading Company were privatised.<sup>7</sup>

The liberal economy necessitated the creation of regulatory bodies for the purpose of implementing regulatory reforms to control the market economy. This pressure resulted in the repeal of the Regulation of Price Act No 19 of 1973 in 1993, whose Price Commission was responsible for setting prices of commodities in order to manage inflation.<sup>8</sup>

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<sup>2</sup> United Nations Conference on Trade and Development report, Voluntary Peer Review of Competition law and policy: A Tripartite Report on the United Republic of Tanzania, Zambia and Zimbabwe (2012) at 37, available at [http://unctad.org/en/PublicationsLibrary/ditccclp2012d1\\_Comparative\\_Report\\_en.pdf](http://unctad.org/en/PublicationsLibrary/ditccclp2012d1_Comparative_Report_en.pdf), [accessed on 15 August 2012].

<sup>3</sup> Ibid.

<sup>4</sup> Musonda Flora, Competition Regimes in the World-A Civil Society Report at 288, available at, <http://competitionregimes.com/pdf/Book/Africa/56-Tanzania.pdf>, [accessed on 19 August 2012].

<sup>5</sup> UNCTAD report (note 2) at 38.

<sup>6</sup> See s 4 of the Tanzania Investment Act No 26 of 1997; s 30 of this Act repealed the former Act No 10 of 1990.

<sup>7</sup> Ibid.

<sup>8</sup> Joseph S & Rugumisa SMH, 'Price Control in the Management of an Economic Crisis: The National Price Commission in Tanzania,' (1988) 31, No. 1 *African Studies Review*, at 47-65.

In 1994, Tanzania enacted the Fair Trade Practice Act No 4 of 1994 which in 2002 was renamed the Fair Competition Act, [Cap 285 R.E 2002].<sup>9</sup> It aimed at enhancing competition in the market through regulating monopolies, prohibiting restrictive trade practices and protecting the consumer. Despite the review of Act No 4 of 1994 in 2002, it lasted for a short time due to its weaknesses as witnessed by the UNCTAD report which states that:

The Act did not achieve much, speculatively because it was accepted without understanding as part of the IMF SAPs and did not have a national champion to promote and promulgate it. The Commission itself was not well resourced and supporting institutions not prepared. Interface with regulators was equally problematic.<sup>10</sup>

In April 2003, the Fair Competition Act No. 8 of 2003 (FCA) was passed. It was assented to by the President on 23<sup>rd</sup> May 2003 and took effect on 12<sup>th</sup> May 2004, [according to GN No 150 of 2004]. This Act repealed and replaced Act No 4 of 1994.<sup>11</sup> The FCA contained provisions regulating prohibited agreements, cartel conduct, abuse of dominant positions and merger control.<sup>12</sup>

The aim of the FCA is to ‘promote and protect effective competition in trade and commerce and to protect consumers from unfair and misleading market conduct’.<sup>13</sup> It promotes competition in the market, to protect consumers and not the competitors.<sup>14</sup> It further establishes the institutions responsible for the enforcement of its objectives, namely the Fair Competition Commission (FCC) and the Fair Competition Tribunal (FCT).<sup>15</sup>

### 1.3 Objective and Statement of the problem

This dissertation is a critique of powers vested in the Tanzanian enforcement bodies viz. the FCC and FCT by the FCA in respect of the right to be heard. It specifically focuses on the provisions of the FCA which concentrated investigation and adjudication powers in the hands of the FCC. These provisions attract criticism particularly on the question of impartiality of the FCC. It further focuses on the provision of the FCA that vested the final appellate

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<sup>9</sup> In Tanzania, the laws revised in 2002 are cited by indicating the chapter of the law ended with abbreviation R.E 2002.

<sup>10</sup> UNCTAD report (note 2) at 40.

<sup>11</sup> S 102 of the Fair Competition Act, No 8 of 2003.

<sup>12</sup> Ss 8, 9, 10 and 11 of the FCA.

<sup>13</sup> The long title of the FCA.

<sup>14</sup> See *Brunswick Corp. v Pueblo Brawl-O-Mat, Inc* 429 US 477,488 (1977), quoting *Brown Shoe Co. v United States*, 370 US 294,320 (1964).

<sup>15</sup> Ss 62 and 83 respectively.

jurisdiction in the FCT. It limits access to the right of appeal as enshrined in international and regional instruments and the Constitution.<sup>16</sup>

The principles of natural justice give an individual the right to a fair hearing by an impartial decision-maker, where contravention is alleged. They include the right to access justice as well as the right to appeal to the final appellate court established by the constitution. These principles are supported by the doctrine of separation of powers among the organs of the State to allow policing of the acts of each organ. The provisions of the FCA undermine the principles of natural justice by concentrating too much power to one body, (FCC: investigation, prosecution and adjudication). Furthermore, it deprives an individual of the right to appeal to a court of law yet gives appellate powers of dispute resolution to administrative bodies without involving the courts.<sup>17</sup>

The FCA transplanted the powers vested in the European Competition Commission to the FCC which is problematic as it is ‘a law-maker, policeman, investigator, prosecutor and a judge’ as Jones and Sufrin<sup>18</sup> put it. The FCC has powers to investigate anti-competitive practices including the power to issue summons, search, initiate a complaint and adjudicate.<sup>19</sup> It is therefore a law maker for it is an agent of the government which is a policy-maker. It monitors breaches of the FCA by investigating anti-competitive conduct and when *prima facie* evidence is established, it initiates a complaint and adjudicates by itself.

The constitutionality of multiple powers of the FCC was challenged in the local case of *Tanzania Cigarette Company Ltd v The FCC and Attorney General*;<sup>20</sup> where the petitioner contended that ‘the exercise of FCC’s accusatory and adjudicative powers infringes its constitutional rights’. This contention is yet to be settled by the court as will be discussed in this paper. The FCC’s powers were again challenged in another local case of *Tanzania Breweries Ltd v Serengeti Breweries Ltd and FCC*.<sup>21</sup> The appellant in this case appealed to

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<sup>16</sup> Articles 13 (6) (a) and 107 A of the Constitution of Tanzania [Cap 2 R.E 2002] provides for a right to be heard by impartial decision body and right to appeal to the highest judicial body.

<sup>17</sup> The Supreme Court of Tanzania was of the view that there is no right to appeal to the High Court where the statute did not provide for the specific provision for appeal from tribunal to ordinary court. See Athumani Kungubaye and 482 others v Presidential Parastatal Sector Reform commission and Tanzania Telecommunication, civil appeal No 56 of 2007 (Unreported) at 7. In Tanzania the High Court has original jurisdiction on constitutional matters(basic rights provided by the constitution) and judicial review and the remedy available in both constitutional matters and judicial review is different from the remedy available on appeal as discussed in detail in this paper.

<sup>18</sup> Jones A. and Sufrin B, *EU Competition Law Text, Cases and Materials* 4 ed, (2011) at 1037.

<sup>19</sup> Ss 68-71 of the FCA.

<sup>20</sup> Misc. civil cause No.31 of 2010 (Unreported) at 7.

<sup>21</sup> Tribunal Appeal No 4 of 2010 at 3 (Ruling of PO).

the FCT on the grounds *inter alia* that the ‘FCC failed to act in accordance with principles of natural justice and procedural fairness’ which included the lack of impartiality. The matter is also yet to be settled by the FCT, and this study intends to respond to it.

The FCA further established the FCT which is a final appellate body; it hears appeals from the FCC.<sup>22</sup> The FCT is presided over by a chairman who is appointed by the President with other members and it has no deputy chairman. Its decision is final. The law provides that ‘the judgement and orders of the Tribunal shall<sup>23</sup> be final’.<sup>24</sup> This means that the decision of the FCT is conclusive and there is no opportunity to appeal to ordinary courts.<sup>25</sup> The findings of the FCT are limited to revision, which is different from appeal, where the appellate body has power and opportunity to re-hear the matter in dispute and gives its own findings.

The Universal Declaration of Human Rights 1948 (UDHR), to which Tanzania is a signatory,<sup>26</sup> provides that ‘[e]very one is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights...’<sup>27</sup> The declaration is read together with the International Covenant on Civil and Political Rights (ICCPR) 1966<sup>28</sup> which advocates for the same rights of equality before the court/tribunal and a fair hearing by a fair, impartial tribunal. At the regional level (Africa) the African Charter on Human and Peoples' Rights (Banjul Charter) emphasizes the right to appeal and to be heard before an impartial tribunal.<sup>29</sup>

In Tanzania, the Constitution provides for the right to a fair trial by an impartial tribunal and the right to appeal.<sup>30</sup> The above listed international, regional and local instruments indicate that an individual should not be barred from accessing justice, that is, the right to be heard by an impartial body and the right to appeal to the final body established by the

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<sup>22</sup> S 83 of the FCA.

<sup>23</sup> The word ‘shall’ means mandatory, see s 53 (2) of Interpretation of Laws Act, Cap 1 R.E 2002.

<sup>24</sup> S 84(1) of the FCA.

<sup>25</sup> Note 17.

<sup>26</sup> United Nations member states available at <http://www.un.org/en/members>, [accessed on 9 September 2012].

<sup>27</sup> Article 10, 1948, available at <http://www.un.org/en/documents/udhr/index.shtml>, [accessed on 28 August 2012].

<sup>28</sup> Article 14 (1), 1966. Tanzania ratified the ICCPR in June 1976. See United Republic of Tanzania Information and Broadcasting Policy at 2, available at <http://www.article19.org/data/files/pdfs/analysis/tanzania-information-and-broadcasting-policy-f.pdf>, [accessed on 2 August 2012].

<sup>29</sup> Article 7(1) (a) and (d), 1981. Tanzania is a signatory to the charter from 31<sup>st</sup> of May 1983 and ratified it on 18<sup>th</sup> February 1984. See List of member countries, available at <http://www.africanunion.org/root/au/Documents/Treaties/List/African%20Charter%20on%20Human%20and%20Peoples%20Rights.pdf>, [accessed on 11 July 2012].

<sup>30</sup> Article 13 (6) (a) of the Constitution of United Republic of Tanzania 1977, [Cap 2 R.E 2002].

Constitution.<sup>31</sup> The FCA is not in conformity with either international or local instrument since the FCC, which is an agent of the executive, is given power in such a way that the general principles of natural justice are infringed. Also, the final appellate jurisdiction of the FCT hinders the right to appeal to ordinary courts.

The question, however, is whether the above laws are applicable to companies, since most of the parties in competition proceedings are corporate bodies? It is justifiable that the right to be heard by an impartial tribunal is a right applicable to both legal and natural persons. A legal entity 'has all legal powers and capacity of an individual'.<sup>32</sup> A company has 'the legal capacity and powers of a natural person'.<sup>33</sup> It is therefore established that a legal entity has full rights equated to a natural person with very few restrictions (things that a metaphysical entity cannot do).<sup>34</sup>

This dissertation therefore argues that the investigation, prosecution and adjudication powers of the FCC are unconstitutional. It also argues that although there is a right to appeal from the FCC to the FCT, there is no statutory right to appeal to ordinary courts<sup>35</sup>; thus revision jurisdiction of the Court of Appeal of Tanzania is not intended to replace the right to appeal to ordinary courts. Chapter three of this dissertation provides the detailed discussion.

#### 1.4 Research questions

The dissertation will argue the following:

- Whether the FCC as established under FCA and vested with multiple functions is adequate to provide an impartial right to be heard.
- Whether the FCT's decision, which is final, breaches the constitutional right to appeal.
- Whether a party aggrieved by the decision of the FCT has any alternative adequate remedy.

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<sup>31</sup> Ibid, article 107A provides that the judiciary shall be the final authority in dispensation of justice in both criminal and civil cases.

<sup>32</sup> Section 19 (1) (b) of the Companies Act 71 of 2008 (SA).

<sup>33</sup> S 161 of Australian Corporations Law Act No 109 of 1989.

<sup>34</sup> Cassim FH 'Corporate Capacity, Agency and the Turquand Rule' in Cassim FH, *Contemporary Company Law* (2011) at 158.

<sup>35</sup> See note 17.

- Whether a study of the South African and Jamaican competition law<sup>36</sup> and case law imparts any persuasive lessons relevant to the institutional framework for the enforcement of anti-competitive practices in Tanzania.
- Whether the current enforcement structure of anti-competitive practices in Tanzania is harmonious with the right to a fair trial as enshrined in the International Convention on Human Rights, the African Charter on Human and Peoples' Rights and the Constitution of Tanzania.

### 1.5 Reasons for selection of the topic

The reasons for selection of this topic are: first, the researcher is Tanzanian by nationality, hence conversant with the legal system of his country. Secondly, the researcher, with the knowledge acquired in the field of competition law in South Africa, identified the danger of likely partiality (being a judge of its own cause) in settlement of competition dispute on the part of the FCC with its multiple functions, as witnessed by challenges raised in TCC and TBL cases and barriers to access justice entertained by provisions of the FCA. Thirdly, the journey of Competition law that started in 1994 in Tanzania does not have an end in sight due to the fact that economic policies and competition law and policy keep changing and there is a need to conform to the emerging trends, which this research seeks to highlight.

### 1.6 Research Methodology

This is a desktop research. It is composed of analysis of international and regional instruments on the right to be heard by an impartial court/tribunal and the right of appeal to a court of law. It examines how the High Court of Tanzania dealt with the challenge of a right to a fair hearing in competition disputes. The study focuses on Tanzanian legislation including but not limited to the Constitution and the FCA, with the purpose of analysing in what ways the provisions of the FCA undermine the Constitution.

The study makes reference to foreign legislations (Constitution and completion law) like the Jamaican legislations<sup>37</sup> and the South African that underline the separation of

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<sup>36</sup> Jamaican law is picked as reference because Jamaican competition law has similar provisions with Tanzanian competition law that empowered the Commission with multiple powers (investigation, prosecution and adjudication) but the supreme court of Jamaica has declared those provisions unconstitutional. Likewise the South African competition law is relevant because it separated investigation powers from adjudication powers and vested these powers in different regulatory bodies.

<sup>37</sup> Ibid.

investigative power from adjudicative power and the right to appeal to a court of law. The experiences from these jurisdictions reflect on the problem facing Tanzania. A comparative study is made of South African competition law regime. This choice is relevant since the South African competition law adheres to general principles of natural justice in that it separated investigation, prosecution and adjudication powers and vested them in different adjudicatory bodies, and also provided for the avenue of appeal to ordinary courts.

Reference is also made to cases that addressed the right to be heard by an impartial decision-making body, United Nations reports on competition law and policy, the work of prominent commentators, books, journals and other relevant materials. The reason for reference to foreign literatures is that Tanzania lacks extensive literature in the field of competition law and very few cases are decided and reported.

The following chapter outlines the concept of anti-competitive practices in competition law.

## Chapter Two

### THE CONCEPT OF ANTI-COMPETITIVE PRACTICES

#### 2.1 Introduction

The dissertation challenges the powers of the FCC and FCT in controlling prohibited agreements, cartel conduct, abuse of dominant position and control of mergers. It is therefore prudent and relevant to give a brief discussion on these anti-competitive practices before discussing the manner in which these regulatory bodies exercise their power. The role of regulatory bodies is to ensure that the competition process is conducted by all players in the market in a manner which is fair and reasonable in the interest of consumer welfare.<sup>38</sup>

The chapter gives a brief overview of the anti-competitive practices covered by Tanzanian competition law. Reference is made to very few available local cases and extensive use of foreign materials is made to elaborate Tanzanian competition law. These anti-competitive practices include anti-competitive agreements, agreements which are prohibited irrespective of their effect on competition, abuse of dominant position and merger control which are collectively known as restrictive trade practices in Tanzania.<sup>39</sup>

#### 2.2 Anti-competitive agreements

The FCA prohibits agreements which prevent, restrict or distort competition in the market.<sup>40</sup> The term 'agreements' as applied by the FCA, includes agreements between persons or a decision of a person whether incorporated or not.<sup>41</sup> Section 8 of the FCA does not specify whether prohibited agreements are in horizontal or vertical relationship, it merely prohibits agreements between persons, and the word person as defined in the FCA means natural or legal person. Sutherland and Kemp<sup>42</sup> admit that there are jurisdictions in which competition legislation does not draw a clear distinction between horizontal and vertical restrictions. The EU and the USA competition legislation are cited as examples, and Tanzania falls under those categories of legislation. The FCA of Tanzania provides only that agreements have to be dealt

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<sup>38</sup> Paulis Emil 'Abuse of dominant position and monopolization: Conclusions of the major debates in the EU and USA' in Mateus AM and Moreira T (eds) *Competition Law and Economics* (2010), at 162.

<sup>39</sup> In South Africa prohibited merger does not fall under restrictive trade practices, see chapter 2 and 3 of Act No 89 of 1998 (SA Act).

<sup>40</sup> S 8 (1) of the FCA.

<sup>41</sup> Ibid s 2.

<sup>42</sup> Sutherland P and Kemp K, *Competition Law of South Africa* at 5-8.

with base on ‘rule of reason’ (section 8) and those agreements which fall under ‘per se prohibition’ (section 9).

The South African competition law makes a distinction between prohibited practices and restrictive practices.<sup>43</sup> The Act is interpreted to distinguish between offences that arise out of the unilateral action of a dominant entity and those offences where one person commits with association with another person.<sup>44</sup> A restrictive practice concerns anti-competitive co-operation (vertical and horizontal restrictive practice) whereas prohibited practice (prohibition of abuse of dominance) is aimed at unilateral anti-competitive conduct.<sup>45</sup>

Whether the competition legislation made a clear distinction between horizontal and vertical restrictive practices or not, in practice agreements may be made by parties who are in horizontal relationship or vertical relationship, as discussed below.

### **2.2.1 Horizontal agreements**

Horizontal agreements are agreements between competitors who are in a horizontal relationship and operate in the same market.<sup>46</sup> It is a challenge to determine whether parties are competitors or not, since operation in the same market per se is not a determinant factor.<sup>47</sup> Campbell J<sup>48</sup> gives the example that three entities might be trading in the same market of pharmaceutical goods: one manufactures and supplies anti-cancer drugs, another makes drugs that relieve ulcer pain and a third makes anti-depressant drugs; but these manufacturers do not necessarily qualify as competitors.

Section 9(1) of the FCA provides that, a person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is:

- a) price fixing between competitors
- b) a collective boycott by competitors or
- c) Collusive bidding or tendering

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<sup>43</sup> See ss 4, 5 and 8 of SA Act.

<sup>44</sup> Ibid s 1, it provides that restrictive horizontal practices means any practices listed in section 4 and restrictive vertical practices means any practices listed in section 5.

<sup>45</sup> *Competition Commission v Federal Mogul Aftermarket Southern Africa (Pty) Ltd and 3 others*, 08/CR/Mar01 at para 22. See also Sutherland (note 42) at 5-3.

<sup>46</sup> S 1(1) of SA Act.

<sup>47</sup> See Campbell J, ‘Restrictive Horizontal Practices’ in Brassey M (ed) *Competition law* 8 ed (2010), at 139.

<sup>48</sup> Brassey (note 47) at 159.

This provision is construed to be ‘per se prohibition’ in the sense that such conduct is prohibited per se irrespective of its effect on competition. The logic behind ‘per se prohibition’ is to ensure efficient utilization of limited resources. It is not seen as necessary to apply ‘rule of reasons’ on restrictions which cannot be justified.<sup>49</sup> The provision may also be construed to fall under horizontal restrictive practices since it prohibits agreements between competitors.

In horizontal restrictive practices competitive firms may act like a monopoly, the competitors co-operating rather than competing.<sup>50</sup> The South African Corporate Leniency Policy assumes that cartels are harmful to consumers and hinder development and innovation.<sup>51</sup> The co-operation of competitors gives rise to the danger that, ‘they may co-ordinate to produce the monopoly output at the monopoly price...receive monopoly profit at a cost to consumers of higher price and a lower output’.<sup>52</sup>

To establish that price fixing has taken place, a complainant needs to establish that such an agreement to price fix, or contract or conspiracy relating to price exists.<sup>53</sup> In fact, it is not easy to establish price collusion because an arrangement of this nature is done secretly.<sup>54</sup> Price fixing arrangements are serious wrongs in competition and strictly prohibited ‘because of their actual or potential threat to the central nervous system of the economy’.<sup>55</sup> Price fixing is ‘inimical to economic competition, and has no place in a sound economy’.<sup>56</sup>

In collusive bidding or tendering, parties to the agreement try to tamper with the entire process of tendering by fixing or controlling the prices and agree that one of them will win the bid by submitting a bid with acceptable terms.<sup>57</sup> Its effect is that it lessens or prevents competitive bidding.

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<sup>49</sup> Sutherland (note 42) at 5-35.

<sup>50</sup> Ibid at 5-3.

<sup>51</sup> See para 2.3.

<sup>52</sup> Sutherland (note 42) at 5-4.

<sup>53</sup> Neale AD and Goyder DG, *The Anti-trust law of USA* 3 ed (1980) at 43.

<sup>54</sup> Jones (note 18) at 805.

<sup>55</sup> *Unites States v Socony-Vacuum Oil Co*, 310 US 150 (1940) at n 59, available at <http://supreme.justia.com/cases/federal/us/310/150/case.html>, [accessed on 5 November 2012].

<sup>56</sup> *The Competition Commission v Pioneer Food (Pty) Ltd*, at para 28, quoting the wording of Supreme Court in *American Natural Soda Ash Corp v Competition Commission* [2005] 1 CPLR 1(SCA).

<sup>57</sup> The parties do not compete by ‘submitting their lowest possible tender at tightest possible margin, they agree on the lowest offer to be submitted or agree amongst themselves who shall be the most successful bidder’. See Jones (note 18) at 812.

How to establish ‘collusive tendering’? Should deceit be established? In *SA Metal & Machinery Co Ltd v Cape Town Iron & Steel Works (Pty) Ltd and others*<sup>58</sup> it was argued that in order to prove collusive tendering it suffices to establish that the parties ‘acted jointly or in concert and that no element of deception, fraud or secrecy is required’. I am of the opinion that deceit and secrecy are crucial ingredients of collusive tendering. The word ‘collusion’ is defined to be ‘[a] secret agreement between two or more parties for a fraudulent, illegal, or deceitful purpose’.<sup>59</sup> Campbell J<sup>60</sup> rightly argued that the enforcement bodies are obliged to establish the elements of deceit and secrecy before holding a party liable for collusive tendering.

Section 4(1) of South African competition law provides for both ‘per se prohibition’ and ‘rule of reason prohibition’.<sup>61</sup> In *American Soda Ash Corporation and another v Competition Commission and two others*,<sup>62</sup> the appellants (American Soda Ash Corporation and CHC Global (Pty) Ltd) appealed against part of the decision of the competition tribunal based on the interpretation of section 4 (1) (b) of Act No 89 of 1998. The argument was that the per se prohibition may be rebutted by adducing evidence that shows that the alleged conducts may result in efficiencies and increase effective competition. It was settled that section 4 (1) (a) is distinguishable from section 4 (1) (b). Subsection 1 (a) allows the defence of efficiency, whereas in subsection 1 (b) ‘parties to agreement cannot produce evidence of pro-competitive gains that outweigh the demonstrated diminution of competition.’<sup>63</sup>

In Tanzania, although the cartel cases are yet to be handled by the competition authorities, the persuasive decision of the above case is relevant in interpreting section 9 of the FCA that provides for ‘per se prohibition’. The role of these authorities is to determine whether parties to the agreements are competitors, and this is done by determining the market at issue. They should also determine whether there were agreements, and if such agreements fall under per se prohibition provided under the FCA. The challenges that face the establishment of cartel cases in Tanzania are the requirement of the elements of ‘intention’ and ‘negligence’. Section 9 (4) of the FCA provides that. ‘[a]ny person who intentionally or negligently acts in contravention of the provision of this section, commits an offence....’ The

<sup>58</sup> 1997 (1) SA 319 (A) at 326E-F.

<sup>59</sup> See free dictionary at <http://www.thefreedictionary.com/collusion>, [accessed on 21 November 2012].

<sup>60</sup> Brassey (note 47) at 143.

<sup>61</sup> Practices that are prohibited without proof of any anti-competitive consequences, and practices that are only prohibited once they are established to have a negative effect on competition.

<sup>62</sup> 12/CAC/Dec01.

<sup>63</sup> Ibid, see paras 24-29 on the interpretation of s 4 (1) (b).

marginal notes of the section provide for the prohibition of agreements irrespective of their effect on competition. Surprisingly, subsection 4 loosens this by changing the standard of proving cartels conduct, with the result that unintentional cartels are allowed. Competition law strictly prohibits cartels conduct.<sup>64</sup>

Other agreements which do not fall under section 9 of the FCA receive the lenient approach of ‘rule of reason prohibition’ as discussed below.

### 2.2.2 Vertical agreements

Vertical agreements are agreements between the ‘competitor and its suppliers, customers or both;<sup>65</sup> for example, ‘the manufacturer may gain or consolidate competitive strength by insisting that distributors deal exclusively in their products and no other’.<sup>66</sup> Section 5 of Act No 89 of 1998 prohibits agreements between parties who are in vertical relationship if the effect of such agreement is to effect or substantially prevent or lessen competition in the market. This gives the lenient interpretation that the agreement is only prohibited if it has negative effects on competition.

Section 5 (2) of the same Act prohibits minimum resale price maintenance; however a recommendation of minimum price may be made but the reseller must be made aware that the minimum price is not binding (subsection 3). This presupposes that resale price may be justified, therefore it receives a narrow understanding and application. According to Sutherland<sup>67</sup> ‘[c]ompetition authorities should only accept that there is resale price maintenance if the seller has clearly established prices at which it obliges distributors to sell the resold products’. The Tanzanian legislation does not mention resale price maintenance.

In Tanzania, section 8 (1) of the FCA pre-supposes the rule of reason prohibition. It provides that, ‘[a] person shall not make or give effect to an agreement if the object, effect or likely effect of the agreement is to appreciably prevent, restrict or distort competition’. The FCC in *Serengeti Breweries Ltd v Tanzania Breweries Ltd*<sup>68</sup> addressed *inter alia* the issue as to whether the respondent’s entry into branding agreements with retail outlet owners

<sup>64</sup> S 9 of the FCA and s 4 (1) (b) of SA Act. See also para 20 in the case of *The Competition Commission of South Africa v Gralio (Pty) Ltd*, 107/CAC/Dec 10.

<sup>65</sup> S 1 (1) of SA Act.

<sup>66</sup> Neale (note 53) at 249.

<sup>67</sup> Sutherland (note 42) at 6-54.

<sup>68</sup> Complaint No 2 of 2009.

amounted to anti-competitive practices.<sup>69</sup> The complainant (Serengeti Breweries Limited (SBL)) requested the FCC to investigate unfair trade practices conducted by the respondent (Tanzania Breweries Limited (TBL)) against it.

It was alleged that the respondent was entering into branding agreements with bar owners which excluded the complainant in the market. The respondent argued that making branding agreements was a social obligation to clean bars and not anti-competitive practices. The FCC held that ‘it is clear that the branding agreements whether in writing or oral, which the respondent (TBL) has entered into with bar owners had the object, the effect or likely effect of preventing, restricting and distorting competition in the Tanzania beer market. The agreements amount to exclusive dealing;<sup>70</sup> the agreements in this case are restrictive vertical practices since they are agreements between parties who are in a vertical relationship (TBL with its suppliers/customer).

The lenient provisions of competition legislation allow competition authorities to be guided by ‘rule of reason’ to distinguish between anti-competitive practices (practices that lessen or prevent competition) from pro-competitive practices (practices that significantly favour competition and the welfare of consumers). Certain conducts may be justified by a defence of ‘any technological, efficiency or any other pro-competitive gain’.<sup>71</sup>

### 2.3 Abuse of dominant position

In competition law, what amounts to anti-competitive practice is the abuse of market power and not the possession of power.<sup>72</sup> The enforcement authority must determine the dominance of an entity before dealing with the issue of abuse of a dominant position.<sup>73</sup> Dominant power or monopoly power according to USA and SA definition is ‘the power to control prices or to exclude competition’.<sup>74</sup> The dominance of an entity is generally determined with reference to its market share.<sup>75</sup>

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<sup>69</sup> Ibid part 2.2.3.

<sup>70</sup> Ibid at 48.

<sup>71</sup> S 4 (1) (a) of SA Act.

<sup>72</sup> ‘The successful competitor, having been urged to compete, must not be turned upon if he wins.’ See Pupkin BA and Mcphie IR, ‘*Dealing with Dominance: United States of America*’ in Dutilh N, (ed) *Dealing with Dominance, The Experience of National Competition authorities* (2004), at 286.

<sup>73</sup> S 10(1) of the FCA.

<sup>74</sup> Pupkin (note 72) at 294.

<sup>75</sup> Ss 7 of the SA Act and 5(6) of the FCA.

Section 10(1) of the FCA provides that, '[a] person with dominant position in a market shall not use his position of dominance if the object, effect or likely effect of the conduct is to appreciably prevent, restrict or distort competition'. The provision however does not provide examples of conduct that amount to abuse of dominant position. The FCC in Serengeti's case<sup>76</sup> applied foreign sources to interpret this provision and stated that 'misuse of dominance position includes practices like excessive pricing, price discrimination, refusal to supply, tying practices, price predation, exclusive conducts and other barriers to market entry'. The South African competition law<sup>77</sup> outlines that charging an excessive price to the detriment of consumers, refusing to give a competitor access to an essential facility, or engaging in an unjustifiable exclusionary act amount to abuse of dominant position.

The question is, when a price is said to be excessive? Should the competition authorities be price regulators? The term 'excessive price' is not provided by the FCA. Section 1 of Act No 89 of 1998 defines excessive price to mean a price for goods or services which bears no reasonable relation to the economic value of those goods or services. In fact, in determining whether the dominant firm charged an excessive price, the competition authorities are not called upon to set and regulate price.<sup>78</sup> They are duty bound to determine whether the price is excessive and whether it is to the detriment of consumers. The Competition Appeal Court of South Africa (CAC) set up the formula to determine the above issues. The competition authorities have to determine the actual price of the goods or services in question which is alleged to be excessive. They should also determine the economic value of the goods or services expressed in monetary value. Furthermore, the question as to whether the actual price is higher than the economic value of those goods or services has to be determined. Lastly, the competition authorities should be in a position to determine whether the charging of an excessive price is to the detriment of consumers.<sup>79</sup>

Not all conduct is anti-competitive; some conduct is both 'anti-competitive and pro-competitive';<sup>80</sup> for example tying or bundling products. Predation action may be looked at as pro-competitive: it is to the consumers' advantage if they acquire goods or services for a

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<sup>76</sup> Serengeti (note 68) at 29.

<sup>77</sup> S 8 of SA Act.

<sup>78</sup> *Mittal Steel South Africa Ltd and others v Harmony Gold Mining Co Ltd and others* 70/CAC/Apr07 at 47.

<sup>79</sup> Ibid para 32.

<sup>80</sup> Paulis (note 38) at 161.

cheap price. What happens after the exclusion of the weak competitors? The predation conduct becomes anti-competitive practice during 'recoupment' by a dominant competitor.<sup>81</sup>

Tying and bundling invite a debate between commentators as to whether they result in anti-competitive or pro-competitive practices. According to Evans and Salinger, tying and bundling amount to anti-competitive practice.<sup>82</sup> The economists argue that both tying and bundling 'are so common in competitive markets that it must provide efficiency'.<sup>83</sup> It is also argued that efficiency may be achieved without bundling or tying.<sup>84</sup> It is the duty of enforcement bodies to analyse such practices and to determine whether they prevent or lessen competition, otherwise they may be thwarting competition instead of promoting it.

The questions of essential facility and exclusive conduct were addressed in the case of *the Competition Commission v Telkom SA Ltd*,<sup>85</sup> where the respondent (*Telkom*) was sued *inter alia* for refusing to supply essential facilities to competitors and conducting exclusive practices by inducing customers/suppliers not to deal with competitors. In this case it was alleged that the dominant firm (*Telkom*) conducted itself in such a manner that it abused its monopoly position in the telecommunication market. It refused to supply essential facilities to its competitors (independent Value Added Network Service (VANS)).<sup>86</sup> It was further alleged that the respondent induced their customers not to deal with competitors and charged excessive prices to the customers of the competitors.<sup>87</sup> In general the respondent's conduct was alleged to cause harm to both competitors and consumers and impede competition and innovation in the dynamic VANS market. The tribunal was satisfied that the respondent refused to supply essential facilities to the competitors and induced customers not to deal with a competitor,<sup>88</sup> and it imposed an administrative fine of R449 million against the respondent.<sup>89</sup>

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<sup>81</sup> Ibid at 163.

<sup>82</sup> Evans DS and Salinger M, 'Why do firms bundle and tie? Evidence from competitive markets and implications for tying law (2005) 22 Yale Journal on Regulation 37 at 48 and 49, available [http://www.justice.gov/atr/public/heating/single\\_firm/comments/219224\\_d.htm](http://www.justice.gov/atr/public/heating/single_firm/comments/219224_d.htm), [15 December 2012].

<sup>83</sup> Kuhn at el 'Economic theories of bundling and their policy implementations in abuse cases: an assessment in the light of Microsoft case' (2005) 1 European Competition journal at 106-107 quoted in Schmidt at 11.

<sup>84</sup> Schmidt (note 83) at 11.

<sup>85</sup> 11/CR/Feb04.

<sup>86</sup> *Telkom* (note 85) at 30.

<sup>87</sup> Ibid at 98 and 119.

<sup>88</sup> Ibid at 159.

<sup>89</sup> Ibid para 196.

## 2.4 Merger control

According to section 12 of Act No 89 of 1998, ‘a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm’. A merger may also be an agreement between two or more companies whereby their ‘assets and liabilities are pooled in a single company’.<sup>90</sup> Parties may agree to dissolve the existing companies and form one new company, or dissolve one of the companies, which is then fused into the surviving one. Assets and liabilities of constituent companies become assets and liabilities of the newly formed company or the surviving company.<sup>91</sup>

If a merger is a good thing for companies and for the growth of the economy, why should competition law and policy be concerned? According to Legh, ‘the easiest way for a firm to establish or enhance market power is by acquiring or merging with other firms’.<sup>92</sup> The FCA provides that, ‘a merger is prohibited if it creates or strengthens a position of dominance in a market’.<sup>93</sup> The FCA seems to be more sensitive to the creation of dominance than the effect of dominance itself.<sup>94</sup> In South Africa, the determination of the merger is guided by the question whether the proposed merger is likely to substantially prevent or lessen competition.<sup>95</sup> The question that is entertained by the provision of section 11 of FCA is whether the creation of dominance per se may harm competition. The merge guideline (Tanzania) which is read together with provisions of the FCA concerning mergers provides that the FCC prohibits a merger proposal if it harms competition.<sup>96</sup> Monitoring of a merger not only concerns the creation of dominance in a market but also the likelihood of preventing or lessening competition. The concern of competition law on the question of mergers is to strike the balance between anti-competitive effects and pro-competitive gains. The FCC approves mergers based on the ‘efficiency test’ which includes but is not limited to likely production of better and higher quality output, economic development and innovation. Mergers which are likely to cause harm to competition, consumers and the economy in

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<sup>90</sup> Cassim MF and Yeats J ‘*Fundamental Transactions, Takeovers and offers*’ in Cassim (note 34) at 618.

<sup>91</sup> S 116 (7) (note 32).

<sup>92</sup> Legh R, Mergers and Merger control in Brassey (note 47) at 224.

<sup>93</sup> S 11 (1).

<sup>94</sup> It is based on the ‘dominance’ test (law of European Union) rather than the SLC (Substantially Lessening Competition) test –the law of the United States. See Wood DP ‘International Harmonization of anti-trust Law: The Tortoise or the Hare’ (2002)3 *Chicago Journal of International law* 391 at 396.

<sup>95</sup> S12A (1) of the SA Act, see determinant factors in subsection 2.

<sup>96</sup> See para 4.3.2 of the FCC merger guidelines-Tanzania.

general such as price increases, the removal of adequate alternative supplies or making excessive profit cannot be approved by competition authorities.<sup>97</sup>

Merger control enables the competition authorities to decide which businesses may be fused together.<sup>98</sup> Not all merger proposals are notifiable. In Tanzania only merger proposals that involve a turnover or assets above the threshold are notifiable. The current threshold is TZS 800,000,000.<sup>99</sup> In South Africa, small mergers are notifiable on request of the Commission or option of the party,<sup>100</sup> while intermediate and large mergers must be notified to the Commission.<sup>101</sup> These laws therefore impose a duty to merging firms to refer their notifiable merger proposal to the competition authorities for approval or disapproval.

The notable prerequisite elements provided by the FCA for establishment of anti-competitive conduct are ‘intention’ or ‘negligence’. Any agreement, whether based on ‘per se prohibition’, or ‘rule of reason prohibition’, or unilateral abuse of dominant position, or implementation of notifiable merger without approval by the FCC, is founded on statutory prerequisite elements of intention or negligence. Sections 8 (7), 9 (4), 10 (4) and 11 (6) of the FCA provides that, ‘[a]ny person who intentionally or negligently acts in contravention of the provisions of this section, commits an offence, under this Act’. The critical example of difficulties of complying with this statutory prerequisite condition may be seen in cartel cases. These are per se cases; justification is not needed either by establishing negligence or intention of the doer. Other examples are in abuse of dominance. According to Sutherland<sup>102</sup> ‘intention is not a prerequisite for abuse of dominance. The complainant need not prove that the dominant firm aimed to misuse its market power or to create anti-competitive effect’. The FCC itself faces problems in relation to this statutory requirement. In the Serengeti case<sup>103</sup> the dominant firm (TBL) directed its outlet owners to remove table cloths supplied by the competitors (SBL) in their bars in order to get an opportunity to utilise 14 crates of beer as buyer motivation. The FCC stated that the conduct had the effect of harming competition even if the dominant firm (TBL) had no intention of preventing, restricting or distorting competition. The UNCTAD report posed a question as to whether under the FCA a person who unintentionally engages in anti-competitive conduct would not be found to have violated

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<sup>97</sup> Ibid para 4.2.3 (e) and (f).

<sup>98</sup> Jones (note 18) at 855.

<sup>99</sup> Para 4.1 (note 96).

<sup>100</sup> S 13 of SA Act.

<sup>101</sup> Ibid s 13A.

<sup>102</sup> Sutherland (note 42) at 7-35.

<sup>103</sup> Serengeti (Note 68) at 43.

the law? It also admitted that the FCC lacks guidelines on how to determine non-intentional and non-negligent acts.<sup>104</sup> This observation call for legislative review of the above mentioned provisions of the FCA.

## 2.5 Conclusion

The FCA vests the FCC and FCT with powers to investigate and determine which practices amount to anti-competitive conduct and further gives them the powers to sanction such conduct. Anti-competitive practices are obstacles to competition and not acceptable in market policy. The question is whether these bodies can exercise these powers fairly if the FCC is an investigator, complainant and adjudicator and the FCT exercises the powers of appeal on decisions of the FCC, while its decision is not appealable to a court of law. This aspect is discussed in detail in the following chapter.

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<sup>104</sup> UNCTAD report (note 2) at 49 and 55.

## Chapter Three

### THE INSTITUTIONAL FRAMEWORK FOR ENFORCEMENT OF COMPETITION DISPUTES IN TANZANIA

#### 3.1 Introduction

The chapter analyses the institutions established by the FCA which are vested with the powers to deal with competition disputes. It focuses on their establishment, their composition, the procedure for investigation, prosecution and adjudication and appeal, and the status of the decision of each institution. The chapter further focuses on the likely risk of bias when one institution is left to handle multiple functions. It also deals with the limitation of the right to be heard when the FCT is vested with final appellate jurisdiction in competition matters. The basis of the critique arises from the challenge of constitutionality of the provisions of the FCA which had been raised from the very first cases handled by the FCC.

Reference will be made to relevant foreign law (legislation and cases) taking into consideration the fact that Tanzania has about five years of experience in matters of competition law and thus lacks sufficient literature, cases and other relevant material in this field.

#### 3.2 The Fair Competition Commission (FCC)

The FCC<sup>105</sup> is mandated to enforce the FCA. It is headed by a chairman who is appointed by the president. The Director General (DG) and other members are appointed by the minister responsible for Trade Affairs.<sup>106</sup> The tenure of the office of the chairman and DG is four years and for the other members it is three years, subject to reappointment.<sup>107</sup>

##### 3.2.1 Investigative power of FCC

The FCC has administrative, investigative, prosecutorial and adjudicative authority.<sup>108</sup> For the purpose of this discussion, investigative, prosecutorial and adjudicative functions are focused upon. In the course of investigation of an allegation either by its own motion or submitted by

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<sup>105</sup> Established under s 62 of the FCA.

<sup>106</sup> Ibid s 63 (3) and (4) and s 62 (7).

<sup>107</sup> Ibid s 63 (7).

<sup>108</sup> Ibid ss 63, 65, 69 and 73.

any person, the FCC has a judicial function to issue a summons<sup>109</sup> to any person to appear before it and produce any information relevant to the investigation.

A person who is summonsed is obliged to submit the information to the FCC. Alternatively a police officer holding a search warrant<sup>110</sup> accompanied by a member of the FCC may enter and search the premises of that person and make copies or take extracts of documents therein.<sup>111</sup> Non-compliance with the summons is an offence.<sup>112</sup> The FCA compels a person to appear before the FCC and give any relevant information to it. S 71(4) of the FCA provides that '[a] person shall not be excused from complying with a summons under this section on the grounds that compliance may tend to incriminate the person or make the person liable to a penalty...' The UNCTAD report at page 59 provides that a person shall be excused if the information tends to incriminate him/her. This appears to be a misconception of the law because the real position of s 71(4) is as quoted above.

The European Court of Justice in *Solvay & Cie v Commission of the European Communities*,<sup>113</sup> was of the view that although the Commission is entitled to compel a person to give self-incriminating information, it should be noted that; '...the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove'.<sup>114</sup> This approach is relevant and may be adopted by the FCC for it is its duty to investigate and not compel admission from the investigated person. The approach taken in South Africa is that any person summonsed by the Commission for the purpose of investigation 'is not obliged to answer any question if the answer is self-incriminating'.<sup>115</sup> However, in Tanzania, although self-incriminating evidence is relevant and admissible, it is noteworthy that such evidence is admissible only under the FCA.

The FCC makes its own rules<sup>116</sup> in order to carry out its functions. It further establishes divisions within itself for the purpose of properly carrying out its functions.<sup>117</sup>

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<sup>109</sup> Rule 13 (1) of the Fair Competition Commission Procedure Rules 2010 (FCCPR) and s.71 of the FCA.

<sup>110</sup> Rule 16 of FCCPR.

<sup>111</sup> S71 (5) of the FCA.

<sup>112</sup> Ibid sub section 6.

<sup>113</sup> [1989] ECR 3355.

<sup>114</sup> Summary, paragraph 2 available at

<http://eurlex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61988CJ0027:EN:HTML>, [accessed on 8 November 2012].

<sup>115</sup> S.49A (2) of the SA Act.

<sup>116</sup> S. 99 of the FCA.

<sup>117</sup> Ibid s 75.

These divisions/departments, however, are not independent; they function under the direction and supervision of the chairman or DG and there is no wall between them. For example, the DG, who has the mandate to decide whether the complaint is to be entertained by the FCC or not, also has the powers to order further investigation of the complaint.<sup>118</sup>

In the United States of America (USA), in spite of the fact that the Federal Trade Commission is vested with the powers to administer all issues of anti-trust, the Commission has further powers to establish independent departments such as the Bureau of Competition,<sup>119</sup> which is vested with investigation and prosecutorial powers, and an Administrative Law Judge vested with adjudicative powers.<sup>120</sup> The decision of the Administrative Law Judge is appealable to the Federal Trade Commission and thereafter to the courts.<sup>121</sup>

Part IV of the FCCPR<sup>122</sup> provides for the investigation of complaints and hearing. The investigation department on the instructions of the DG investigates any alleged prohibited practice, provided that it is not pending or has not been reported before any other adjudicative body.<sup>123</sup> However, the DG may order that the complaint will not be entertained by the FCC and give notice of non-referral and reason thereof.<sup>124</sup> An applicant aggrieved by the decision of the DG may apply to the FCC to have the matter determined by it.<sup>125</sup> The FCCPR rule is silent on the time-frame within which an application may be referred to the FCC. This may amount to delay of justice. In other jurisdictions like SA the notice of non-referral is issued within one year after submission of the complaint or as extended.<sup>126</sup>

The notice of non-referral may cause problems to a complainant. He/she has no access to the offending firm to conduct investigations as compared to the FCC which has resources and powers to compel a firm to provide information, and where necessary, to conduct a search and extract the relevant information. In the South African case of *Sasol Oil (Pty) v*

<sup>118</sup> See rule 10 and 12 of the FCCPR.

<sup>119</sup> Part 2 subpart A of 16 Code of Federal Regulation provided for investigation power. Section 2.8 particularly separates investigation from hearing and is conducted by a separate and independent section of the Commission ie a Bureau of Competition. See 16 CFR 0.16 Bureau of Competition available at <http://www.law.cornell.edu/cfr/text/16/0.16>, [accessed on 14 September 2012].

<sup>120</sup> Part 3 of the code provides for adjudication. 16 CFR 3, Subpart E available at <http://www.law.cornell.edu/cfr/text/16/3/subpart-E>, [accessed on 14 September 2012]. See also Neale (note 53) at 383.

<sup>121</sup> Neale (note 53) at 385-6, see also s 45. (Sec. 5) (c) and (g).

<sup>122</sup> Note 109.

<sup>123</sup> Rule 10 (2) and (3) of the FCCPR.

<sup>124</sup> Ibid sub rule 4 and 5.

<sup>125</sup> Ibid rule 10 (6).

<sup>126</sup> S 50 (2) (b) and (4) (a) of SA Act.

*Nationwide Poles CC*,<sup>127</sup> the Commission issued a notice of non-referral to the complainant who further decided to refer the matter directly to the tribunal for determination.<sup>128</sup> The Competition Appeal Court (CAC) was of the view that; ‘[i]t is to be regretted that this case was litigated without the benefit of the Competition Commission and its investigative powers. As a result, the only evidence...was that of the respondent (complainant) which clearly had limited access to the industry’.<sup>129</sup>

### 3.2.2 Prosecutorial and Adjudicative powers of the FCC

The enforcement department plays a prosecutorial role during adjudication before the FCC.<sup>130</sup> This role extends to the FCT in case an appeal is made against the decision of the FCC.<sup>131</sup> Before an oral hearing the FCC supplies the findings of its investigation to the respondent who is obliged to respond within a specified period.<sup>132</sup> Statutory time-limit for filing correspondence documents is not uncommon: the Civil Procedure Code Act<sup>133</sup> gives a time-limit for the defendant to file a written statement of defence and it may extend it. The parties to the proceedings are entitled to ‘a statement of the case setting out the facts of the case and the relevant provisions of the law alleged to have been contravened’.<sup>134</sup>

When the FCC sits for a hearing it should be composed of five members including the chairman, the DG and three other members.<sup>135</sup> However, the hearing may be conducted where there is a quorum of three members including the chairman.<sup>136</sup> Lack of quorum nullifies the entire findings. In *Tanzania Breweries Ltd v Serengeti Breweries Ltd and Fair Competition Commission*,<sup>137</sup> the FCT nullified the decision of the FCC because the tenure of the office of the Chairman who sat on the panel had expired.

The FCC may conduct a pre-hearing for the purposes of identifying areas of disagreement between the parties. It has also powers to determine its own jurisdiction<sup>138</sup> and

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<sup>127</sup> [2006] 1 CPLR 37 (CAC).

<sup>128</sup> Ibid at 39.

<sup>129</sup> Ibid at 57.

<sup>130</sup> Rule 18 (1) of FCCPR.

<sup>131</sup> Ibid rule 75.

<sup>132</sup> Ibid rule 18 (3).

<sup>133</sup> Order VIII rule 2, Act No 49 of 1966 (Tanzania).

<sup>134</sup> Rule 12 (3) of FCCPR.

<sup>135</sup> S 62 (6) of the FCA.

<sup>136</sup> Ibid s 73 (5).

<sup>137</sup> Consolidated Tribunal Appeals No 4 and 5 of 2010 at 48.

<sup>138</sup> See *TANROADS V Global Outdoor Systems (T) Ltd and others*, Appeal No 4 of 2009, at 19 -20 (FCT). The FCC gave a ruling on objection of want of jurisdiction.

other issues related to legal proceedings.<sup>139</sup> In the hearing parties may appear either personally or through their legal representatives and the hearing may be conducted in public or in camera where there are reasons to justify it.<sup>140</sup> Third parties who have material interest in the hearing also have a right to participate.<sup>141</sup> The hearing is conducted following the normal procedure of conducting trials in ordinary courts, ‘but the FCC shall not be bound by the formal rules of evidence’.<sup>142</sup> The FCC ‘shall adopt an inquisitorial procedure in the hearing rather than an adversarial.’<sup>143</sup>

The hearing may be conducted in the absence of either party provided that the notice of the hearing was served to the absent party and there is proof that such notice was duly served.<sup>144</sup> Neither the FCA nor the FCCPR indicate whether an *ex parte* proof or judgement may be set aside.<sup>145</sup> Non-appearance may be due to factors other than insufficient notice such as serious illness which could not be communicated to the hearing authority.<sup>146</sup> The FCC may also consolidate proceedings<sup>147</sup> of the same nature, but parties should be given notice and intention of consolidation and time to respond, normally fourteen days after the notice. The FCC will not consolidate the proceedings where there is an objection from either party unless and until that objection has been dealt with.<sup>148</sup>

### 3.2.3 Decision of the FCC

After the closing of the hearing, the FCC is required to release its decision within forty five working days, provided that where it deems fit, the time may be extended, but not for more than fifteen working days.<sup>149</sup> According to FCCPR<sup>150</sup> a decision is made through a majority vote by all members but the chairman has the casting vote.<sup>151</sup> A judgement shall contain a brief of the case, the date and place of proceedings, summary of issues, opinion and arguments of the parties, the decision and reasons thereof: and in case of any order (for

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<sup>139</sup> Rule 20 of FCCPR.

<sup>140</sup> Ibid rule 22.

<sup>141</sup> Ibid rule 18 (9).

<sup>142</sup> Ibid rule 25 (3).

<sup>143</sup> Ibid rule 17 (1) and (2).

<sup>144</sup> Ibid rule 27 (3).

<sup>145</sup> Order IX Rule 13 (1) of the code (note 133), provides for setting aside the *ex parte* judgment.

<sup>146</sup> In *Kanoria and others v Guinness* [2006] EWCA Civ. 222 [2006] Arb LR 513 quoted in Blackaby N et al *Redfern and Hunter on International Arbitration* 5ed (2009) at 644, serious illness was considered as a valid ground which hinders the appearance of the party.

<sup>147</sup> *Serengeti* case (note 137) at 5.

<sup>148</sup> Rule 29 of FCCPR.

<sup>149</sup> Ibid rule 33 (2) and (3).

<sup>150</sup> Rule 32 (1) and 33 (1) (4) of FCCPR.

<sup>151</sup> S 73 (1)-(4) and (6) of the FCA and rule 30 and 32 of FCCPR.

example a compliance order), the date to enforce such an order and the opinion of a dissenting member, if any.<sup>152</sup>

A judgement may contain an administrative fine and a compliance order.<sup>153</sup> In a serious violation of competition law, administrative sanctions are imposed which are punitive and deterrent in nature. In other jurisdictions, like the USA and SA,<sup>154</sup> criminal sanctions are imposed in cartel cases.<sup>155</sup> The FCA does not impose criminal sanctions on violators of the Act.

The purpose of a compliance order (cease and desist) is to restore competition. Failure to comply with a compliance order by the party amounts to an offence.<sup>156</sup> However, the FCA does not provide for a fine for non-compliance of the order.<sup>157</sup> There is a need to set a fine for non-compliance of such order.

The word ‘offence’ as provided for in the FCA is a misnomer. It does not mean an offence that attracts a criminal sanction. The FCC may only impose a fine of not less than five percent and not exceeding ten percent of the firm’s annual turnover (an offence of non-compliance of compliance order is excluded).<sup>158</sup> In the *Serengeti* case, the FCC ordered Tanzania Breweries Ltd to pay a fine of five percent of its annual turnover which is about 27 billion Tanzanian shillings.<sup>159</sup>

The liability of the Company extends to its directors and managers, but the FCA is uncertain on how to fine these individuals.<sup>160</sup> It is uncertain due to the fact that section 60(3) of the FCA provides that ‘...where a body corporate is convicted of the offence, every such director, manager or officer of the body corporate shall be deemed to be guilty of that offence’ unless there is evidence that excludes his participation. The fine imposed on the body corporate/firm ranges between five percent and ten percent of the annual turnover. Should this annual turnover apply to the income (salary) of the directors or managers, so that

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<sup>152</sup> Ibid.

<sup>153</sup> Tanzania Breweries Ltd was ordered by FCC ‘to immediately refrain from removing its competitor’s POS materials at the outlets and entering into anti-competitive branding agreements with outlet owners’, see *Serengeti* case (note 68) at 53.

<sup>154</sup> S 74 of SA Act as amended by s 13 of Act No 1 of 2009.

<sup>155</sup> Murakami Masahiro ‘*Competition Rules and Enforcement in US, EU and Japan*’ in Jones CA and Matshushita M (eds) *Competition policy in the Global Trading System* (2002), at 100-1

<sup>156</sup> S 58 (2) of the FCA.

<sup>157</sup> Rule 35(7) of FCCPR.

<sup>158</sup> S 60 (1) of the FCA, see also rule 36 of FCCPR on what to be taken into consideration when imposing a fine.

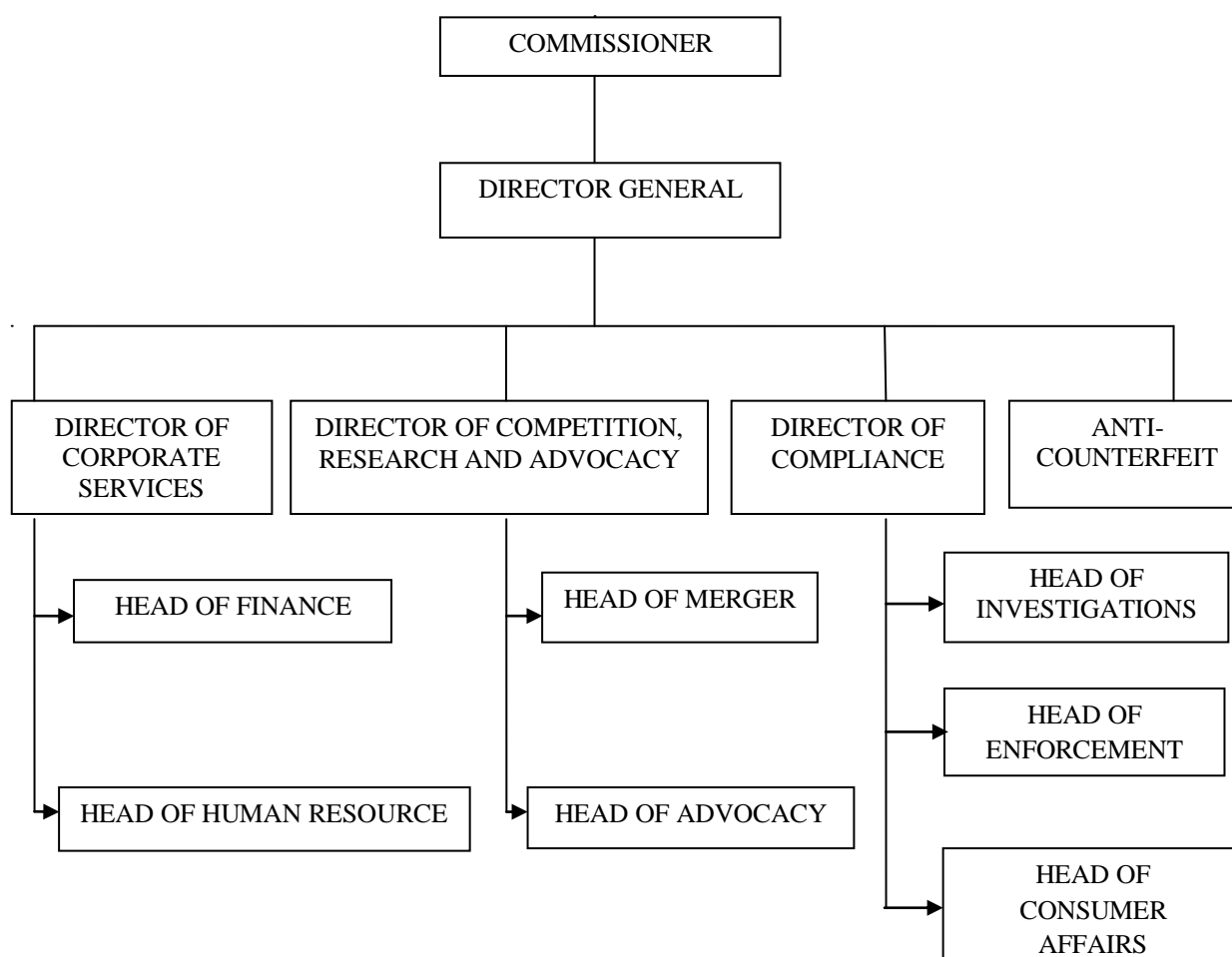
<sup>159</sup> *Serengeti* (note 68) at 53.

<sup>160</sup> Ibid s 60 (3).

when found guilty they are fined on the basis of their annual earnings? The FCA ought to set the fine for the natural persons who were in the management posts and actually caused a company to breach the FCA. Also the minimum fine of five percent of annual turnover could be argued to be very high as compared to the general business of the firm. A firm might deal with more than one product in the market, and if the firm commits anti-competitive conduct against one product only, the fine might be charged over the entire business of the firm.

The decision of the FCC is executed by the court without any further examination by the court that executes it, and may be sent before any court on the Tanzanian mainland for execution, including the High Court.<sup>161</sup> According to s 61 of the FCA, the decision of the FCC is appealable to the FCT.

**FIGURE 1: ORGANISATIONAL STRUCTURE OF FCC**



SOURCE: UNCTAD-Voluntary Peer Review of Competition Law and Policy: United Republic of Tanzania, Overview, New York and Geneva, 2012 at 14.

<sup>161</sup> Rule 40 of FCCPR.

### 3.3 The FCT

The Fair Competition Tribunal (FCT) is established under section 83 of the FCA. It is an appellate organ consisting of a chairman who is a judge of the High Court of Tanzania and six other members who are appointed by the president.<sup>162</sup> The FCA is silent on the tenure for holding the office by the chairman. It only provides for the tenure for the members of the FCT. It provides that a member will preside in the office for a period not exceeding three years.<sup>163</sup> It is not certain whether the term ‘member’ includes the chairman of the FCT. Arguably, this term excludes the chairman of the FCT from the membership of the FCT when the question of tenure is taken into consideration. The inference may be drawn from the same FCA which under section 63 (7), provides that the tenure for holding the office by the chairman and DG of the FCC is four years and other members is three-five years respectively. So it separates the tenure for holding the office of the chairman of the FCC and its members, but when it comes to the question of tenure of the chairman of the FCT it is unclear.

It is also uncertain whether the president will take into consideration the issues of gender sensitivity when appointing the members as the law is silent on that aspect.<sup>164</sup> It is noted that all members of the FCT are appointed by the president, as opposed to the FCC where the chairman is appointed by the president and other members are appointed by the minister. The members of the FCT are skilled in industry, commerce, economics, law and public administration.<sup>165</sup>

The members of the FCT including the chairman serve on a part-time basis and there is no deputy chairman. In the event that the chairman is unable to act, other members may not conduct the hearing and they have no mandate to appoint the deputy chairman. The FCA insists that ‘[t]he FCT shall be duly constituted if at any time the Chairman and two other members are present’.<sup>166</sup>

The post of deputy chairman is crucial and other jurisdictions like South Africa have mandated the president to designate a member of the tribunal as a deputy chairman whose

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<sup>162</sup> S 83 (2) (a) of the FCA.

<sup>163</sup> Ibid sub section (5).

<sup>164</sup> S 26 (2) of SA Act at least touches issues of gender sensitive since it provides that ‘...tribunal consists of the chairman and not less than three, but not more than, other women or men appointed by the president...’

<sup>165</sup> S 83(3) of the FCA.

<sup>166</sup> Ibid s 85(6).

duties are to perform the functions of chairman in his/her absence.<sup>167</sup> However, in South Africa, the tribunal is not headed by a judge. The FCA leaves a vacuum as to what should be done in the absence of the chairman. It is uncertain whether the president will appoint another judge to act in the temporary absence of the Chairman.

In the United Kingdom, the law is clear that the Secretary of State appoints both the chairman and the deputy chairman. In the absence of the chairman, the deputy takes over and, in the absence of both, the Secretary of State designates a person from the other staff.<sup>168</sup>

### 3.3.1 Appellate power of FCT

The FCT hears all appeals originating from the FCC.<sup>169</sup> It is not a court of record despite the fact that it is presided over by a judge of the High Court, although it has powers similar to the High Court when performing its duties<sup>170</sup> and its decisions are enforced like any order or judgement of the High Court and are final.<sup>171</sup>

The approach taken in South Africa is that the CAC is an appellate body on competition matters. It is presided over by a panel of three judges;<sup>172</sup> however its decision is appealable (with leave) to the Supreme Court of Appeal or the Constitutional Court on constitutional issues.<sup>173</sup> The FCT has a single part-time judge presiding with other three members who are non lawyers. It is privileged to have personnel with complex knowledge in industry, commerce and economics. The FCA requires the FCT to be guided by the ‘rules of natural justice’,<sup>174</sup> yet it abuses both the Constitution and rules of natural justice by limiting the right to appeal.

The FCT has the power to compel the attendance of witnesses, and extract evidence and documents from them.<sup>175</sup> Its decision is made based on the majority decision and should be reasoned.<sup>176</sup>

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<sup>167</sup> S 30 of SA Act.

<sup>168</sup> Para 3 of 7 schedule of the Competition Act 1998 (England).

<sup>169</sup> See part XI of the FCA.

<sup>170</sup> S 85 (5) and (8) of the FCA.

<sup>171</sup> Ibid s 84 (2).

<sup>172</sup> S 38 (2) of SA Act.

<sup>173</sup> Ibid s 63(2).

<sup>174</sup> S. 85 (3) of the FCA.

<sup>175</sup> Ibid subsections 5 and 6.

<sup>176</sup> Ibid subsection 7.

### 3.3.2 Appeal procedures

The procedure for appeal to the FCT is provided by its rules.<sup>177</sup> All appeals are directed to the registrar of the FCT.<sup>178</sup> A person who intends to appeal against the order or decision of the FCC must file a notice of appeal not later than fourteen days after the decision.<sup>179</sup> This rule is read together with rule 75 (3) of the FCCPR which provides that ‘an appeal shall be made in not more than twenty eight days after notification or publication of the decision’. The two rules connote that a person who intends to appeal must file a notice of appeal not later than fourteen days after the publication of the decision. Thereafter, he may file a memorandum of appeal not more than twenty eight days after notification or publication of the decision. If the notice is filed but the potential appellant fails to comply with the time limit he or she shall be deemed to have withdrawn the notice of appeal and may be subjected to pay costs.<sup>180</sup>

The notice must contain the signature of the appellant and particulars of parties and the nature of the decision appealed against.<sup>181</sup> The appellant after filing a notice must within seven days serve the same to the respondent, and the registrar will also serve such a notice to the FCC within three days of receipt. Any person served with the notice must respond to it within seven days.<sup>182</sup> The FCTR use the term ‘days’ to set the time limits; it does not plainly indicate whether the term ‘days’ exclude weekends and public holidays. The FCCPR is certain in setting time limits: it provides that the FCC shall take into account working days as well as public holidays when setting the time limits and the term ‘working days’ appears severally in the rules.<sup>183</sup>

Commonly, the appellant applies for an appeal, first to have the matter re-tried by a competent appellate authority, and secondly to stop the implementation of the order of the lower authority. There are two conflicting approaches on the question of procedure of stay of execution.

One approach is that the appeal plays an automatic role of staying the execution of an order appealed against, and this is what the FCA provides for. It states that, on application of an appeal ‘the order shall, unless the FCT otherwise orders, be stayed pending the

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<sup>177</sup> The Fair Competition Tribunal Rules, 2006 (FCTR).

<sup>178</sup> Rule 4 of FCTR.

<sup>179</sup> Ibid rule 7 (2).

<sup>180</sup> Ibid rule 10.

<sup>181</sup> TANROAD case (note 138) at 12.

<sup>182</sup> Rule 7(4)-(6) of FCTR.

<sup>183</sup> See rules 33, 44, 45, 56, 59, 60 and 76.

determination of the appeal'.<sup>184</sup> This approach is supported by a South African case, *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*<sup>185</sup> where the court stated that:

It is today the accepted common law rule of practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect may be given thereto, except with the leave of the Court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application.

The second approach is that stay of execution is done by application. This is supported by the Civil Procedure Code (Tanzania) which provides that an appeal per se does not operate as a stay of execution.<sup>186</sup> Similarly, in South Africa, the other approach is that the court may not stay or suspend the execution of an order unless and until an application is made in that respect.<sup>187</sup> Davis JP made it clear that an application to stay execution may only be made after an appeal is lodged before a competent appellate body.<sup>188</sup> My opinion is that the FCA should be compatible with the general law that governs civil procedure in Tanzania, thus a stay of execution would be subject to a special application made by the interested party. This would maintain uniformity of the civil procedure in the Tanzania for both judicial and quasi-judicial bodies.

After lodging a notice of appeal, the appellant is also obliged to file a memorandum of appeal on the prescribed form not later than thirty days from the date the notice was lodged (the presumption is thirty working days). The same applies on cross-appeal. The appellant after filling a memorandum of appeal before the FCT should also serve the same to the respondent within seven days.<sup>189</sup> The memorandum of appeal is accompanied by the copies of the decision or order appealed against (normally served in ten copies) and should state the grounds of appeal, relief sought and must be signed by the appellant.<sup>190</sup>

After receiving a memorandum of appeal with its attachments, the respondent must respond within fourteen days.<sup>191</sup> The FCT will publish the intended appeal in its website or a

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<sup>184</sup> S 91 of the FCA.

<sup>185</sup> 1977 (3) SA 534 (A) at 534F-G.

<sup>186</sup> Order XXXIX Rule 5(1) (note 133). The existence of substantial loss on the side of the applicant is considered to be good ground for staying execution, see rule 2 and 3.

<sup>187</sup> S 38 (2A) (d) of SA Act, the CAC on application, may order stay of execution of an order.

<sup>188</sup> *Glaxo Wellcome (Pty) Ltd and others v Terblanche no and others* (no 2) 2001 (4) SA 901 (CAC) at 907A-D.

<sup>189</sup> Rule 11 of FCTR.

<sup>190</sup> *Ibid* rule 9.

<sup>191</sup> *Ibid* rule 15.

widely circulated local newspaper to make it known to any interested person who might wish to object it within seven days.<sup>192</sup> A party who intends to object the notice of appeal should apply to FCT before hearing, otherwise such an objection will not be entertained during the hearing of the appeal.<sup>193</sup>

### 3.3.3 Hearing of appeal

After the filing process the Registrar must give a notice of the hearing of an appeal ten days<sup>194</sup> before the hearing date, unless the date was fixed by the consent of the parties.<sup>195</sup> The quorum for appeal meetings is at least three members including the chairman.<sup>196</sup> The FCT has the power to reject the appeal wholly or in part where there are sufficient grounds to do so.<sup>197</sup> It may conduct appeal meetings in camera where it deems fits to do so, and any document proven to be confidential will be treated in a confidential manner.<sup>198</sup>

The FCT may confirm or reverse the findings of the FCC or order the proceedings to be conducted afresh. A copy of an order or decision made by the FCT must be sent to the FCC and to any party who was not present at the proceedings.<sup>199</sup> In the event that the appellant does not appear on the hearing date, the FCT has the option to dismiss the appeal or adjourn to a future date.<sup>200</sup>

The appellant may within seven days after dismissal of appeal apply for restoration. The FCT may also order *ex parte proof*, in the event that the appellant appears but the respondent does not.<sup>201</sup> Like the FCCPR, the FCTR is silent on whether there is a remedy for setting aside *ex parte* proceedings or judgement.<sup>202</sup>

The FCT also has the power to order costs in case the appellant withdraws the appeal without the consent of the respondent or when the appeal is finally determined and may order security for costs to be deposited.<sup>203</sup> The judgement of the FCT may be pronounced by any

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<sup>192</sup> Ibid rule 13.

<sup>193</sup> TANROAD case (note 138) at 13.

<sup>194</sup> See pages 29- 30 on the application of the term ‘days’ and ‘working days’.

<sup>195</sup> Rule 24 of FCTR.

<sup>196</sup> Ibid rule 25.

<sup>197</sup> Ibid rule 27. In TANROAD case at 21, it rejected the appeal wholly on the ground that the interlocutory order did not determine the matter finally.

<sup>198</sup> Rules 28 and 29 of FCTR.

<sup>199</sup> Ibid rule 35.

<sup>200</sup> Ibid rule 36 (1).

<sup>201</sup> Ibid sub rule 2.

<sup>202</sup> See note 145.

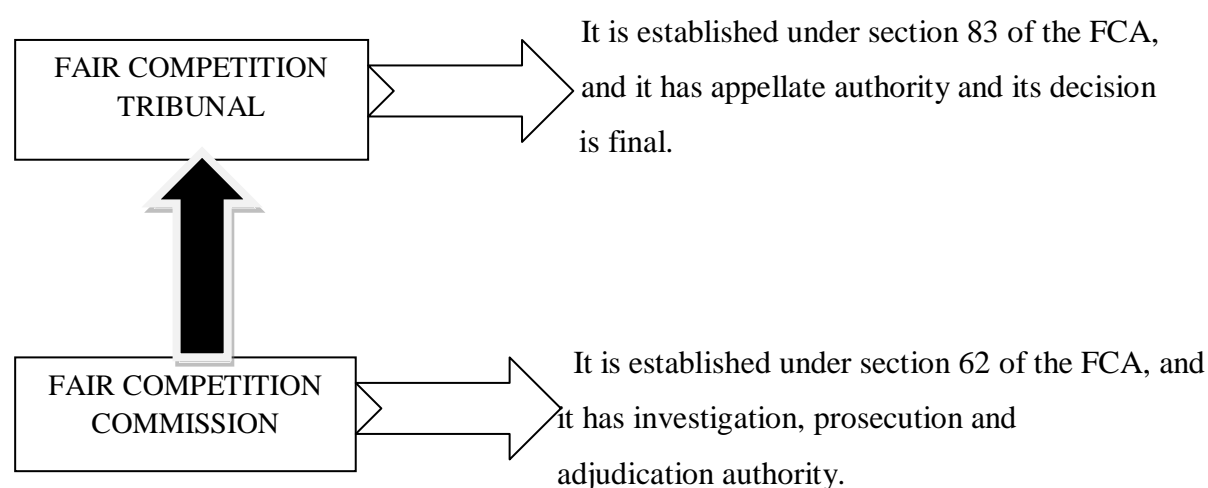
<sup>203</sup> Ibid rules 39 and 40.

member.<sup>204</sup> There is no appeal against a decision of the FCT.<sup>205</sup> The only remedy available for an aggrieved party is to apply for review before the same FCT.<sup>206</sup> This remedy is limited to the correction of errors on records.

If the FCT rehears the dispute and makes errors in fact or in law, what body may make the external checks and balances if the ordinary court is deprived of this role? In *Federal Trade Commission v Gratz*<sup>207</sup> the court was of the view that the ordinary court reserves its due process power to rehear the matter and makes further orders. Where evidence is watertight and the findings of the Commission sustained, the appellate court still reserves the powers to deal with a matter of law relevant to that appeal.

In addition, in *Federal Trade Commission v Motion Pictures Advertising Services Company*,<sup>208</sup> Justice Frankfurter commented on the power of the appellate courts in anti-trust cases by stating that the question whether an act amounts to anti-trust practice is a question of law that a court should be given a final jurisdiction. The lack of mechanism for appeal of decision of the FCT and the functions vested in the FCC are procedural problems which are unconstitutional and breach the principle of natural justice as discussed below.

## FIGURE 2: INSTITUTIONAL FRAMEWORK UNDER THE FCA



Source: Tanzanian Fair Competition Act No. 8 of 2003.

<sup>204</sup> Ibid rule 44(2) and (4).

<sup>205</sup> Ss 61 (8) and 84(1) of the FCA.

<sup>206</sup> Rule 45 of FCTR.

<sup>207</sup> 253 U.S 421 (1920)

<sup>208</sup> 344 U.S 392 (1953); 5n.

### 3.4 The effect of the multiple functions of the FCC and the final appellate jurisdiction of the FCT

This part of the dissertation discusses how the High Court of Tanzania and FCT dealt with the challenges raised by stakeholders on the unconstitutionality of the provisions of the FCA.

#### 3.4.1 The High Court of Tanzania and unconstitutionality of the FCC's multiple functions

In 2008 the FCC handled a competition case on notification of merger and abuse of dominant power in the *Fair Competition Commission v Tanzania Cigarette Company Ltd (TCC)*.<sup>209</sup> This was the first case to be handled by the FCC and the very first case that questioned the constitutionality of the multiple powers of the FCC in *Tanzania Cigarette Company Ltd v The Fair Competition Commission and the Attorney General*<sup>210</sup> (TCC's case). The former case gave birth to the latter one.

#### Brief facts of the TCC case

The petitioner (TCC) intended to merge its business with Iringa Tobacco Company Ltd (ITC) which would result in the assets of ITC being sold to TCC. The petitioner made inquiry as to whether the merger proposal was objectionable under the terms of the FCA, and, concluding that it is not notifiable, concluded the merger. The FCC alleged that the petitioner had violated the law by completing the merger without notification and approval by it.

The petitioner argued that at the time of the merger transaction the Commissioners of the FCC were not yet appointed and the threshold notification was published in 17<sup>th</sup> January 2007 and made to operate retrospectively from 10<sup>th</sup> March 2006 ( the merger transaction took place on 17<sup>th</sup> September 2005). It further avers that the exercise of the FCC's accusatory and adjudicative powers infringes some of its constitutional rights. The FCC overruled the preliminary objections and ordered the hearing of the complainant. The petitioner sought redress before the High Court thus giving rise to TCC's case.

The petitioner argued before the High Court that the first respondent (The FCC) made itself a judge of its own cause, thus infringing its right to a fair hearing as enshrined under article 13(6)(a) of the Constitution of Tanzania. Thus, the petitioner requested the High Court

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<sup>209</sup> Complaint No.1 of 2008.

<sup>210</sup> Misc. civil cause No 31 of 2010 (Unreported).

to grant a declaration that section 69(1) of the FCA is unconstitutional since it gives the FCC jurisdiction to determine complaints initiated by itself.

The second respondent (Attorney General (AG)) contended that the merger transaction was notifiable whether the threshold notification of merger was published or not, and argued that the Commissioners of the FCC were already appointed when the merger transaction was concluded. However the court did not entertain the contention since the High Court is not an appellate body on competition matter, and the intention of the petition was to request the High Court to exercise its original jurisdiction empowered by both the **Constitution and the Basic Rights and Duties Enforcement Act (BRADEA)**<sup>211</sup> to declare a provision of the law a nullity.<sup>212</sup> The AG, however, submitted two preliminary objections (PO), one being that the petitioner ought to have exhausted available remedies before filing the petition to the High Court. The High Court determined the PO and ruled that the petitioner should first exhaust the opportunity available under the FCA, that is, to appeal to the FCT before seeking a remedy in the High Court. The petition was dismissed with costs, thus the questions of unconstitutionality of s 69(1) of FCA and the powers of the FCC remain unsettled to date.

To comment on the ruling, the High Court had a duty to ask itself what the petitioner before it sought? It is a constitutional issue, declaration of a provision of the law. The petitioner was not challenging the findings of the FCC per se, rather the powers vested in the FCC by the FCA. The FCT does not have power to declare any law void. In Tanzania there is a rebuttable presumption that ‘a piece of legislature or provision in a statute’ is constitutional.<sup>213</sup> The FCT would obviously presume that s 69 of the FCA is constitutional. The High Court allowed itself to be tied up with technicalities of section 8(2) of the **BRADEA** which obstruct dispensation of justice, thus contradicting the requirement of the Constitution which directs courts ‘to dispense justice without being tied up with technical provisions which may obstruct dispensation of justice’.<sup>214</sup> It is a question of ‘wait and see’ since the matter is before the Supreme Court for appeal.<sup>215</sup>

The impartiality of the FCC was also challenged in the case of *Tanzania Breweries Ltd v Serengeti Breweries Ltd and the FCC*, Consolidated Tribunal Appeals No 4 and 5 of

<sup>211</sup> Ss 5, 6, 8, and 10(1) of Cap 3 R.E 2002.

<sup>212</sup> Article 30 (5) (note 30) empowers the High Court to declare void any law that is in conflict with constitution or avail time for the relevant authority to rectify that law.

<sup>213</sup> TCC (note 209) at 19.

<sup>214</sup> Article 107A (2) (e) (note 30).

<sup>215</sup> Civil appeal No 113 of 2012 (Court of Appeal of Tanzania).

2010. This appeal originates from complaint No 2 of 2009 which was the second case to be handled by the FCC.

### **Brief facts of the TBL case**

The FCC in complaint No 2 of 2009 held that the appellant (TBL) is liable for contravening both s.8 (1) and 10(1) of the FCA by entering into branding agreements which had led automatically to serious and important distortions of competition in the beer market and abuse of dominant position. It ordered the appellant to pay a fine of five percent of its annual turnover. In addition a compliance order was issued (refrain from removing its competitor's signage and posters or POS materials at the outlets and entering into anti-competitive branding agreements with outlet owners).

Aggrieved by the decision of the FCC, the appellant appealed to the FCT. It filed two appeals, No 4 and 5 respectively, but the FCT consolidated them. The appellant submitted ten grounds of appeals including failure of the FCC to act in accordance with principles of natural justice and procedural fairness, thus failing to act independently and impartially (the FCC is an investigatory and adjudicatory authority in competition). The appellant further avers that the proceedings and the decision of the FCC are a nullity because the FCC was not properly constituted when it determine the matter. This ground took priority and it was concluded that the meetings of the FCC held during determination of complaint No 2 of 2009 lacked a proper quorum and such a decision was invalid and therefore a nullity. The effect of this finding is that the FCT did not discuss other grounds of appeal raised, including the question of impartiality of the FCC.

The summary of the two cases above indicated the efforts made by stakeholders to challenge (unsuccessfully) the provisions of the FCA that give multiple powers to the FCC.

#### **3.4.1.1 Impartiality of the FCC**

In the TCC case the petitioner requested the High Court to give a declaration order in term of section 69(1) of the FCA. This was however, not done, as discussed above. S 69(1) of the FCA provides as follows, '[t]he Commission (FCC) may initiate a complaint against an alleged prohibited practice'. Subsection 2 further allows a person to submit a complaint against an alleged prohibited practice before the FCC for investigation. The court interpreted this provision and stated that, '[t]he provision creates a situation in which it is the FCC that investigates an alleged prohibited practice, then prepares and files a complaint before itself,

prosecutes a complaint before itself and goes on to adjudicate over the same complaint'.<sup>216</sup> The provision of the FCA therefore concentrated investigative, accusatory and adjudication powers to the FCC. According to OECD report, 'combining the function of investigation and adjudication in a single institution may save costs but may also dampen internal critique; it may raise a concern about the absence of checks and balances'.<sup>217</sup>

The UNCTAD report at page 67 stated that the FCC is a fairly independent agent in performance of its functions. This finding is based on section 62 (2) of the FCA which provides that, '[t]he Commission shall perform its functions and exercise its power independently and impartially without fear or favour'. This however connotes an independence from external interference which by itself is not absolute, since the members of the FCC are appointed by the executive to perform administrative duties (quasi-judicial function) without the approval of any other organ. In summary both the president and the minister responsible for trade affairs have **powers to hire, set fee and allowance, and fire the members of the FCC**,<sup>218</sup> so their independence is impaired.

The impartiality of the FCC is affected by lack of internal independence. The separation of powers among the departments of the FCC is not absolute. The provisions of the FCA indicated below show that both the chairman and DG who sit for adjudication also participate in investigation processes. In TCC and TBL cases, if the allegation that the FCC acts as an investigator and adjudicator in alleged anti-competitive practice were determined, then factual evidence could be adduced to prove how the chairman or DG of the FCC participated in both investigation and adjudication, as was done in the *Jamaica Stock Exchange case* discussed under part 3.4.2 of this dissertation.

Does the interference of the chairman or DG in an investigation violate the fundamental rights to fair hearing as enshrined in the Constitution? Article 13(6) (a) of the Constitution<sup>219</sup> provides that, '[w]hen the right and duties of any person are being determined by the court or any other agency, the person shall be entitled to a fair hearing....' This simply means a decision-maker when determining a right of an individual should be free from any

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<sup>216</sup> TCC (note 209) at 13.

<sup>217</sup> OECD's report on European Commission - Peer Review of Competition Law and Policy, 2005 at 62, available at <http://www.oecd.org/eu/35908641.pdf>, [accessed on 27 November 20112].

<sup>218</sup> See ss 62, 63 and 64 of the FCA.

<sup>219</sup> Constitution (note 30).

bias created from whatever manner. It is apparent that section 69 of the FCA gives power to the FCC to be a judge of its own cause, causing bias as discussed herein below.

The partiality of the FCC may be proved by giving facts or the circumstances that surround the entire process of determining a right. So, to decide whether section 69 of the FCA causes the FCC to be partial one has to analyse the loopholes provided by FCA. In *Johnson v Mississippi*<sup>220</sup> it was stated that a party to litigation has the right to be heard by an impartial decision-maker. The question is who is an ‘impartial decision-maker’? In *Caperton v. A.T. Massey Coal Co* 129,<sup>221</sup> it was stated that ‘[t]he inquiry is an objective one. The court asks not whether the judge is actually, subjectively biased, but whether the average judge in his position is ‘likely’ to be neutral, or whether there is an unconstitutional potential for bias’.

The unconstitutional potential for bias created by the FCA is that the same person who takes part in investigation of prohibited practice sits for adjudication of the same. For example when the allegation is submitted before the FCC for investigation, the DG **has power to decide whether the matter is to be investigated by the FCC or not**. The DG has power to issue a notice of non-referral to the person who submitted a complaint. The complainant then has the right to refer the complaint directly to the FCC for adjudication,<sup>222</sup> where the same DG who issued a notice of no referral forms part of the hearing meeting of the FCC.<sup>223</sup> Also, the chairman or the DG of the FCC has **the power to issue a summons and request for a search warrant** from the FCT for the purposes of conducting investigation. The investigation department cannot call a person to supply information unless it requests the chairman or DG to issue a summons to call that person. Section 71(1) of the FCA provides that, ‘...a member of the Commission may by the summons **signed by the chairman or Director General** serve on that person...’to produce any information or document to the FCC.

For searching processes, the chairman or the DG apply for the search warrant from the FCT and appoint the FCC’s staff to participate in searching. Section 71 (5) of the FCA provides that the FCT ‘shall issue a search warrant authorizing a police officer **accompanied by staff of the Commission duly authorized by the chairman** of the Commission to enter the premises and conduct search...’The FCA does not vest these powers in the head of the

<sup>220</sup> 403 U.S 212,216 (1971) (USA).

<sup>221</sup> S. Ct. 2252 (2009) (USA) at 2262.

<sup>222</sup> See rule 10 (4), (5) and (6) of the FCCPR.

<sup>223</sup> The hearing meeting of the FCC is constituted by the chairman, DG and three other members.

investigation department; rather to the chairman and DG of the FCC. These examples extracted from the FCA prove that the chairman and DG of the FCC participate in both investigation and adjudication of alleged prohibited practice. To avoid lack of neutrality, the FCC when it has investigated the dispute, needs to recuse itself in adjudication to let the neutral organ decide the matter.

Waelbroeck and Fosselard argued that everyone is entitled to be heard by an impartial tribunal (court) regardless of whether a matter is inquired into by an administrative body.<sup>224</sup> Slater *et al*<sup>225</sup> also argued that, giving the Commission all the powers will create a so-called ‘prosecutorial bias’, as naturally the Commission will have bias in favour of its findings during the investigations when it comes to the question of adjudication, a ‘hindsight bias or desire to justify past efforts’.<sup>226</sup> They relate this bias to the one possessed by the lawyer in favour of his or her client.

Would a prudent person expect that the FCC, having used its resources in investigations and drawn an inference that there was infringement of the provisions of the FCA, would then in trial declare that its findings in the investigations hold no water? Montag argued that, ‘it is understandable in human terms that Commission officials sometimes want to push through what they perceive to be their case. And it explains why arguments put forward by the parties often appear to fall on deaf ears’.<sup>227</sup> Although the decision of the FCC is appealable to the FCT, it is impossible for the FCT to declare the acts of the FCC void on grounds of want of jurisdiction because the provisions of the FCA supply loopholes for the FCC to be a judge of its own acts.

In *Findlay v United Kingdom*,<sup>228</sup> the European Court stated that to ‘maintain impartiality, the tribunal...must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect’.

The test to apply for impartiality is the nature of the incidence supported by the evidence that suggests that there was danger of bias on the side of the adjudicative body.<sup>229</sup>

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<sup>224</sup> Waelbroeck D and Fosselard D, ‘Should the Decision-Making Power in EC anti-trust Procedures be left to an Independent Judge? The Impact of the European Convention of Human Rights on EC Anti-trust Procedures’ (1995), 15 *YEL* at 115 quoted also in Slater *et al* at 27.

<sup>225</sup> Slater *et al*, ‘Competition law proceedings before the European Commission and the right to a fair trial: no need for reform?’ (2009) 5 issue 1, *European Competition Journal* at 33.

<sup>226</sup> *Ibid* at 34.

<sup>227</sup> Montag F, ‘The Case for a Radical Reform of the Infringement Procedure under Regulation 17’ [1996] 8 *ECLR* 428-437, at 430.

<sup>228</sup> (1997) 24 *EHRR* 221, 244 at para 73.

Thus, the first step is to examine whether the surrounding circumstances may support the allegation that the decision-maker is biased or not. The next is to look at it from the viewpoint of the prudent or fair-minded observer, and decide whether inference may be drawn that such leading circumstances are in real danger of bias on the side of a decision-maker.<sup>230</sup>

In *Porter and Another v Magill*,<sup>231</sup> the Local Government Finance Act 1982 (England) vested the Auditor Commission with power to investigate, make up the complaint and hear and determine it.<sup>232</sup> The court was of the view that ‘[t]he question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased’.<sup>233</sup> It further stated that no fair-minded and informed observer would suggest that the auditor, who investigated the matter and prosecuted it and made a decision, was free from bias. In the light of this, as it was put forward in the TCC case, the chairman/DG of the FCC who participates in investigation and sits for adjudication may not be free from bias.

In the TCC case, the FCC in its submissions contended that ‘accusatory and adjudicative powers are exercised separately’ and that it is impartial and independent since the initiation of complaints ‘do not involve a single individual or single department within the FCC, which both initiates and decides the complaints’.<sup>234</sup> Although this submission was not determined by the court, (the court ruled that the petitioner should exhaust available opportunities before it sought remedy before the High Court) it is clear from the provisions of the FCA that these departments are not independent from the control of the chairman and DG of the FCC.<sup>235</sup>

If that is the case why does the Chairman or DG issue a summons and not the director of the head of the investigation department? The FCA does not guarantee that the DG or the chairman will not interrogate the summonsed person before referring him or her to the investigation department for further investigation.

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<sup>229</sup> *R v Gough* [1993] AC 646 at 670.

<sup>230</sup> See *re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at 726H-727C.

<sup>231</sup> [2002] 1 ALL ER 465, available in soft copy at

<http://www.publications.parliament.uk/pa/ld200102/ldjudgmt/jd011213/magill-1.htm> [accessed on 10 July 2012]

<sup>232</sup> *Ibid*, para 89.

<sup>233</sup> *Ibid* para 103.

<sup>234</sup> TCC (note 209) at 10.

<sup>235</sup> See pages 22 (notes 119 and 120) 38 & 39.

Why does the Chairman or DG apply for a search warrant and appoint a member of the FCC to accompany the police in the search, and not leave the investigation department to work alone? The chairman or DG applies for the search warrant. This indicates that they know the nature of the investigation and they are aware at what stage the search warrant is required. If the investigation department were to be independent from the control of the chairman or DG in due course of performing its function, the FCA or the FCCPR could empower it to summons any person to provide information to it, and where it deems fit, it would also be empowered to apply for search warrants and act alone without waiting for the authorization of the chairman of the FCC.

Why does the DG have a mandate to order investigation and yet it may decide not to refer a complaint to the FCC? If the investigation department were independent, the complaint would have been submitted to it for investigation. Where it deemed fit, it would refer a matter to the FCC for adjudication depending on the evidence on record, or issue a notice of non-referral to the complainant. The Chairman and the DG form part of the FCC hearing meetings. Indeed, they participate in investigation and adjudication. The powers of the European Commission, which is also an investigator and adjudicator of anti-competitive practices,<sup>236</sup> have been challenged vehemently by a number of commentators.<sup>237</sup>

The fact that the FCC investigates complaints and establishes sufficient evidence to support its case, leads to an undisputable inference that it is likely be influenced, and be partial, as it cannot make a decision against itself. A decision-maker who is biased cannot easily give a fair trial as he or she may be influenced to favour one side.<sup>238</sup> One might say that an empty-minded judge is a good judge compared to a well-informed judge who might have pre-judged a matter before a hearing. In other words, a good judge is one who makes a decision based on facts and evidence submitted during the hearing, and not one who makes a decision based on facts that came into his or her knowledge, prior to the arguments of the disputants. The premises of the above discussion draw an inference that section 69 of the FCA allows the FCC to be partial in due course of performing its duties and therefore breaches the fundamental principles of fair hearing as guaranteed by the Constitution of

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<sup>236</sup> Jones (note 18) at 1037.

<sup>237</sup> Ibid at note 74 of the book.

<sup>238</sup> Betts DW, How High is Too High? Judicial Elections and Recusal after Caperton (2010) 15 *Texas Review of Law & Politics* at 248, available at [http://www.trolp.org/main\\_pgs/issues/v15n1/Betts.pdf](http://www.trolp.org/main_pgs/issues/v15n1/Betts.pdf) [accessed on 24 September 2012].

Tanzania. The following section shows how the Supreme Court of Jamaica dealt with a similar situation.

### **3.4.2 The Supreme Court of Jamaica and unconstitutionality of a Commission's multiple functions**

Courts have the role of interpreting and applying the law. The Supreme Court of Jamaica in *Jamaica Stock Exchange v Fair Trading Commission*,<sup>239</sup> (JSE case) was called upon to interpret the provisions of the Fair Competition Act No 9 of 1993<sup>240</sup> (FCA 1993) that vested the Fair Trading Commission (FTC) with the powers to investigate, initiate a complaint and adjudicate the dispute. The court determined the dispute and declared such provisions unconstitutional.

#### **Brief facts of the JSE case**

In 1992 Behring, Bunting & Golding Ltd (BD & G Ltd) applied to the JSE for corporation membership. The application was not determined until 1993, and in 1994 BD&G Ltd submitted a complaint before the FCT for investigation. The FTC made an investigation on the procedures and rules of the JSE concerning the process of admitting new members and based on its finding it concluded that the JSE was in breach of the law. It therefore wrote an official complaint to the JSE alleging *inter alia* that the JSE had created a barrier to entry into the market since it had failed to respond to an application for membership within a reasonable time, therefore abusing its dominant position in the securities market.

The JSE informed the FTC that it had no jurisdiction to entertain the matter since the FCA 1993 did not apply to the JSE but to the Securities Act. The FTC contended that it had jurisdiction. The JSE referred the matter before the court (Judge in Chambers) for determination of matters of law that the FCA 1993 was not applicable to it, and further that its **constitutional right to be heard by an impartial decision-maker was breached when the FTC that conducted investigation and lodged a complaint adjudicated the same complaint.** The court entered judgement in favour of the FTC. Sections 49 and 50 of the FCA 1993 allow findings of the FTC to be appealed to the ordinary courts. The appellant (JSE) appealed to the Supreme Court of Jamaica.

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<sup>239</sup> Supreme Court, civil appeal No: 92/97(Jamaica), available at [http://www.jftc.com/Libraries/Court\\_Judgements/Jamaica\\_Stock\\_Exchange\\_vs\\_The\\_Fair\\_Trading\\_](http://www.jftc.com/Libraries/Court_Judgements/Jamaica_Stock_Exchange_vs_The_Fair_Trading_), [accessed on 23 September 2012].

<sup>240</sup> Ss 5, 6, 7 and 8.

The Supreme Court addressed several issues in this case, but the action of the FTC and the constitutionality of the FCA 1993 that give the FTC the powers to investigate and adjudicate alleged anti-competitive practice are relevant to this dissertation. The FCA of Tanzania gives the same powers to the FCC and its constitutionality was challenged unsuccessfully before the High Court of Tanzania in the TCC case. In Jamaica the challenge of unconstitutionality of the FCA 1993 was successful. Below is the determination of the Supreme Court.

Forte P (Judge) was of the view that '[t]o my mind the more substantive contention is whether the Commission (the FTC) has, and if so, should have the power to adjudicate upon matters which it has itself investigated and itself laid the complaint'.<sup>241</sup> The evidence on record indicated that the officers of the FTC applying the powers vested to them by the FCA 1993 summonsed the manager of the JSE under threat of penalty and had a thorough interview concerning the alleged prohibited practice. There was also a constant communication between the FTC and Executive Director of the JSE for purpose of investigation. The court observed that '[t]here is no guarantee that the Commissioner who directed the investigation or might have undertaken the investigation, would not sit and hear the complaint'.<sup>242</sup> It was of the view that the evidence in record 'has revealed sufficient conduct in the officer of the FTC who consulted with the Commission throughout the 'investigation' to establish that there is a real danger of the JSE being the subject of bias in determination of the complaints'.<sup>243</sup>

The investigation and adjudication powers vested in the Commission not only breach the 'common law rule of natural justice' but also the constitutional right to be heard by 'an impartial tribunal'.<sup>244</sup> The appeal was allowed and the Supreme Court declared that '**...the action and proceedings being taken and pursued by the FTC against the JSE whereby the FTC is performing the functions of investigation, complainant and adjudication is in**

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<sup>241</sup> JSE case (note 239) at 32. Sections 5, 7, and 8 of the FCA 1993 merger the investigation and adjudication functions.

<sup>242</sup> Ibid at 39.

<sup>243</sup> Ibid at 40.

<sup>244</sup> Article 20 (2) of Jamaica Constitution 1962 provides that, '[a]ny court or other authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial...' Available at <http://pdba.georgetown.edu/Constitutions/Jamaica/jam62.html>, [accessed on 27 September 2012].

**breach of the rules of natural justice and void.** The FTC was also restrained from continuing the proceedings.<sup>245</sup>

The court gave its opinion that ‘a problem may however, be remedied for the future if the legislature would place those functions in two separate bodies, (the investigative function in the FTC and the adjudicative function in the courts or in some other appropriate body)’.<sup>246</sup> No one is fit to be a judge in his own cause, *Nemo iudex in propria causa est*. The issue of bias has to be strictly emphasised,<sup>247</sup> and justice has to be administered impartially.<sup>248</sup>

Based on the findings of the Supreme Court of Jamaica which are persuasive<sup>249</sup>, it is obvious that in Tanzania the multiple functions of the FCC originate from the settings of the FCA, and in the TCC case the High Court ought to exercise its constitutional power to declare the provisions of the FCA that vest multiple functions in the FCC void and therefore unconstitutional, for it breaches the general rules of natural justice and constitutional right of fair hearing as enshrined under article 13 (6) (a) of Constitution of Tanzania.

This decision sensitized many writers who called upon the relevant authorities to amend the competition law. According to Derrick, investigative power is to be left to the Commission and all the adjudicatory and enforcement functions to be passed on to the court.<sup>250</sup> He admits that the background of compositions of bills and the intention of the policy-makers led Jamaica to have a law which is not easy to enforce, and the remedy available is to amend the law (FCA 1993).<sup>251</sup>

On the contrary Gordon<sup>252</sup> introduced two relevant models to amend the FCA 1993. The first model is to separate adjudication and investigation functions into two distinctive bodies, which entail the establishment of a new body, which to him is too expensive.<sup>253</sup>

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<sup>245</sup> JSE (Note 239) at 41.

<sup>246</sup> Ibid.

<sup>247</sup> In the *The King v Essex Justices* [1927] 2 KB 475 at 490 Swift J stated that, ‘it is essential that justice should be so administered as to satisfy reasonable persons that the tribunal is unbiased’.

<sup>248</sup> See *Danisa v British and Overseas Insurance Co Ltd* 1960 (1) SA 800 (D) at 801C.

<sup>249</sup> Foreign decisions are persuasive in Tanzania, see *TBL v SBL* at 50.

<sup>250</sup> McKoy, Derrick V, *The Courts as the Preferred Means of Competition Law Enforcement* (July 16, 2009) at 2, available at SSRN: <http://ssrn.com/abstract=1913529> or <http://dx.doi.org/10.2139/ssrn.1913529>, [accessed on 23 September 2012].

<sup>251</sup> Ibid at 3 and 5.

<sup>252</sup> Gordon PJ, ‘The Case for Maintaining a Single Competition Agency for Investigation and Adjudication of Anti-trust Cases’ at 14, available [http://www.jftc.gov.jm/Libraries/Speeches\\_and\\_Presentations/The\\_Case\\_for\\_Maintaining\\_a\\_Sin](http://www.jftc.gov.jm/Libraries/Speeches_and_Presentations/The_Case_for_Maintaining_a_Sin) [accessed on 23 September 2012].

<sup>253</sup> Ibid at 12.

However, to re-set the system in Tanzania together with its various functions should be cheap and efficient as demonstrated in the recommendations, since the two institutions are already in place.

The second model is to divide the investigation and adjudication functions within the same body (the existing FTC), ‘with the appropriate fire-walls to ensure that the rules of natural justice are preserved,’<sup>254</sup> as in the American model. Gordon prefers this approach. However this approach does not work in Tanzania as demonstrated above. There is no guarantee of ‘fire-walls’ between the Chairman or the DG and other members of the investigation department.

Based on the above arguments, the comparison between the Jamaican competition legal regime and that of Tanzania is relevant to this dissertation because competition law of both countries gives multiple functions to the regulatory bodies. These powers had been challenged in both countries by stakeholders, successfully in Jamaica (the JES’ case) and unsuccessfully in Tanzania (the TCC’s case). Tanzania has lessons to take from Jamaica, first that the status of these multiple powers works against the principle of fair hearing as declared by the Supreme Court of Jamaica; secondly that the decisions of regulatory bodies are appealable to ordinary courts as per Jamaica competition law.<sup>255</sup>

### 3.5 Right to access court for re-hearing (appeal)

The concern of the TCC case was the right to be heard by an impartial decision-making body and the right to appeal. Having discussed the issues of impartiality, this section focuses on appeal. From the provision of the FCA there is right to appeal from the FCC to the FCT. Section 61 (1) of the FCA provides that a person aggrieved by the decision of the FCC may appeal to the FCT, and subsection 2 provides that the appeal shall be by way of rehearing. Subsection 4 further provides for grounds for appeal that;

- i) the decision made was not based on evidence produced.**
- ii) there was error in law.**
- iii) the procedures and other statutory requirements applicable to the FCC were not complied with and non-compliance materially affected the determination, and**
- iv) the FCC did not have powers to make the determination.**

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<sup>254</sup> Ibid at 17.

<sup>255</sup> See also note 36.

The procedures for appeal are straightforward as provided by the FCTR, and discussed under parts 3.3.2 and 3.3.3 above. Under this premise, grounds and procedures for appeal from the FCC to the FCT as was witnessed by the TBL case above are not in question.

This dissertation argues that there is no statutory right to appeal from the decision of the FCT to the ordinary courts. Where should a person aggrieved by the decision of the FCT go, where he/she wishes to challenge that decision on the same grounds stated above if there is no a bridge of appeal from the FCT to the ordinary court? Section 61(8) of the FCA provides that **‘[t]he decision of the FCT on appeals under this section shall be final’**. Furthermore section 84 (1) provides that **‘[a] judgement or order of the Tribunal on any matter before it shall...be final’**.

There should be a clear distinction between the routes taken by the Tanzania Cigarette Company in the TCC case to approach the High Court and the appeal procedure provided by the FCA. In the TCC case the defendant/appellant, having found that the FCC had investigated it, and lodged a complaint against it, and was in the process of hearing the case, realised that its constitutional right to be heard by impartial decision-body was in danger. It therefore invoked the provisions of the **BRADEA**<sup>256</sup> to approach the High Court to challenge the constitutionality of the provision of FCA that give the FCC power of investigation and adjudication. It is true that under **BRADEA** one has to exhaust the FCT route, because it is the available local remedy under the FCA, before invoking the High Court.<sup>257</sup> The FCT, however, has no powers to give the declaration orders on the provision of the law, but the High Court does. So the High Court was not exercising its appellate power, rather original jurisdiction vested in it by the **BRADEA**.<sup>258</sup> The High Court gave judgement against the appellant, and the appellant further appealed to the Supreme Court.<sup>259</sup> The appeal is pending<sup>260</sup> and the Supreme Court is exercising its appellate powers to rehear the dispute originating from the High Court and not from the FCC.

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<sup>256</sup> Section 4 provides that any person who alleges that his rights provided under articles 13 to 29 of the Constitution are being contravened may apply to the High Court for redress.

<sup>257</sup> Section 8(2) provides that the High Court shall dismiss any application if it believes that there is available remedy under any other law.

<sup>258</sup> Section 8(1) provides that the High Court shall have the original jurisdiction to hear applications made under section 4 of **BRADEA**.

<sup>259</sup> *Ibid* s 14 provides that any person aggrieved by the decision of the High Court may appeal to Court of Appeal (Supreme Court).

<sup>260</sup> *TCC V FCC and Attorney General*, Civil Appeal No 113 of 2012, (the appeal originating from the judgment and decree of the High Court in Misc. civil cause No 31 of 2010).

Having clarified the above issues, the arguments still focus on limitation of right to appeal from the FCT to the ordinary courts of the law. The UNCTAD report focused on the right to appeal to the judge: it refers appeals to the FCT because it is presided over by a judge of the High Court and other members. The report touched very little on right to appeal to ordinary courts; this dissertation intends to shed light on this.

Sections 61(8) and 84 (1) of the FCA are vulnerable to unconstitutionality since they conflict with the constitutional right of appeal and undermine the doctrine of separation of powers, because they vest the administrative bodies with the powers to determine competition disputes and exclude courts' powers of rehearing.

What is the position of Tanzanian law if the Constitution provides right of appeal but another Act of the parliament does not provide for right of appeal? It may be argued that even though the FCA does not have specific provisions of appeal to the High Court, appeal is still available by invoking provisions of article 13(6)(a) of the Constitution that provides for the right to appeal. The Supreme Court of Tanzania put it clearly in the case of *Athumani Kungubaya & 482 Others v Presidential Parastatal Sector Reform Commission & Tanzania Telecommunications*.<sup>261</sup> In this case the labour dispute was entertained by the Industrial Court, (which is merely a labour tribunal), and the appellant appealed to the High Court. The respondent raised a preliminary objection on want of jurisdiction on the grounds that the Industrial Court Act 1967 had no specific provisions for appeal to the High Court. The court sustained the objection and dismissed the appeal.

The appellant appealed to the Supreme Court on the grounds that the appeal could still be brought by virtue of articles 13 (6) (a) of the Constitution. The Supreme Court was of the view that right to appeal is created by specific provisions of statutes which provide for the procedures to appeal. **Industrial Court Act** 1967 by then did not provide for appeal to the High Court.<sup>262</sup> Sections 61(8) and 84 (1) of the FCA should therefore be amended to provide for specific provision for appeals to courts.

The Constitution provides that the final determination of any individual's right is vested in the judiciary<sup>263</sup> which include powers to rehear the dispute. The appellate power of the Court of Appeal is therefore derived from the Constitution. Thus the question of final

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<sup>261</sup> Civil Appeal No 56 of 2007 (Unreported).

<sup>262</sup> Ibid at 7. See also the summary of the case in *TCC's case* at 34-7.

<sup>263</sup> Articles 4 and 107A ( note 30).

appellate jurisdiction has to be judged according to the appellate structures created by the Constitution<sup>264</sup> and not any other law inferior to it. The Constitution does not give the legislature the power to vest a tribunal with a final appellate jurisdiction.<sup>265</sup>

Finality clauses are very common in private arbitration proceedings where parties voluntarily waive their constitutional rights to appeal.<sup>266</sup> So long as competition proceedings do not fall under private arbitration cases, parties should be made aware of their constitutional right of appeal to a final appellate body. In *Porter's* case, despite the fact that the Commission was found to be partial, there was a statutory remedy.<sup>267</sup> The aggrieved party had the right to appeal to the Division Court to have the case heard afresh.

It may also be argued that although the FCA has no specific provision for appeal to the ordinary courts, one may still seek a remedy through judicial review or revision, where the court may exercise its inherent power over quasi-judicial bodies.<sup>268</sup> The question is whether this remedy suffices, or accords an aggrieved party in competition proceedings a sufficient recourse.

### 3.6 The court and the remedies of judicial review and revision

In *Kingsley v United Kingdom*,<sup>269</sup> it was argued that the adjudicative body cannot be said to have breached the rule of natural justice if its decision is 'subject to subsequent control by a judicial body...' The issue is not a mere control, but rather the extent and effect of judicial control over the administrative decision. The decision of the FCT lacks statutory judicial control (no appeal to court). The judicial review may be available but does not provide for a complete rehearing of the dispute in question.

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<sup>264</sup> *National Union of Metalworkers of SA and others v Fry's Metal (Pty) Ltd* 2005 SA 433 (SCA) at paras 13 and 27.

<sup>265</sup> *American Natural Soda Ash Corporation and another v Competition Commission and others* 2005 (6) SA 158 (SCA) at para 11.5.

<sup>266</sup> *Total Support Management (Pty) Ltd and another v Diversified Health Systems (SA) (Pty) Ltd and another* 2002 (4) SA 661 (SCA) at 674D-E.

<sup>267</sup> S 20 (3) of Local Government Finance Act 1982 (England).

<sup>268</sup> The High Court has supervisory powers, see *Electric Supply Co. Ltd. v. Interebest Investment Co. Ltd.*, available at

[http://www.judiciary.go.tz:8081/help/topic/com.optima.infocenter.judgements/High%20Court/Civil%20Case/TA\\_NESCOVsInterbestInvestmentCoLTD68%20OF%202000%20%28RULING%29.pdf](http://www.judiciary.go.tz:8081/help/topic/com.optima.infocenter.judgements/High%20Court/Civil%20Case/TA_NESCOVsInterbestInvestmentCoLTD68%20OF%202000%20%28RULING%29.pdf), [accessed on 6 October 2012].

<sup>269</sup> Application No 35605/97, 7 November 2000, at para 51, quoted in *Porter's* case note 233 at para 93.

Judicial review is a remedy in public law. It is a supervisory jurisdiction vested in the High Court over the inferior courts, tribunal or other public bodies.<sup>270</sup> It is '[a] court's authority to examine an executive or legislative act and to invalidate that act if it is contrary to constitutional principles'.<sup>271</sup> In summary it is a supervisory jurisdiction of the Higher Courts over the inferior bodies. According to Lord Diplock, judicial review comes in place where there is '**illegality; irrationality; and procedural impropriety**'<sup>272</sup> in the finding of a decision-maker.

The reviewing authority is concerned with the manner in which a decision is made, and the question as to whether such a decision was a right decision is the duty of the **appellate body. It does not 'review the merits of a decision'**. Dinah Rose was of the view that:

The exercise of judicial review should be contrasted with an appeal "on the merits"...In an appeal on the merits, the tribunal is entitled to substitute its own views for those of the decision-maker. In contrast, judicial review proceedings are solely concerned with the lawfulness of a decision and not its correctness.<sup>273</sup>

The effect of judicial review is that at the end of the day, when the court finds the decision invalid, it refers the matter to the same court /tribunal for retrial. It may be before the same panel or a different one. In the case of FCT if this happened, it is referred to the same panel since there is only one chairman and there is no substitute chairman. It is therefore concluded that the remedy of judicial review is not a satisfactory remedy for a party that is aggrieved by a decision of the FCT; the appropriate remedy is to give a party access to a court for appeal. It is well settled that, 'judicial review may not be taken as a panacea for the violation of rights of defence, nor (sic) as a systematic fix for the problems of competition law proceedings'.<sup>274</sup>

By virtue of section 4 (2) of the **Appellate Jurisdiction Act** No 25 of 2002 the Supreme Court of Tanzania has revision power. This power however is limited to specific grounds and does not give the court power to rehear the dispute. Section 79 of **the Civil**

<sup>270</sup> Gordon RQC *Judicial Review: Law and Procedure*, 2ed (1996), at 1.

<sup>271</sup> [Define:Judicial review](http://legal-dictionary.thefreedictionary.com/judicial+review) available at <http://legal-dictionary.thefreedictionary.com/judicial+review>, [accessed on 3 December 2012].

<sup>272</sup> *Council of Civil Service Unions v. Minister for Civil Service* [1985] A. C. 374 at 410D.

<sup>273</sup> Dinah Rose QC and Tom Richards, *Appeal and Review in the Competition Appeal Tribunal and High Court* at 10 and 11 quoting the authoritative words in *Merger Action Group v Secretary of State for Business, Enterprise and Regulatory Reform* [2008]CAT 36, available at <http://www.blackstonechambers.com/document.rm?id=379>, [accessed on 28 November 2012].

<sup>274</sup> *Ibid* at 137. See also *Solvay v Commission*, [1995] ECR II-1833, para 108.

**Procedure Code Act** No 49 of 1966 provides that revisionary power is available where there is no appeal and it is limited to the fact that the decision-maker:

- i) has exercised a jurisdiction not vested to it by the law;**
- ii) has failed to exercise a jurisdiction so vested, or**
- iii) has acted in the exercise of its jurisdiction illegally or with material irregularity.**

None of the above grounds replace grounds for appeal stated above. In *Mabibo Beer Wines and Spirits Ltd v Lukas Mallya and another*,<sup>275</sup> the court of appeal made revision of the finding of the FCT and quashed the proceedings and order for retrial. This remedy does not give the court power to re-hear the matter, it is not intended to replace the right to appeal, and the remedy available from it is quite different from a remedy available on appeal.

### **3.7 Conclusion**

The institutions established by the FCA are relevant for promoting and monitoring competition law and policy in Tanzania. However, the manner in which they operate casts doubt on the administration of justice as required by due process. The act of the legislature of combining powers in one body, and further denying the constitutional right to appeal to ordinary court of law, undermines the harmonious relationship between competition law and fundamental rights to a fair trial.

The High Court of Tanzania did not solve the problem; the matter however is pending before the Supreme Court. The following chapter looks at how South African Competition law has dealt with the situation by separating the investigation function from the adjudication one and allowing access to court for appeals.

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<sup>275</sup> Civil application No 160 of 2008 at 15-6.

## Chapter Four

### A COMPARATIVE ANALYSIS OF THE SEPARATION OF INVESTIGATIVE AND ADJUDICATIVE FUNCTIONS AND COMPETITION AUTHORITIES WITH RESPECT TO SOUTH AFRICA AND TANZANIA

#### 4.1 Introduction

This chapter discusses convergence and divergence issues with regards to procedural matters arising out of enforcement bodies established by legislations of both Tanzania and SA. It particularly analyses the investigative powers of the Commissions (in both states), adjudicative powers of the Commission (in Tanzania) and Tribunal (in SA). It also reviews the appellate powers of Tribunals (in both states), Competition Appeal Court, Supreme Court and Constitutional Court as provided under SA competition law.

The two countries were selected because both are common law countries, and have laws that govern competition law which establish rather similar regulatory bodies. However, as opposed to Tanzania, in South Africa, the investigation and adjudication functions are vested in different bodies, unlike the Tanzanian approach. Furthermore, in SA Competition disputes are appealable to an ordinary court of law, an approach not available in Tanzania. The functions of Commissions and Tribunals in both states have slight differences.

In general, institutions discussed in this chapter are the Competition Commission (CC), Competition Tribunal (CT), and CAC in SA<sup>276</sup> and FCC and FCT in Tanzania. However, in Tanzania there is a High Court-Commercial Division that deals with commercial issues but which is not part of the competition enforcement bodies.

The High Court of Tanzania-Commercial Division is a suitable division of the High Court for appeal of competition disputes. It was established by High Court Registry Rule in 1999<sup>277</sup> following the changes of the economic policy in the 1990s. It has similar powers to that of the general High Court, the only difference being that the commercial division deals specifically with disputes which are commercial in nature, while the general High Court has unlimited jurisdiction.

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<sup>276</sup> These are institutions created to enforce the SA Act, see *Seven-Eleven Corporation SA (Pty) Ltd and another v Simelane NO and others* 2002 (1) SA 118 (T) at 118E-F. See also Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development' (2005-6) 26 *Northwestern Journal of International Law & Business* 667 at 668-9.

<sup>277</sup> Rule 5A, 1999 (GN 141 of 1999).

In 2005, the High Court Registry Rules were amended and the High Court-Commercial Division was vested with appellate jurisdiction on disputes of a commercial nature.<sup>278</sup> The competition disputes are disputes that are commercial in nature, thus this division of the High Court might be made an appellate court on competition disputes.

It may be argued that since the FCT is a specialised body that deals with commercial disputes, its decision should not go to ordinary court for appeal, as the appeal judges are not specialised in commercial dispute. This argument is defeated by the fact that the recommended ordinary court for appeal is the High Court-Commercial division which is an expert court in commercial dispute.

Here follows a comparison between the two countries on the procedure of investigation (summons and searching), hearing and appeals. The purpose is to analyse the experience of each country in these specific areas and where possible to adapt some lessons from SA experience, because its competition law and policy is more advanced than Tanzanian law.

#### 4.2 Investigation (Commissions)

Both states have Commissions responsible for investigation of prohibited practices.<sup>279</sup> They investigate the alleged anti-competitive practices and initiate a complaint. They may also receive a complaint from a private person and investigate it.<sup>280</sup>

The right to be heard at the investigation stage is an issue which is not dealt with in both laws. In *Chairman, Board on Tariffs and Trade, and others v Brenco inc and others*<sup>281</sup> the Supreme Court of SA stated that the investigation authority's aim in visiting premises and even conducting interrogation is to establish the accuracy of the information and to satisfy itself whether there is *prima facie* evidence on the alleged breach of the Act. The authority does not have to inform the investigated person of every step of the investigation and offer a right to be heard at that stage. In short, the Supreme Court specified that to allow the *audi alteram partem* principle in investigation, 'not only unduly hampers the exercise of investigative powers of the investigation authority, but would seek to transform investigative

<sup>278</sup> Rule 5A (2) of GN.427/2005.

<sup>279</sup> Sutherland (note 42) at 11-6 -16. See also s 21(1) (c), (d) and (e) of SA Act and s 68 and 71 of the FCA and Part IV (a) of FCCPR.

<sup>280</sup> S 49B of SA Act and s 69 of the FCA.

<sup>281</sup> 2001 (4) SA 511 (SCA) at paras 47 and 51.

process into an adjudicative process...’ Therefore, both legislations correctly do not offer the right to be heard at the investigation stage.

#### 4.2.1 Power to summons

In the course of investigations, both Commissions have the powers to summons the person being investigated to provide relevant information. In South Africa, a person being investigated is not obliged to give self-incriminating answers.<sup>282</sup> In Tanzania a party may give self-incriminating answers which are, however, not admissible in any other proceedings other than those under the FCA.<sup>283</sup>

A summons should not be too general, and investigated practices should fall within the powers of investigation as provided by relevant law.<sup>284</sup> A summons that shows that the investigation authority is conducting an investigation of any kind of prohibited practice recognised by the law is void.<sup>285</sup>

However, the evidence acquired through an invalid summons may be credible evidence or not all depending on the assessment of fairness by the decision-maker. Davis JP, quoting the judgement in *Ferreira v Levin*<sup>286</sup> was of the view that, ‘fairness is an issue which has to be decided upon the facts of each case, and the trial judge is the person best placed to take that decision. At times fairness might require that evidence unconstitutionally obtained be excluded’.

#### 4.2.2 Power to enter and search

In South Africa, a search may be conducted with or without warrant. In the case of a search warrant, it is issued either by a judge of the High Court,<sup>287</sup> or a magistrate. The search warrant authorises the inspector who may be accompanied by a police officer to enter and search the premises.<sup>288</sup> It is valid if is conducted in good time and is in conformity with search

<sup>282</sup> S 49A (2) of SA Act. However, in a hearing before the CT, a person may be ordered by the CT to answer any question even though is self-incriminating. See s 56 (3) of the same Act.

<sup>283</sup> S 71 (4) of the FCA.

<sup>284</sup> *Woodlands Dairy (Pty) Ltd and Milk wood Dairy (Pty) Ltd v Competition Commission*, 103/CR/Dec06 at para 39.

<sup>285</sup> *Ibid* paras 43, 49 and 130.

<sup>286</sup> *Ferreira v Levin NO and others; Vryenhoek and others v Powell NO and others* 1996 (1) SA 984 (CC) at 1078A-B, see also *Woodland* case at para 57.

<sup>287</sup> A search warrant may be challenged under s 46 (3) (b) of SA Act. See also *Pretoria Portland Cement Company Ltd & another v The Competition Commission & other* (TPD 19803/2000) cited in by Wilson J, ‘Institutions, Procedures and Remedies’ in Brassey (note 47) at 297.

<sup>288</sup> Ss 46(1) and 48 (3) of SA Act.

procedures.<sup>289</sup> The expiry date of the search warrant and time of its execution have to be considered by the searching officer.<sup>290</sup> He/she should also consider whether has the powers to search without warrant.

A search warrant is issued when there are reasonable grounds to believe that a prohibited practice has taken place, is taking place or is likely to take place on or in those premises,<sup>291</sup> or when any relevant information is in possession or control of the owner or controller of those premises. The investigation authority has the duty to establish sufficient grounds that justify the infringement of the right to privacy of a searched person.<sup>292</sup>

Conversely, in Tanzania, a search warrant is issued by the chairman of the FCT on application by the Chairman or DG of the FCC.<sup>293</sup> The Chairman of the FCT is a judge of the High Court and therefore a court official, and a search warrant is an authorisation issued by a court official and may be challenged.<sup>294</sup> The search warrant authorises a police officer to conduct a search and not a member of the FCC. However, the chairman may authorise a member of the FCC to accompany a police officer.<sup>295</sup> Furthermore, the search is to be witnessed by a justice of the peace or two adult persons from that locality unless there are justifiable reasons to dispense with their presence during the search.<sup>296</sup> The FCC is faced with a challenge of having its own specialised personnel to conduct a search. The police officers who are authorised to conduct a search are experts in crime and not competition issues. Their assistance is only relevant in the situation where there is resistance from the searched person.

The FCA gives power to search but does not give details on the rights of the searched person. In SA, the law plainly provides for the rights of the searched person, such as the right to get assistance from a lawyer, to get receipts for the seized items and the right to privileged

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<sup>289</sup> Ibid s 49 and 46 (6).

<sup>290</sup> Ibid s 46 (3) and (4).

<sup>291</sup> Ibid s 46 (1) (a) and (b).

<sup>292</sup> Constitutional Court of South Africa in *Investigating Directorate: Serious Economic Offences and others v Hyundai Motor Distributors (Pty) Ltd and others: in re Hyundai Motor Distributors (Pty) Ltd and others v Smit no and others* 2001 (1) SA 545 (CC) at paras 54-5.

<sup>293</sup> S 71(5) of the FCA.

<sup>294</sup> In *Ferrel (Pty) Ltd and others v Commissioner for Inland Revenue and others* 1998 (4) SA 275 at 285G-H 'judges are required to perform administrative functions; it is difficult to see why they should not be subject to review.' On the contrary in *United Reflective Converters (Pty) Ltd v Levine* 1988 (4) SA 460 (W) at 462J-463A the court was of the opinion that no judge may review the order of another judge. In Tanzania, the issue of search warrant may be challenged under rule 14 (2) (b) FCCPR.

<sup>295</sup> S 71 (5) of the FCA.

<sup>296</sup> Rule 16 (3) of FCCPR.

information.<sup>297</sup> It is unclear whether or not some of these rights may be exercised in Tanzania since the law is silent.

Like a summons, a search warrant should be specific in nature, outlining the nature of the breach and the scope of the search. Investigation authorities ought to act in accordance with the law that vested them with such powers. In *Powell NO and others v Van der merwe NO and others*,<sup>298</sup> the court stated that;

A warrant had to convey intelligibly to both searcher and searched the ambit of the search it authorised. If a warrant was too general, or if its terms went beyond those the authorising statute permitted, the Courts would refuse to recognise it as valid, and it would be set aside. It was no cure for an overbroad warrant to say that the subject of the search knew or ought to have known what was being looked for: The warrant must itself specify its object, and had to do so intelligibly and narrowly within the bounds of the empowering statute.

In South Africa, where evidence on prohibited practices is established, the CC refers a complaint to the CT for hearing.<sup>299</sup> Conversely, in Tanzania the FCC hears the complaint by itself,<sup>300</sup> and thus is a judge in its own cause. Its decision is appealable to the FCT.

The Commissions may issue a notice of non-referral<sup>301</sup> to the complainant if it deems fit. In South Africa the CC issues such a notice within one year after submission of the complaint or as extended and it may be issued expressly or impliedly.<sup>302</sup> The CC ceases the investigation and it no longer has jurisdiction to refer that complaint when it issues a notice of non-referral.<sup>303</sup> In Tanzania there is no time limit within which a notice may be issued.<sup>304</sup> After receiving a notice of non-referral the complainants in both jurisdictions may refer a dispute to the FCC (Tanzania)<sup>305</sup> or CT (SA)<sup>306</sup> for determination.

In South Africa, the respondent may admit the charge of anti-competitive practices; a dispute may not be referred to the CT for a hearing of evidence but rather for confirmation of consented order.<sup>307</sup> In the *Competition Commission v British Airways PLC*,<sup>308</sup> the CC's

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<sup>297</sup> S 49 of SA Act.

<sup>298</sup> 2005 (5) SA 62 (SCA) at 59D-E.

<sup>299</sup> S 50 of SA Act.

<sup>300</sup> Rule 18 of FCCPR.

<sup>301</sup> See *Sasol* (note 127) at 39.

<sup>302</sup> S 50 (2) (4) and (5) of SA Act.

<sup>303</sup> *Hayley Ann Cassim & others v Virgin Active South Africa (Pty) Ltd*, 57/IR/Oct01 at 4.

<sup>304</sup> Rule 10 (5) of FCCPR.

<sup>305</sup> Rule 10 (6) of FCCPR, there is also no time limit for submission of a dispute to the FCC.

<sup>306</sup> *Sasol's case* and s 51 (1) of SA Act, it should be referred within twenty business days after the issuing of notice of non-referral, rule 14 (1) (b) of CTR.

<sup>307</sup> Ss 49D and 58 (1) (b) of SA Act.

investigations proved a contravention of the Act and the respondent admitted the findings of the CC. The CC entered into a settlement agreement with the respondent which was subject to confirmation by the CT. There is no consent order in Tanzania; instead where the investigated party by conducts admits the allegation the FCC makes a decision.<sup>309</sup>

#### 4.3 Hearing (Tribunal/Commission)

In adjudication, both FCC and CT have the power to conduct a pre-hearing conference for determination of areas of controversy. However, in Tanzania, the length of time to conduct a hearing conference is not set, and this may cause delays because there is no statutory time limit that binds the FCC. In South Africa it is clear that the conference is to be conducted within twenty business days after completion of filing of documents.<sup>310</sup>

In South Africa, the CT may have more than one panel of three members but the chairperson must ensure that at least one member of each panel has knowledge in legal training and experience.<sup>311</sup> In Tanzania, due to limited number of members of the FCC, only one panel is constituted which is headed by a chairman.<sup>312</sup> Hearing of proceedings is governed by the respective rules of the enforcement bodies (FCCPR and CTR). As opposed to Tanzania where the rules are silent, in South Africa in case of a lacuna in the rules the CT may apply the High Court's rules.<sup>313</sup>

In competition disputes, both States adopted the inquisitorial approach,<sup>314</sup> where the decision-maker is duty bound to play an active role to investigate facts concerning the dispute. He/she tries to detect the material truth by questioning witnesses<sup>315</sup> and the 'ordinary rule of evidence does not apply.'<sup>316</sup>

Parties may appear through their legal representatives.<sup>317</sup> In South Africa, the decision of the CT is subject to the provisions of the Promotion of Administrative Justice Act.<sup>318</sup>

<sup>308</sup> 42/CR/Jul10. See also s 49D of SA Act. The order however, has to be confirmed within a prescribed statutory time, see *GlaxoSmithKline South Africa (Pty) Ltd v Lewis* No 62/CAC/Apr 06 at 12.

<sup>309</sup> Rule 18(8) of FCCPR.

<sup>310</sup> See Rule 21 of both FCCPR and CTR.

<sup>311</sup> S 31 (1) (a) of SA Act.

<sup>312</sup> S 73 (5) of the FCA.

<sup>313</sup> Rule 55 (1) of CTR.

<sup>314</sup> Sutherland (note 42) at 11-27. See also rule 17 of FCCPR.

<sup>315</sup> *Mlifi v Klingenberg* 1999 (2) SA 674 (LCC) at para 107.

<sup>316</sup> *Patensie Sitrus Beherend Beperk v Competition Commission* 16/CAC/Apr02 at 34.

<sup>317</sup> Rule 22 of FCCPR and 44 of CTR.

<sup>318</sup> See s 3 (1) of Act No 2 of 2000 and *Patensie* 'case at 36.

Conversely, in Tanzania the decision of the FCC is executed directly by the court like any other decision of the court without the examination of procedural fairness.<sup>319</sup>

#### 4.4 Appeal (FCT/CAC)

In Tanzania the FCT is an appellate body and hears all appeals from decision of the FCC.<sup>320</sup> The FCC form part of the respondent body on appeal. In *Tanzania Breweries Ltd v Serengeti Breweries Ltd and Fair Competition Commission*,<sup>321</sup> the FCC objected that it acted as adjudicator therefore it was wrongly joined as a respondent on appeal.<sup>322</sup>

Rule 7(3) of FCTR does not specify who is a respondent in an appeal before the FCT. However, the words ‘Commission or relevant regulatory body’ appearing in sub rule 5 which is read together with rule 75 (4) to (6) of FCCPR which *inter alia* provides that, ‘the Director of Compliance shall represent the Commission in any appeal...’ connote that the FCC is a respondent on appeal before the FCT since is a necessary and statutory party.<sup>323</sup> The justification of this approach is that the FCC has to defend its decision even though it may have granted a non-referral notice to the complainant.

Complications are brought about by the setting out of the FCA that vested the FCC with both investigation/complainant and adjudication powers. It is unfair to join the FCC as a respondent on appeal when it has withdraw itself as a complainant. In SA, when the CC issues a notice of non-referral, it withdraws itself from the entire proceedings and may not form part of the respondents on appeal.<sup>324</sup> However, it is fair and common to join the FCC as a respondent on appeal when it has acted as an adjudicator. In SA, the CT which is purely an adjudicative body forms part of the respondents when the matter goes for appeal before the CAC.<sup>325</sup>

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<sup>319</sup> Rule 40 of FCCPR. The decision of the administrative body has never received equal status with that of the court, see *Glaxo Wellcome (Pty) v Terblanche* No 03/CAC/Oct00 at 13.

<sup>320</sup> S 61 of the FCA and Rule 75 of FCCPR.

<sup>321</sup> See note 21.

<sup>322</sup> *Ibid* at 15.

<sup>323</sup> *Ibid* at 15-6 and 38.

<sup>324</sup> *Sasol* case (note 127).

<sup>325</sup> *Sasol Chemical Industries Ltd v The Competition Commission and others*, 52/CAC/Jun05, *Glaxo Wellcome* (note 319).

In SA although the CT hears appeals from the decision of the CC,<sup>326</sup> on specific matters which the CC has power to determine, it is the court (body) of first instance hence appeals of its decisions which are final and not consent orders<sup>327</sup> go to the CAC.<sup>328</sup> The CAC is ‘a court with similar status to that of the High Court’ and composed of at least three judges of the High Court who serve on a full time basis.<sup>329</sup>

In Tanzania an appeal suspends or stays execution of the FCC’s order automatically.<sup>330</sup> In SA, however, the approach is that the suspension of execution may only be granted on application.<sup>331</sup>

The CAC has original jurisdiction on actions of the CC or CT and any Constitutional matter arising out of the Act.<sup>332</sup> Conversely, the FCT has no similar jurisdiction on the above issues. Furthermore, the CAC has review jurisdiction which is available where the right to appeal is exhausted.<sup>333</sup> The decision of the FCT, however, is final which is contrary to the due process of the law.<sup>334</sup> The Constitution of Tanzania is supreme and any law which is inconsistent is subject to be declared null by a competent court.<sup>335</sup>

The decision of the CAC is appealable to the Supreme Court of Appeal (SCA) or to the Constitutional Court for a Constitutional matter. Such an appeal is subject to the leave of the CAC, SCA or Constitutional Court.<sup>336</sup> This is different from the decision of the FCT which is final. (See chapter three above).

#### 4.5 Conclusion

From the above analysis of the powers granted to the respective enforcement bodies and their procedures, it is obvious that the South African Competition regime is better off as it has

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<sup>326</sup> The CT reviews or hears appeal from the CC’s decision when referred to it pursuant the regulations, schedules and rules which together make an Act, see *TWK Agriculture Ltd v Competition Commission and others* 67/CAC/Jan07 at para 23.

<sup>327</sup> S 37 of SA Act.

<sup>328</sup> Ss 61 and 62 of SA Act. In *Glaxo* (note 319) the CAC reviewed the decision of the CT and remitted to it for reconsideration. CAC is a special court with appellate and review jurisdiction, see Sutherland (note 42) at 11-32 and ss 36 and 37 of SA Act.

<sup>329</sup> S 36 of SA Act.

<sup>330</sup> S 91 of the FCA.

<sup>331</sup> S 38 (2A) (d) of SA Act.

<sup>332</sup> See *Sappi Fine Paper (Pty) v Competition Commission* 23/CAC/Sep02 at para 4. See also s 62(2) of SA Act.

<sup>333</sup> *JD Group Ltd v Profurn Ltd* 28/CAC/may at 16, also s 7(2) (a) of PAJA.

<sup>334</sup> Due process in short means ‘fairness’; it is the fair treatment of an individual being a natural or legal person. See ‘DUE PROCES’ available at <http://www.lectlaw.com/def/d080.htm>, [accessed on 20 December 2012].

<sup>335</sup> Article 30(5) of the Constitution.

<sup>336</sup> S 62 (4) and 63 of SA Act.

managed to separate investigation and prosecution functions from those of adjudication, as opposed to Tanzania. This dissertation does not suggest that the competition regime of South Africa is free from drawbacks; rather it is better as compared to Tanzanian competition law and its procedures.

The South African enforcement bodies are also divided into two forks. There are the quasi judicial bodies (CC and CT) and normal court structure. Appeals from the CT go to the CAC which is a division of the High Court, and from there the normal hierarchy of appeal that is to the SCA and Constitutional Court for specific matters may take place. These resources and facilities are available in Tanzania but the FCA deprives these courts of their constitutional powers. The following Chapter provides for the general conclusion and recommendations.

## Chapter Five

### GENERAL CONCLUSION AND RECOMMENDATIONS

#### 5.1 General conclusions

This dissertation seeks to answer the question whether the provisions of the FCA that concentrate investigation and adjudication powers in the FCC and further vest the FCT with a final appellate jurisdiction with regards to competition disputes, breach the right to a fair trial and limits access to justice and are therefore unconstitutional. It determines whether there is a need for amendment.

Generally, the two regulatory authorities, namely FCC and FCT established by the FCA in Tanzania to regulate competition law are commendable since they are specialised bodies in competition matters, notwithstanding some problematic areas identified by the research that calls for amendment.

The provisions of the FCA that concentrate investigation, prosecution and adjudication powers in the FCC and further make final the decisions of the FCT are open to criticism as evidenced in the *TCC and TBL* cases. The arguments levelled by the appellant in the TCC case are relevant since they advocate the general principles of fair hearing as enshrined by the Constitution.

The conduct of the chairman and DG of the FCC in participating in investigation of alleged anti-competitive practice and thereafter sitting for adjudication undermines the principle of natural justice. The practical challenges shown in the TCC case require a substantial review to remove the contradiction between the Constitution and the FCA. The FCC is facing difficulties in enforcing competition law because of the nature of its functions conferred on it by the FCA, which is open to challenge on its partiality. This therefore warrants amendment as a means to eliminate the challenges noted.

The decision of the Supreme Court of Jamaica in the JSE case which is persuasive in Tanzania revealed that the provisions of competition law that concentrate the powers on one body is not only unconstitutional, but also breaches the general principles of natural justice and is therefore void. The Constitution of Jamaica has similar wording to that of Tanzania which emphasizes the impartiality of the decision-maker.

The Jamaican and South African competition laws also show that courts are best positioned to hold final appellate jurisdiction in the dispensation of justice. The Supreme Court of South Africa in *Nation Union of Metalworkers of SA and others*<sup>337</sup> rightly argued that ‘the Supreme Court is the highest court of appeal vested with the powers to decide any appeal,’ thus the Constitution does not give the legislature powers to vest a specialist tribunal with final appellate jurisdiction. Furthermore, the Constitution of Tanzania provides for a general right to appeal but the FCA ought to provide for specific provision for appeal to the ordinary courts and the procedure thereof.<sup>338</sup> With that premise, the provision of the FCA that gives the FCT the final appellate jurisdiction needs to be reviewed.

A comparative study on South Africa has thus revealed that it is possible to separate investigation from adjudication powers and build a bridge between specialised tribunals and the ordinary courts. The study does not intend to transplant the South African competition regime into the Tanzanian system, but the legislature is bound to adopt the general principles of natural justice since Tanzania domesticated international conventions that advocate for a fair trial and the right to access justice. The dissertation, therefore, concludes that the structure of the institutional framework and its roles has to be overhauled to open a road to justice from the quasi-judicial bodies to the judicial bodies, as recommended below.

## 5.2 Recommendations

The following recommendations are suggested based on the findings of the dissertation. It is my opinion that if they are utilized, the problem areas in the provisions of the FCA may be reformed by the legislature in order to enhance fair hearing.

### 5.2.1 Recommendation for FCC

This dissertation noted that ss 69 and 71 of the FCA, and rules 12 and 18 of FCCPR give powers to the FCC to be an investigator, complainant and adjudicator of the alleged anti-competitive practices. Section 71 and rule 10 of the FCCPR further indicate that the Chairman and DG participate in investigation and adjudication of the same matter. In order to remove bias, this dissertation recommends that the FCC retains the powers of investigation, while the FCT handles adjudication.

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<sup>337</sup> 2005 SA 433 (SCA), at 439E.

<sup>338</sup> See note 261-2.

The UNCTAD report also recommends (page 83) that there is a need to have a visible separation of the triple roles of the DG (investigation, prosecution and adjudication) for the DG cannot be an investigator and adjudicator in the same case. This dissertation recommends that not only the role of the DG needs to be re-defined but also the role of the chairman. The way forward is to re-structure the FCC by appointing the current Director of Compliance as the chairman of the FCC. The two departments of investigation and enforcement should continue to be under the Director of Compliance as they have necessary experience to investigate anti-competitive practices. So, the dissertation not only recommends the separation of roles of DG and chairman of the FCC but also the manner of separating these roles. Both the chairman and DG might be posted to a new post as recommended below.

### **5.2.2 Recommendation for FCT**

In Tanzania the remedy of appeal is only available where there is a statute that provided for it, this is according to the Supreme Court of Tanzania in Athumani's case cited above. In terms of ss 61 and 84 of the FCA there is no appeal from the FCT to the ordinary courts. The UNCTAD report at page 84 recommended an appeal mechanism against the decision of the FCT. This dissertation seconds this recommendation and adds the manner and details of getting that mechanism and generally re-structuring the competition authorities. It recommends as follows:

- i) The substantial amendment to be made to make the FCT the court of first instance like the CT in SA because it is a neutral body which does not play a part in investigation. The FCC therefore, after investigation, will refer the dispute to it for adjudication.
- ii) Further, the current chairman of the FCC to be appointed as a chairman of the FCT, and the DG as a deputy chairman. Both of them have sufficient experience to adjudicate competition disputes and their neutrality will not affect their independence. (A transition period is further recommended.)
- iii) Sections 61 and 84 of the FCA to be amended to allow appeals from the FCT to the ordinary courts as recommended herein below.

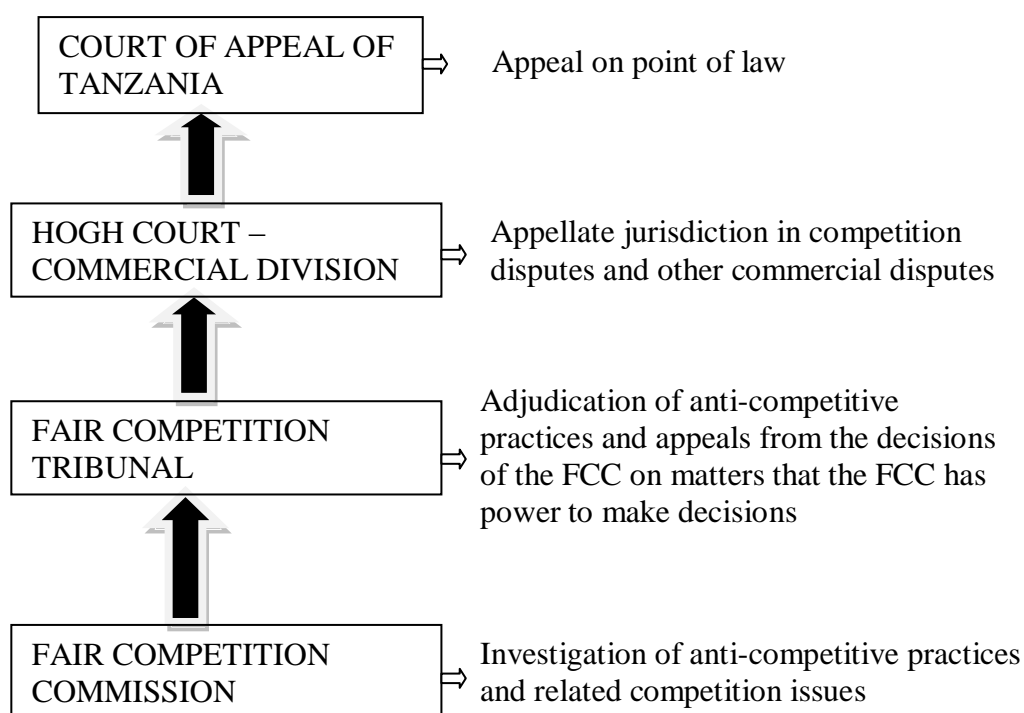
### **5.2.3 Recommendation for linking administrative bodies with judicial bodies**

The dissertation further recommends that an amendment of ss 61 and 84 go hand in hand with amendment of rules of the FCTR governing appeals from the FCT and the High Court

Registry Rules 1999 so as to allow appeal from the FCT to the High Court of Tanzania Commercial Division, as in SA where the appeal from the CT goes to CAC.

The High Court-Commercial Division is well experienced in commercial dispute and well-staffed (it has several judges and registrar) and therefore is a division suitable to hear appeals from the FCT because competition disputes fall under the category of commercial disputes. It is further suggested that the current chairman of the FCT who is a judge of the High Court and who serves on a part-time basis in the FCT be posted to this division of the High Court to strengthen the panel. Furthermore, the appeal from this court on points of law may be referred to Court of Appeal of Tanzania. Below is a proposed structure of competition authorities.

**FIGURE 3 THE PROPOSED INSTITUTIONAL STRUCTURE THAT LINKS WITH THE COURT SYSTEM**



The re-structuring of the FCC and the FCT and linking them with the High Court-Commercial Division will help to draw a link between the quasi-judicial bodies and judicial

bodies in determining competition disputes. Many jurisdictions like the United Kingdom,<sup>339</sup> South Africa,<sup>340</sup> Canada<sup>341</sup> and Jamaica<sup>342</sup> have opened this link and function well.

#### 5.2.4 Other recommendations

The dissertation also noted that there is no provision for consent orders in the FCA which may assist the authority to make consented judgement. A consent order helps the competition authority to speed up its proceedings in the situation where the respondent admits the allegations. I recommend the reform of the FCA to incorporate this provision. In SA where the respondent agrees with the investigation of the CC, the consent order is made and the CT has no duty to hear evidence on that matter but rather confirms the consented agreement.<sup>343</sup>

Sections 8, 9, 10 and 11 of the FCA introduced ‘intention’ or ‘negligence’ as statutory requirement for establishment of anti-competitive practices. Its implication is that a person may be found to have contravened the law only if its intention or negligence is established. The FCC has search and seizure powers. In the exercise of these powers, it has a duty to establish that a person has breached the FCA, but also it has to establish that such a person has breached the FCA intentionally or negligently. The main problem lies in ‘per se prohibition’ provided under s 9 of the FCA which prohibits cartel cases irrespective of their effect on competition.

Also, intention is not a prerequisite condition in abuse of dominance in other jurisdiction like SA.<sup>344</sup> The FCC admits that the intention or negligence is a hindrance in enforcement of anti-competitive practices and in Serengeti’s case<sup>345</sup> it breached this statutory requirement when it held the TBL liable for abuse of dominance without establishing its intention. This dissertation recommends that intention/negligence be removed as a prerequisite condition to establish anti-competitive practices. It is enough to establish that a

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<sup>339</sup> Appeal from Competition Commission goes to Competition Commission Appeal Tribunal and from there to Court of Appeal. See para 4 of 7 schedules and para 3 of 8 schedules and section 49 of UK Competition Act 1998.

<sup>340</sup> Appeal from the CT goes to CAC and from there to Supreme Court or Constitutional Court. See a discussion in Chapter Four.

<sup>341</sup> The decision of Competition Tribunal is appealable to Federal Court, from there to Federal Court of Appeal. See ss 30.24, 74.18 and 74.19 of Canadian Competition Act, R.S.C., 1985, c. C-34 (as amended in 2010).

<sup>342</sup> The decision of the Fair Trading Commission is appealable to the court, s 49 and 50 of the FCA No 9 of 1993.

<sup>343</sup> Ss 49D and 58 (1) (b) of the SA Act.

<sup>344</sup> Ibid s 8.

<sup>345</sup> See note 103.

conduct of a person breaches the FCA whether such conduct was done intentionally or unintentionally.

In terms of s 60 (3) of the FCA where a firm is found liable the director, manager or an officer of that firm may also be liable. This provision however does not provide the manner of punishing these staff members. In Serengeti's case, the FCC found TBL liable and punished it but the issues of liability of its director and manager was not addressed. S 73A of SA Act as amended by Act No 1 of 2009 introduces the criminal sanction to any person in the management of a firm who causes it to engage in prohibited practices, particularly per se prohibition. The UNCTAD report on page 83 recommended criminal sanctions against individuals employees of the firm who engaged in cartel activities. In this regard, the dissertation recommends amendment of s 60 (3) of the FCA to impose criminal sanction for directors and managers of the firm who cause a firm to engage in a prohibited practice in terms of s 9 of the FCA. For other petty violation a lenient punishment should be imposed such as a pecuniary fine so as not discourage investors who are vital to the economy's growth.

Lastly, regular training programmes for the FCC, the FCT and judges of the High Court-Commercial Division are recommended to familiarise them with the manner of handling competition issues.

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