Do Supra-National Competition Authorities Resolve the Challenges of Cross-Border Merger Regulation in Developing and Emerging Economies?

The Case of the Common Market for Eastern and Southern Africa.

Willard Mwemba

Thesis Presented for the Degree of Doctor of Philosophy in the Department of Commercial Law

Faculty of Law

UNIVERSITY OF CAPE TOWN

October 2020

DEDICATION

I thank Jehovah for giving me the wisdom to complete my research. It was not smooth undertaking research and being fully employed simultaneously. I am appreciative that in that period, Jehovah afforded me good health and resilience to handle research and office pressure. To him alone be the glory and honour. I dedicate this work to my children. May it be an inspiration to them to do even better. I also dedicate this work to my mother who encouraged me from a tender age and kept reminding me how great I was and would be. Those words inspired me to work hard and I am a PhD scholar today because of the positive seed sown by my mother several years ago.

Finally, but not the least in importance, I dedicate this achievement to my late aunt and uncle, Mrs. Dorothy Mweshi Milandu and Mr. Ruddle N'gandu Milandu repectively. They greatly contributed to shaping my life and I am convinced they are smiling from above in ecstasy for this achievement to which they played a part. May their Souls Rest in Eternal Peace.

ACKNOWLEDGEMENTS

I profoundly thank my Supervisor, Justice Dennis Davis who meticulously guided this work and led it to the refined piece it is today. I also extend my profound thankfulness to my Co-supervisor, Justice David Unterhalter whose microscopic eye indisputably shaped this dissertation. Further, I am intensely grateful to Professor Richard Whish, Nick Franczyk, Thula Kaira, Maria Coppola, Professor Eleanor Fox and others, too numerous to mention, who rendered support to this work.

Disclaimer

This dissertation was prepared by the author as a requirement of the University of Cape Town for the award of the Philosopher's Degree. The views expressed herein are personal and do not on all fours reflect the views of the COMESA Competition Commission. The views do not bind the COMESA Competition Commission in any manner whatsoever. This dissertation is the intellectual property of the author and the same or any part thereof shall not be used in any manner whatsoever, without citing or the express permission of the author or the University of Cape Town.

Abstract

The case for cross-border merger control and the need for a supranational merger control system has been debated upon and several scholars have written extensively on the subject. What is immediately evident from literature is that it is not easy to regulate such mergers because of the challenges encountered. The challenges are pronounced in developing and emerging economies (DEEs) as arguably they have less experience in the enforcement of merger laws and lack adequate resources for such an exercise. Other challenges identified from publicly available information are the lack of extra territorial application of national competition laws to conduct taking place outside their borders, limited skills and expertise and poor cooperation and coordination arrangements among the jurisdictions involved. Further cross-border merger regulation presents challenges to merging parties too due to their exposure to different national competition laws.

The dissertation focuses on whether supra-national competition authorities address the challenges of cross-border merger regulation in DEEs. However, there are a number of supra-national competition authorities established by DEEs that generalising the study would be an unrealistic and impractical task to undertake. In view of this, the Common Market for Eastern and Southern Africa (COMESA) was selected as a sample because it is the regional economic community that has recently established a fully operational supra-national competition authority to regulate *inter alia*, cross border mergers. Further, all COMESA Member States are DEEs which provides to a greater degree a relatively uniform sample.

Table of Statutes

Competition Act of Kenya of 2011

Competition Act of Mauritius of 2007

Competition Act of South Africa of 1998

Competition Act No.8 of 2007 of Swaziland

Competition Act of Zimbabwe of 1996

Competition and Consumer Protection Act of Zambia No. 24 of 2010

Competition and Consumer Protection Regulations of Zambia; 2011

Competition and Fair Trade Act of 1998 of Malawi

Competition and Fair Trading Act of Zambia CAP 417 of the Laws of Zambia of 1994

COMESA Competition Regulations, 2004

Economic Commission for West African States Treaty

European Union Merger Regulations 139/2004

Revised Treaty of Chaguaramus establishing the Caribbean Community including the CARICOM Single Market and Economy.

Rome Statute of the International Criminal Court

Southern African Development Community Protocol on Trade

Supplementary Act A/SA. 2/06/08 on the Establishment, Function of the Regional Competition Authority for the Economic Commission for West African States

The Constitution of Djibouti

The Constitution of Egypt

The Constitution of Ethiopia

The Constitution of Kenya

The Constitution of Malawi

The Constitution of Mauritius

The Constitution of Uganda

The Constitution of Zambia

The Constitution of Zimbabwe

The Hart-Scott-Rodino Act

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters

The Law of Protection of Competition and Prohibition of Monopolistic Practices (Egypt)

The Ratification of International Agreements Act, 2016; Zambia

Trade Competition and Consumer Protection Proclamation of Ethiopia

Treaty Establishing the Common Market for Eastern and Southern Africa

Treaty Establishing the Preferential Trade Area for Eastern and Southern Africa

Treaty of the Functioning of the European Union

Treaty of Rome 1957.

Treaty of the Southern African Development Community

Treaty of the West African Monetary and Economic Union (WAEMU) (1994)

Vienna Convention on the Law of Treaties

Operational Definitions on Terms

1. **Abuse of Dominance:** Conduct by dominant firm(s) to the commercial detriment of competitors and/or consumers.
2. **Anti-competitive Practices:** Conduct by undertakings which prevent, restrict or distort competition.
3. **Cartel**: Group of firms operating in the same or related markets which eliminate competition among themselves to the detriment of consumers.
4. **BRICS**: BRICS is an acronym of a group of fast emerging economies namely Brazil, Russia, India, China and South Africa.
5. **Community Dimension**: Competition effects on two or more Member States in the European Union
6. **Competition:** Process of rivalry among firms to win consumers' patronage.
7. **Competition Law:** A law that promotes or seeks to maintain competition by regulating anti-competitive conduct.
8. **Domestication:** Process of transforming international legal instruments into municipal legal instruments.
9. **Economies of Scale:** Stage in the development of a firm when its unit cost of production falls with increasing output.
10. **Extra Territorial Jurisdiction:** legal ability of a government or government agency to exercise authority beyond its borders.
11. **Foreign Direct Investment:** Investment made by foreign firms in a domestic economy of another country.
12. **Local Nexus:** Likelihood of conduct affecting competition in the reviewing jurisdiction
13. **Market:** Products that are substitutable and traded in space where conditions of competition are sufficiently homogenous.
14. **Market Power:** Ability of a firm(s) to prevent effective competition by engaging in anti-competitive conduct without regard to the reaction of competitors and consumers.
15. **Merger:** Acquisition of direct or indirect control by one or more undertakings over the whole or part of the business of one or more other undertakings.
16. **Multi National Corporation:** Corporations with a global dimension.
17. **Person:** For purposes of this dissertation, person means a natural or legal person.
18. **Regional Dimension:** Competition effects on two or more COMESA Member States
19. **Regressive Tax:** A tax imposed in such a manner that the tax rate decreases as the amount subject to taxation increases.

20. **Supra National Competition Authority:** Competition authorities that regulate competition conduct affecting more than one country
21. **Undertaking:** Includes any person, public or private, involved in the production of, or trade in, goods, or the provision of services.

Declaration

I, Willard Mwemba hereby declares that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other University. I authorise the University to reproduce for the purpose of research either the whole or any portion of the contents in any manner whatsoever. The thesis is to be used for non-commercial research purposes only.

Signature

Table of Contents

		Page
	Chapter One	
1.0	**Introduction**	**1**
1.1	Common Market for Eastern and Southern Africa	9
1.2	Tension between Supranational Law and Domestic Law	10
1.3	Meaning of *'Merger'* in Competition Law	13
1.4	Objectives of the Study	16
1.4.1	General Objectives	16
1.4.2	Specific Objectives	16
1.5	Hypothesis	17
1.6	Significance of the Study	18
1.7	Conclusion	19
	Chapter Two	
2.0	**What are Mergers, Acquisitions and Takeovers**	**20**
2.1	Definition of Mergers, Acquisitions and Takeovers	20
2.1.1	Definition of Mergers, Acquisitions and Takeovers in Competition Law	20
2.2	Definition of Control	24
2.2.1	Interpretation Difficulties of the term Control: A Comparative Excursus	28
2.2.2	Other Means of Control	32
2.3	Joint Ventures	32
2.3.1	Interpretation Difficulties of Joint Ventures that Amount to Mergers	34
2.4	Importance of Defining the term Merger	35
2.5	Conclusion	36

Chapter Three

3.0	**Principal Basis for Mergers**	**37**
3.1	Correlation between the Status of the Global Economy and the Frequency of Mergers	39
3.2	Economic Motivation for Mergers	42
3.2.1	Economies of Scale	43
3.2.2	Enhancing Dominance	43
3.2.3	Exiting the Market	44
3.2.4	National Champions	45
3.2.5	Management Efficiency and Market for Corporate Control	45
3.3	Conclusion	46

Chapter Four

4.0	**Rationale for Merger Control**	**47**
4.1	Merger Assessment is Forward Looking unlike other Anti-trust Cases	49
4.2	Merger Control is not Conducted to Enhance Shareholder Value	50
4.3	The Rationale of Merger Control is to Maintain Competitive Markets	51
4.4	Merger Control Assists Undertakings in Making Sound Commercial Decisions	53
4.5	Non-Competition Reasons for Merger Control	53
4.5.1	Regulating the Concentration of Wealth in the Private Hands	54
4.5.2	Safeguarding Public Interest Concerns	54
4.6	Conclusion	55

Chapter Five

5.0	**Types of Mergers**	**57**
5.1	Horizontal, Vertical and Conglomerate Mergers	57
5.2	Competition Concerns	58
5.3	Conclusion	64

Chapter Six

6.0	**Substantive Assessment of Mergers**	**65**
6.1	What is Merger Assessment	65
6.2	Relevant Market Definition	66
6.2.1	Relevant Product Market	67
6.2.2	Relevant Geographic Market	69
6.3	Market Shares and Market Concentration	71
6.3.1	Concentration Ratio	71
6.3.2	Herfindahl Hirschman Index	73
6.4	Barriers to Entry	75
6.5	Import Competition	77
6.6	Countervailing or Buyer Power	79
6.7	Removal of a Vigorous Competitor/Maverick	80
6.8	Consideration of Unilateral Effects	81
6.9	Consideration of Coordinated Effects	84
6.10	Consideration of Efficiencies	86
6.11	Public Interest Considerations	89
6.12	Failing Firm Defence	95
6.13	The Single Market Imperative	95
6.14	Conclusion	97

Chapter Seven

7.0	**Cross-Border Mergers**	**99**
7.1	What are Cross-Border Mergers	99
7.1.1	How do the Regulations define Cross-Border Mergers	100
7.1.2	Not all Mergers that have Operations in More than One Member State are Captured by the Regulations	101

7.1.3 What is the Law and Practice at the European Commission 104

7.2 Conclusion 107

Chapter Eight

8.0 The Regulation of Cross-Border Mergers 108

8.1 Overview of Cross-Border Merger Regulation and the Challenges Posed 108

8.2 Convergence in International Merger Control 109

8.3 Conclusion 115

Chapter Nine

9.0 Genesis of Regional Competition Law in COMESA 116

9.1 Composition of COMESA 116

9.2 Aims and Objectives of COMESA 116

9.3 Institutional Set up of COMESA 117

9.4 Realisation of the Aims and Objectives of COMESA 118

9.5 Promulgation of the Regulations 119

9.6 Scope of Application 123

9.7 Conclusion 125

Chapter Ten

10.0 The Application of the Treaty and the Regulations in Member States 127

10.1 The Binding Nature of the Treaty and its Subsidiary Instruments 127

10.1.1 Case Law Principles Conferring the Regulations with their Binding Effect 130

10.1.1.1 Dualism 133

10.1.1.2 Monism 143

10.2 Conclusion 145

Chapter Eleven

11.0 Challenges for the Merging Parties and Whether the Regulations have Resolved these Challenges 146

11.1 Costs of Multi-Jurisdictional Review Processes 146

11.1.1 Information Requirements for Different Jurisdictions 147

11.1.2 Voluntary v. Mandatory Regimes 150

11.1.3 Suspensory v. Non-Suspensory Regimes 156

11.1.4 Inconsistent Decisions 163

11.1.5 High Notification Fees 167

11.1.5.1 Principles for Setting Merger Notification Fees 181

11.1.5.2 International Best Practices on Determination of Merger Notification Fees 182

11.1.5.3 Merger Notification Fees Based on the Size of the Economy 183

11.1.5.4 Cost Based Merger Notification Fee 185

11.1.6 Waiting Periods 194

11.1.7 Triggering Event for Notification 199

11.1.8 Local Nexus 203

11.1.9 Non-Domestication of the Treaty and the Regulations 209

11.1.10 Less Jurisprudence on Merger Assessment in the Common Market 210

11.1.11 Policy Imperatives beyond the Conventional Consideration of Mergers under the Substantial Lessening of Competition Test 212

11.2 Conclusion 216

Chapter Twelve

12.0 Challenges for National Competition Authorities and whether the Regulations have Resolved these Challenges 217

12.1 Lack of Extra-Territorial Application of National Competition Laws 217

12.2 Lack of Skills and Expertise 224

12.3 Lack of Financial Resources 225

12.4 Poor Coordination and Cooperation Arrangements among the Competition Authorities Involved 226

12.5 Lack of Autonomy of National Competition Authorities 227

12.6 Challenges of Multiple Membership to Regional Economic Communities 229

12.7 Conclusion 230

Chapter Thirteen

13.0 What does Experience in COMESA Teach us? Comparison with Other Regional Economic Blocs 231

13.1 Allocation of Jurisdiction 232

13.2 Merger Filing Fees ` 233

13.3 Funding and Staff Complement 234

13.4 Advocacy 234

13.5 Effective National Competition Authorities 235

13.6 Corporate Governance/Sound and Legitimate Institutional Framework 236

13.7 Domestication 238

13.8 Conclusion 238

Chapter Fourteen

14.0 Conclusion and Recommendations 239

14.1 Conclusion 239

14.2 Recommendations 242

14.2.1 Amend Article 3(2) of the Regulations 242

14.2.2 Amend Article 23(1) to Refer to *'Control'* and not *'Controlling Interest'* 242

14.2.3 Amend Article 23(3)(a) of the Regulations 243

14.2.4 Introduce an Express Provision to make the COMESA Merger Control Regime Suspensory 244

14.2.5 Do Away with Deadline after Triggering Event 245

14.2.6 Address the Confusion of Public Interest under Article 26 of the Regulations 246

14.2.7 Consider Revising the Merger Filing Fees Downwards 246

14.2.8 Consider Revising the Merger Notification Thresholds Upwards 247

14.2.9 Increase the Allocation of Resources to the Commission 248

14.2.10 Clothe the Regulations with Express Exclusive Jurisdiction on Mergers that Satisfy the Regional Dimension Requirement 249

14.2.11 Domesticate the Treaty and the Regulations 249

Bibliography

Chapter One

1.0 Introduction

1. There has been an evident increase in the number of cross-border mergers in the past decades and research reveals that the regulation of these mergers presents challenges.[1] Globalisation and the consequent emergence of Multi-national Corporations (MNCs)[2] is largely responsible for the proliferation of cross-border mergers and the subsequent challenges of regulating them. Globalisation and the associated expansion of markets has generated an increase in international mergers as firms seek to strengthen their positions for a strategic advantage.[3] The widening of markets has also increased the potential for the effects of transnational mergers to extend beyond the physical location of the firms involved thereby arousing the interests of multiple regulators.[4]

2. As a world-wide phenomenon, the globalisation has generated markets that know no national boundaries, giving rise to a wide variety of cross-border mergers and acquisitions. Such cross-border transactions increase the competitive pressure on companies and the pressure on domestic competition regimes requiring them to deal with the threat to competitiveness of national markets that cannot be ignored. The increasing impact of globalisation on business activity has paralleled the spread of

[1] This view is supported by a number of authorities. See for example A Paper by Ivana Rakic, "Cross-border Mergers and Competition Law; An Overview of Comparative Practice", under *"Settings,"* https://www.researchgate.net/publication/325106294_CROSS-BORDER_MERGERS_AND_COMPETITION_LAW_AN_OVERVIEW_OF_COMPARATIVE_PRACTICE (accessed on 12 October 2018) See also the European Central Bank Paper by Nicolas Coeurdacier, Roberto A. De Santis and Antonin Aviat, "Cross-border Mergers and Acquisitions; Financial and Institutional Forces", under *"Settings,"* https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1018.pdf?3d8589d6ef40959b47328b2f7cae4dcc (accessed on 11 October 2018). Further see the Organisation for Economic and Development Round Table Policy Roundtables of 2011 on Cross-Border Merger Control, "Challenges for Developing and Emerging Economies", under *"Settings,"* http://www.oecd.org/daf/competition/mergers/50114086.pdf (accessed on 11 October 2018). See also Daiva Burksaitiene, "Cross-border Mergers and Acquisitions: An Analysis of Activity". A Paper Presented at the 6th International Scientific Conference, 13-14 May 2010, Vilnius, Lithuania, under "Settings", http://dspace.vgtu.lt/bitstream/1/557/1/030-037_Burksaitiene.pdf (accessed on 22 October, 2019).

[2] These are companies with operations in several countries. MNCs' conduct occasioned in one country may not be anti-competitive but the effects of such conduct may be anti-competitive in another part of the world.

[3] Julie Clarke, The International Regulation of Transnational Mergers: Dissertation submitted in Total Fulfilment of the Requirements of the Degree of Doctor of Philosophy, 2010.

[4] Ibid

competition law regimes; so, most countries in which multinational companies do business have competition law and a competition authority.[5]

3. Before delving into the focus of the dissertation, it is important to contextualise the meaning of globalisation. There is no single accepted definition of globalisation. It may mean different things to different people and usually its definition depends on the discipline and subject of discussion. Therefore, as observed by Stephen Davies and Bruce Lyons, it is described as an elusive and contested concept.[6] However, it is important to adopt definitions from some authorities for purposes of this dissertation. The beginning authority is the Financial Times which defines globalisation as "a process by which national and regional economies, societies and cultures have become integrated through the global network of trade, communication, immigration and transportation".[7] As a result of this integration and global networks, markets have transcended national boundaries. Consistent with the foregoing, globalisation has also been defined as "the expansion of markets beyond purely national boundaries".[8]

4. Julie Clarke has observed that "this process of expansion, facilitated by the growing reduction of public trading barriers has important implications for competition policy. Mergers are now more likely to have economic and social consequences that extend beyond national borders. This has implications not only for the way in which individual mergers should be assessed, but also for national merger policy. The globalisation of markets should therefore be an important consideration in determining an appropriate policy framework for transnational merger review".[9]

5. Lastly, for purposes of this dissertation, the Parliamentary Assembly of the Council of Europe has defined globalisation "as the ever closer economic integration of all the countries of the world resulting from liberalisation and consequent increase in both volume and the variety of international trade in goods and services, the falling cost of

---

[5] Supra-note 3
[6] See Stephen Davies and Bruce Lyons, "Mergers and Merger Remedies in the EU; Assessing the Consequences for Competition" (2007) and William Blumenthal, "Reconciling the Debate over Merger Remedies; A Discussant's Proposed Decision Rule", (2001) 69 George Washington Law Review 978.
[7] http://lexicon.ft.com/term?term=globalisation (accessed on 10 June 2018)
[8] Hans Lofgren and Prakash Sarangi: Introduction; Dynamics and Dilemmas of Globalisation in Hans Lofgren and Prakash Sarangi (eds), The Politics and Culture of Globalisation: India and Australia (2009).
[9] Supra-note 3

transport, the growing intensity of the international penetration of capital, the immense growth in the global labour force, and the accelerated worldwide diffusion of technology, particularly communications".[10] What is evident in all the definitions above is that markets have expanded beyond national boundaries as a result of globalisation. Consequently, new tools of regulating markets have to be adopted as geographically constrained tools appear to have become obsolete.

6. International trade is one evident consequence of globalisation. As international trade has increased, the number of competition law enforcement activities related to cross-border mergers and cartels has risen substantially (up by about 250%–466% since the 1990s).[11] This trend has been catalysed by global value chains (GVCs).

7. GVCs are closely related to the concept of globalisation. As observed by some scholars, they are a function of a multiplicity of producers located in several jurisdictions providing components for and/or assemble and manufacture end-use products. GVCs have developed rapidly since the 1990s, largely as a result of reduced transportation and communication costs and increasing mobility and concentration of financial resources that makes it easier and more efficient to shift production across borders. GVCs offer potential benefits to both producers and consumers. However, not all is flowery about GVCs. They carry a potential for harm that is often beyond the reach of current legal remedies.[12] They can also shield producers who artificially raise prices from legal responsibility. It has been observed that producers anywhere in a GVC can reduce competition and raise prices for all subsequent purchasers. Such conduct may have effects in many jurisdictions. Moreover, the harmful effects from the conduct are likely to be found outside the jurisdiction in which they are located. Consequently, where producers can be confident that they are shielded from competition law enforcement, they are more likely to engage in such conduct.[13]

---

[10] https://www.coe.int/en/web/compass/globalisation (accessed on 12 October 2018)

[11] John Davies, Sean F. Ennis and Antonio Capobianco, "Implications of Globalisation for Competition Policy: The Need for International Cooperation in Merger and Cartel Enforcement", under *"Settings,"* http://e15initiative.org/publications/implications-of-globalisation-for-competition-policy-the-need-for-international-cooperation-in-merger-and-cartel-enforcement/ (accessed on 26 June 2018).

[12] David J. Gerber, "Competition Law and Global Supply Chains", June 2016. under *"Settings,"* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2807154 (accessed on 12 October 2018)

[13] Ibid

8. GVCs harm represents a transnational problem, but little has been done on the transnational level to respond to the harms. As a result, the tools available for dealing with them remain primarily national. However, national legal tools remain either limited in scope or applied in ways that render them largely ineffective.[14] In view of the foregoing, it appears that national competition authorities (NCAs) cannot cope with these developments as they are unable to effectively address anti-competitive effects emanating therefrom. Several reasons account for this among them the lack of extra-territorial reach of national competition laws, the difficulties in obtaining evidence abroad and the admissibility of such evidence in national courts, present troubling challenges for the regulation of cross-border mergers.

9. The application of a State's anti-trust laws[15] to conduct occasioned outside that State raises key issues, *inter alia,*[16]

   a) it must be determined whether the law of a particular country (or subdivision thereof) extends to conduct taking place outside its borders.

   b) it must be confirmed whether any domestic court or tribunal has jurisdiction to hear the matter.

   c) if the law does have extra-territorial reach and a domestic court or tribunal has jurisdiction to hear the case, practical problems of enforcement will arise, both with respect to obtaining of evidence and the implementation of any penalties.

10. To address anti-competitive mergers that have cross-border effects, countries engage in a number of mechanisms *inter alia* memoranda of understanding, comity and enshrining provisions in their laws allowing for extra-territorial reach[17]. However,

[14] Supra-note 12
[15] The terms Anti-trust laws and competition laws have been used synonymously in this dissertation.
[16] Calvin S. Goldman, Q.C. and J.D. Bodrug, Competition Law of Canada", Volume 2, Juris Publication, 2005, p. 13.
[17] For example, Article 4 of the Ethiopian Trade Competition and Consumer Protection Proclamation provides that it has jurisdiction on all conduct regardless of where they are consummated as long as they have effect in the Federal Democratic Republic of Ethiopia. Similarly, section 3 of the Competition and Consumer Protection

these mechanisms appear not to be effective as mostly they depend on the cooperation of one jurisdiction to implement the laws of another or assist in the investigation of an undertaking that has violated the laws of another country.[18] The different rules of admissible evidence in the national courts may compound this problem. The view that such mechanisms depend on the will of countries involved to cooperate was implicitly recognised in 1895 when the US. Supreme Court remarked as follows in the **Hilton v. Guyot** case:

> ***"Comity", in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws".[19]***

11. Indisputably, the US Supreme Court in the above case was not blind to the fact that a country can elect to ignore *'comity'* without significant legal consequences because it is simply recognition and not absolute legal responsibility, *albeit* a serious matter in international intercourse. The foregoing is supported by the views of Bruno Zanettin when he explicated that "the use of positive comity is discretionary and left to the goodwill of anti-trust authorities".[20]

12. A cursory review of cross-border merger regulation shows that it is not only national competition authorities that face challenges. Firms engaged in cross-border mergers also face various challenges due to their exposure to more than one national competition law. Some of the challenges include the need to comply with different information requests in different jurisdictions, multiple filing fees, inconsistent

---

Act of Zambia has similar language. However, this extra-territorial reach may be ineffective if it is not recognized by other countries where the law is desired to be applied.

[18] This is not to say such mechanisms do not always work. As stated in the text, they depend on the levels of cooperation between countries and the officials involved. Cooperation worked well between South Africa and Zambia in the case of excessive pricing in Zambia involving Chemical and Engineering (CES) Limited in 2006. This information was sourced by the author from the Competition and Consumer Protection of Zambia on 25 August 2015.

[19] Hilton v. Guyot, 159 U.S. 113, 164 (1895)

[20] Bruno Zanetti, Cooperation between Anti-trust Agencies at the International Level: Hart Publishing. Oxford and Portland, Oregon, 2002

decisions, insufficient nexus, different trigger events and different review periods among others. Multi-jurisdictional review of cross-border mergers therefore, arguably raise the cost of implementing mergers. Further, these costs may have an impact on consumers as companies engaged in mergers may simply pass the cost through higher prices of their goods and services. There is also arguably, a likelihood of procrastinating the merger specific benefits.

13. Consequently, the case for supra-national merger control systems has gained prominence. Supra-national competition authorities are created pursuant to a Treaty or Trade Agreements in an economic grouping of countries. For example, the European Union (the EU), developed a system of competition laws in the 1957 Treaty of Rome to address cross-border competition cases.[21]

14. DEEs have also adopted similar systems in an attempt to effectively handle cross-border competition matters. Some of the objectives of establishing supra-national competition authorities are to strengthen the case for regional integration and to address the challenges posed by the regulation of cross-border competition cases, among them mergers. The organization for Economic Cooperation and Development (OECD) has observed that over the past decades, numerous countries have embarked on a path to regional integration, as it is widely recognised to bring several benefits, including the enhancement and acceleration of economic growth.[22] The OECD has further observed that since regional integration is often combined with trade and investment liberalisation, competition law and policy becomes crucial, as benefits of trade and investment liberalisation should not be compromised by cross-border anti-competitive practices and be appropriated by private undertakings by means of their unlawful conduct.[23]

15. With the foregoing perspective in mind, while there has been a lot of research conducted on the operations of the EC (which regulates competition in developed

[21] Most countries in the European Union are Developed Countries

[22] Organisation for Economic Cooperation and Development; "Regional Competition Agreements: Benefits and Challenges", 12 November, 2018. under *"Settings,"* https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/regional_competition_agreements_united_states.pdf (accessed on 16 May 2019)

[23] Ibid

countries)[24] regarding the solutions it provides in regulating cross-border mergers, little research has been conducted on whether supra-national competition authorities in DEEs addresses challenges of cross-border merger regulation. This is especially true for COMESA, the regional economic community (REC) that recently established a fully functioning supra-national competition authority at the time of writing this dissertation. Dabbah Maher has also observed that DEEs face enormous challenges when seeking to establish merger control regimes and effective competition law regimes more generally.[25] During the past decade in particular, an abundance of academic literature, studies and reports by various international organisations have emerged in which challenges were identified and discussed at length in relation to establishing effective competition law regimes in DEEs. This notwithstanding, there has been insufficient attention given to the challenges in the area of cross-border merger control and how to resolve them.

16. The research explored on this issue and determined whether supra-national competition authorities in DEEs are a solution to such challenges, with a specific focus on COMESA. Some challenges have been outlined in the preceding paragraphs. However, these issues have been explored in greater detail in Chapters ten, eleven and twelve of this dissertation.

17. The problem addressed by the research as elaborated above may therefore be summarised as follows:

    a) National Competition Authorities encounter challenges when regulating Cross-border mergers.

---

[24] The EC has been specifically mentioned here because to the greater understanding of the author it was the only (apart from the COMESA Competition Commission) other fully functioning supra-national competition authority with a mandate on cross-border mergers at the time of writing this dissertation and for purposes of comparison with COMESA, it regulates competition in developed markets. The Eurasian Economic Commission is also a supra-national institution that regulates competition affecting more than two Member States but has no mandate on mergers. The United States of America Federal Trade Commission and the Department of Justice though based on the principal of being apex competition authorities to those in the States, they may not exactly be compared or equated to the EC because the States in the United States of America are not complete sovereign nations as is the case in the European Union.

[25] See Dabbah Maher, "Competition Law and Policy in Developing Countries: A critical assessment of the challenges to establishing an effective competition law regime" (2010) world competition: Law and Economics Review 457.

b) Undertakings involved in cross-border mergers also encounter competition regulatory challenges

c) There are several challenges among them the lack of extra-territorial application of national competition laws and the exposure of firms engaged in cross-border mergers to more than one national competition law.

d) The challenges are more pronounced in DEEs due to lack of resources, inadequate legal framework, and insufficient experience in enforcing merger laws among other things.

e) To address these challenges, countries engage in a number of mechanisms like cooperation, comity and enshrining provisions in their laws providing for extra-territorial reach.

f) Mechanisms in e) above do not however appear effective as they depend on the goodwill of one country to implement the laws of another country.

g) The solution appears to lie in the creation of supra-national competition authorities

h) The creation of supra-national competition authorities is especially feasible in RECs where countries are bound by Treaties, Trade Agreements and other common values and goals.

i) In developed countries the EU has established the EC to address identified challenges and much research has been conducted on the solutions it offers in addressing these challenges.

j) DEEs have also established supra-national competition authorities. However, not much research has been conducted on the solutions such supra-national competition authorities in DEEs provide in addressing challenges of cross-border merger regulation.

k) The research explored this inquiry and determined whether supra-national competition authorities in DEEs are a solution to addressing the identified challenges.

l) COMESA was selected for this purpose because it is the REC that has recently established a fully functional supra-national competition authority among DEEs. Therefore, COMESA brought into sharp focus the challenges facing DEEs.

18. In addressing this wide inquiry, the following issues will, *inter alia*, be considered: the nature of cross-border mergers; the merger laws of COMESA Member States; the approaches to merger regulation in COMESA; rethinking the current cooperation paradigm in cross-border merger regulation; the extra-territorial application of merger laws in the COMESA Member States; the creation of a supra-national competition authority; and whether the supra-national competition authority is a panacea to the challenges of cross-border merger regulation; and questions of primacy between domestic law and regional law.[26]

1.1 The Common Market for Eastern and Southern Africa (COMESA)

19. It is necessary as background to the problem to be investigated, that the nature of COMESA be outlined. COMESA is a REC composed of 21 Member States namely; Republic of Burundi, Union of Comoros, Democratic Republic of Congo, Republic of Djibouti, Arab Republic of Egypt, State of Eritrea, Federal Democratic Republic of Ethiopia, Federal Republic of Somalia, Republic of Kenya, Libya, Republic of Madagascar, Republic of Malawi, Republic of Mauritius, Republic of Rwanda, Republic of Seychelles, Republic of Sudan, Kingdom of Swaziland,[27] Republic of Tunisia, Republic of Uganda, Republic of Zambia and Republic of Zimbabwe.[28]

20. COMESA is created under the Treaty Establishing the Common Market for Eastern and Southern Africa (the Treaty). The main objective of the Treaty is market integration i.e. where the markets of all the Member States would culminate in one. This view is derived from the wording in the preamble of the Treaty which *inter alia*, provides that:

> ***"….. Resolved to strengthen and achieve convergence of their economies through the attainment of full market integration".***

---

[26] In this dissertation, the terms domestic, municipal, local and national law mean the same.

[27] It should be noted that the Kingdom of Swaziland is now called Eswatini. The Treaty should be amended at some point to reflect this change.

[28] The Federal Republic of Somalia and the Republic of Tunisia acceded to the Treaty on 19 July 2018. See the Final Communique of the Twentieth Summit of the Authority of Heads of State and Government. Tunisia deposited the ratification instruments on 21 June 2019.

21. To achieve this objective, there is need to implement certain measures *inter alia*, the elimination or significant reduction of tariff and non-tariff barriers resulting in free movement of labour, goods and services across borders.[29] Further, to ensure that firms operating in the Common Market do not erect barriers to trade through anti-competitive conduct[30], the Treaty has under Article 55 provides for matters of competition. It was realised by the Member States which had enacted competition laws that it was becoming increasingly difficult to deal with anti-competitive practices emanating from outside national borders.

22. To deal with these challenges, it became palpable that a law with supra-national jurisdiction had to be promulgated. Pursuant to Article 55(3) of the Treaty, the COMESA Competition Regulations (the Regulations) were developed to regulate competition in the Common Market. The COMESA Member States realised that market integration could only be achieved in a dynamic competitive economic environment where new trade barriers are not erected in place of those that have been dismantled. Suffice to mention that it has become practice to implant competition provisions in regional trade agreements to ensure that public obstacles to trade which would be eliminated will not be replaced by private obstacles to trade. The latter are a consequence of anti-competitive practices by Member States' firms aiming to foreclose markets to firms from other Member States. This would result in the benefits of trade and investment liberalisation accruing only to private firms to the detriment of the consumers and negate the market integration agenda.

1.2 Tension Between Supra-National Law and Domestic Law

23. To appreciate the objective of the dissertation, it is imperative to understand in broad terms at this stage the relationship between the Regulations[31] and the national competition laws. From the outset, it is important to have an understanding of this matter as the application of regional or international law raises key issues at municipal level and some of these issues may affect the effective regulation of cross-border

[29] See also Article 45 of the Treaty establishing the Common Market for Eastern and Southern Africa.
[30] The barriers to trade created by anti-competitive behavior of firms may in certain instances result in significant harm to markets than the tariff and non-tariff barriers erected by governments.
[31] The Regulations are a regional law that address competition matters in COMESA

mergers. In the case of COMESA the tension may emanate either from conceptualising the Regulations as supra-national law or from the practical application of the Regulations and the Treaty or from both. Anecdotal evidence supports the conclusion that the tension mainly emanates from the practical application of the Regulations and the Treaty.

24. From a conceptual point of view, it does appear that Member States agreed by their volition to establish COMESA through the Treaty and the COMESA Competition Commission (the Commission) through the Regulations. This can be attested from the wording of the Treaty in the preamble where Member States have agreed with the contents therein and none ratified the Treaty subject to reservations. It is true that some Member States have attempted to raise the importance of their national policies like public interest above the objectives of the Regulations, therefore challenging the conceptualising of the Regulations as supra-national law but this may on a balance of probability lie more on the practical application than the conceptualising of these laws. Some Member States have questioned the practical application of the Regulations and the Treaty in their jurisdictions as these are not treated as binding law therein.

25. This tension is not far-fetched as recently the adjudicative bench of the Trade Competition and Consumer Protection Authority (the Bench) rendered a judgement on 27 June 2019 in which it expressly challenged the application of the Regulations and the Treaty in Ethiopia. The brief background to the matter is that in 2015, the Commission approved a merger involving the Coca-Cola Beverages Company (CCBA) and the Coca-Cola Authorised Bottlers collectively referred to as SABCO. Among the bottlers under SABCO were East Africa Bottling Share Company (EABSC); an entity operating in Ethiopia. Further, CCBA through its parent company held a controlling interest in Ambo Co., an entity operating in Ethiopia as well. Therefore by virtue of the Commission’s merger approval of 2015, EABSC and Ambo Co. became a single economic unit whose commercial interactions could not be faulted in competition law from the settled principle that an agreement between undertakings falling within the same economic unit cannot amount to an anti-competitive practice.

26. The Bench however, disregarded the jurisdiction of the Regulations and concluded that the parties had engaged in an unlawful merger in Ethiopia. The bench remarked thus:[32]

> ***"In this regard, the Bench was able to acknowledge that Ethiopia signed the COMESA Treaty in 1994 and that it was ratified by the House of the People's Representatives and issued into law under proclamation no. 90/1984 [E.C]. However, as the agreement deals with COMESA in general and it does not have a clear or specific provision that is relevant for reviewing and passing a decision on the issue of the merger at hand, it would be appropriate to look at other legislations that are relevant to the issue. Accordingly, the Bench has considered whether the Regulations are applicable to the matter. In this regard, in order for the Regulations to be applicable in Ethiopia, Article 9(4) of the Federal Democratic Republic of Ethiopia Constitution provides that it should be submitted to and ratified by the appropriate legislative body. However, as these Regulations have not been submitted to and ratified by the Ethiopian House of People's Representatives, the Bench has found that it is not part of the country's law and as such it is not applicable to the matter at hand".***

27. The determination by the Bench is troublesome as it threatens the existence of cross-border merger control by a supra-national institution in the Common Market. The sad part is that the Bench recognised the fact that the Treaty is part of law in Ethiopia but chose to interpret that the Regulations which are a creature of the Treaty and not recognised in Ethiopia. The foregoing is also consistent with some early unfounded avowals that insinuated that the application of the Regulations in the Common Market usurped the jurisdiction of national competition laws. However, the correct position at law is that the Regulations were not promulgated to usurp the jurisdiction of national competition laws. The two pieces of law apply to distinct types of conduct. The Regulations can only be invoked where there is cross-border impact, i.e. the merger

[32] Judgement of 27 June 2019 of the Adjudicative Bench of the Trade Competition and Consumer protection Authority. File No. 000072

should be able to affect two or more Member States. National competition laws will generally apply where the merger does not have effects extending beyond the borders of a particular country.

28. However, such assertions are not unusual and unique to COMESA. They are raised even in advanced jurisdictions like the European Union where the encroachment of sovereignty is at the surface of fierce policy debate. The BREXIT is a good example of this were the United Kingdom (the UK) voted to exit from the European Union on account that they wanted to take back control of their national issues like immigration, the supremacy of the UK law and Judiciary, among other matters. The tension between community law[33] and domestic law is not new. For example the attempt to enforce the judgments of the Southern African Development Community (SADC) Tribunal, a supra-national institution, contributed to its demise.[34]

29. Further, the world is witnessing a scenario where the assertion of national interest is enjoying considerable revival and the utility of supra-national institutions is being questioned. This has particular relevance for merger control where some countries wish to elevate national policies in the consideration of mergers for example public interest considerations. The latest amendments[35] to the South African Competition Act are one example of this. The dissertation shall also determine whether the rise of national interests can be accommodated within the structure of supra-national merger control or whether it is a threat to the durability of these arrangements.

1.3 Meaning of 'Merger' in Competition Law

30. The competition law element of central focus in this dissertation is merger regulation. Therefore, it is imperative to have a good comprehension of what amounts to a

[33] While appreciating that international law and community law are sometimes defined and described differently, for purposes of this dissertation, the two are taken to mean the same. Further, in this dissertation community and regional law mean the same thing. This is for purposes of convenience as the focus of the dissertation is not on such distinction and this categorization is not fatal to the dissertation.

[34] R. Phooko, "The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A call for supra-nationality and the Uniform Application of SADC Community Law".

[35] For a quick synopsis of the amendments, see the Competition Alert by Lara Granville of Cliffe Dekker Hofmeyr. under *"Settings,"*https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Competition/Competition-alert-13-february-competition-amendment-bill-signed-into-law.html (accessed on 18 May 2019)

merger from the outset of the dissertation. A detailed account of transactions that amount to mergers and why undertakings engage in mergers have been discussed in chapters two and three of this dissertation.

31. The term merger has several definitions depending on the discipline. For example, in company law, the term may have a definition different from its definition in competition law. Even in competition law, the term may have several definitions. Sometimes the definitions in different competition legislation may reflect the policy considerations of a particular jurisdiction. This notwithstanding, in competition law, it is generally accepted that a merger occurs when two or more undertakings that were independent pre-merger cease to be independent post-merger.
32. At this stage of the research, we shall look at the definition of a merger in the Regulations. This is because it would be unrealistic to look at the definitions of the term ***'merger'*** in the competition laws of all COMESA Member States in the introduction. Therefore, we may liberally assume that the definition in the Regulations reflects consensus among Member States. The Regulations under Article 23(1) define a merger as:

> **"For the purpose of this Article, merger means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:**
>
> **a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;**
> **b) the amalgamation or combination with a competitor, supplier, customer or other person; or**
> **c) any means other than as specified in sub-paragraph (a) or (b)".**

33. The common feature of these transactions is that two (or more) undertakings[36] that were autonomous pre-merger cease to be autonomous post-merger. This view is aptly supported by Jones and Sufrin who posited that "a number of different transactions and agreements concluded by undertakings could result in the unification of independent undertakings' decision-making process".[37]

34. The question that follows then is why do undertakings merge? Undertakings merge for several reasons *inter alia*, because they want to reduce costs through efficiencies and synergies and because they are in financial anguish such that without the merger they would cease to exist.[38] The above intentions for merging are viewed favourably by competition authorities the world over as in most cases they result in enhanced consumer welfare and are in the interest of the public. Other reasons that may motivate undertakings to engage in mergers include, globalisation, increasing competition in both domestic and international markets, increased dynamism of the economies, and the firms' internal pressure from management.[39]

35. The foregoing notwithstanding, undertakings may also merge because of ulterior motives. Some undertakings may want to eliminate effective competition from another undertaking. Post-merger, the merged entity may no longer be mindful of the reactions of its competitors and customers should it engage in anti-competitive behaviour. Such conduct is pernicious to the process of competition and erodes consumer welfare. This leads us to the reason why mergers are regulated.

36. While it is generally accepted and empirical evidence reveals that most mergers are not harmful to competition, there is a small number of mergers that may result in a substantial prevention or lessening of competition (SPLC) and harm consumer welfare and the optimal operation of markets. Therefore, to avoid such outcomes, mergers need to be regulated. The OECD stated in 1999 that "some mergers would seriously harm competition by significantly increasing the probability of exercising

[36] For purposes of this dissertation, the term *'undertaking'* is used interchangeably with the terms *'company'*, *'enterprise'* and *'firm'*.
[37] Alison Jones and Brenda Sufrin, EC Competition Law, 2nd ed. (Oxford: Oxford University Press, 2004) 847.
[38] Such mergers are generally approved by competition authorities on the premise of *'failing firm defence'*.
[39] http://www.projectguru.in/publications/why-firms-engage-in-merger-acquisition-ma/ (accessed on 29 September 2014)

market power". The COMESA Merger Assessment Guidelines[40] (the Guidelines) have also recognized this supposition under paragraph 7.3 where they have stated that *"in some circumstances, mergers can substantially weaken the incentives of undertakings to engage in competition. Such mergers may result in higher prices, lower output, reduced variety or reduced innovation and will therefore likely lead to an adverse effect on consumers".* These are mergers that competition authorities seek to identify and prohibit.

1.4 Objectives of the Study

1.4.1 General Objective

37. The general objective of the research was to determine if the creation of supra-national competition authorities addresses the challenges of cross-border merger regulation in DEEs with a focus on COMESA

1.4.2 Specific Objectives

38. The specific objectives of the research were:

a) To review the merger laws of selected COMESA Member States;

b) To review selected cross-border mergers in COMESA that were implemented before the establishment of the Commission;

c) To review selected cross-border mergers in COMESA that have been implemented after the establishment of the Commission;

d) To explore and understand the policy imperatives that go beyond the conventional consideration of mergers under the economic test of a substantial prevention or lessening of competition;

e) To review the merger control provisions in the Treaty and the Regulations;

[40] COMESA Merger Assessment Guidelines published on 31 October 2014.

f) To analyse the legal systems of selected COMESA Member States; and

g) To review the legal status of the Treaty and the Regulations in COMESA Member States.

1.5 Hypothesis

39. In order to realise the objectives of the study, the following hypotheses were tested:

HO: The creation of the COMESA Competition Commission has not resolved the challenges of cross-border merger regulation in the Common Market

H1: The creation of the COMESA Competition Commission has resolved the challenges of cross-border mergers regulation in the Common Market

40. The analysis of the hypotheses was informed by the consideration of the following questions:

(a) Do the Regulations conform to international best practice?
(b) Do the legal systems of the COMESA Member States allow the application of the Regulations in their territories?
(c) Do the Regulations have exclusive jurisdiction on the review of cross-border mergers in the Common Market?
(d) Is the jurisdictional test/nexus of the Regulations sufficient for Member States to cede jurisdiction to the Commission on certain mergers?
(e) How should jurisdictional disputes between national and supra-national authorities be resolved?
(f) Is the institutional framework of the Commission adequate/sound enough to effectively regulate cross-border mergers i.e. how is the institution built to secure legitimacy (independence, efficiency, impartiality, etc.)?
(g) How about resources, both financial and human; are they adequate and do they affect the enforcement of the Regulations in the Common Market?

(h) What does the experience of COMESA thus far teach us?

1.6 Significance of the Research

41. As observed earlier in the dissertation globalisation has increased, the number of anti-competitive activities related to cross-border mergers. There is evidence that national competition authorities (NCAs) cannot cope with this development as they are unable to effectively address anti-competitive practices emanating therefrom. Credible research reveals that at the same time, the number of jurisdictions with competition law enforcement increased by more than 600% between 1990 and 2015, from fewer than 20 to about 125.[41] In Africa, the number of jurisdictions with competition regimes has rapidly expanded from 13 in 2000 to more than 30 in 2017.[42] The same is true for COMESA which had less than 5 national competition authorities before the year 2000 and in 2019, it had over 10 national competition authorities.[43] The spread of competition law is a positive development, but cooperation has become more complicated as a result. Between 1990 and 2011, an index of complexity of cooperation on cross-border cases increased between 23 and 53 times.[44]

42. John Davis, Antonio Capobianco and Sean F. Ennis have observed that as "cross-border business activity increases in the future, and young competition authorities become more active, effective cooperation will become even more complicated. Ultimately, complexity of cooperation can lead to undesirable outcomes, such as inconsistent decisions and unchallenged illegal conduct"[45]. The problem of failure of cooperation is more serious in regional economic communities where countries have agreed to abolish borders in order for goods and services to move freely as this may also mean the free movement of anti-competitive practices. Further, in some instances cooperation without binding legal obligations may not always be effective.

---

[41] Kovacic W.E and Mariniello, M. (2016). 'Competition Agency Design in Globalised Markets'. E15Initiative. Geneva: International Centre for Trade and Sustainable Development and World Economic Forum. under "*Settings*,"http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Kovacic-and-Mariniello-FINAL.pdf (accessed on 17 May 2019)

[42] *Daniel Schwarz***.** The Internationalization of Competition Law in Africa, August 2017. under *"Settings,"* **https://www.competitionpolicyinternational.com/the-internationalization-of-competition-law-in-africa/** (accessed on 17 May 2019)

[43] Author's own research

[44] Supra-note 11

[45] Ibid

43. Cooperation has shown significant deficiencies in addressing anti-competitive conduct because it does not impose absolute legal obligation on the involved parties. This situation has posed challenges for national merger control laws especially that they lack extra-territorial application. Further, this situation has presented challenges to merging parties due to the need to comply with different national competition laws. To address these challenges, some RECs like COMESA have pursuant to binding legislation established supra-national competition authorities. However, the extent to which such institutions have resolve identified challenges of cross-border merger regulation especially in DEEs has not been widely explored.

44. The study explored this inquiry and determined that the creation of a supra-national merger control regime has not fully resolved the challenges of cross-border merger regulation in COMESA. The study therefore proposed recommendations to address the challenges.

1.7 Conclusion

45. The preceding chapter has laid down the foundation of the dissertation. The successive chapters shall expound on most of the issues raised in Chapter One in order to achieve the objectives of the dissertation. Chapter Two discusses in greater detail transactions that amount to mergers.

Chapter Two

2.0 What are Mergers, Acquisitions and Takeovers?

2.1 Definition of Mergers, Acquisitions and Takeovers

1. What are mergers, acquisitions and takeovers? If this question was posed to a student of company law, Business Administration and most likely economics the answer would be different if the same question was posed to a student and/or practitioner of competition law. This is because in the former disciplines, the terms have different definitions whereas in the latter the terms may mean the same thing. What is critical in competition law is the competitive effect on the market of any transaction called merger, acquisition or takeover. In competition law, the effects of these transactions on the market are likely to be the same.

2. In market economies, where free competition is the principal rule for establishment and extinction of enterprises, a third natural process, the concentration of companies can be observed. In the widest meaning, concentration is the gaining of control over the other company, gaining influence on the decisions of the other company and the joining of companies. In a narrower sense, only the achievement of influence above a certain extent and the joining of companies can be considered as concentration. Corporate mergers and acquisitions are among the forms of concentrations.[46]

2.1.1 Definition of Mergers, Takeovers and Acquisitions in Competition Law

2 The regulation of cross-border mergers is undertaken within the overarching competition law framework. Therefore, it is important that the dissertation limits itself to the definition of mergers, takeovers and acquisitions in competition law. It is generally accepted that despite being diverse operations in company law, mergers, takeovers and acquisitions are essentially the same phenomenon from the perspective of economic

---

[46] The preceding paragraph is liberally borrowed from a 2006 PhD Paper by Csaba Balogh titled: *Analysis of Factors Determining Success of Cross-Border Mergers and Acquisitions*. under *"Settings"* http://phd.lib.uni-corvinus.hu/153/2/balogh_csaba_en.pdf (accessed on 28 October 2019).

theory as well as competition law that takes the former as its basis.[47] These transactions result in a reduction of firms operating in the market because after their consummation, at least one or more firms, party to the transaction loses its autonomy to determine its commercial strategy and direction in the market place.

3 The important word to note in the preceding paragraph is *'autonomy'*. Whenever such a transaction occurs, the loss of autonomy by one or more firms becomes the subject. Therefore, since all these transactions raise autonomy as a subject, for simplicity of exposition, all such transactions are generally referred to as mergers in competition law and accordingly in this dissertation. However, this is a very broad definition of the term merger and therefore it is important to narrow it down by looking at how this autonomy is curtailed. Looking at definitions in some notable competition statutes would be instructive.

4 The European Union Merger Regulations (EUMR) is the starting point for this purpose.[48] Therein, 'concentration' is defined under Article 3(1) as below:

1. **"A concentration shall be deemed to arise where a change of control on a lasting basis results from:**

   a) **the merger of two or more previously independent undertakings or parts of undertakings; or**
   b) **the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings".**

8. Close to home, Zambia, Zimbabwe and South Africa offer definitions from jurisdictions which have enjoyed longer periods of enforcing model competition laws in the region and

[47] PhD Paper by M. Fevzi Toksoy titled: *Competition Law Aspects of Mergers and Acquisitions in the EU and Turkish Law. Does Turkey call for a Merger Reform? The Answer and a Policy Proposal. (2007)*
[48] The EUMR have been chosen as the starting point because they are the longest established supra-national competition legislation that provides sound comparison for the Regulations which are the second true functioning supra-national competition legislation the world-over binding sovereign States.

Africa in general.[49] The Zambian Competition and Consumer Protection Act of 2010 (CCPA) under section 24 provides that:

1. **"For purposes of this Part, a merger occurs where an enterprise directly or indirectly, acquires or establishes, direct or indirect, control over the whole or part of the business of another enterprise, or when two or more enterprises mutually agree to adopt arrangements for common ownership or control over the whole or part of their respective businesses.**

2. **A merger contemplated in subsection (1) may be achieved in the following circumstances:**

    a) **where an enterprise purchases shares or leases assets in, or acquires an interest in, any shares or assets belonging to another enterprise;**
    b) **where an enterprise amalgamates or combines with another enterprise; or**
    c) **where a joint venture occurs between two or more independent enterprises".**

9. The definition of a merger in the Competition Act of Zimbabwe is to a greater extent similar to the definitions above. Section 2 of the Competition Act of Zimbabwe defines a merger as:

"the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of –

(a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;

(b) the amalgamation or combination with a competitor, supplier, customer or other person; or

[49] Zambia passed its Competition Law in 1994, Zimbabwe in 1996 and South Africa in 1998.

(c) any means other than as specified in paragraph (a) or (b)"

10. The 1998 Competition Act of South Africa defines a merger in section 12. It provides that:

12(1)(a) "For purposes of this Act, 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.

(b) A merger contemplated in paragraph (a) may be achieved in any manner, including through –

(i) purchase or lease of the shares, an interest or assets of the other firm in question; or
(ii) amalgamation or other combination with the other firm in question".

11. An examination of the definition of the term merger would be incomplete if the dissertation does not take a close look at its definition in the Regulations as they are the focus of this dissertation. The term 'merger' is defined under Article 23 of the Regulations. Specifically, Article 23(1) of the Regulations provides that:

"For the purpose of this Article, merger means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person whether that controlling interest is achieved as a result of:

a) the purchase or lease of the shares or assets of a competitor, supplier, customer or other person;
b) the amalgamation or combination with a competitor, supplier, customer or other person; or
c) any means other than as specified in sub-paragraph (a) or (b)".

12. This definition is to a very large degree, constructed and worded similarly to definitions in all statutes referred to above. As a matter of fact, it is clearly notable

that the definition of the term merger in the Zimbabwean Competition Law is worded exactly the same as in the Regulations. It is not far-fetched therefore to conclude that the Zimbabwean definition of the term merger was simply exported to the Regulations. This situation may appear encouraging as it already shows consensus and effort to achieve harmonisation of competition laws among the Member States. However, wholesome import of provisions may also be worrying because sometimes provisions are simply imported without addressing the challenges they have raised as regards enforcement in their jurisdictions. For example, the definitions of merger in the Regulations and the Zimbabwean Competition Act does not use the term *'control'* a term that is commonly used by most competition laws but uses the terms '*controlling interest'.* Are these terms intended to mean the same? The merger control provisions of the Regulations appear to be fraught with fundamental ambiguities as will be discussed later. These ambiguities may raise challenges in the application of the Regulations to cross-border mergers. Ambiguities contribute to inadequacy of legal frameworks.

2.2 Definition of 'Control'.

13. A close review of definitions from the competition laws referred to above i.e. the EUMR, CCPA and South African competition laws reveal that the word *'control'* is critical. It is clear that for a merger to be construed, control has to be established. Conversely, where control is not established, a merger cannot be construed. It is therefore important to understand this term to have a conclusive definition of the term 'merger'.

14. The EUMR has provided the definition of control under Article 3(2) which provides that:

"Control shall be constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on an undertaking, in particular by:

(a) ownership or the right to use all or part of the assets of an undertaking

(b) rights or contracts which confer decisive influence on the composition, voting or decisions of the organs of an undertaking".

15. What should be borne in mind is that the control contemplated in Article 3(2) of the EUMR is that which leads to the acquiring undertaking having an influence on the target undertaking's commercial strategy, detailed financial management and policy direction in the market place. It is those actions that affect the competitiveness of an undertaking in the market place. It follows therefore that those rights that simply refer to proprietary protection of investments especially in the short run may not define a merger as in most cases they do not confer the possibility of exercising decisive influence over the affairs of an undertaking. Control should be on a lasting basis. What is '*lasting'* is not defined in most legislation but generally a period of more than 5 years would be considered '*lasting*'.

16. The definition of the term *'control'* appears to be very wide and vague in the EUMR. Its definition in the Zambian legislation appears specific and definite. Section 24(3) of the CCPA provides that:

"For purposes of subsection (1), a person controls an enterprise if that person—

(a) beneficially owns more than one half of the issued share capital of the enterprise;

(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the enterprise, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that enterprise;

(c) is able to appoint or to veto the appointment of a majority of the directors of the enterprise;

(d) is a holding company and the enterprise is a subsidiary of that company;

(e) in the case of an enterprise which is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;

(f) has the ability to materially influence the policy of the enterprise in a manner comparable to a person who, in ordinary commercial practice, can exercise the elements of control referred to in paragraphs (a) to (e); or

(g) has the ability to veto strategic decisions of the enterprise such as the appointment of directors, and other strategic decisions which may affect the operations of the enterprise".

17. Section 24(3) of the CCPA provides both a quantitative and qualitative definition of the term *'control'*. For example in (f), there is no need to demonstrate the quantum of the parameter under consideration as long as material influence is clearly manifest. Further, there is a general misconception that only an acquisition of majority assets, shares or any other interest amounts to control. This view is not correct. An acquisition of minority interests may result in an acquisition of control. It follows therefore that under (c), (f) and (g) for example, the acquisition of a minority shareholding may be sufficient to amount to control. The dissertation will not labour to look up the definition of the term *'control'* in the South African Competition legislation as it is significantly similar to that of its definition in the Zambian Competition legislation. Further, the Zimbabwean Competition legislation has not been reviewed in this respect because *'control'* has not been defined therein but has been used to define *'controlling interest'*. Therefore, a detailed review of these legislation with regard to the term would either be repetitive in the case of the South African Competition legislation or indeed superfluous in the case of the Zimbabwean Competition legislation.

18. Model competition legislation require that the term *'control'* is precisely defined in order to determine whether a competition authority has jurisdiction to intervene in a transaction that presents characteristics of a merger. Sadly, the Regulations do not define the term *'control'*. Article 23(1) uses other related terms called *'controlling interest'* which curiously are defined with reference to the term *'control'*. The terms *'controlling interest'* are defined in Article 23(2) as:

"For the purpose of this Article, "controlling interest", in relation to:

a) **any undertaking, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the activities or assets of the undertaking; and**

b) **any asset, means any interest which enables the holder thereof to exercise, directly or indirectly, any control whatsoever over the asset".**

19. A closer look at Article 23(2) above informs us that the control contemplated is broad and ambiguous when it uses the terms *'….control whatsoever…'* Control as applied in competition law should be precisely defined and qualified. What therefore is *'control'* within the meaning of the Regulations? An inspection was conducted in the Guidelines. The Commission regards *'control'* as being constituted by rights, contracts or any other means which, either separately or in combination and having regard to the considerations of fact or law involved, confer the possibility of exercising decisive influence on the undertaking or asset concerned. Whether or not a person has the possibility of exercising decisive influence on an undertaking or asset concerned should be assessed on a case by case basis. Regard should be had to the overall relationship between the person and undertaking or asset concerned in light of the commercial context, in particular in relation to the competitive conduct of the relevant business, including its strategic direction and its ability to define and achieve its commercial objectives.[50]

20. The Guidelines provide that *"when determining whether a person has the possibility of exercising decisive influence over an undertaking, the Commission will take into account, among other factors, whether the person directly or indirectly:*[51]

(a) has the ability to determine a majority of the votes that may be cast at a general meeting of the undertaking;

(b) is able to appoint or to veto the appointment of a majority of the directors of the undertaking;

[50] Section 2.5 of the Guidelines
[51] Section 2.6 of the Guidelines

(c) *has the ability to determine the appointment of senior management, strategic commercial policy, the budget or the business plan of the undertaking; or*

(d) *has a controlling interest in an intermediary undertaking that in turn has a controlling interest in the undertaking".*

21. The definition of the term *'control'* in the Guidelines is similar in specificity to the Zambian CCPA when it defines decisive influence with reference to elements (a) to (d) under section 2.6. What is clear is that the Guidelines have defined the term *'control'* in line with international best practice and this is not unusual in law.

22. It is important to note that the definition of *'control'* has arisen as a problem for the EC in a number of cases. There has been very little of such problems in COMESA for a number of reasons among them, the enforcement of the Regulations is in its nascent stages, the unambiguous definition of the term under the Guidelines and poor culture of litigation in the Common Market. Nevertheless, since the Guidelines, in many respects, borrow the definition of the word *'control'* from the EUMR, it is important to review some cases where the term raised problems as lessons may be drawn for the Commission which is likely to encounter such challenges as it grows in its enforcement of the Regulations.

2.2.1 Interpretation Difficulties of the term 'Control': A Comparative Excursus

23. Despite the definition of the term *'control'* in competition legislation, its interpretation has not been free from difficulties. Even the European Courts[52] have faced similar challenges on some cases that have come before them. The assessment of control is clearly devoid of pure objective criterion. Subjective considerations are taken into account *albeit* on the basis of law and facts involved. It should be noted that control may either be sole or joint. Where one undertaking acquires more than one-half of the voting rights in another, sole control is assumed unless otherwise, for example where the minority right holders are given the power of veto over strategic decisions of commercial significance.

[52] European Courts have been mentioned here as they have dealt with several cases where the issue of control was in dispute. Further, the European Courts have rich experience on the determination of merger cases and hence provides a good basis for comparison.

24. In order to determine whether or not sole control has arisen in such circumstances, there should be an accurate assessment of matters of fact and law existing at the time. Therefore, in the case involving **Air France and the Commission**[53] the Community Court stated that having regard to the factors which may, according to the wording of Article 3(3) of the EC Merger Regulation, constitute control, the EC was correct in finding that an undertaking, although exercising a substantial influence, only controlled another undertaking jointly with a third undertaking, since the holding of shares in the controlled undertaking and the conferment of powers laid down by its statutes were such that major decisions could only be taken with the consent of the third undertaking. The Court added that the appraisal by the EC of the compatibility of a concentration between undertakings with the common market must be carried out solely on the basis of the matters of fact and law existing at the time of notification of that transaction, and not on the basis of hypothetical factors, such as the acquisition of total control by the exercise of an option to purchase shares not yet held, the economic implications of which cannot be assessed at the time when the decision is adopted.

25. Problems have also arisen with regard to sole control and minority right acquisition. Some minority right acquisition may confer sole control. The minority right acquisition may be so large compared to the other right holders that it may be able to exert significant influence in shareholder meetings for example. This is supported by the decision in the Electrabel/Compagnie Nationale du Rhone (CNR)[54] merger where the Commission determined that Electrabel had acquired sole control over CNR despite being a minority shareholder, on the basis of a number of different considerations, including that it was assured of a *de-facto* majority at CNR's General Meeting. This position was affirmed by the General Court and the Court of Justice on appeal.

26. Similarly, in the Eridania/ISI case,[55] Eridania increased its shareholding in ISI to 65% by purchasing 15% from another shareholder, a sugar beet growers' co-operative, Finbieticola, which retained 35%. The EC decided that before the transaction had

[53] Case T-2/93 Air France v. Commission [1994] ECR II-323
[54] Case M 4994, decision of 10 June 2009.
[55] Case IV/M62, [1991] 4 CMLR 663

occurred Eridania exercised joint control with Finbieticola because the ISI Board of Directors, on which Eridania had no absolute majority, exercised a number of important rights, including the appointment of a managing director and the making of decisions on the sale of plants and on plant closures. After the transfer, the rights retained by Finbieticola considerably reduced and merely enabled it to veto major changes to the structure of the company, such as the issue of new capital or a transfer of its head office. It was held, therefore, that, as a result of the 15% transfer of shares, Eridania had now acquired sole control in place of the previous joint control with Finbieticola. The transaction therefore amounted to a merger.

27. From the Eridania/ISI case, it is clear that a merger may be construed where the acquirer is an existing joint controller which acquires a further holding in the target company bringing it to a higher percentage, conferring sole control. Suffice to mention that joint control does not just exist where two undertakings have equal shareholding in the target. Joint control may exist where one undertaking has less than 50% as long as the shareholding allows it to exercise decisive influence on the undertaking's strategic policies on the market.[56]

28. Another jurisdiction where divergent interpretation of the term *'control'* has raised issues is Eswatini. In the case[57] involving the Swaziland Competition Commission and Kirsch Holdings Limited (Kirsch), the former contended that the latter engaged in a merger without notifying it as required by the Competition Act No.8 of 2007 of Swaziland (the Act). The brief facts were that in 1972 Kirsch entered into an agreement with the Swaziland Industrial Development Corporation (SIDC) to form a 50/50 shareholding joint venture called Swaki (Pty) Ltd (Swaki). In 2006, the relationship between Kirsch and SIDC broke down irretrievably that led to the demise of their joint venture in Swaki. It is common cause that when the joint venture between Kirsch and SIDC was formed, the Articles provided for the Chairman of the Meeting to have a casting vote in an event that there was equality in voting. It is also common cause that this casting vote was never used in the more than 30 years that Kirsch and SIDC were in a joint venture. When the joint venture was

[56] Recall the Eridania/ISI, Air France v. Commission and the Electrabel/CNR cases discussed in the preceding sections. Further recall the discussion of control in the EUMR, the Zambian CCPA and the COMESA Merger Assessment Guidelines.

[57] At the time of writing the dissertation, the case was still before the Swaziland Competition Commission Board of Commissioners (the Board) for determination. The author was one of the experts advising the Board on the principles of control.

terminated, SIDC exited and Kirsch remained the sole shareholder. The Swaziland Competition Commission contended this transaction amounted to a merger in that there was a change on a lasting basis from joint to sole control. On the other hand, Kirsch disputed that it had always been in sole control in that it had the casting vote in an event that consensus in decision making was not secured. The Swaziland Competition Commission on the other hand argued that 'control' is construed from a *de facto* and *de jure* basis. From a *de jure basis,* it was indisputable that Kirsch had the casting vote which *prima facie*, gave it control. Nevertheless, from a *de facto* basis, Kirsch had never exercised this casting vote for over 30 years because it does appear that the shareholders had strong common interests that exercising the casting vote would have resulted in the breakdown of the joint venture. As a matter of fact, it was the failure of the shareholders to come to a consensus in a different project in which they were both shareholders that led to the demise of their joint venture in Swaki.

Implications

29. From this examination it is clear that the concept of change of control may sometimes prove difficult to determine. There may thus be situations that may *prima facie* appear to be mergers and yet they are not and the converse is equally true. For example, what would be the status of the acquisition of non-voting securities? Non-voting securities do not alone result in acquisition of control over an undertaking. Further, acquisition of voting rights does not always result in acquisition of control. For example, the Guidelines provides that "mere acquisition of a minority interest below 15 percent of the voting securities of an undertaking, held within a short period solely for the purpose of passive investment and without exercising influence over the affairs of the undertaking, is not capable of conferring the possibility of exercising decisive influence on an undertaking".[58] This is because in such transactions, the holders of the acquired interests would lack the ability to influence the budget, financial plan, and commercial strategy *inter alia,* over the undertaking. The time period in issue is also limited for someone to exercise decisive influence in the commercial context especially that the interest is merely for purposes of the proprietary protection of investment. However, caution has to be taken here to review each case on its own merit paying due regard to matters of law and/or fact involved. This may be a

[58] COMESA Merger Assessment Guidelines

daunting task in DEEs where adequate legislation and experience to do so may not be available.

30. In some cases, a minority interest in an undertaking may include certain rights, such as the ability to veto decisions which are essential to determining the strategic commercial behaviour of the undertaking. Any such rights must be considered as a whole to assess whether they amount to control. Such rights will typically not be considered to confer the possibility of exercising decisive influence unless they relate to decisions over the appointment of senior management, strategic commercial policy, the budget or the business plan. Whenever a minority interest in an undertaking is changed, the parties should consider whether the new minority interest amounts to a "control." Where the new minority interest amounts to "control" a merger is construed.[59]

2.2.2 Other Means of Control

31. The Regulations under Article 23 allows for the construction of control by other means other than through purchase or lease of shares or assets or by amalgamation or combination with a competitor, supplier, customer or other person pursuant to Article 23(1)(c) of the Regulations. Consistent with the foregoing, the Guidelines have also recognised that there are other means through which control is construed. According to the Guidelines this may happen for example through the exit of a shareholder or on a contractual basis. The critical requirement is that such means must confer the possibility of exercising decisive influence over another undertaking.

2.3 Joint Ventures

32. The competition legislation reviewed in the preceding sections save for the Zambian competition legislation and the EUMR have not expressly provided for joint ventures. What is true is that the assessment of joint ventures is key under most merger control regimes as some joint ventures may lead to similar effects on the market as those from the merger transactions defined above. Some joint ventures lead to a loss of

[59] Supra-note 58

independence between two or more undertakings and it is this loss of independence in terms of their commercial strategies that triggers the interest of competition authorities. The loss of this independent decision-making process may lead to a significant reduction or elimination of competition on the market. This notwithstanding, whether there is a significant reduction or elimination of competition on the market depends on the duration of the joint venture and the degree of autonomy it enjoys from its parent companies.

33. In the case of the COMESA merger control regime, for a joint venture to constitute a "merger" within the meaning of Article 23(1) of the Regulations as explained under section 2.11 of the Guidelines, it must be a "full-function" joint venture. This means that it must perform, for a long duration functions of an autonomous economic entity, including:[60]

- operating on the market and performing functions normally carried out by undertakings operating on the same market; and
- having a management dedicated to its day-to-day operations and access to sufficient resources including finance, staff and assets (tangible and intangible) in order to conduct for a long duration its business activities within the area provided for in the joint-venture agreement.

34. A joint venture established for a purposefully finite period (e.g.: for a major construction project) will not be viewed as having a long duration.[61] This position is true for most competition regimes including that of the EC from where the Commission draws its insight. A careful reading of Article 3(4) of the EUMR reveals that the definition of a joint venture that amounts to a merger was imported wholesome therefrom.

[60] Supra-note 58
[61] Ibid

2.3.1 Interpretation Difficulties of Joint Ventures that Amount to Mergers

35. The determination of whether a transaction amounts to a full function joint venture is not free from trouble despite being adequately defined in most legislation. There are also situations where a joint venture that is likely to raise competition concerns may escape the application of merger laws simply because it is not full-function. In such instances, the parties may also escape the application of anti-trust laws such as Article 16 of the Regulations and Article 101 of the TFEU that address agreements or cooperation between competitors. This is because a joint venture that is not full-function may result in the construction of a single economic unit that may not be subject to anti-trust laws. This results in what is termed as the enforcement gap. This matter arose in the Austria/Asphalt Case.[62] On 7 September 2017, the Court of Justice of the European Union (**CJEU**) delivered its judgment following the Austrian Supreme Court's (*Oberster Gerichtshof*) request for a preliminary ruling, seeking clarification on whether the change from sole to joint control over an existing entity is subject to the EU merger control regime only when the entity concerned is full-function. The CJEU ruled that the full-functionality of the joint venture, whether newly created or not, is a pre-requisite for a transaction to fall under the EUMR.

36. In other words, the acquisition of a controlling stake by a third party in an existing non-full-function undertaking is not caught by the EU merger control regime. In order to reach its conclusion, the CJEU analysed the wording, purpose and context of Article 3 of the EUMR. The CJEU found that the wording of Article 3 of the EUMR was imprecise on the referred question. Article 3(1)(b) EUMR states that a notifiable concentration arises where an undertaking acquires, on a lasting basis, "direct or indirect control of the whole or parts of one or more other undertakings". Under Article 3(4) EUMR, the creation of a JV amounts to a concentration if, on a "lasting basis", it performs "all the functions of an autonomous economic entity". The notified transaction concerns a lasting change in control, seemingly falling under Article 3(1)(b). But it also relates to a JV, making it a notifiable concentration only if it is fully functional (Article 3(4) EUMR). The EC's legal service had argued before the CJEU that Article 3(4) EUMR can be interpreted as meaning that the concept of full-

[62] Case C-248/16 Austria Asphalt GmbH & Co OG v. *Bundeskartellanwalt*, 7 September 2017, EU:C:2017:322 ("**Judgment**").

functionality only applies to the creation of a new JV, but not to the conversion of an existing undertaking into a JV controlled by its parents. As such, the Commission's legal service had argued that the present JV amounted to a notifiable concentration.

37. The CJEU considered that a different interpretation of Article 3(4) EUMR could compromise the overall legislative context intended by the legislator. Only significant changes to the market structure are caught under the merger control rules. The conduct of undertakings which does not constitute a concentration, including non-full-function JVs, falls under the general antitrust rules of Articles 101 and 102 TFEU, as such conduct can lead to coordination between the parent undertakings. However, it is the view of this dissertation that herein lies the risk of the enforcement gap as Articles 101 and 102 of the TFEU may lack jurisdiction due to the single economic unit doctrine in such circumstances.

2.4 Importance of Defining the term 'Merger'

38. The definition of a merger is important for a number of reasons. First, it enables a competition authority to focus only on those transactions that are likely to raise competition concerns on the market. This therefore enables a competition authority to save resources by avoiding the review of transactions that are not mergers within the meaning of competition laws but only exhibit characteristics of a merger. Secondly, it brings legal certainty and avoid costly and unnecessary litigation by both the parties and competition authorities.

39. The third reason why it is important accurately define the term merger is that it lowers the regulatory burden on the merging parties. Over-regulation may have the effect of discouraging pro-competitive mergers and therefore deprive consumers and the general economy merger specific benefits like reduced prices and efficient allocation of scarce resources. This matter is therefore very important for DEEs where mergers can play a bigger role in accelerating economic growth.

2.5 Conclusion

40. Chapter Two has discussed the definition of a merger in selected competition legislation and reviewed the definition in the Regulations. The chapter has reviewed that the definition of a merger in the Regulations is fraught with ambiguity but the Commission has attempted to address the ambiguity in the Guidelines, practice that is permissible at law as long as the Guidelines are not *ultravires* the Regulations. In this chapter, it has been clarified that it is important to have a definition of a transaction termed a *'merger'* in order for competition authorities to claim jurisdiction. In the absence of such definitions, the competition authorities exercise a lot of discretion in determining which transactions amount to mergers. The danger of too much discretion in the administration of law is the increased probability of administrative *mala fide*, inconsistencies in its application and uncertainty on the parties. Chapter Two has also built the case that the substantive assessment of merger cases may not be easy as even the definition of the term merger presents challenges. This challenge appears to be more endemic the more a transaction is subjected to review in two or more jurisdictions. Further, competition authorities with less expertise and resources to engage in such an interpretation may end up leaving off the hook transactions that are mergers or over regulation by capturing transactions that are not mergers.

41. Having defined transactions that amount to mergers within the ambit of anti-trust laws, the next chapter shall discuss the principle basis for mergers in order to appreciate how to regulate them within the overarching competition law framework.

Chapter Three

3.0 Principal Basis for Mergers

1. Mergers have become a popular and preferred mechanism of industrial organisation in recent times. This is largely due to globalization, liberalization, technological advancement and intense competition. Mergers are also a popular form of foreign direct investment as greenfield investments have arguably declined. Corporate finance has witnessed increasing merger activity in recent times. Mergers have become an important avenue for financing the growth of firms rather than relying from traditional means of financing such as banks. Mergers are not the only way of financing the expansion of a firm. There are other methods like debt, equity, retained earnings and depreciation. However as observed by Thomas Karier, a firm must weigh the expected profits and risks associated with any investment relative to the dollar expenditure. The prospect with the greatest expected return per dollar, accounting for risk is most likely to attract the firm's funds.[63] The prospects with which the source of funding is readily available should also be a critical consideration. Anecdotal evidence suggests that in recent times, obtaining financing from conventional sources have been elusive or at least difficult. Mergers have come to fill in this gap.

2. Mergers affect business and government policy considerations. Mergers may either bring efficiencies and benefit the entire economy or to the contrary, they may harm markets. With regard to the former, mergers may play a fundamental role to the successful expansion of undertakings in their growth and development path. Entry into new markets by an undertaking may require such an undertaking to engage in a merger as *de novo* entry has its own challenges which are not discussed here as they are beyond the scope of the dissertation.

[63] Karier Thomas. Beyond Competition: The Economics of Mergers and Monopoly Power. M.E. Sharpe, Inc., 80 Business Park Drive, Armonk, New York 10504. 1993. Page 137.

3. Further, successful competition in international markets may depend on capabilities obtained in a timely and efficient manner through mergers.[64] Michael C. Jensen[65] has argued that mergers increase value, efficiency and move resources to their highest and best uses, thereby increasing shareholder value. However, other commentators are not so optimistic. For example, Magenheim and Muller have argued that undertakings acquired are already efficient and that their subsequent performance post-merger is not improved.[66] Others are even more pessimistic on this matter. For example, Shleifer and Summer have contended that the gains to shareholders merely represent a redistribution away from labour and other stakeholders.[67]

4. New market opportunities, increased competition, changing business models, privatisation, foreign direct investment, rapidly developing technologies, free trade initiatives, and trade liberalisation that are all associated with globalisation have resulted in organisations turning to mergers.[68] The characteristics of globalisation have been described as "key drivers" in organisational restructuring.[69] To achieve competitiveness in the new global order, firms are undertaking diverse strategic actions among them mergers. In turn, mergers are believed to have accelerated globalisation by way of FDI, which have inclined towards mergers rather than other types of investments.[70] Furthermore, the increasing lack of trade barriers because of globalisation, as well as liberalisation and privatisation, have facilitated MNCs access to acquisitions in other countries which help them to secure new markets as well as to acquire human and technological resources from these countries.[71]

---

[64] Pradeep Kumar Gupta, Innovative Journal of Business and Management; Mergers and Acquisitions (M&A): The Strategic Concepts for the Nuptials of Corporate Sector, 2012. Under *"Settings"* https://pdfs.semanticscholar.org/fd46/7529b9e1f22b39034e037613238dbe8c7c23.pdf (accessed on 17 October 2019)

[65] Michael Jensen, Takeovers: Folklore and Science, Harvard Business Review, 62, November – December 1984.

[66] Magenheim, Muller (1998) read as Hitt, M.A; (2001), " Mergers and Acquisitions: A Guide to creating Value for Stakeholders", Oxford University Press, New York.

[67] Weston, F.J., Johnson, B. (1999), "What it takes for a Deal to Win Stock Market Approval", Mergers and Acquisitions, Philadelphia.

68 Tasnim Bibi Kazi and Vartikka Indermun, The Impact of Globalisation, Mergers, Acquisitions, Reengineering and Downsizing, on Individuals and Organisations in South Africa: Interdisciplinary Journal of Contemporary Research in Busines,s Volume 5, Number 6, 2013. Under *"Settings"* https://journal-archieves36.webs.com/681-698.pdf (accessed on 19 August 2018).

69 Jones, M.T. (2002). Globalization and organizational restructuring: A strategic perspective. Thunderbird International Business Review, 44, 325-351.

70 Kang, N. & Johansson, S. (2000). Cross-border mergers and acquisitions: Their role in industrial globalization. Working paper: OECD Science, Technology and Industry.

[71] Supra-note 67

5. In view of this, the correlation between the status of the global economy and the frequency of mergers as they have become popular due to globalisation is important.

3.1 Correlation between the Status of the Global Economy and the Frequency of Mergers

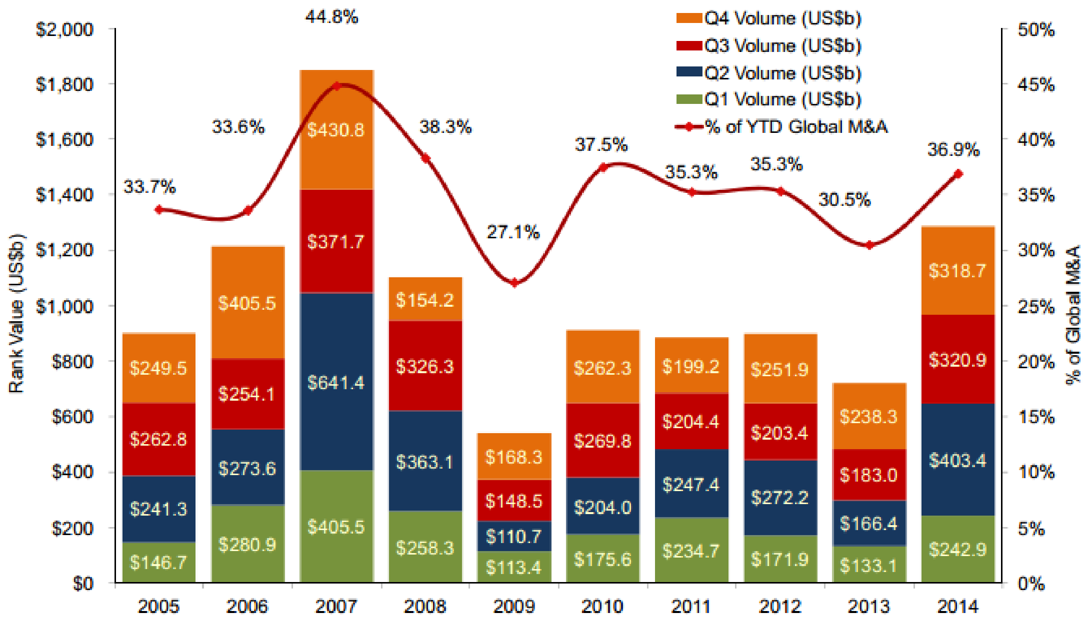
6. The number of global mergers fell drastically in 2008 largely because of the global financial melt-down. The global economy took the path of recovery in 2009 and since then prospects for a better global economy are encouraging though growth remains sluggish.[72] With this recovery from the global economic crisis, it has been observed that the number of mergers has been increasing. This perhaps is a signal by the corporate world that they have confidence in the resurging global economy as mergers are an integral component of corporate finance. It remains to be seen whether the resurgent increase in the number of global mergers and acquisitions shall continue under the Administration of President Donald Trump who has signalled a worrying protectionist disposition. Such policies raise scepticism and uncertainty to business who may halt their strategic decisions and adopt a wait and see approach. This view is supported by Christine Lagarde; the International Monetary Fund (IMF) Chief who warned at the 2018 Spring Meetings of the IMF and the World Bank Group that trade fuels growth and if trade is threatened markets lose confidence. The world can only speculate at this historical moment in time as the country which is perceived to be a champion of free market economies is seemingly in the reverse gear towards this path of protectionism.

7. In the first three quarters of 2014, the value of global mergers and acquisitions hit $2.66 trillion, according to Thompson Reuters – a 60 percent increase on the same period in 2013. Many deals announced during this time were mega deals, pushing the number of transactions worth $5bn or more to a new high in September. Transactions such as Valeant Pharmaceuticals' $55bn purchase of Botox-maker Allergan, Facebook's $22bn acquisition of mobile messaging platform WhatsApp and

[72] It is important to note that at the time of writing this dissertation, the post 2008 global economic recovery is been threatened by the protectionist tendencies exhibited by some major economies including near trade wars for example between China and the United States.

Comcast's proposed $70bn deal for Time Warner Cable, all helped to bring mergers back to the fore.[73] Figure 1 below shows the trend of global mergers shortly before the global financial crisis in 2007 and after the financial crisis of 2008.

Figure 1: Mergers & Acquisition Review[74]



8. In 2015, the world continued to see phenomena increase in the number and value of mergers even beating the pre-financial crisis period of 2007. Globally, companies had spent $3.1 trillion dollars buying one another by Aug. 31, 2015. That's already more than was spent on buyouts in five of the past six full years. The total amount of money companies spent on buying other companies in 2015 reached an all-time record.[75]

9. The prospects of increasing numbers of global mergers have increased post-global economic crunch. However, 2016 saw a slowing trend. Merger Market's 2016 Global Trend Report shows that dealmakers were forced to navigate a sea of change during 2016, as the populist vote swept across the global political stage. Despite a series of political shockwaves, global M&A activity (17,369 deals, US$ 3.2tn) managed to reach its third highest deal value since 2007 (US$ 3.7 trillion), despite value dropping

---

[73] Financier World, Cross-border M & A Boom. December 2014. "Under Settings" https://www.financierworldwide.com/cross-border-ma-boom/#.XairbfZuLIU accessed on 17 October 2019
[74] http://blog.thomsonreuters.com/index.php/mergers-acquisition-review-full-year/ (accessed on 22 April 2018)
[75] http://qz.com/491328/mega-deals-could-make-2015-a-record-year-for-mergers/ (accessed on 22 August 2016)

18.1% compared to 2015.[76] The record in 2017 was impressive with some financial analysts putting the total value of deals at about US$3.71 trillion.

10. As regards the Common Market, it is clear that the number of mergers has been increasing in correlation with the increase of the COMESA economy over the years.[77] This inference is drawn from the trends on the African continent as a whole. Over the last decade, mergers in Africa have surged, at one point reaching a record high value of US$44 billion in 2010. As a matter of fact, it is recorded that in 2015, the value of mergers in Africa hit an all high record in the last decade of US$64.9 billion.[78]

11. While companies in developed markets face slowing prospects, some countries on the African continent have experienced growth rates of 7 percent or more. Combined with an expanding middle class and increasing trade with Asia, investors see in Africa the potential for fast and sustainable growth.[79] However, there have been troughs and peaks in the trends, a situation that is not unusual in business and economics. For example, the total deal volumes and values of Merger & Acquisition (M&A) transactions in Africa fell sharply in the first half of 2018, declining 44% in deal volume and 57% in aggregate value, compared to the first half of 2017, according to analysis by Baker McKenzie of Thomson Reuters M&A data for Africa. The report notes that there were 485 deals valued at US$ 19,420 million in the first half of 2017, this dropped to 270 deals valued at US$ 8,318 million in the first half of 2018.[80] Clearly, this situation is not only as a result of the performance of the global or African economies but also other factors like political instability in some African countries, tougher laws against bribery and corruption in the United States among other things.[81] On a positive note, intra-regional cross-border deals rose twofold in terms of aggregate value from US$ 418 million in the first half of 2017 to US$ 1,292

[76] https://www.mergermarket.com/info/research/2016-global-ma-report-press-release (accessed on 21 October 2017)

[77] See Appendix One on the progression of the COMESA economy over the years.

[78] https://qz.com/africa/1195920/growth-in-energy-technology-for-sub-saharan-ma-despite-overall-drop/ (accessed on 17 August 2018).

[79] https://www.nixonpeabody.com/en/ideas/articles/2012/08/02/current-trends-in-mergers-and-acquisitions-in-africa (accessed on 18 June 2017 at 16:30)

[80] https://www.cnbcafrica.com/news/east-africa/2018/07/20/fewer-mergers-and-acquisitions-are-taking-place-in-africa-heres-why/ (accessed on 17 August 2018).

[81] Ibid

million in the first half of 2018.[82] All in all, one may surmise that with reference to economic performance, merger activity has been responding positively in Africa.

12. These statistics reveal that there is a correlation between the status of the global economy and the mergers consummated. This is to say that when the global economy is buoyant, the number of mergers and acquisitions consummated are on the increase and the converse is true. It also shows that when the economy is doing well, firms are spending through corporate restructuring and corporate financing. With this in mind, the dissertation can now explore the question, ***'what motivates firms to engage in mergers?'***

13. A plethora of authorities have enunciated that mergers are an important area of capital market activity in restructuring a corporation and have lately become one of the favoured routes for growth and consolidation.[83] Firms' motives to merge vary ranging from acquiring market share to restructuring the corporation to meet global competition. Sometimes firms merge because they want to eliminate effective competition in the market place that threatens their own survival.

14. To reiterate the views made in the preceding paragraphs mergers have become a tool for permeating into new territories[84]. To borrow the words of Richard Whish, a notable feature of mergers in recent years has been their increasing complexity, size and geographical reach.[85]

3.2 Economic Motivation for Mergers

15. The chapter shall now provide a deeper insight into the specific economic motivation for mergers. Most of these have been described in general terms above. Nevertheless,

[82] Supra-note 80
[83] Professor R. Ramakrishnan, Head, Department of Management Studies, Muthyammal College of Engineering: Corporate Restructuring Related to M & A, Amalgamations, Takeovers etc. 2006. See also GLOBALISATION AND ITS IMPACT ON MERGERS AND ACQUISITION IN INDIA – A LEGAL STUDY. under *"Settings"* http://maheshchamarty.blogspot.com/2012/06/globalisation-and-its-impact-on-mergers.html (accessed on 19 June 2016).
[84] For example the SABMiller/ AB Inbev Merger involved two largest producers of beer in the world. SABMiller was very active in Africa while AB Inbev had very little presence in Africa. The merger could be seen as one way through which AB Inbev was increasing its foot print on the African continent.
[85] Whish Richard, Competition Law. 5th ed. Oxford: Reed Elsevier (UK) Ltd, 2003. Page 780.

without running the risk of repetition, it is important that they are discussed in detail in this section.

3.2.1 Economies of Scale and Scope

16. In simple terms, an undertaking attains economies of scale when it reaches a stage where its per unit cost of output are falling the more it produces. Specifically, economists have posited that economies of scale are the cost advantages that enterprises obtain due to size, output, or scale of operation, with cost per unit of output generally decreasing with increasing scale as fixed costs are spread out over more units of output. Economies of scale may also be a function of globalisation. With globalisation, there has been a drastic reduction in tariff and non-tariff barriers especially in regional trading blocks. This coupled with startling technological advancement has opened new horizons for undertakings to venture into unchartered geographical markets which may result in lower marginal costs at least in theory. Whether this is true in practice remains debatable. Economies of scale may be achieved internally or indeed externally through merging with other firms.

17. It has also been argued that mergers lead to economies of scope. Economies of scope is an economic theory stating that the average total cost of production decreases because of increasing the number of different goods produced. Specifically, economies of scope describe situations in which the long-run average and marginal cost of a company, organization or economy decreases, due to the production of complementary goods and services. The output of item A, therefore, reduces the cost of producing item B.[86] Merging with another company is one way to achieve economies of scope.

3.2.2 Enhancing Dominance

18. The attainment of dominance may be the objective behind a merger. Every firm's natural desire is to grow and attain dominance. Sometimes it may be difficult to do this internally and a merger becomes a viable mode. Horizontal mergers which

---

[86] http://www.investopedia.com/terms/e/economiesofscope.asp (accessed on 13 October 2017)

involve the acquisition of firms producing competing products are usually the mode firms use to enhance dominance. Thomas Karier has observed that by reducing the number of substitutes, horizontal mergers tend to raise monopoly power[87] which is sometimes used synonymously with dominance in competition law. However, firms may want to enhance dominance for bad reasons like using it to exploit consumers or eliminate effective competition.

19. To sum up on this specific motivation for mergers, the CBI-electric Cable Group stated after its recent merger involving ZAMEFA and Reunert that:[88]

"Competition in the global arena requires a concentration of resources that in concert will have more influence than will individual parts. In particular, it positions the organisation to take advantage of the rapidly developing electrical and telecommunications industries".

3.2.3 Exiting the Market

20. In industrial organisation and ordinary commercial practice, exiting the market may not always be easy because of the costs that may be incurred from such an exercise. A merger may be a better way through which a firm may exit the market.[89] This results in many benefits like saving a failing firm, saving jobs, maintaining taxes to the government among other benefits. Mergers may also be a way of facilitating the contractual exit of one of the parties.

---

[87] Karier Thomas, Beyond Competition: The Economics of Mergers and Monopoly Power. M.E. Sharpe, Inc., 80 Business Park Drive, Armonk, New York 10504. 1993. Page 137.

[88] Airlink Inflight Magazine, December 2017 Copy, page 68. The Commission also considered this merger and granted approval on 22 November 2016

[89] An example in the Common Market is the takeover in February 2017 by SBM Africa Holdings Ltd of Fidelity Commercial Bank Limited merger. Fidelity Commercial Bank was a failing firm. Another example is the merger notification between Copperbelt Energy Corporation and Liquid Telecommunications Holdings Limited made to the Commission on 13 June 2018. In this particular transaction, it was expressly submitted that the motivation behind the transaction was for Copperbelt Energy Corporation to pull out of the joint venture they established with Liquid Telecommunications Holdings Limited.

3.2.4 National Champions

21. This does not appear to be a pure economic reason for engaging in mergers. Political motives may also be behind this. Governments may encourage firms to merge to achieve the critical mass required to compete effectively in international markets. A word of caution has to be entered here. Where governments encourage the creation of national champions, it is usually the case that they may also want to shield these undertakings from competition. In the long-run this may not be beneficial because of the inefficiency that may result leading to creating firms that may be uncompetitive at domestic and international level.[90] Being competitive at domestic level is a precursor to being competitive at international level.

3.2.5 Management Efficiency and the Market for Corporate Control[91]

22. The motivation behind some mergers is that one undertaking competes to run another. The threat of a successful takeover bid acts as an important influence upon the exiting management of a firm to ensure that it functions as efficiently as possible. Where the shareholders are satisfied with the current management's performance, they will not sell their shares to another bidder, unless it is overbidding. The new regime would not be capable of generating greater profits than the existing one. If the shareholders are dissatisfied, they may prefer to sell at the price offered and to reinvest the proceeds elsewhere.[92]

23. The main objective of Merger transactions may be summarized as follows:[93]
    (a) Proper utilization of all available resources.
    (b) Forming a strong human base.
    (c) Reducing tax burden.
    (d) Improving profits.

---

[90] The national champion motive may threaten the durability of supra-national merger control as such are inimical to the single market imperative.
[91] Richard Whish, Competition Law. 5th ed. Oxford: Reed Elsevier (UK) Ltd, 2003. Page 780.
[92] The Preceding paragraph is liberally borrowed from Richard Whish, Competition Law. 5th ed. Oxford: Reed Elsevier (UK) Ltd, 2003. Page 780.
[93] GLOBALISATION AND ITS IMPACT ON MERGERS AND ACQUISITION IN INDIA – A LEGAL STUDY. under *"Settings"* http://maheshchamarty.blogspot.com/2012/06/globalisation-and-its-impact-on-mergers.html (accessed on 19 June 2016).

(e) Eliminating or limiting competition.

(f) Achieving savings in monitoring costs.

3.3 Conclusion

24. In conclusion, a number of reasons exist why firms engage in mergers. Nevertheless, the general motive for mergers is to reduce costs, achieve efficiencies and control markets. For example, in the case of the collapsed deal between Pfizer and Allergan, it was widely thought that the deal was designed to lower the corporate-tax burden by relocating its headquarters to Dublin.[94] The dissertation has also revealed that firms may merge because they desire to eliminate competition on the market which threatens their survival. It is for this reason among others why competition authorities regulate mergers. It is therefore important for competition authorities to comprehend the motive behind a merger as this may give an indication of the effects of the merger on the market. It is gratifying to see that the merger notification forms in some jurisdictions in the Common Market have a section requesting the merging parties to provide the motive behind the merger.[95]

25. At this stage the dissertation is ready to elucidate the rationale for merger control within the overarching competition law framework and the next chapter is devoted to this.

94 https://www.theatlantic.com/business/archive/2016/01/2015-mergers-acquisitions/423096/ (accessed on 19 August 2018)

95 See the Merger Notification Forms of Zambia and the COMESA Competition Commission

Chapter Four

4.0 Rationale for Merger Control

1. The prime objective of merger control is the preservation of competition which ultimately benefits consumers. Mergers involve structural, as opposed to transient behavioural issues.[96] They have the potential to fundamentally affect future development in a sector of the economy as they alter the very structure of an industry. Moreover, from a public interest perspective, mergers cannot be classified with negative anti-trust conduct such as cartels and abusive dominance given that mergers will often produce positive effects.[97] In most jurisdictions, mergers involve prospective inquiries and unlike prohibited practices, a firm does not stand accused of prohibited activity. This is because for mergers especially in jurisdictions with suspensory and *ex ante* merger review process, the effects of the merger have not yet materialised on the market. As regards prohibited anti-competitive conduct, the negative effects of the conduct would have already caused injury to the market by the time the competition law is enforced.

2. Mergers typically involve significant commercial and financial risks, and often have an impact on financial markets and stock exchanges. This enhances their value from a business perspective and necessitates a special regulatory approach within the overarching competition law framework because such impact on financial markets and stock exchanges may affect the overall economic outlook.[98] It is imperative therefore to narrow down the rationale for merger control within the framework of a competition law.

3. There are a number of policy considerations and objectives that are advanced to argue for government intervention in merger transactions. The main policy consideration is

---

[96] Dabbah, Maher and Lasok, Paul, *Merger Control Worldwide.* Cambridge, 2005. See also OECD Policy Roundtables, Cross-border Merger Control: Challenges for Developing and Emerging Economies "under "Settings" http://www.oecd.org/competition/mergers/50114086.pdf (accessed on 18 October, 2019)

[97] Ibid

[98] OECD Policy Roundtables, Cross-border Merger Control: Challenges for Developing and Emerging Economies "under "Settings" http://www.oecd.org/competition/mergers/50114086.pdf (accessed on 18 October, 2019)

to ensure that markets remain competitive. In view of this, it is almost universally accepted that this is a desirable social and economic goal with the result that mergers leading to the creation of monopoly conditions are subject to exceptions condemned by all jurisdictions that have adopted merger regimes.[99] Conversely, mergers having little or no impact on the market are generally permitted. Beyond the extremes, debate rages over the extent to which mergers should be the subject of regulation and degree to which factors such as efficiencies, socio-economic effects or the facilitation of international competitiveness should be considered when determining whether to allow a merger to proceed.[100] Julie Clarke has observed that as a result, some regimes go further than others in preventing mergers which reduce competition but fall short of creating a monopoly.[101]

4. It has also been observed that competition laws, in practice prohibit conduct only where it both harms competition and conflicts with the underlying public policy goals.[102] While the second rarely forms part of core legislation, it is often relevant for authorities in determining whether to investigate a merger and for regulators and courts in determining whether or not a merger should be blocked. In many jurisdictions, while it is unanimously agreed that competition laws were enacted to encourage competition, fierce and frequent aggressive debate persists about the reason why competition was sought to be encouraged and protected and whether and why it should continue to receive protection.[103] The fiercest debate has centred on whether regulation should be formulated to value economic efficiency over all other possible objectives or whether the policy outlook should directly consider broader social objectives such as wealth distribution or protection of small businesses.[104]

5. Julie Clarke has observed that "determining existing and appropriate objectives is complicated by the fact that the publicly articulated goal of merger policy almost

---

[99] See for example, Michael A Utton, The Economics of Regulating Industry (1986), 93. 'The Inefficiency that can result from monopolies have been thoroughly analysed and well known'.
[100] See Robert H. Bork, the Anti-trust Paradox (Basic Books, 1978). See also OECD, Substantive Criteria used for the Assessment of Mergers (2003), DAFFE/Comp (2003) 5.
[101] Supra-note 3
[102] Joseph Farrell and Michael L. Katz, The Economics of Welfare Standards in Anti-trust: UC Berkeley, Competition Policy Center, Institute of Business and Economic Research, 20 July 2006.
[103] Julie Clarke. International Merger Policy: Applying Domestic Law to International Markets.
[104] Kathryn McMahon, Developing Countries and International Competition Law and Policy: Research Paper No. 2009/11, Warwick School of Law, 2009.

always stems from a political bargaining process that is subject to change with each successive government. In some jurisdictions, the policy objectives have become so obscured over time that it is difficult to discern what policy is being employed in the formulation of merger laws. In addition, the politically articulated goals do not always coincide with the practical application of the policy by merger regulators and judicial bodies".[105] For example, in Zambia, the CCPC has been given a mandate by the government to create jobs and each quarter, they are supposed to report on how many jobs they have created or saved. This is absurd as competition authorities are not established with the *raison d'etre* of creating or saving jobs. To attempt to achieve this policy objective, the CCPC imposes a condition on all merger approvals regardless of whether the merger is pro-competitive that no job should be lost as result of the merger. With the foregoing background, the dissertation shall in the next sections of this chapter explore the scope within which merger regulation is undertaken and the specific identified rationale for doing so.

4.1 Merger Assessment is Forward Looking unlike other Anti-trust Assessments

6. It should be noted that merger assessment is concerned with the likely effects of the merger on the market and the competition landscape and not the instant situation. Unlike other aspects of anti-trust laws, merger control in most cases save for jurisdictions that have *ex-post* merger review is prospective. This means that the analysis of a merger considers its effects in the future as opposed to effects that have already occurred. Merger assessment is concerned with the probable structure of the market and its resultant effects post-merger, and not with the present anti-competitive conduct of the market actors.

7. Most merger laws are designed to deal with the likely state of competition post-merger. This position was observed by the US Supreme Court in the Brown Shoe case. The US Supreme Court remarked that the US Congress used the words *'may be substantially to lessen competition'* to indicate that its concern was with probabilities, not certainties.[106] The Court noted that Congress settled on *'may be'* to mean *'reasonable probability'* of anti-competitive effects and not absolute certainty. The

[105] Supra-note 103
[106] Brown Shoe v. United States, 370 U.S. 294, 321-22 (1962).

task of merger review is to predict on a high balance of probability whether a merger transaction would require intervention to avoid a substantial lessening or prevention of competition. This is predicated on facts and the legal and economic reasoning thereof.

8. It is however, important to stress that merger assessment is not overwhelmingly presumptive. Merger assessment uses tested tools to predict with sufficient though not absolute certainty the future competitive outcome of a merger. Therefore, in order to ensure that the forward- looking nature of merger assessment is not speculative, competition authorities rest their focus on facts. A review of merger assessment reports by most competition authorities not only in the Common Market but most DEEs discloses that the assessments are very speculative, lacking sound evidence and critical thinking to arrive at conclusions. As noted by some renowned experts on the subject, predicting competitive conditions after a merger requires an understanding of market dynamics developing in real-time that will likely bear on future competition.[107] This may not be an easy undertaking for young competition authorities in most DEEs including the Common Market due to limited experience in implementing merger laws.

4.2 Merger Control is not Conducted to Enhance Shareholder Value

9. While mergers affect the interests of shareholders in terms of enhancing shareholder value, governments are not interested in regulating mergers for this reason. Merger control is implemented with the rationale of safeguarding the process of competition and protecting the interests of consumers. The question that may arise is whether merger control is an intrusion in the operation of markets in a free economy. It is commonly accepted that enterprises are better placed to make rational decisions about the operation of markets than government and its regulations. Undertakings may advance an argument that merger control is intrusive in markets where commercial players should be free to engage in selling and buying of shares, assets and other

[107] Deborah L. Feinstein, Director, Bureau of Competition, Federal Trade Commission, The Forward-Looking Nature of Merger Analysis Advanced Antitrust U.S. – San Francisco 2014. under *"Settings"* https://www.ftc.gov/system/files/documents/public_statements/forward-looking-nature-merger-analysis/140206mergeranalysis-dlf.pdf (accessed on 31 October 2019)

interests. Nevertheless, it is in the interest of government to intervene where the interest of consumers and the masses is threatened. Therefore, since mergers result in the alteration of market structure that may facilitate the elimination or significant reduction of competition and/or the exploitation of consumers, they should be regulated.

4.3 The Rationale of Merger Control is to Maintain Competitive Markets

10. The basic premise of merger control as already observed is to safeguard and maintain competitive markets. Elementary economics informs us that competitive markets are more desirable than monopolistic ones because they lead to innovation, distributive and allocative efficiencies and enhance consumer welfare. On the contrary, monopolistic markets and their resultant deadweight loss erode consumer welfare. Therefore, merger control is aimed at preventing the creation of market structures that may lead to a substantial prevention or lessening of competition particularly as a result of the attainment or strengthening of a position of dominance or indeed a monopoly situation. A careful digestion of the preceding sentence may suggest that there is a dichotomy between merger control and provisions of anti-trust laws such as Article 102 of the TFEU or Article 16 of the Regulations which do not presuppose that the attainment of a position of dominance is an infraction of these respective laws. What is in contemplation under the aforementioned laws is that the position of dominance should be abused for these undertakings to commit a legal sin that would result in them falling from grace in the eyes of anti-trust agencies.[108] Richard Whish puts it very well when he states that merger control is not an anticipatory regulation of abuse of dominance. This notwithstanding, this debate is beyond the scope of this dissertation.

11. Merger control provisions are an instrument for the maintenance of competitive markets. This is consistent with the judgement of the Court of First Instance (now the General Court) in **Gencor v. Commission**[109] where the court enunciated that:

---

[108] It should be clarified however, that equally merger control, does not presuppose that the attainment of a position of dominance is a violation of the law. Nevertheless, competition authorities should be cautious and scrutinize comprehensively such mergers.

[109] Case T-102/96 [1999] ECR II-753, [1999] 4 CMLR 971, para 106

'…….. while the elimination of the risk of future abuses may be a legitimate concern of any competent competition authority, the main objective in exercising control over concentrations at Community level is to ensure that the restructuring of undertakings does not result in the creation of positions of economic power which may significantly impede effective competition in the Common Market. Community jurisdiction is therefore founded, first and foremost, on the need to avoid the establishment of market structures which may create or strengthen a dominant position, and on the need to control directly possible abuses of a dominant position'.

12. As already observed, in a free market economy, firms are free to engage in commercial practices. However, such practices are not always devoid of drama. Sometimes they lead to abuse of market power by way of anti-competitive agreements, abuse of dominance, mergers and acquisitions among firms which may result in distortion of the market. Mergers attract the attention of competition authorities because they generally have implications for the concentration of, and ability to use, market power, which, in turn can impact negatively upon competition and harm consumer welfare by foreclosing other players from entering the market.[110]

13. The basic principle for exercising merger control is that if a merger is likely to give rise to market power, it is better to prevent this from happening than to control the exercise of market power after the merger has taken place. This is because the exercise and abuse of the market power may cause considerable damage to the market and harm consumers by the time redress is implemented by way of anti-trust regulation.[111] Further, firms should not be allowed to evade the competition law by using the merger route to achieve an agreement between themselves which would

[110] Mrudal Dadhic, Regulation of Vertical Mergers under the European Union Law: Lessons to be Learnt by other Jurisdictions. Staff Paper No 3/15, November, 2015.

[111] Note also that the social and economic cost of de-merging the firms after the merger is usually very heavy and thus not an easy option for competition authorities. In this regard merger control provisions differ from other provisions of competition law, i.e., anti-competitive agreements and the abuse of dominance, in that they involve an *ex-ante* as opposed to an *ex-post* review, basically on account of the fact that 'undoing' a merger that has taken place presents great difficulties and involves high costs. Note though that some merger legislation have *ex-post* merger control provisions. For detail see Vinod Dhall, 'Introduction to Competition Law', in Vinod Dhall (ed) *Competition Law Today: Concepts, Issues and the Law in Practice* (1st ed, Oxford University Press 2007) at 15.

have been found to be anti-competitive by a competition authority. It is for these reasons that competition law concerns itself with mergers and many of the jurisdictions having a competition regime have provisions on merger control. This is very true for the competition regime of COMESA.

4.4 *Merger Control Assists Undertakings in Making Sound Commercial Decisions*

14. Though not the justification for government intervention on mergers, merger control also assists undertakings in making sound decisions in the design of long-term business and commercial strategies. This point is important for DEEs. Merger control in such economies can have positive impact in terms of structuring different sectors of the economy and enhancing the prospects of stronger economic performance, in addition to protecting competition and consumers.[112] With this in mind, it is immediately observed that well designed mergers may lead to economic growth, enhanced consumer welfare and the emergence of firms that are able to effectively compete on the global scale. Competition authorities are therefore an integral component in the design of mergers especially when they authorise mergers with behavioural and/or structural Undertakings. Such interventions lead to mergers that ensure efficient allocation of resources. Ultimately such efficiencies contribute to economic growth. Suffice to mention that in the case of COMESA and other regional economic blocks with supra-national competition authorities such as the EU, the role of merger control is beyond preventing less competitive outcomes and ensuring enhanced consumer welfare. The role of merger control to contribute to the realisation of the single market imperative.

4.5 ***Non-Competition Reasons for Merger Control***

15. The reasons for merger control put across above are premised on the maintenance of competitive market structures. Sometimes merger control is undertaken by governments to serve other objectives beyond market structure concerns. Most of these reasons are premised on public interest and are briefly discussed below:

---

[112] 'The analytical framework for merger control' produced by the UK Office of Fair Trading for the International Competition Network Merger Working Group under "settings" http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf. (accessed on 10 October 2014)

4.5.1 Regulating Excess Wealth in Private Hands

16. The rationale here is that private undertakings should not be left to have a lot of economic power as they may become too political and negate the equitable distribution of wealth. Critics especially those that subscribe to ordoliberal policies argue that mergers may result in the redistribution of wealth from labour and society in general to shareholders and other such private institutions. They view the State as an institution that offers an appropriate legal framework for the efficient functioning of markets. It emphasises that the State has a crucial role to play in fostering market competition, by preventing the rise of monopolies that can exert harmful economic and political power. At the same time, the State must also avoid distorting free markets.[113]

4.5.2 Safeguarding Public Interest Concerns

17. In order to achieve efficiencies, sometimes mergers may lead to job losses, a situation which attracts a lot of political debacle in DEEs and DCs alike. It is not a secret that the creation of jobs is one of the major tools politicians use to sell their agenda. It follows therefore that anything that negates this agenda is not viewed favourably. It is not surprising therefore that in some cases mergers are reviewed to ensure that they do not lead to job losses. In COMESA, most of the Member States' National Competition Authorities have adopted a standard approach that mergers are approved on condition that no job is lost as a result of the merger. Kenya, Malawi and Zambia are very good examples where this is the case. Perhaps in Africa, a country with the most robust pursuit of public interest consideration (among others, jobs) in its assessment of mergers is South Africa. Public interest is so central in the assessment of mergers in South Africa to the extent that sometimes it appears irrational.

18. Some cases have raised drama that they are subject to international debate when it comes to discussions regarding the extent to which public interest should be considered in merger cases. The infamous case as regards this matter in South Africa

---

[113] http://www.thehindu.com/opinion/op-ed/what-is-ordoliberalism-in-economics/article19099601.ece (accessed on 13 October 2017)

is the **Walmart Stores Inc and Massmart Holding Ltd**[114]. The case is infamous in that it attracted vocal critics who argued that the public interest consideration in this merger was extended beyond levels reasonably required in merger analysis and that it created bad precedent where mergers could be rejected not because they are anti-competitive but on unreasonable public interest grounds. Suffice to say that the determination also has proponents who argue that the public interest consideration was reasonable under the circumstances and it was in the context of South Africa's history of apartheid where some groups were disadvantaged and therefore public interest consideration should be used to address that historical problem.

19. The concept of public interest may be very elastic, i.e. it may be limitless. Without digressing from the focus of the dissertation, a few things are worth observing. This dissertation is not advocating for unfettered consideration of public interest as it may be a dubious justification for rejecting pro-competitive mergers or approving anti-competitive mergers. It is the view of the dissertation that excessive public interest consideration may discourage mergers or they may result in inefficiencies that are detrimental and lead to more undesirable outcomes the authorities were intending to avoid in the first place. There is no comprehensive and conclusive research thus far especially in DEEs that has been conducted to determine the long-term impact of public interest considerations in merger cases. For example, one may argue that in order to achieve efficiencies, the merged entity may have to scale down on redundant labour in the short-run. This may allow it grow in the long-run and engage more labour than was the case pre-merger. This may sound theoretical but highly probable and a dedicated study should be undertaken on this specific subject.[115]

4.6 Conclusion

20. The preceding chapter has revealed that the most important reason for regulating mergers is to ensure competitive markets. Anti-competitive mergers would lead to an

[114] Case no: 73/LM/Nov10

[115] This dissertation is of the settled view that public interest consideration in merger assessment poses serious threat to the durability of the COMESA supra-national merger control system as Member States may dubiously use this avenue to advance their vested interests.

inefficient allocation of resources and the ultimate poor economic performance of an industry, country or region as a whole. Merger control is therefore especially pertinent for DEEs whose markets are so concentrated and cannot afford to have misallocation of resources thereby stifling growth in already poor economies.

21. The rationale for merger control may be summed up by borrowing from the settled holdings in the celebrated cases of **United States v. Long Island Jewish Med. Ctr., 983 F. Supp.121, 136 (E.D.N.Y. 1997)** and **United States v. Oracle Corp., 331 F. Supp.2d 1098 (N.D. Cal. 2004).** In these cases, the courts held that as applied to mergers, anti-trust laws seek to ensure that such transactions do not create, enhance, or facilitate the exercise of market power, thereby giving one or more firms the ability to raise prices above competitive levels for a significant period of time. This holding is also echoed under Article 26 of the Regulations which makes the **Substantial Prevention and Lessening of Competition** test the central focus of assessment.

22. The next chapter shall discuss the different types of mergers to which merger control applies. It is important to understand the different types of mergers because merger control applies differently to them in terms of vigour, focus and time spent on investigating them which has implications on the efficient utilisation of the resources of competition authorities and also implications for the merging parties. Some of the challenges faced by the merging parties is as a result of failure by competition authorities to distinguish mergers that require significant scrutiny from those that do not. Further, the different types of mergers have different impact on the competitive landscape of markets.

Chapter Five

5.0 Types of Mergers

1. Several types of mergers may be identified. Some of these are conglomerate mergers, horizontal mergers, market extension mergers, vertical mergers and product extension mergers. The term chosen to describe the merger depends on the purpose of the business transaction and the competitive relationship between the merging parties. Generally, competition laws have categorised mergers into three types. These are horizontal, conglomerate and vertical mergers. It is important to note that some mergers may have two or all the aspects of the three types of mergers like the General Electric/Honeywell Merger.[116]

5.1. Horizontal, Vertical and Conglomerate Mergers

2. In simple terms, horizontal mergers are those that involve actual or potential competitors whereas vertical mergers are not mergers among competitors in the same market but between firms situated at a different level along the production, distribution and supply chain.

3. Conglomerate mergers encompass pure conglomerate transactions where the merging parties have no evident relationship (e.g., merger between a tomato grower and a car manufacturer), geographic extension mergers, where the buyer deals in the same product as the target firm but does so in a different geographic market (e.g., when a baker in Blantyre buys a bakery in Lilongwe), and product-extension mergers, where a firm that produces one product buys a firm that makes a different product that requires the application of similar manufacturing or marketing techniques (e.g., when a producer of household detergents buys a producer of liquid bleach).[117] Given these definitions of mergers, it is not far-fetched to conclude that most of the mergers the Commission has considered are conglomerate mergers as mostly they involve companies dealing in the same product lines but different geographic markets. The

---

[116] Case No COMP/M.2220. General Electric/ Honeywell. Date: 03/07/2001

[117] The preceding paragraph is liberally borrowed from http://www.encyclopedia.com/topic/Acquisitions_and_mergers.aspx (accessed on 17 July 2016)

Commission has generally categorised these as horizontal mergers but from the foregoing, it does appear to be an erroneous categorisation.

4. In summary, conglomerate mergers may be divided into three main types: product line extensions (where one firm, by acquiring another, adds related items to its existing products); market extensions (where the merged firms previously sold the same products in different geographical markets (typical of the Commission's mergers)); and pure conglomerates (where there is no functional link whatsoever between the merging firms.[118]

5.2 Competition concerns

Horizontal Mergers

5. The three types of mergers raise competition concerns with varying degrees of alarm/seriousness. Empirical evidence informs us that horizontal mergers pose serious concern to competition than other types of mergers. These types of mergers may raise unilateral[119] or coordinated effects concerns[120] whose assessment is not always free from difficulty. Horizontal mergers raise two basic competition problems. The first is the elimination of competition between the merging firms, which, depending on their size, could be significant. The second problem is that, by increasing concentration in the relevant market, the transaction might strengthen the ability of the market's remaining participants to coordinate their pricing and output decisions. In this context, the obvious fear is not that the entities will engage in covert and clandestine conduct but that the reduction in the number of market participants may facilitate tacit coordination of behaviour. Chapter Six has a detailed discussion on unilateral and coordinated concerns and the circumstances under which they arise.

---

[118] Richard Whish, Competition Law. 5th ed. Oxford: Reed Elsevier (UK) Ltd, 2003. Page 780.
119 Unilateral concerns arise when a firm is singularly able to dictate conditions like prices and output in the market without regard to the reaction of competitors, customers and consumers.
[120] Coordinated concerns arise when the market becomes very transparent due to a very small number of market participants that the risk of uncertainty as regards each other commercial strategies is eliminated or significantly diminished.

Vertical Mergers

6. Richard Whish argues that vertical mergers may have harmful effects on competition, in particular if it gives rise to a risk of the market becoming foreclosed to third parties; an example of this would be where a firm downstream in the market acquires an upstream undertaking that has monopoly power in relation to an important raw material or input: there is an obvious concern here that competitors in the downstream market will be unable to obtain supplies of the raw material or input, or that they will be able to do so on discriminatory terms, with the result that they will be unable to compete effectively.[121] However, care has to be taken when considering foreclosure in vertical merger assessment. This is because as observed by Simon Bishop and Mike Walker, it is tempting to consider as foreclosure any commercial practice that reduces the options for rival firms or adversely affects the ability of an individual firm to compete. This view point would consider any commercial practice that makes commercial life harder for a competitor as representing foreclosure and would result in a hostile interventionist approach towards non-horizontal mergers.[122]

7. One thing that is important to note is that vertical mergers are unlikely to raise as pressing competition concerns compared to horizontal mergers. In most cases, vertical mergers are pro-competitive. As observed by Steven C. Salop and Daniel P. Culley, vertical mergers may increase the efficiency of this process by improving communication and harmonising the incentives of the merging firms. These benefits may include cost reduction and improved product design that can lead to lower prices, higher-quality products, and increased investment and innovation. By reducing the cost of inputs used by the downstream division of the merged firm, a vertical merger also can create an incentive for price reductions. In markets vulnerable to coordination, a vertical merger might lead to creation or enhancement of maverick or disruptive firm, or it might disrupt oligopoly coordination in other ways.[123]

[121] Richard Whish, Competition Law. 5th ed. Oxford: Reed Elsevier (UK) Ltd, 2003.
[122] Simon Bishop and Mike Walker, The Economics of EC Competition Law: Concepts, Application and Measurement. 3rd ed. Sweet & Maxwell (UK) Ltd, 2010.
[123] Steven C. Salop and Daniel P. Culley, Potential Competitive Effects of Vertical Mergers: A How–To–Guide for Practitioners, December, 2014.

Conglomerate Mergers

8. Conglomerate mergers involve firms that operate in different markets. Ordinarily, conglomerate mergers have no direct effect on competition. There is no reduction in the number of firms in either the acquiring or acquired firm's market. It is also highly unlikely that it raises foreclosure concerns as parties operate in unrelated markets. The Court of First Instance[124] (the CFI) has also considered conglomerate mergers not to raise significant competition concerns. For example, in the case of **Tetra Laval v Commission**,[125] the CFI recognised that the effects of conglomerate mergers were generally neutral, or even beneficial, for competition. Conglomerate mergers can supply a market or "demand" for firms, thus giving entrepreneurs liquidity at an open market price and with a key inducement to form new enterprises. The threat of takeover might force existing managers to increase efficiency in competitive markets. Conglomerate mergers also provide opportunities for firms to reduce capital costs and overhead and to achieve efficiencies.[126] The Commission has dealt with pure conglomerate mergers and none of them raised competition concerns. Whether conglomerate mergers should be regulated remains controversial as there is a presumption that these mergers do not raise serious doubts as regards compatibility with competition laws. US law long ago abandoned any interest in the conglomerate effects of mergers.[127]

9. Conglomerate mergers, however, may lessen future competition by eliminating the possibility that the acquiring firm could have entered the acquired firm's market independently. A conglomerate merger also may convert a large firm into a dominant one with a decisive competitive advantage, or otherwise make it difficult for other companies to enter the market. This type of merger also may reduce the number of smaller firms and may increase the merged firm's political power, thereby impairing

[124] The Court of First Instance was a court under the European Community. It was a trial court of original jurisdiction. It is now called the General Court which is a constituent court of the Court of Justice of the European Union.
[125] Case T – 5/02 [2002] ECR II – 4381, [2002] 5 CMLR 1182
[126] The preceding paragraph is liberally borrowed from http://www.encyclopedia.com/topic/Acquisitions_and_mergers.aspx (accessed on 17 July 2016)
[127] See Scherer and Ross, Industrial Market Structure and Economic Performance (Houghton Milfflin, 3rd ed, 1990), pp 188-190.

the social and political goals of retaining independent decision-making centres, guaranteeing small business opportunities, and preserving democratic processes.[128]

10. In the past, the EC has expressed anti-trust concerns as regards conglomerate mergers. The most celebrated merger in this regard is the General Electric/Honeywell International.[129] The basis of the EC's fundamental concerns with the merger were foreclosure effects through packaged offers. The EC's supposition was that the merged entity would have the ability to offer customers favourable discounts from the bundling of General Electric's engines and Honeywell's avionics and non-avionics products. In its July 3, 2001 decision, the EC specifically stated that:[130]

"the merged entity will be able to offer a package of products that has never been put together on the market prior to the merger and that cannot be challenged by any other competitor on its own."

11. The EC was concerned that the merged entity would engage in "mixed bundling, whereby complementary products are sold together at a price which, owing to the discounts that apply across the product range, is lower than the price charged when they are sold separately.[131] The case is also seminal in that it represents divergent and conflicting decisions by two well respected competition authorities *viz* the European Commission and the United States of America Department of Justice.

12. The dissertation shall address the issue of divergent and conflicting decisions at a later stage. Nevertheless, a few comments are worth making on the decision in the GE/Honeywell merger. It does appear that the EC erred in its conclusion especially by finding fault with the merger on the basis that it would give favourable discounts to consumers. The ultimate goal of merger assessment is to ensure that consumers are not harmed, their welfare is not adversely diminished and that the merger benefits them. The favourable discounts would have enhanced the welfare of consumers.

[128] The preceding paragraph is liberally borrowed from http://www.encyclopedia.com/topic/Acquisitions_and_mergers.aspx (accessed on 17 July 2016)

[129] See case No. COMP/M 2220.

[130] *See* Commission Decision, General Electric/Honeywell, Case No. COMP/M.2220 at 84 (July 3, 2001), *available at* http://europa.eu.int/comm/ competition/mergers/cases/decisions/m2220_en.pdf

[131] Supra-note 131

Further, it does appear or at least may be interpreted that the decision had the effect of protecting competitors who could not afford similar discounts. It is recalled that the aim of competition laws is not to protect competitors but the process of competition. It is the view of this dissertation that the EC erred in that decision and negated the enhancement of efficiencies by protecting competitors who should have become more innovative and efficient to counter the competition from the merged entity (GE/Honeywell).

13. As regards the practice at the Commission, it is not settled whether or not the Regulations have jurisdiction to review pure conglomerate mergers. The Commission staff including this dissertation are of the view that the Regulations have jurisdiction to review conglomerate mergers. Others like the former Chairman of the Commission's Board[132] argued that the Regulations lack jurisdiction to review conglomerate mergers. In order to debate this issue further, there is need to intellectually diagnose the relevant provision of the Regulations. Article 23(1) of the Regulations may shed light and offer guidance in this respect. The aforementioned Article provides that:

> **"For the purpose of this Article, merger means the direct or indirect acquisition or establishment of a controlling interest by one or more persons in the whole or part of the business of a competitor, supplier, customer or other person…..".**

14. The key words in this Article for purposes of this inquiry are *'competitor, supplier, customer or other person'.* This is because they determine the nature of competitive relationship between the merging parties. For example, it is clear that when the merger involves competitors, then that merger is a horizontal merger within the meaning and definitions already elucidated above. Similarly, a merger between a supplier or a customer falls within the definition of vertical mergers given above. As for conglomerate mergers, Article 23(1) does not appear to expressly capture them. However, it is arguable that it is captured within the wide, general, natural and ordinary interpretation of the words *'other person'*. This is because person include

[132] Mr. Alexander Kububa

any legal and natural person as defined in Article 1 of the Regulations. It therefore means that a merger that involves parties that have no functional relationship would still be captured as they would involve persons within the legal or natural context. What matters is not whether they are a competitor, supplier or customer but whether they are a person within the meaning of the Regulations.

15. The foregoing notwithstanding, other commentators like Alexander Kububa, the former Board Chairman of the Commission have posited that Article 23(1) of the Regulations only applies to horizontal and vertical mergers as the terms *'other person'* should be construed within the meaning of the rule of interpretation '*Ejusdem Generis'*. These commentators argue that the terms *'other person'* in Article 23(1) does not broaden the scope but limits the persons to competitors, suppliers and customers. This interpretation sounds incorrect. It does not appear that the rules of statutory interpretation would support this position. If competitors, suppliers and customers have been specifically mentioned in Article 23(1), then what could have been in the mind of the originators of the Regulations to have the terms *"other person"* refer to competitor, supplier and customer? Such an interpretation would render the words "*other persons*" in Article 23(1) of the Regulations *otiose*.

16. The position is therefore not settled. Some authorities like George Lipimile and indeed this dissertation are of the strong view that such an interpretation of Article 23(1) of the Regulations is erroneous and a misdirection at law. It does not appear this was the intention of those who developed the Regulations.[133] However, the Commission has not yet faced any litigation as regards this part of the law. It is therefore only the courts that can interpret the exact meaning of this provision to settle such debates. In the normal and ordinary course of legal certainty, the Commission should seek the advisory opinion of the COMESA Court of Justice (the "CCJ"). However, it is manifestly sad that the Treaty that establishes the CCJ under Article 7 does not give institutions such as the Commission an avenue to seek advisory opinions on the interpretation of the Treaty or indeed the Regulations promulgated pursuant to the Treaty. Article 32 of the Treaty embarrassingly omits this very

[133] It is surprising though to note that both Mr. Kububa and Mr. Lipimile were key people in the promulgation of the Regulations and yet they have divergent positions on this provision.

important requirement as it provides that avenue only to the Authority, Council and Member States. Specifically, Article 32 of the Treaty reads:

"The Authority, the Council or a Member State may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the Common Market, and the Member States shall in the case of every such request have the right to be represented and take part in the proceedings".[134]

17. Getting back to the different types of mergers it is important to note that some competition legislation in the Common Market and beyond have not defined the different types of mergers. What is important is the effect of the merger on the market and not the form in which it is consummated. This appears to have been the intention of the pioneers of the Regulations as could be reflected and inferred from various provisions of the Regulations like Articles 2, 3 and 26 of the Regulations. Any ambitious argument with regard to the jurisdiction of the Regulations on conglomerate mergers is immaterial and merely academic. The *raison d'etre* of the Regulations and consequently the Commission is the assessment of the effects of any competition transaction on the market.

5.3 Conclusion

18. Having understood the different types of mergers and the competition concerns they raise, it is important to discuss the substantive elements that are taken into account when assessing the competitive effects of mergers. Most of these elements are generally applied even to non-cross border mergers. In addition, the next paragraph shall discuss one or more elements (not paramount in national merger assessment) that are taken into account when assessing cross-border mergers. It is important to understand to a competent degree the application of these elements as some of the challenges of cross-border merger regulation may be related to the assessment of these elements.

---

[134] This Lacuna is serious and may affect the adequate regulation of cross-border mergers where there is no speedy request for advisory opinions from the CCJ.

Chapter Six

6.0 Substantive Assessment of Mergers and Acquisitions

6.1 What is Merger Assessment?

1. The dissertation has thus far given us an insight on the motivation behind mergers and the rationale of merger control. The dissertation is informative when it reveals that while most mergers are not pernicious to the optimal operation of markets, there are some firms whose motive to merge is to distort competition in the market. Others may not explicitly have the motivation to distort competition but the effects of such transactions are distortive nevertheless. It is such mergers that create the rationale to regulate mergers so that those that are deleterious to the process of competition in the market are prohibited or cleared with undertakings and/or conditions.[135]

2. However, in order to systematically identify and establish those mergers that are harmful to the process of competition, it is important to conduct a structured and methodical assessment. As already observed in this dissertation, the review of the competitive effects of a merger may be speculative if this structured and methodical approach is not undertaken. It is this approach that prevents the authorisation of mergers that are anti-competitive or conversely the rejection of mergers that are pro-competitive. It is important to note that the process of merger assessment is not linear. There are a number of elements that are taken into consideration in order to arrive at an accurate and sound determination and it should be stressed that such a process is in most circumstances devoid of mathematical precision. There are two generally accepted tests used in the substantive assessment of mergers. These are the **substantial lessening of competition test** and the **dominance test**. A third test called the **public interest test** may also be invoked. In some jurisdictions, the public interest test is applied expressly and enshrined in legislation. Other jurisdictions, especially those that consider themselves purists in

[135] In this dissertation, undertakings is used synonymously with the terms 'company, enterprise and firm'. The term is also however used in a completely different context when it refers to the submissions the merging parties make to the competition authority in order to address the competition concerns raised by the competition authority. The converse to this is the term condition which refers to the terms the competition authority imposes on the merging parties in order to approve their transaction.

terms of competition assessments, claim not to consider public interest[136] in their merger assessment. Anecdotal evidence reveals otherwise, as public interest is considered *albeit* in an implicit manner. What may differ from jurisdictions that expressly consider public interest is the degree and importance attached to this test.

3. The dissertation shall thus discuss in brief some of these elements in the following sections. It is not the intention of this research to delve into greater detail as regards the assessment of mergers, but it is important to have a holistic comprehension of merger control in order to appreciate the objectives of this dissertation. The assessment of mergers may not always be smooth and easy that it may present challenges especially to new and inexperienced competition authorities and this may be true for the Commission.

6.2 Relevant Market Definition

4. Relevant market definition is fundamental to the accurate disposition of any anti-trust case including mergers. It forms an important starting step, but it is not an end in itself. In other words, it is a necessary but not sufficient requirement in the determination of merger cases. A plethora of authorities have enunciated the importance of the relevant market definition. Among these authorities is the European Commission's Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law (the "Notice"). Paragraph 2 of the Notice explicates why market definition is important:

> *'Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure'.*

[136] In its later chapters, the dissertation shall analyse the challenges the consideration of public interest has raised in the assessment of mergers at national level and whether this has been resolved at regional level.

5. This rationale for defining the relevant market is instructive. It informs us that the inquiry about the market within which a competition authority applies its competition law and policy should not be infinity. The market should have boundaries so that only those firms that have an effect on the competitive behaviour of the firm(s) in question should be considered. Failure to do so may result in an inaccurate definition of the market. An erroneous definition of the relevant market may be fatal to the ultimate disposition of a merger case in that it may result in a rejection of a pro-competitive merger where a very narrow market has been erroneously defined. This is because the merging parties may end up showing higher market shares with a possibility of substantial lessening of competition when in fact not. An erroneous widely defined market may also result in clearing an anti-competitive merger because the merging parties may appear to have lower market shares thereby giving an illusion of less likelihood of a substantial lessening of competition.

6. It is worth noting that this Notice captures the EC's experience on market definition over many years of competition law enforcement. The Notice is also without prejudice to extensive and rich jurisprudence on the subject. However, the Notice appears to have its own shortcomings and among the fundamental shortcomings is its focus on actual competitors only. It is settled in practice that potential competition is likely to exert effective competitive restraint to the behaviour of incumbent firms especially where the barriers to entry are not insurmountable.

7. The Notice advises that in order to arrive at an accurate relevant market, it is important to define both the relevant product and geographic markets. These are the two constituent elements of the relevant market.

6.2.1 Relevant Product Market

8. In determining whether a merger is likely to substantially prevent or lessen competition, it is important to define the relevant product market. In the **Continental Can v. the Commission**, it was the EC's failure to define the relevant product market that caused the ECJ to quash its decision.[137] The relevant product market includes all those products that

[137] Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities was the first appeal case heard by the ECJ on the application of Article 82 of the Treaty of Rome to Merger Cases.

are in actual or potential competition with the product under consideration. This is important because if the product under consideration has several and effective actual and potential competing products, then competition concerns are less likely to arise from a merger. The converse is very true. From the foregoing, it does appear that the central point of consideration is substitution. Those products which consumers can substitute with the product under consideration form part of the same product market. Several authorities have provided guidance on relevant product market definition. The authority to begin with for purposes of this inquiry is the Notice. This document is particularly chosen because the EC has established and long-standing experience in the enforcement of competition law. The Notice has defined the relevant product market as:

> *'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.*

9. The Notice is instructive when it uses the terms interchangeable or substitutable. All substitutable products in the perception of a consumer therefore form part of the same product market. Substitutes, actual and/or potential are in competition with the product in issue. The definition of the relevant product market is therefore essentially a matter of interchangeability. Where the goods or services can be regarded as interchangeable, they are within the same product market. This supposition is supported by the holding in the landmark judgment of the **United Brands v Commission** case where the applicant was arguing that bananas were in the same market as other fruits. The ECJ remarked that this issue depended on whether the banana could be:

> ***'singled out by such special features distinguishing it from other fruits that it is only to a limited extent interchangeable with them and is only exposed to their competition in a way that is hardly perceptible'.***[138]

10. Similarly, in the Continental Can case, the ECJ enjoined the Commission, for purposes of delimiting the market to investigate those characteristics of the products in question by virtue of which they are particularly apt to satisfy an inelastic need and are only to a

[138]Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429, para 22.

limited extent interchangeable with other products. The issue of interchangeability/substitutability is not an exact science and has value and subjective judgments in the minds of different consumers. However, economists have devised tools to determine substitutability.[139] Among these tools is the hypothetical monopolist test also called the Small but Significant Non-Transitory Increase in Price (SSNIP).[140] It makes an assumption that the product in issue is a monopoly product. It provides that if the price of X were to increase by 5% -10%, would consumers switch to buying Y. If the answer is yes, then Y is in the same relevant product market with X. If not, then the X is a distinct relevant product market. The process is repeated with so many other products until all the potential candidates are eliminated. A comprehensive discussion to review the SSNIP falls outside the scope of this dissertation. However, it should be noted that the world we live in especially in DEEs is not ideal so data is not always available to accurately compute the SNNIP.

6.2.2 Relevant Geographic Market

11. The definition of the relevant geographic market may equally have a decisive impact on the determination of a merger case. Geographic dimension involves identification of the geographical area within which potential and actual competition takes place. Relevant geographic markets could be local, national, regional or even world-wide, depending on the facts of each case. Some factors pertinent to geographic market definition are consumption and shipment patterns, transportation costs and perishability. For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility. It is however important to note that with the advance in technology, some of the traditional considerations in defining the relevant geographic markets are being defied as markets are becoming seamless in space. This situation may present challenges for young competition authorities without sufficient experience to consider such factors. The Commission is not immune to this.

---

[139] Substitutability and interchangeability are used synonymously in this dissertation for purposes of market definition.

[140] Note that the SSNIP test makes an assumption that the prices of all the other products remain constant except the hypothetical monopolist's product. This may not always be realistic to achieve in the actual world and reliance may be more on simulation.

12. The principle of geographic market is similar to that of product market. The geographic market is defined by purchasers' views of the substitutability or interchangeability of products made or sold at various locations. In particular, if purchasers of a product sold in one location would, in response to a SSNIP switch to buying the product sold at another location, then those two locations are regarded to be in the same geographic market with respect to that product.[141] If not, the two locations are regarded to be in different geographic markets.[142]

13. That the geographic market should be identified is clear from the ECJ's judgement in the **United Brands v the Commission**.[143] It said that the opportunities for competition under Article 82 of the Treaty of Rome (now Article 102 of the Treaty of the Functioning of the European Union (TFEU)) must be considered:

> ***'with reference to a clearly defined geographic area in which [the product] is marketed and where the conditions are sufficiently homogeneous for the effect of the economic power of the undertaking concerned to be able to be evaluated'.***

14. In the United Brands case, the ECJ said that the geographic market must be an area in which the objective conditions of competition are fundamentally the same for all traders or undertakings. In this particular case, this was not true of the United Kingdom, Italian and French Markets, because of the special arrangements for bananas there.

15. The holding in the United Brands Case on the definition of the relevant geographic market has been echoed in the Notice and most competition authorities the world over follow the principles laid therein. The Notice has provided the following as regards the relevant geographic market:

> '*The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be*

[141] http://www.circ.in/pdf/Relevant_Market-In-Competition-Case-Analyses.pdf (accessed on 6 November 2016 at 19.13)
[142] Ibid
[143] Case 27/76 [1978] ECR 207, [1978] 1 CMLR 429

distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas'.

16. It is evident that the Notice on this aspect is informed by the ECJ's pronouncement in the United Brands Case thereby supporting the argument that the Notice reflects the EC's long experience on the enforcement of competition law.

6.3 Market Shares and Market Concentration

17. After carefully delineating the boundaries of the market within which competition law and policy should be applied, the next issue to establish is the market position of the parties in this delineated market. This will assist a competition authority to determine if unilateral or coordinated effects will arise from a merger. A useful but not conclusive indicator to establish this are the market shares of the undertakings in issue and the market concentration ratio in the relevant market. The higher the market shares of the merging parties, the higher the likelihood that the merger may raise competition concerns. The converse is true. However, in order to determine whether the merger will raise unilateral or coordinated effects, it is imperative to determine the market concentration ratio in the relevant market/s.

18. A plethora of authorities have posited that mergers that result in high levels of market concentration are not presumed to be anti-competitive. Rather high levels of market concentration are merely the starting point for identifying cases that require detailed scrutiny. The most commonly used measures of market concentration are the Herfindahl Hirschman Index (HHI) and the three or four firm concentration ratio (CR3 or CR4). These measures are described below.

6.3.1 Concentration Ratio (CR3 or CR4)

19. The concentration ratio is the sum of the market shares of the largest firms in the relevant market. Therefore in the CR3, the sum of the market shares of the three largest firms are taken into account while in the CR4 it is the sum of the four largest firms in the relevant market that are taken into account. The choice of whether to use the CR3 or the CR4 is

not a precise science but depends on a number of factors such as the policy consideration of a competition authority, the nature and size of a given economy, arbitrary choice among other factors. Countries like Singapore and regional competition authorities like the COMESA Competition Commission use the CR3 to compute the market concentration ratio.

20. For example, the Competition and Consumer Commission of Singapore is generally of the view that competition concerns are unlikely to arise unless the merger results in

(a) a merged entity with a market share of 40% or more; or
(b) a merged entity with a market share of between 20% to 40% and a post-merger CR3 ratio of 70% or more.[144]

21. As regards the Commission, this is inferred from the language of the Guidelines which provides that the Commission is unlikely to find concern in horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity concerned is below 15% and the sum of the market shares of the top three firms is less than 70%[145]. The reference to the top three firms in the Guidelines expressly confirms that the Commission uses the CR3 in the computation of market concentration ratio. The research further confirmed this position by reviewing the Commission's merger assessment reports. However, the research revealed a worrying approach in the application of the CR3 inconsistent with the Guidelines. In most of the Commission's merger assessment reports, the focus was just on the 70% CR3 and not the 15% post-merger market share of the merged entity. For example, in most cases, the Commission concluded that the merger would not raise competition concerns simply because the CR3 was below 70% even where the merged entity's market share exceeded 15%. The application of the test in the Guidelines needs to be considered in *toto* and not in part if the results are to be reliable.

22. In the Common Market, countries like Zambia also use the CR3 to determine the concentration ratio. This is stated under paragraphs 70 and 71 of the Competition and

[144] http://www.singaporelaw.sg/sglaw/laws-of-singapore/commercial-law/chapter-27 (accessed on 4 May 2017)
[145] Paragraph 8.10 of the Guidelines.

Consumer Protection Commission Guidelines for Merger Regulations (CCPC Guidelines). These Guidelines provide that the CCPC normally uses concentration ratios for three firms, showing the proportion of the market dominated by the three leading enterprises.

6.3.2 Herfindahl Hirschman Index (HHI)

23. The CR3/CR4 has an advantage in that it does not require knowledge of the market shares of all the firms operating in a relevant market and it is simple to compute. One may argue that it is a more reliable tool in DEEs where data is notoriously insufficient. It however appears to suffer from one shortcoming in that it does not give us an indication of the dispersion of the market shares in a relevant market. It is therefore possible to conclude that the merger will not raise competition concerns when as a matter of fact it would. The converse is equally true.

24. In order to address the above identified shortcoming of the CR3/CR4, some competition authorities use the HHI. The HHI is the sum of the squares of the market shares of all firms in the market. In contradistinction to the CR3/CR4, the HHI is affected by both the quantum of firms in the relevant market and the dispersion of their market shares. The value of the HHI decreases as the number of firms in a market increase. Consistent with the foregoing mathematical logic, the value of the HHI is greater the larger the differences in the market shares of the firms under consideration. It is not the intention of the dissertation to engage into an extensive mathematical demonstration of how the HHI plays out given different firm sizes. Reference to the HHI in the dissertation is simply to provide a platform for a clear understanding of what competition authorities take into account when assessing a merger and this should ultimately contribute to achieving the overall objective of the dissertation. The foregoing notwithstanding, it is important to understand the thresholds or safeguard levels most competition authorities consider as red lines when assessing mergers.

25. The European Commission Guidelines on the Assessment of Horizontal Mergers,[146] set out the HHI safe harbours that the EC applies. The safe harbours applied by the EC, also adopted by the Commission are:

a) if the post-merger HHI is below 1,000, competition concerns are unlikely to arise;
b) if the post-merger HHI is 1,000 to 2,000 and the delta is below 250, competition concerns are unlikely to arise except in special circumstances; or
c) if the post-merger HHI is above 2,000 and the delta is below 150, competition concerns are unlikely to arise, except in special circumstances.

26. It is important to make a few observations about safe harbours. Paragraph 20 of the EC Guidelines on the Assessment of Horizontal Mergers, provides that for mergers in highly concentrated markets, a change of below 150 points is unlikely to raise significant competitive concerns. Nonetheless, in **United States vs Philadelphia National Bank**, it was observed that ***"if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great."***[147] This is because it is easier to prevent the creation of a dominant position than to attempt to deal with its abusive conduct and the effects thereof once it is already dominant. It is however important to reiterate that measures of concentration are only a starting point in merger assessment and in practice, most mergers which exceed the safe limits are cleared. Therefore, there is no presumption that when the thresholds are exceeded, an adverse conclusion will always be arrived at by the competition authority.

27. The draw back or difficulty identified with the application of the HHI is the need to have information on the market shares of all firms in the market. In DEEs where market information is absent or occasionally insufficient, HHI may not be an appropriate measure to use. Nevertheless, it is also important to note that firms with small market shares do not greatly affect the result because larger firms have a greater weighting in the calculation of the HHI. It is not the intention of this dissertation to engage in

[146] Much reference is made to the EU in this dissertation because it is the only other true functional supra-national competition authority and the Commission has a lot to learn from it in its nascent stages.
[147] United States v. Philadelphia National Bank, 374 U.S. 321, 365 n.42 (1963)

mathematical muscle flexing but it is possible even in the absence of all the market shares of the market participants to have an indication of the change to the HHI post-merger. As long as the market shares for the merging parties are known, then an indication of the change can be estimated and the likely effects of such a merger determined on the basis of the safe harbours discussed above.

28. Let us assume that that the market share of company A is x and that of company B is y. If these two companies decide to merge, their contribution to the HHI pre-merger is $x^2 + y^2$. Post-merger, there contribution to HHI would be $(x + y)^2$. Therefore, the change in HHI would be

$$\mathbf{(x + y)^2 - (x^2 + y^2) = 2xy.}$$

29. Therefore in simple terms, the change in HHI as a result of the merger is simply the product of the merging parties' pre-merger market shares multiplied by 2. It follows therefore, that even the seemingly complex HHI is not that complex after all as we can still get some meaningful indication even in the absence of complete information on market shares of the marker participants.

6.4 Barriers to Entry/Exit

30. After putting the market in context by defining the boundaries and understanding its structure through the determination of the relevant market and market concentration, competition authorities look at other elements that assist in the accurate determination of a merger case. Among these elements are barriers to entry and exit. Barriers to entry are the conditions of a specific industry which tend to keep out prospective competitors.[148] Barriers to entry are a critical element of consideration in determining potential competitors who would provide competitive restraint to the merged entity should it attempt to conduct itself in an anti-competitive manner.

31. The assessment of barriers to entry is separate but closely related to market concentration assessment. Markets characterised by high barriers to entry are expected to be highly

[148] Eliot G. Disner, Cornell Law Review. Volume 58, Issue 5 June 1973. Barrier Analysis in Antitrust Law

concentrated due to limited levels of new players entering the market. Further, if a market is characterised by low barriers to entry, the incumbent players are unlikely to engage in anti-competitive conduct as such behaviour would trigger an incentive for potential competitors to enter the market. There is empirical evidence that competition concerns in a *prima facie* concentrated market may be assuaged by establishing that the barriers to entry are not insurmountable. For example, in **United States v. Baker Hughes**, it was held that in the absence of significant entry barriers, a company probably cannot maintain supra-competitive pricing for any length of time. In the Common Market, a notable case where a competition authority made a decision on a merger transaction taking serious account of barriers to entry is the **Zambian Breweries Plc/Northern Breweries Plc** merger. In this case, ZCC considered that the relevant market was characterised by significant barriers to entry and that merger would result in the enhancement of the market power of Zambian Breweries Plc. ZCC therefore approved the merger with undertakings to address the competition concerns.

32. The barriers to entry are usually Structural and Behavioural nature. The Structural barriers as explained in The Official Journal of the European Union[149] are solely due to conditions outside the control of market participants. Structural barriers to entry include basic costs of production, adequacy of capital markets, and activities of governments and regulators. The Behavioural barriers are endogenous and are erected by incumbent firms to frustrate market access to would be competitors.

33. In the consideration of possibility to enter a market, care has to be taken not to construe any entry as signalling low barriers to entry in a given market. For example, under the Canadian Merger Assessment Guidelines, it is stated that "the assessment of barriers to entry is directed towards determining whether entry by potential competitors would be likely to occur on a sufficient scale in response to a material price increase or other change in the relevant market brought about by the merger, to ensure that such a price increase could not be sustained for more than two years". The Canadian Merger Assessment Guidelines further stipulate that one must assess cost advantages available to

[149] Official Journal of the European Union, Commission Recommendation of 11th February 2003 on relevant product and service markets within the electronic communication sector susceptible to ex ante regulation in accordance with Directive 2002/21/EC of the European Parliament and of the Council on a common regulatory framework for electronic communication networks and services.

incumbent firms, sunk costs and the effect of mergers on barriers. In summary, in order to arrive at the conclusion that a given market does not have significant barriers to entry, a competition authority should be satisfied that entry would be likely, timely, and sufficient to offset any anti-competitive effects of the merger. Most DEEs are characterised by high market barriers to entry and most competition authorities appear not to have the competence to effectively determine this thereby sometimes approving mergers on account of low barriers to entry.

34. In this inquiry, it is also important to consider barriers to exit. Markets that have high barriers to exit are also to a large extent concentrated markets. This is because barriers to exit are highly cognate to barriers to entry. Firms may consider as a disincentive to enter a market if they are of the view that it may not be easy for them to exit should a need to do so arise. Sunk costs usually result in barriers to exit. It is recalled that one of the principal basis for firms to engage in mergers is to exit the market. This exit may not always be easy and one way of doing it is through a merger. This notwithstanding, most competition authorities do not engage in an ambitious exercise to assess barriers to exit may be speculative.

6.5 Import Competition

35. Import Competition is critical to competition case analysis because it provides a profound competitive discipline on local firms. This is especially true if imports have a significant and sustainable share of the market, and/or the threat of imports prevents local firms from pricing their products above a competitive level as stated in the Manual on the Formulation and Application of Competition Law by UNCTAD[150]. As a matter of fact, import competition is closely related to the definition of the relevant geographic market. If imports have the potential to enter a domestic market in response to anti-competitive conduct by incumbent firms, then the areas or origins of the imports *ceteris paribus* could be included in the determination of the relevant geographic market. This may lead to widening the market and diluting any perceived economic strength incumbent firms may have. It is the considered view of this dissertation that import competition should not be looked at as an isolated element of assessment but should be considered during the

[150] United Nations Conference on Trade and Development (UNCTAD) – Manual on the Formulation and Application of Competition Law (2004)

determination of the relevant geographic market. This view supports the supposition earlier in this dissertation that the assessment of a merger case is not done in a linear fashion.

36. Competition authorities the world over have approved certain mergers on the premise that the potential for import competition is great should the merged entity engage in anti-competitive conduct. The converse is true. For example, in the **Zambian Breweries Plc/Northern Breweries Plc** merger, ZCC raised competition concerns *inter alia*, diminutive import competition. Another example is that of the merger of **Qantas Airways Limited (PCC) (Frequent Flyer) and Hazelton Airlines Limited** determined by the Australian Competition and Consumer Commission (ACCC). In this case, import competition was absent to assuage the competition concerns of ACCC. Consequently, Qantas aborted its merger intention as a result of the competition concerns raised by ACCC. The converse is where competition authorities have approved transactions that raise competition concerns on the basis that there is a sufficient level of imports to discipline the anti-competitive behaviour of incumbent firms. In the **Email Limited and Southcorp Limited** merger the ACCC determined that the market was characterised by high barriers to entry. This notwithstanding, ACCC authorised the merger on the premise that potential import competition was likely to ensure the merger would not substantially lessen competition.

37. A few remarks have to be made as regards the consideration of import competition in merger assessment at regional level. At regional level, the imports to be considered should be those that come from outside the region as opposed at looking at individual Member States' imports. This is because this may be misleading to conclude that there is import competition and yet it is intra-regional trade. Where imports come from outside the regional market but into one Member State, their significance should be assessed and determined if they can address concerns of a regional nature otherwise, such a Member State may be treated as a distinct market which is not impermissible in community competition law.

6.6 Countervailing or Buyer Power

38. Buyer power has been defined by some authorities as the ability of one or more buyers, based on their economic importance in the market in question to obtain favourable purchasing terms from their suppliers. Buyer power is an important aspect in competition analysis, since powerful buyers may discipline the pricing policy of powerful sellers, thus creating a 'balance of power' on the market concerned. A firm is apt to charge high prices in the market if the buyers are insignificant in economic strength. Therefore, where a firm faces few or no strong buyers, it is likely to have its market power manifest and in most cases engage in exploitative abuse. However, buyer power does not necessarily always have a positive effect. Where a strong buyer faces weak sellers, for example, the outcome can be worse than the where the buyer is not powerful.[151] The later situation gives rise to what economists call 'monopsony power'.

39. Most competition authorities assess the bargaining strength customers have due to their size, commercial significance to the supplier and their ability to switch. The question is whether this is sufficient to offset the increase in market power that the merged entity will otherwise obtain through the merger.[152] In the decision of the South African Competition Tribunal in the **Franco-Nevada Mining Corporation case**[153] one of the factors for clearing the merger in the gold mining industry was that a single producer of gold could not influence prices in the international market. Gold producers were effectively price takers. In contrast, one of the factors which lead the South African Competition Tribunal to block the merger in **JD Group Limited/Ellerine Holdings Ltd**[154] was that the customers of these two furniture companies were the least powerful of South African customers.[155]

40. So how is countervailing power considered in merger assessment? Where a competition authority determines that a merger shall result in dominance on the market, but

[151] Shilpa Bhadoria, "Glossary of Terms in Indian Competition Law", C/f http://www.cci.gov.in/images/media/ResearchReports/shilpa_report_20080730103931.pdf, (last visited on December 5, 2009)
[152] Paula Riedel, Postgraduate Diploma/Masters in EC Competition Law 2008 – 2009. Unit 6; Merger Regulation
[153] Franco Nevada Mining Corporation Ltd/Gold Fields Ltd (CT 77/LM/Jul00, 28.9.2000)
[154] CT 78/LM/Jul00, 5.9.2000)
[155] Martin Brassey et al., Competition Law. 1st ed. Lansdowne: Juta Law, 2002.

countervailing power exists, a competition authority may allow this merger as it is unlikely that the merged entity may abuse its dominance. The merging parties may also advance the argument of countervailing power as a defence to avoid a competition authority from arriving at the conclusion that a merger would lead to a substantial prevention or lessening of competition. Where countervailing power lacks in the market, a competition authority is more likely to prohibit such a merger or approve it with conditions/undertakings.

41. Buyer or countervailing power may also be used to reject a merger that results in the merged entity facing very weak sellers. This is in the context of the monopsony power referred to above. Such a merger may distort competition in a similar manner as a merger that leads to a monopoly situation. Therefore, it is not every buyer power that results in the desired results or the optimal and efficient operation of markets as mostly depicted by scholars on the subject. Buyer power should be looked at in context taking into account the specifics of each relevant market under consideration.

6.7 Removal of a vigorous competitor/Maverick

42. A vigorous competitor or maverick as the Americans would call it is an undertaking that despite its small size has the capability to offer substantial competitive restraint to market leaders. Such an undertaking might have particularly low marginal costs, may be more innovative relative to its competitors or has better products. Such an undertaking may also have a better corporate control.[156] However, such a determination requires competent economists at competition authorities with sufficient data, a situation that appears notoriously absent at competition authorities in DEEs. The Commission is not an exception on this matter. The shockingly low number of economists at the Commission poses a great challenge to the successful determination of such matters. As stated in the Guidelines, “mergers involving a maverick are more likely to result in a significant and sustainable increase in the unilateral market power of the merged undertaking or increase the ability and incentive of a small number of undertakings to engage in coordinated conduct. Vigorous and effective competitors may drive fundamental aspects of competition, such as pricing, innovation or product development, even though their own

[156] COMESA Merger Assessment Guidelines

market share may be modest. These undertakings tend to be less predictable in their behaviour and deliver benefits to consumers beyond their own immediate supply, by forcing other market participants to deliver better and cheaper products. They also tend to undermine attempts to coordinate the exercise of market power. A merger that removes a vigorous and effective competitor may therefore remove one of the most effective competitive constraints on market participants and thereby give rise to competition concerns".[157]

43. A competition authority is more likely than not to prohibit a merger that results in dominance and would remove a vigorous competitor from the relevant market. This is because such a merger would significantly impede effective competition in the market place. Conversely, a competition authority is likely to approve a merger that results in dominance if the market is characterised by a maverick or vigorous competitor. Such a determination is not free from difficulty especially in DEEs as one would need to look at the historical data in terms of past pricing, innovation, corporate control among other things of the vigorous competitor and the reaction of other firms in the market including those involved in the merger in issue.

44. In the proposed merger between **Tongaat-Hulett and Transvaal Suiker Beperk (TSB)**, the South African Competition Commission rejected the transaction on the premise that the merger would remove a maverick. TSB appeared to be a maverick and it was the firm most likely to compete in packaging fees and credit terms.[158]

6.8 Consideration of Dominance/Unilateral Effects

45. In order to determine whether a merger is likely to result in a substantial lessening and prevention of competition in the relevant market, one of the most critical elements to look at is dominance. Mergers that result in the creation or strengthening of a dominant position are more likely than not to result in a substantial lessening and/or prevention of competition. It is therefore important that the meaning of dominance is understood.

---

[157] Supra-note 156

[158] See Media Release 9 of the Competition Authority of South Africa issued on 22 September 2000 and the decision of the Tribunal. Standard Bank was also viewed as an effective competitor by the South African Competition Commission in its Report on the proposed Nedcor/Stanbic merger.

Where a firm behaves, to a large and/or sustainable extent, as though it had no competitors, such a firm would be rightly referred to as a “dominant” and or “monopoly” undertaking, regardless of its market share.

46. Dominance is in most cases inferred from market shares. This notwithstanding, domination of a given market cannot solely be based on the market share held by an undertaking. Doing so would amount to an astonishing intellectual approach palpably devoid of elementary comprehension of the principles of dominance. It is also important that an undertaking is considered in light of its ability to exercise an appreciable influence on the functioning of the market and on the behaviour of other firms. In its judgment of 14 February 1978 [Decision 72/21] in the case of "**United Brands Company v. Commission**" the ECJ upheld and enlarged the definition of the dominant position adopted by the Commission as early as its decision of 9 December 1971 [Decision 72/21] in the "**Continental Can** Company" case [Case 6-72]. It thus stated that:

> ***“the dominant position referred to in Article 86 (EEC, new Article 102 TFEU)"relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers”.***

47. The High Court of Australia has also defined market power ***“as the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product”***[159]. The foregoing appears to suggest that market power is synonymous to dominance. The position is not very settled. Others argue that the terms are used interchangeably while others have posited that it is possible to be dominant and yet lack market power. Those who hold the latter view argue that dominance is a quantitative measure which shows the size of the firm while market power is a qualitative measure that shows the ability of a firm to influence the market conditions without regard to the reaction of competitors and consumers. What is important is to interpret dominance within the meaning of the legislation being applied at the time. For example, the

[159] High Court of Australia: Queensland Wire Industries Proprietary Company Limited and Another (1989) 167 CLR 177 F.C.89/004

Regulations under Article 17 appear to suggest that the two terms are synonymous when it defines dominance as a position of economic strength that enables an undertaking to operate in the market without effective constraint from its competitors or potential competitors. The definition in the United Brands case unequivocally expresses this position. In this dissertation, the two terms are therefore used interchangeably.

48. Care has to be taken when considering whether or not an undertaking is dominant in a given relevant market. There are some markets that may show some semblance of competition but if this competition is not effective, then it does very little to constrain the abusive behaviour of a dominant undertaking. Therefore, in order to address situations where undertakings would escape the application of the law because of some semblance of competition in that market, the ECJ in the **Hoffman La-Roche** case extended the definition of dominance enunciated in the United Brands case. The ECJ reiterated the test and added:

> ***"Such a position does not preclude some competition, which it does where there is monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment".***[160]

49. A word of caution should be entered when discussing dominance. It is important that mergers are not rejected simply because they lead to dominance. The converse is equally true as mergers are not cleared because the merging parties are already dominant and the merger does nothing to change the status quo. The primary test is the substantial prevention or lessening of competition or a significant impediment of effective competition as it is known in the European Union. Practice and case law are abound with interpretations to this effect. As a matter of fact, it is this situation that led to the promulgation of the European Union Merger Regulations. *Hitherto*, the EC had been using Article 82 of the Treaty of Rome to assess mergers because the focus was on the dominance test.

[160] Case 85/76 *Hoffman-La Roche & Co. AG v. Commission of the European Communities* [1979] ECR 461, para 39

50. To reiterate the point, the test now focusses on whether a merger is likely to substantially lessen competition in particular through the creation or strengthening of a dominant position. This shift in the test is intended to capture non-coordinated effects as well as coordinated effects cases. Some respected scholars have observed that the continued reference to the creation or strengthening of a dominant position is intended to preserve guidance on that test that is available from past Court judgments.

6.9 Consideration of Coordinated Effects

51. The preceding sub-section discussed unilateral effects. This simply means that an undertaking unilaterally influences the conditions of competition in the relevant market. This notwithstanding, it does not follow that where unilateral effects cannot be determined or foreseen, then the merger is unlikely to lead to a substantial prevention or lessening of competition. As a matter of fact, that is why currently the focus is on the SLC test and not dominance. The SLC test enables competition authorities to capture coordinated effects. Mergers may still lead to an adverse effect on competition in the relevant market through coordinated effects by making the market so transparent. The determination of whether coordinated effects are likely flows directly from the determination of market concentration. In a highly concentrated market, the probability of coordination and cartelisation among the market players is high. A merger removes at least one autonomous player from a relevant market. Depending on the market strength of the acquired firm, the number and motives of the remaining firms in the relevant market, and the conditions of competition in which the remaining firms compete, a merger may result in an increased incentive for the remaining firms to coordinate their market conduct through interdependent behaviour on the basis of rational prediction of the behaviour of the remaining competitors. Such a situation eliminates and/or significantly diminishes the possibility of serious competition in the relevant market.

52. Coordination is simplified when the number of market participants is small and the likely responses of competitors are easier to forecast. As stated in the Canadian Guidelines, “other things being equal, the likelihood that a number of firms may be able to bring

about a price increase through interdependent behaviour increases as the level of concentration in a market rises and as the number of firms declines".[161]

53. The removal of a firm through a merger may facilitate coordination, express or tacit, among the remaining firms in the market, leading to reduced output, increased prices or diminished innovation. Therefore, it is important to meticulously review a market with high levels of concentration.

54. Some cases can be cited as regards coordinated effects and again reference shall be to the EC from whence the dissertation draws much inspiration. The case that immediately comes to mind here is the **Nestle/Perrier**.[162] In that case, Nestle and Perrier shared about 60% of the French bottled mineral water market, whilst BSN had 22% and the remainder of the market was shared by several insignificant undertakings. This situation raised the concern of European anti-trust authorities and Nestle was willing to shed off the Volvic brand to BSN in order to dilute its market shares. However, even with this proposal, the aggregate market share between Nestle and BSN would have been in the region of 82%. The EC decided that the merger would create a duopoly which would facilitate anti-competitive parallel behaviour leading to collective abuses. The EC observed that there was market transparency, which facilitated tacit co-ordination of pricing. It further noted that Nestle and BSN had similar strength in the market and already cooperated in some sectors of the food industry. The EC noted that there was reciprocal dependence between the two companies which created a strong common interest and incentive to maximise profits by anti-competitive conduct. To dispose the matter, Nestle was required to divest itself of a major brand, not to BSN, but to a third party, so as to weaken the duopoly power of the two major companies.

55. The criteria to be satisfied to establish coordinated behaviour were laid down in the **Airtours/First Choice**[163] merger. In this case the EC blocked Airtours' proposed merger with First Choice on grounds that the merger would create a collective dominant position amongst the three largest travel companies in the United Kingdom, who together would hold 80% of the UK short-haul foreign package holiday market.

[161] Canadian Guidelines section 4.2.1
[162] Case IV/M190, [1993] 4 CMLR M17
[163] Case Comp/M1524, [1999] 5 CMLR 971; the CFI judgment is Case T-342/99 at [2002] 5 CMLR 317, [2002] ECR II-2585

56. Airtours appealed the EC's decision and in 2002, the CFI overwhelmingly disagreed with the EC's decision and overturned the ruling. The CFI criticised the EC's poor economic analysis and established three conditions which the EC needed to satisfy before it could reach the conclusion that the merger would create or strengthen a collective dominant position. The CFI stated the criteria as:

a) the firms engaging in the coordinated behaviour must be able to monitor whether the terms of coordination are being adhered to;
b) there must be credible deterrent mechanism to deter any firm from deviating from the coordination; and
c) the results expected from these common policies must not be at risk of foreseeable reaction from competitors or consumers.

57. This is not a simple task for a competition authority especially in DEEs where experience, competence and resources required to undertake such an assessment are seriously lacking. Take for example at the Commission where at the time of writing the dissertation, there were only 3 officers responsible for mergers in the whole Common Market. Such numbers are not just absurd to allow for such an assessment but clearly impractical. It is observed in the above Airtours/First Choice merger that such an exercise is daunting even for advanced competition authorities.

6.10 Consideration of Efficiencies

58. In most competition legislation, efficiency claims are considered by competition authorities to authorise otherwise anti-competitive mergers. However, not all efficiency claims should be considered as defence for an otherwise anti-competitive merger. Only those efficiencies that outweigh anti-competitive effects and benefit consumers are taken into account. Care has to be taken when considering efficiency claims from the merging parties. It is common to see long stories of efficiency claims submitted by the parties to justify their merger transactions. Most of these efficiency claims are very theoretical, academic, narrative and indeed speculative without any fundamental basis of reasonable predictability and objectivity that such efficiencies shall emanate from a merger.

59. The EUMR provides guidance that the efficiency claims should be merger specific and there should be no other less anti-competitive means of achieving the claimed efficiencies. Further, the efficiencies should be verifiable. In addition, the efficiencies should benefit the consumers as opposed to only increasing the dividends of the shareholders. Benefits to consumers can be in the form of reduced prices or increased quality of the products. Such efficiency claims should also not frustrate the process of competition in the relevant market. The burden, therefore, is on the merging parties to justify their efficiency claims. The research is of the view that the standard of proof for the efficiency claims appears to be very high that it is not easy for a merger that leads to an anti-competitive outcome to satisfy the criteria and standard required. For example, a merger that is anti-competitive is suggestive of one that frustrates competition. It is however, not patently clear how efficiency claims from such a merger would escape frustrating competition. It is improbable though not impossible to immediately conceive without sounding academic a situation where efficiency claims would lead to the authorisation of a merger that is anti-competitive as one of the requirements is that such efficiencies should not be a hindrance to the process of competition in the market place. The determination of such a situation would require long experience of competition law enforcement with sound and competent analysis a requirement stubbornly absent in most young competition authorities.

60. The efficiency defence is contained under Article 26(1)(a) of the Regulations. Article 26(1)(a) stipulate that:

> **"Whenever called upon to consider a merger, the Commission shall initially determine whether or not the merger is likely to substantially prevent or lessen competition ………, and if it appears that the merger is likely to substantially prevent or lessen competition , the Commission shall then determine whether the merger is likely to result in any technological efficiency or other pro-competitive gain which will be greater than and offset the effects of any prevention or lessening of competition that may result from the merger and would not likely be obtained if the merger is prevented…"**

61. Article 26(1)(a) above gives an interesting reading in that it expressly provides for the requirements of the efficiency defence stated in the preceding paragraphs, the efficiency claims can be used as a defence and that there should not be any other less anti-competitive alternative of obtaining similar efficiencies.

62. The consideration of efficiencies in the Regulations is not unique to COMESA only. Article 2(1)(b) of the EUMR has similar wording. It provides that:

> **"Concentrations within the scope of this Regulation shall be appraised in accordance with the objectives of this Regulation and the following provisions with a view to establishing whether or not they are compatible with the Common Market. In making this appraisal the Commission shall take into account the market position of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for the relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to the consumers' advantage and does not form an obstacle to competition".**

63. Reference to the development of technological and economic progress in Article 2(1)(b) of the EUMR is suggestive of efficiency claims. Article 2(1)(b) of the EUMR is more instructive than Article 26(1)(a) of the COMESA Competition Regulations when it expressly provides that the development of such technical and economic progress should not form an obstacle to competition. Arguably, this requirement makes the efficiency defence superfluous due to the views advanced above. Consistent with this view, in **Danish Crown/Vestjyske Slagtrier**,[164] the EC said at paragraph 198 that, ***"since the concentration in question would create a dominant position, the efficiency arguments of the parties cannot be taken into account".*** The EC has therefore similarly in some cases either determined that a transaction would not create or strengthen a dominant position such that Article 2(1)(b) of the ECMR is not invoked or has disagreed with the

[164] Case IV/M.1313 OJ [2000] L 20/1, [2000] 5 CMLR 296

parties' submission that efficiencies shall emanate from the concentration and benefit the consumers.[165]

6.11 Public Interest Considerations

64. The consideration of public interest is not free from controversy because of its susceptibility to other vested interests *inter alia,* politics. Further, what amounts to public interest varies widely across jurisdictions. This raises challenges especially for regional merger control like in COMESA where merger assessment may have to take into account the different views of what amounts to public interest in different jurisdictions. Public interest is an amorphous concept in that it may be limitless. It is quite clear that the consideration of public interest is a controversial topic in most jurisdictions. Defining public interest too wide renders a competition authority susceptible to political interference. In some jurisdictions, employment preservation is the main public interest consideration. Since jobs usually are on the lips of politicians when they campaign, such an agenda becomes very important to them and would intervene at every slightest instance that presents itself.

65. Although the debate is not yet settled, it does appear as a rule of the thumb in most jurisdictions that an anti-competitive merger may be cleared if the public benefits emanating from such a merger outweigh its anti-competitive detriment. In some jurisdictions, this principle is actually explicitly or implicitly embedded in legislation. This notwithstanding, a careful review of the consideration of public interest in some jurisdictions for example, South Africa shows or at least indicates that a pro-competitive merger in that jurisdiction may be rejected if it results in job losses which is a public interest consideration. A point in example is the **Walmart/Massmart Merger.**[166]

66. Zambia is another jurisdiction where *prima facie,* a pro-competitive merger may be rejected because it is not in the interest of the public. Section 31 of the Zambian

[165] For example, see Case No IV/M.477 Mercedes Benz/Kassbohrer OJ [1995] L 211/1; Case No IV/M.53 Aerospatiale – Alenia/de Havilland OJ [1991] L 334/42, [1992] 4 CMLR M2, para 65-68; MSG/Media Service OJ [1994] L 364/1, paras 100-101; Bertels Mann/Kirch/Premiere OJ [1999] L 53/1, [1999] 4 CMLR 700, paras 119-122.

[166] South African Competition Commission case number: 2010Nov5445; South African Competition Tribunal case number: 73/LM/Nov10 (29 June 2011); South African Competition Appeal Court: 110/CAC/Jun11 and 111/CAC/Jun11 (9 March and 9 October 2012)

Competition and Consumer Protection Act provides that the Zambian competition authority ***may***, in considering a proposed merger, take into account any factor that bears upon the public in the proposed merger. The language of the law suggests that in such consideration, if the Zambian competition authority raises public interest concerns, then the merger may be rejected on those grounds. This matter was put across to officials from the Zambian competition authority at a workshop ***on Analysing Competitive Effects, Public Interest Issues and Drafting Effective Remedies in Merger*** Investigations organised by the Commission and the Federal Trade Commission of the USA on 22 – 23 October 2018 in Eswatini. The Zambian officials confirmed that in Zambia it is possible to reject a pro-competitive merger on public interest grounds.

67. Ideally, merger analysis should be free from other considerations except the competitive effects of a merger. Public interest consideration raise uncertainty especially to the merging parties and therefore negate the generally accepted tenets of merger control of certainty, timeliness and transparency. This approach stems from a purist analytical point of view. Even the ICN in its Recommended Practices for Merger Analysis states that the legal framework for competition law merger review should focus exclusively on identifying and preventing or remedying anti-competitive mergers. Merger review law should not be used to pursue other goals.

68. Nevertheless, merger analysis the world-over is not pure. Even advanced jurisdiction like the EU do place some reliance on public interest. In its nascent stages of enforcement, the EC took a strong position to consider only competition related matters in merger assessment. In **Aerospatiale-Alenia/de Havilland**[167] merger, the EC was criticised for rejecting the merger on pure competition grounds and for not considering industrial policy matters that the merger would have resulted in the world's largest manufacturer of turbo propeller aircraft, and it would be domiciled in Europe. This is reminiscent to the non-economic motivation for mergers identified in Chapter 3 of this dissertation. Similarly, in the **Volvo/Scania** merger, the Prime Minister of Sweden personally visited the EC in support of a merger that would create an international champion in the market for trucks.[168] The EC prohibited the merger on the premise that competition

[167] Case No. IV/M.53 OJ [1991] L 334/42, [1992] 4 CMLR M2
[168] Financial Times, 17 February 2000

considerations were paramount to industrial policy considerations. In contradistinction to the Volvo/Scania merger, the EC cleared the **Mannesmann/Vallourec/Ilva[169]** merger in suspicious circumstances that appeared to be a real possibility of serious injury to competition. It is widely believed that the EC was influenced by political consideration in approving this merger.

69. It should also be pointed out that the EUMR allows Member States to consider public interest matters in merger control to the extent that it does not impair the functioning of the internal market. Under Article 21(4) of the EUMR, EU Member States are permitted to take appropriate measures to protect "legitimate public interests" that are not taken into consideration under the EUMR, provided those measures are compatible with the general principles and other provisions of EU law; that is they remain non-protectionist and do not undermine principles such as the operation of the EU internal market and freedom of movement of capital. Similarly, the Enterprise Act 2002 (UK) (as amended) permits the UK Secretary of State to intervene in mergers which do not fall within the jurisdiction of EUMR where an "exceptional public interest" such as national security, media plurality or the stability of the UK financial system may be adversely affected.

70. As already pointed out, uncertainty is the main challenge in the consideration of public interest. For example, in Zambia, the repealed and replaced CFTA did not define what amounted to public interest. This gave the Commission wide discretion to determine what amounted to public interest. Such wide discretion may result in administrative *malafide*, uncertainty and inconsistent decisions. The CCPA which has since replaced the CFTA has brought some certainty as to what amounts to public interest under section 31. It includes issues like exports and international competitiveness. It is important to note that even section 31 of the CCPA does not conclusively avert the possibility of disputes of interpretation as to what constitutes public interest. Section 31 is still wide and may create such disputes. Section 31 (g) and (h) of the CCPA provides that:

> **"The Commission may, in considering a proposed merger, take into account any factor which bears upon the public interest, including—**

[169] Case No. IV/M.315 OJ [1994] L 102/15, [1994] 4 CMLR 529

(g) socioeconomic factors as may be appropriate; and

(h) any other factor that bears upon the public interest".

71. The above provisions were invoked by the CCPC in the case of the takeover of Equinox the largest shareholder in Lumwana Copper Mine by Barrick Gold Corporation of Canada. The CCPC resolved that the 2.2% that ZCCM-IH held on behalf of government in Equinox should not be disposed of by virtue of the transaction.[170] It was the CCPC's view that government representation in mining firms was in the interest of the public since mining was an industry of sentimental value in Zambia. Certain stakeholders argued that CCPC overstepped its boundaries to consider this as public interest. CCPC waived this condition[171] but later there was public outcry from the public among them traditional chiefs in Solwezi[172] who decried *inter alia* that it was not in the interest of the public for government to dispose of its 2.2% shares. This is just an illustration of how disputes may arise even where public interest factors have been expressly laid out in legislation. It also clearly shows how real political interference can be within the realm of public interest. CCPC's earlier decision to approve the merger conditionally was changed within 24 hours to an unconditional approval after government intervened as can be seen from the two staff papers in the footnotes.

72. In conclusion, it should be stated that while public interest is a wide concept and may bring in dubious consideration during merger review, it is improbable not to consider it in today's changing global economic environment. This is true for both developed and DEEs. What would be important is that the consideration of public interest does not negate the fundamental tenets of merger review of transparency, certainty and timeliness. This view has been supported by the ICN which has stated that "if a jurisdiction's merger test includes consideration of non-competition factors, the way in which the competition and non-competition considerations interact should also be made transparent. Therefore, to the extent that merger control goes beyond serving the economic objectives of efficient resource allocation and enhancing consumer welfare so as to include other public interest factors, these other factors should be clearly articulated so that they can be considered

[170] CCPC Staff Paper No. 416. May 2011.
[171] CCPC Staff Paper No. 417. May 2011.
[172] Post Newspaper, 3rd June 2011

alongside the core of competition policy".[173] Further, in order for competition policy and its enforcement to remain legitimate especially in DEEs, it should be seen to support other broad policy objectives of national governments otherwise it risks being side-lined. Anecdotal evidence reveals that most governments in DEEs do not think competition policy is a priority therefore, it is important for competition authorities to undertake efforts to justify and legitimise their existence.

73. As already pointed out, for COMESA, the challenge is even more daunting. This is because there is no universal definition for public interest and each Member State may have its own definition. Consideration of all Member States' Public Interest may dilute and render competition assessment *otiose* as the determination may end up being made only on the basis of these varied public interest matters. At the same time, the Commission should walk the tight rope to avoid infuriating Member States by ignoring their public interest submissions as it may lead to the collapse of the entire regional merger control system. It is a delicate balance to undertake but the Commission should consider only those public interest that affect the Common Market or a substantial part of it. Anything short of this standard should not be entertained.

74. In COMESA, the challenge appears to be beyond what has been discussed above. While the foregoing has reviewed that the main challenge of public interest considerations is the uncertainty it brings, the legal framework is there for the consideration of public interest in most jurisdictions. At COMESA level, the Regulations do not have a sound basis for the consideration of public interest and yet recently, the Commission has increasingly taken into account public interest considerations in its merger assessments. One reason for this is the tight rope that the Commission must walk in order not to lose its legitimacy from the Member States where public interest consideration is paramount. However, the risk is that the Commission may be challenged by the parties on the basis that there is no legal framework for public interest consideration under the Regulations. Fortunately, this has not happened yet. If the Commission wishes to continue to pursue the public interest agenda, it should amend the Regulations so that it is on firm legal ground to pursue public interest considerations.

[173] Dave Poddar and Gemma Stook: Consideration of Public Interest Factors in Anti-trust Merger Control, March 2015. Under *"settings,"* https://www.competitionpolicyinternational.com/consideration-of-public-interest-factors-in-antitrust-merger-control/ (accessed on 27 October 2018)

75. The question that begs the answer is why the dissertation is stating that there is no framework for public interest consideration under the COMESA merger control regime? The answer lies in reviewing the provisions that deal with merger control in the Regulations and this is part 4. Article 26 of the Regulations prohibits mergers likely to substantially prevent or lessen competition. Specifically, Article 26 (1) of the Regulations provides that if the merger is likely to substantially prevent or lessen competition, the Commission must determine whether there is offsetting "technological efficiency or other procompetitive gain" and "whether the merger can be justified on substantial public interest grounds by assessing the factors set out in paragraph 4." Article 26 (3) provides that **"A merger shall be contrary to the public interest if the Commission is satisfied that the merger**

a) has lessened competition substantially or is likely to do so, or

b) has strengthened a position of dominance or is likely to strengthen dominance which is or will be contrary to the public interest."

76. Article 26 (4) further provides that **"in order for the Commission to determine whether a merger is or will be contrary to the public interest, the Commission shall take into account all matters that it considers relevant in the circumstances and shall have regard to the desirability of:**

a) maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;

b) promoting the interests of consumers, purchasers, and other users in the region, in regard to the prices, quality and variety of such commodities and services;

c) promoting through competition, the reduction of costs and the development of new commodities and facilitating the entry of new competitors into existing markets".

77. The research reveals that the only examples of public interest provided in Article 26(4) of the Regulations are specific examples of pro-market public interests. Applying the

rule of interpretation *ejusdem generis* (restricting the meaning of general words to the class or nature of the specific examples), the dissertation interprets Article 26(4) to allow only pro-market justifications. Under Article 26, it appears therefore that the Commission should not take into account non-competition considerations when reviewing a merger.

78. However, it appears the Commission has been taking public interest into account by widely interpreting the definition of competition under Article 1 of the Regulations. Article 1 defines competition as **"the striving or potential striving of two or more persons or organisations engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another which results in greater efficiency, high economic growth, increasing employment opportunities, lower prices and improved choice for consumers".** Reference to employment especially that it is the main public interest matter pleaded by national competition authorities appear to justify the Commission's consideration of public interest in merger review. The foregoing notwithstanding, even this appears to be a dubious way of including public interest in the assessment of mergers. Nevertheless, it is important to have this weak provision than not having any at all.

6.12 Failing Firm Defence

79. In some jurisdictions, the failing firm defence is treated as a separate element of assessment while in others it is under the umbrella of public interest. In some instances, competition authorities may approve mergers where one of the merging firms is in financial distress and the only way of continued operations in the market is through a merger. This may be the case even if a merger is likely to be anti-competitive. The reasoning behind this is that even if a merger is rejected, the failing firm would still exit the market and this would lead to reduction in competition equal to a reduction in competition resulting from the merger. However, not all situations that present themselves with a face of a failing firm are entertained by competition authorities.

80. There are three criteria, established in the **Kali und Salz** case[174] which must be met in order for the failing firm defence to apply. These are:

- ***"in the absence of acquisition, the failing firm would be forced out of the market in the near future;[175]***
- ***there is no less anti-competitive alternative purchase than the notified merger; and***
- ***in the absence of a merger, the assets of the failing firm would inevitably exit the market".***

81. Important though is to ensure that such mergers are approved with conditions or undertakings to address the potential competition concerns. In the Common Market, the 1998 **Zambian Breweries Plc/Northern Breweries Plc** merger is a good case in example. The transaction raised serious competition concerns. However, the target company, Northern Breweries, was in financial distress and it appeared delays in implementing the transaction would result in the company's liquidation and significant loss of jobs. ZCC accepted the failing firm defence and approved the transaction.

82. The Commission has also authorised a merger on the basis of a failing firm in the merger involving SBM Africa Holdings Ltd and Fidelity Commercial Bank Limited of Mauritius and Kenya respectively in February 2017. In the foregoing merger case, the principles espoused in the Kali und Salz merger were applied diligently. It should be noted however that the burden of proof is on the firm invoking the defence *(emphasis).*

6.13 The Single Market Imperative: Consideration of Effect on Trade between Member States

83. For regional competition authorities like the Commission and the EC, their objectives are much wider than those at national level. The fundamental objective is to contribute to the single market agenda. As Richard Whish has observed, "agreements and conduct which might have the effect of dividing the territory of one Member State from another will be

[174] Case IV/M190,[1993] 4 CMLR M17.
[175] The near future should be foreseeable

closely scrutinised and may be severely punished. The existence of 'single market' competition rules as well as 'conventional' competition rules is a unique feature of community competition law".[176]

84. Therefore, the consideration of effect on trade between Member States is central in the disposition of merger cases under community competition law. In **Société Technique Minière**[177], the ECJ indicated that for an agreement to affect trade between Member States:

> ***"it must be possible to foresee with sufficient degree of probability on the basis of a set of objective factors of law or fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between member states"***

85. Though the above ruling was in the context of agreements and not mergers, the same analogy may be applied to regional merger assessment. Mergers that are likely to lead to an appreciable effect on trade between Member States are those that result in high market shares and/or foreclosure concerns. Where there are foreclosure concerns, it is highly likely that firms may find it difficult to operate in some Member States and goods and services may not easily move from one Member State to another. Mergers making it difficult for other firms to establish themselves in the Common Market are likely to have an appreciable effect on trade between Member States. Such mergers are likely to be prohibited by a regional competition authority like the Commission whose *raison detre* is the single market imperative.

6.14 Conclusion

86. This chapter has shed light on the elements taken into account to assess a merger. It is evident that a merger cannot be cleared or assessed based on the consideration of one factor. All factors are taken into account before a decision is arrived at. It is therefore

---

[176] Richard Whish, Competition Law. 5th ed. Oxford: Reed Elsevier (UK) Ltd, 2003. Page 780.

[177] Case 56/65 *Société Technique Minière v Maschinenbau Ulm GmbH* [1996] ECR 235 at page 249; See also - Case 42/84 *Remia BV and others v European Commission*, Judgment of the Court (Fifth Chamber) of 11 July 1985, paragraph 22.

important for competition authorities to have a comprehensive understanding of these elements in order to arrive at an accurate determination of mergers cases as erroneous decisions may be detrimental to the merging parties or to the competitive landscape. The determination of mergers using the elements discussed in this chapter may not always be easy and may require sound legal framework, adequate resources, experience and competence on the part of competition authorities. These factors are absent in most DEEs and the problem is compounded when dealing with multi-jurisdictional mergers.

87. The same elements of assessment are taken into account when assessing cross-border mergers with the view of single market imperative. Therefore, it is important that regional competition authorities handling cross-border mergers have a thorough appreciation of these concepts and their practical application. It however does appear that regional competition authorities in DEEs face similar challenges of inadequate experience and competence and ambiguous legal frameworks as those faced by national competition authorities. A review of the COMESA Merger Control Regime shall establish whether or not the preceding statement is true. The next chapter specifically discusses cross-border mergers.

Chapter Seven

7.0 Cross-Border Mergers

7.1 What are Cross-Border Mergers?

1. The dissertation has thus far laid a rich foundation and background to the understanding of mergers, their assessment, their likely effects on the market and indeed that merger transactions may sometimes involve more than one country. Cross-border mergers, the focus of attention of this dissertation fall within the realm of merger transactions that involve more than one country. The foregoing taxonomy of cross- border mergers sounds very broad, ambiguous and vague. Given to an elementary scholar of competition law, this classification may do less to help him/her appreciate the real nature of cross-border mergers. Therefore, because dissertations of such a magnitude and expectation are supposed to thoroughly investigate and research into identified subjects, a deeper examination of this subject has been undertaken in this chapter.

2. As already stated above, simply put, cross-border mergers are those that involve more than one country. The question that begs the answer is what amounts to involvement of more than one country? The most obvious form of merger transactions that involve more than one country are between firms established and domiciled in two or more different countries. For example, a merger between Global Food Products registered and resident in Zambia and Kampinda Ltd registered and resident in Eswatini may qualify to be classified as a cross-border merger. Some scholars have posited that a classification of cross-border mergers using the foregoing criteria is based on structure (structural).

3. However, involvement of two or more than one country through establishment or structure is evidently not the only way a merger may be classified as cross-border. The wave of globalisation, technological advancement and indeed the internationalisation of commerce makes the effects of the decisions of undertakings

located in one part of the world to be felt by consumers and producers of similar and related products in far-away countries. Therefore, while true, it is an oversimplification to conclude that only mergers that involve firms established in two or more countries can be classified as cross-border mergers.

7.1.1 How do the Regulations Define Cross-Border Mergers?

4. Mergers between undertakings located in one and the same country may be classified as cross-border mergers if the effects of such mergers are felt beyond the borders of the country where these two companies are located. This is a classification of cross-border mergers by effect. For example, a merger of Google and Yahoo even if both are not domiciled/incorporated in Africa is likely to have effects in Africa because their services are consumed in Africa. Put differently, these firms operate[178] in Africa as they derive turnover therefrom. Turnover is the test for establishing whether or not a merger is cross-border if it is derived in more than one country. What amounts to cross-border mergers has been implicitly neatly laid down by Courts in some landmark cases like the **Gencor v. Commission[179]** where the CFI held that a concentration with a Community dimension does not necessarily have to be one where the undertakings concerned are resident or established in the European Community or have their production assets located there. The CFI went on to state that the test of jurisdiction is that of turnover, i.e. sales carried out within the common market. The CFI arrived at this conclusion by applying the jurisdictional principles laid down in the **Wood Pulp**[180] case that the application of the Regulations is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect on the Community.

5. Since the focus of the dissertation is on COMESA, how does it define and view cross-border mergers. The starting point to this inquiry is to recall that the Regulations are only applicable to conduct that affects two or more Member States. This is instructive from the construct and wording of Article 3(2) of the Regulations which provides that

[178] The Guidelines have also defined the word operate to mean the derivation of turnover in a particular jurisdiction or market.
[179] Case t-102/96, [1999] ECR II - 753
[180] Re Wood Pulp Cartel: A. Ahlstrom OY and others V. E.C Commission (Wood Pulp) [89/85, 114/85, 116-117/85, 125-129/85] [1988] 4 Comm. Mkt. L.R. 901 [1988]

the Regulations are applicable to conduct covered under Parts 3, 4 and 5 of the Regulations which have an appreciable effect on trade **between Member States** and which restrict competition in the Common Market. The terms *'between Member States'* incontrovertibly suggest the involvement of more than one Member State. This is also consistent with the analysis above that for a merger to be defined as cross-border, more than one country should be involved.

6. In order to comfortably and without any doubt appreciate the meaning of cross-border mergers, it is important to review Part 4 of the Regulations and the answer appear to lie in the wording and construct of Article 23(3)(a) which provides that it shall apply where both the acquiring firm and the target firm or either the acquiring firm or target firm operate in two or more Member States. Article 23(3)(a) is explicit when it provides that two or more Member States have to be involved thereby laying to rest any doubts that may arise as regards the categorisation of cross-border mergers in COMESA.

7.1.2 Not all mergers that have operations/effects in more than one Member State are captured by the Regulations.

7. The next question to consider is whether every merger that involves two or more countries should be classified as cross-border. This assessment shall begin at looking at mergers that should be notified to the Commission. Basically, these are mergers that are clothed with regional dimension. In the European Union, they are referred to as mergers with a community dimension. Article 23(5)(a) of the Regulations provides that:

"notifiable merger' means a merger or proposed merger with a regional dimension with a value at or above the threshold prescribed…..".

8. Argument by analogy would dictate that a non-notifiable merger as defined in Article 23(5)b) would not be classified as cross-border from a COMESA point of view because it may lack sufficient nexus and effect to be construed as one. The effects in question should be to a certain magnitude or quantum. Anything short of this is not a

cross-border merger regardless of how much it may have elements that may enable it disguise as one. The thresholds are therefore there to guide the process of qualifying what amounts to cross-border transactions consistent with the requirements of Articles 3 and 23 of the Regulations. The purpose of merger notification thresholds is to help in identifying those transactions that are likely to have an effect on competition and additionally in the case of regional competition regulation, those that are likely to affect trade between Member States. Consistent with the definition of cross-border mergers above i.e. that it is those mergers that affect or are likely to affect two or more Member States, it follows that mergers below a certain level of thresholds are not likely to have this effect and therefore lack regional dimension or indeed are not cross-border mergers. The Commission has therefore promulgated merger notification thresholds under Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation. The foregoing Rule provides that the threshold of the combined annual turnover or assets for the purposes of Article 23(4) of the Regulations is exceeded if:

a) *the combined annual turnover or combined value of assets, whichever is higher, in the Common Market of all parties to a merger equals or exceeds COM$50 million*[181]*;*

b) *the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM$10 million,*

unless each of the parties to a merger achieves two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State.

9. It is puzzling that between 15 January 2013 and 27 March 2015, the Commission implemented a zero-merger notification threshold regime (more than two years from the time the Commission issued its Commencement Notice). Arguably this was illegal as it appears it was against the spirit of the Treaty and the Regulations under Articles 55 and 3 respectively. Article 55 of the Treaty enjoins the Member States to prohibit

[181] COM$ is equivalent to US$

any practice that negates the objective of free and liberalised trade. It goes on to proscribe any agreements between undertakings or concerted practices which have as their object[182] or effect the prevention, restriction of distortion of competition in the Common Market. It is difficult to comprehend how a merger of insignificant size and commercial importance could negate the objective of free and liberalised trade. Similarly, Article 3(2) also introduces a jurisdictional limit when it demands that the Regulations should only apply to conduct that has an appreciable effect on trade between Member States and that restricts competition in the Common Market. Article 3(2) is fundamental and the pinnacle of the jurisdiction of the Regulations. Anything purported to be commissioned or omitted beyond this jurisdictional limit is illegal. Therefore, consistent with this analysis, it is the considered position of this dissertation that the zero-merger notification regime was unlawful as evidently some mergers of a certain magnitude were unlikely to meet the requirements of Article 3(2) of the Regulations.

10. The foregoing notwithstanding, a clash of practice and law is clearly observable. The law was very clear that mergers needed to have a certain level of effects to be captured by the Regulations but it was not clear how this effect would be determined without experimenting and testing the market before the Commission assessed any mergers.[183] Therefore, in order to commence operations and later on determine an optimum level of merger notification thresholds, the Council of Ministers approved the Rules on the Determination of Merger Notification Thresholds of November 2012 at COM$0. This threshold was meant to be temporal until the Commission was able to find the right policy balance and promulgate meaningful merger notification thresholds.[184]

---

[182] Note that the Treaty has used the term objective and not object. In modern competition law, object is the term used for such purposes and there is a lot of rich jurisprudence on the subject matter especially in the European Union. Nevertheless, it does not appear there is any problem likely to arise from the use of this term and indeed it does appear the intended mischief to address is the same.

[183]It is however the dissertation's view that laws should be respected and observed at all times especially by those entrusted with the responsibility of enforcing them. The rational thing to have been done therefore was to undertake an economic and legal study to determine some reasonable level of thresholds before commencing to enforce the law. Beginning with the zero-notification thresholds manifestly revealed that COMESA was not ready to commence operations then. The Zero-notification threshold under any conceivable situation and argument was absurd.

[184] Meaningful thresholds in the sense that the zero-notification threshold was not a threshold for all intents and purposes. It is astounding that a man of Mr. George Lipimile's levels of commendable and respectable knowledge of competition law, arguably among the top in Africa passionately argued at a number of

7.1.3 What is the Law and Practice at the European Commission?

11. As has been the case throughout this dissertation, insight and reference can be drawn from the EU. In the EU, not all mergers that present themselves with cross-border characteristics are considered by the EC. Only those that meet laid down criteria to satisfy the community dimension. The EU has two categories of thresholds, the primary and secondary turnover thresholds. These categories have both the EU wide turnover and the worldwide turnover thresholds. The primary turnover thresholds stipulate that a merger has Community dimension where:

    a) "the combined worldwide turnover of all the undertakings concerned exceeds EUR 5,000 million and

    b) the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR 250 million,

    unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State".[185]

12. One reason of introducing a *'one stop shop'* is to reduce multiple filings under national competition laws thereby creating predictability, certainty and reducing the regulatory burden on the parties. The possibility of multiple filings even in the wake of the primary turnover thresholds was foreseen by the promulgators of the EUMR. Therefore, to address this, they included the secondary turnover thresholds. Mergers that do not meet the primary turnover thresholds may still be captured by the EUMR where:

    a) "the combined worldwide turnover of all the undertakings concerned exceeds EUR 2,000 million;

    b) the combined turnover of all the undertakings concerned exceeds EUR 100 million in each of at least three Member States

---

competition law fora that the Commission had a threshold then except it was at Zero. Some of these fora include the Bowman Gilfillan and Webber Wentzel Competition law conferences of 2013.

[185] Article 1(2) of the EUMR

c) **the aggregate turnover of each of at least two of the undertakings concerned exceeds EUR 25 million in each of the same three Member States, and**
d) **the aggregate EU-wide turnover of each of at least two of the undertakings concerned exceeds EUR 100 million**

unless each of the undertakings concerned achieves more than two-thirds of its aggregate EU-wide turnover within one and the same Member State".[186]

13. While it is not the intention of this dissertation to review the EU merger regime, it is tempting in some instances to do so. It is to be noted that the EU includes the world-wide turnover in its thresholds. It is difficult to comprehend let alone imagine how worldwide turnovers help in the determination of local nexus in the clear presence of EU-wide turnover thresholds. It is the EU-wide turnover that should matter as it reflects the level of activity of the concerned undertakings through their sales in the EU. The research inquired on this matter from some practitioners in the EU and the answers have not been convincing or simply some practitioners do not understand the reason either. Maybe it would be important to conduct an in-depth inquiry by engaging those who were there when the EUMR were promulgated. This is however, beyond the scope of this dissertation. What appears to be the position of this dissertation is that the COMESA merger regime which focuses on the COMESA wide turnover or value of assets only is sounder than that of their EU counterparts because it represents a true reflection of COMESA nexus than world-wide turnovers.

14. Concluding this section without further dissecting Article 23(3)(a) on matters that have captured the research's attention as regards regional dimension would be leaving some questions unsettled. Article 23(3)(a) is irregular in that it presupposes a situation where a merger between a firm with operations in COMESA and one with operations outside would be notifiable. Article 23(3)(a) can be delineated into three components to appreciate the concern. The first component is that the Article is applicable where both the acquiring firm and the target firm operate in two or more Member States. This means that if we have company A[187] operating in Comoros and Djibouti and

[186] Article 1(3) of the EUMR
[187] In these illustrations, A denotes acquiring firm.

Company T[188] operating in Libya and Eritrea, the first component of the Article is satisfied, and regional dimension is not in dispute. Each of the parties to the transaction operate in two and separate Member States making the number of Member States involved four.

15. The second scenario under the first component of Article 23(3)(a) is where A operates in Comoros and Djibouti and T in Libya only. In this instance, regional dimension may be in in dispute because only one party has operations in two Member States (the minimum requirement) while the other party has operations in only one Member State. A closer view and careful reading of the Article would suggest that A should have operations in a minimum of two Member States so should T, otherwise the transaction may fall short of the standard required to be termed a cross-border merger. It does not appear this was the intention of the Regulations as evidently the firms operate in the Common Market in this second scenario. The Commission has considered mergers falling in the instant scenario notifiable reflecting the intention of the Regulations. However, to avoid potential legal disputes, the Article need to be amended. This discussion is however deferred to later chapters of the dissertation.

16. The interesting scenario under this component would be where A operates only in Comoros and T operates only in Libya. Would the first component be satisfied in this scenario? Evidently no. This is because while two Member States are involved pre-merger, each of the parties to the merger operates in only one Member State. The second and third components of Article 23(3)(a) are arrogantly worrying, and no imaginative levels of legal interpretation can save them from falling outside the objective and scope of the Regulations under Article 3(2). The second component presupposes that a merger is notifiable only where the acquiring firm operates in the Common Market. This means that if A operates in Madagascar and Egypt and T on the Island of Vanuatu, the merger is notifiable. Under any reasonable circumstances this is absurd and not only inconsistent with international best practice but the spirit of the Treaty and the Regulations which makes the effect of trade between Member States and the restriction of competition in the Common Market prerequisites for jurisdiction to be invoked. Similarly, the third component which presupposes that a

[188] In these illustrations, T denotes target firm.

merger is notifiable where only the target firm has operations in the Common Market with the acquiring firm devoid of any form of presence either through assets or turnover is clearly flawed and lack the blessings of fundamental principles of competition law, i.e. local nexus and the intended mischief to be addressed.

17. This absurdity has however been addressed in Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation. However, one may argue that that the Rules are *ultra vires* the Regulations. The Rules are subservient to the Regulations and if they are inconsistent, then they become *ultra vires* to the extent of the inconsistency. The second-tier threshold which requires each of at least two parties to the merger to derive COM$ 10 million in the Common may eliminate the possibility of having a merger notified with only one party operating in the Common Market. The Mischief to address the local nexus issue may have been addressed *albeit* in an unlawful manner. A careful reading of Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation reveals that the issue of nexus has not been completely resolved. This matter has been discussed in greater detail in Chapter Eleven of the dissertation. The Regulations need to be amended!

7.2 Conclusion

18. The dissertation has deliberately taken some time to comprehend cross-border mergers and that not all mergers that involve two or more countries are considered cross-border unless they have or are likely to have effect to a certain magnitude. The dissertation shall accordingly focus only on those mergers that are likely to have a substantial effect in two or more Member States. At this moment, it is now important to have an intellectual and sound consideration of the regulation of cross-border mergers.

Chapter Eight

8.0 The Regulation of Cross-Border Mergers

8.1 Overview of Cross-Border Merger Regulation and Challenges it Poses

1. All merger legislation the world over (whether national or regional) have dealt with or will at one point in time deal with cross-border mergers. As already observed cross-border mergers may be subject to the review of two or more merger laws. Therefore, challenges arise as a result of their exposure to a minimum of two national competition laws. Further, the rapid establishment of competition authorities has compounded the problem as cooperation and coordination of activities among the countries involved has increased in complexity. Countries may differ in the procedural and substantive treatment of mergers which though infrequent raises the possibility of inconsistent decisions in the same cases.[189]

2. In Africa, this was observed in the 2011 **Massmart/Walmart** merger involving some countries in Sub-Sahara Africa including Botswana, Namibia, South Africa and Zambia. While the merger was approved without conditions in Botswana and Zambia, it raised concerns in Namibia and South Africa. Another example is the merger between **Coca-Cola Beverages Africa Limited** and **Coca-Cola SABCO Proprietary Limited** which was notified to the Commission on 15 April 2015 and cleared unconditionally on 29 July 2015 but took several months to be conditionally cleared in South Africa due to divergent considerations. Several reasons account for this and shall be explored later in the dissertation. The other puzzling occurrence in cross-border merger regulation is the continued dubious and controversial application of national legislation lacking extra-territorial application to mergers of cross-border nature. This poses a significant challenge in the regulation of cross-border mergers.

[189] Note here that the word *'inconsistent'* as opposed to *'different'* has been used. This is because it does not mean that when there is cooperation and coordination then countries shall arrive at the same decision. Countries have different and unique market structures and sometimes policy considerations that may lead to different outcomes. The concern therefore should be *'consistency'* and not *'difference'*.

3. Further, effective merger control of cross-border mergers requires that the countries involved have effective merger control regimes. However, this may be a challenging task in many DEEs (including those in COMESA) given the complexities of enforcing competition laws in these countries[190]. In particular, DEEs face many challenges in their efforts to build effective merger control regimes, including lack of resources, inadequate legal framework, absence of competition culture, difficult transition towards a market-based economy, the dominance of industrial policy, problems with implementation, and the role of foreign direct investment (FDI)[191]. As regards the Common Market, this research revealed that most countries lack effective competition authorities and adequate legal frameworks. After careful consideration and assessment of a number of factors, out of 21 Member States only Kenya and Zambia revealed some semblance of effectiveness.

8.2 Convergence in International Merger Control

4. For an effective review of cross-border transactions, and to ensure consistent approaches to merger assessment, international cooperation between the competition authorities involved is essential. Increased co-operation should be encouraged between competition authorities particularly in the design of remedies in cross-border merger cases.[192] The reasoning behind this argument is that remedies to address certain competition concerns in a particular jurisdiction may have far reaching consequences on the pattern of competition, structure of markets and on consumers in another country. This outcome was very evident in the 2001 merger between **Chilanga Cement Plc** and **Lafarge SA in Zambia.** In that merger, ZCC approved the takeover on condition that the merged entity would only be allowed to export cement after saturating the Zambian market.

5. From a public interest perspective, this sounded justifiable. However, this remedy had far reaching consequences in the Great Lakes Region which was the major importer of Chilanga Cement Plc products.

---

[190] Organisation for Economic Cooperation and Development Policy Roundtables, Cross Border Merger Control: Challenges for Developing and Emerging Economies (posted on 13th February 2012) under "settings," http://www.oecd.org/competition/mergers/50114086.pdf (accessed on 9 October 2014)
[191] Ibid
[192] Ibid

6. It may be argued that the effects did not only affect the Great Lakes Region, but Zambia and probably a significant part of the Common Market too. Economic theory teaches that allowing firms to operate freely in the market encourages them to reach optimum levels of output due to the efficient allocation of resources. Such an outcome results in increased economic activity of undertakings which contributes to the economic outlook of a country and indeed a region in a regional economic block. Measures that constrain undertakings from operating efficiently have an opposite effect. To this effect, it may appear that cooperation with competition authorities in the Great Lakes Region[193] at that time would have prevented such a sub-optimal outcome from a regional welfare point of view. The affected authorities could have raised concern with the conditions proposed by the Zambian authorities and probably a better remedy would have been designed.

9. It is manifestly clear to any practitioner of competition law and indeed those subject to its regulation that there are so many other challenges that the regulation of cross-border mergers poses. The challenges have already been identified and can be summarised as follows:

   a) Inadequate Legal Framework
   b) Limited skills and expertise
   c) Limited resources
   d) Poor coordination and cooperation arrangements among the jurisdiction involved
   e) Unnecessary costs on the merging parties
   f) Lack of extra-territorial reach of national competition laws

10. In order to address these challenges, the answer may lie in cooperation among the jurisdictions involved.

11. There are three main types of co-operation: multilateral, regional and bilateral. While all three are relevant to DEEs, bilateral contacts are a key element for effective review

[193] Suffice to mention that most countries in the Great Lakes Region did not have competition authorities let alone competition laws at that time.

of cross-border mergers[194]. Scholars, practitioners and regulators may have different views on this last point. This was very evident at the annual African Competition Law Forum held by Bowmans in 2016 where Mr. Elton Jangale, a practitioner from Malawi criticised the Commission for having entered into bilateral cooperation agreements with the National Competition Authorities in the Common Market. Mr. Jangale observed that this model was likely to fail as the Commission risked entering into 19 cooperation agreements with all the Member States.[195] Mr. Jangale advised the Commission to adopt the model of SADC which had a multilateral cooperation agreement with its Member States. However, it should be observed that efforts towards cooperation in SADC were not a new thing. SADC has attempted this cooperation pursuant to the SADC Protocol on Trade and the SADC Declaration on Regional Cooperation in Competition and Consumer Policies and this has not yielded the expected results. Multilateral cooperation agreements are too broad and different countries have different and unique needs and challenges. This research revealed that cooperation agreements usually work when they are symbiotically beneficial and when the institutions involved have confidence in each other's systems.

12. The last point could be the reason why the South African Competition Authority has been procrastinating to enter into a cooperation arrangement with the Commission. Despite being approached by the Commission in 2013 immediately after operations commenced, the South African Competition Authority has not responded positively, while it has entered into cooperation agreements with the Competition Authority of Kenya,[196] Competition Authorities in SADC[197] and those under the auspices of the BRICS.[198] There is irrefutable evidence that in 2014, the Commission officials visited

---

[194] Supra-note 190

[195] At the time, there were only 19 Member States as Tunisia and Somalia had not yet acceded to the COMESA Treaty.

[196] A Memorandum of Understanding on Bilateral Cooperation between the Competition Commission of South Africa and the Competition Authority of Kenya; October 2016. "Under Settings" *www.compcom.co.za/wp-content/uploads/2016/05/CCSA-and-CAK-MOU.pdf* (accessed on 27 February 2019)

[197] https://globalcompliancenews.com/african-competition-law-update-20170407/ (accessed on 27 February 2019)

[198] Competition Commission Signs Accord with Fellow Brics Nations. Under *"Settings"* https://www.lexology.com/library/detail.aspx?g=99b76a60-a528-4e36-980e-bcaafa7d17b3 (accessed on 27 February 2019)

the South African Competition Authority in an attempt to kick start the process of entering into such a cooperation agreement but *alas*, to date nothing has happened.[199]

13. It is therefore, clear that international cooperation in merger regulation is replete with its own challenges and its effectiveness questioned at a number of competition fora, and by a number of competition scholars. As a matter of fact, the mere fabric and construction of the cooperation agreements are brought into question. Cooperation agreements generally lack binding effect on the participating parties and are vague. It is quite evident that even bilateral cooperation may not always be effective. Anecdotal evidence suggests that were one jurisdiction has no significant interest in the matter, it will have no incentive to cooperate even when the other party to the agreement is significantly affected by the merger. Further, cooperation in some cases become difficult due to the confidentiality obligations that different competition authorities are subject to under their respective national laws. Additionally, cooperation on some cases may not yield much fruit despite hard core evidence being collected against the parties. This is because the manner in which this evidence is collected may not be compatible with the laws of evidence in some countries and may therefore be inadmissible. Rules used to determine the admissibility of evidence vary by jurisdiction.[200]

23. What then is the solution to challenges in cross-border merger regulation? The solution appears to lie in the promulgation of a Multilateral Treaty on the regulation of not only cross-border mergers but also other cross-border anti-trust cases. Several efforts have been made to have some form of a supra-national competition order but mostly these efforts have failed on account of lacking clarity and in some cases simply because of lack of will and different levels of development of the prospective

[199] Mr. Vincent Nkhoma, the first and former Head of the Enforcement and Exemption Division together with Mr. George Lipimile visited the South African Competition Authority in 2014 for this purpose.

[200] It should be noted that despite these challenges, cooperation on merger cases has fundamental advantages. With regard to the merging parties, it is in their interest where their transactions are subject to multi-jurisdictional review, that the authorities involved do cooperate to avoid inconsistent outcomes and unnecessary delays. Further, case cooperation in the definition of the market, construction of theories of harm and remedies, *inter alia,* facilitates the transfer of knowledge and experiences from the mature and experienced competition authorities to new competition authorities lacking experience. It is shocking that none of the Commission staff has ever visited the EC, a system on which the COMESA Merger Control Regime is mirrored. It is still strange that the Commission has not even made an attempt to have any staff exchanges with any of the advanced competition authorities including the United States of America Department of Justice and the Federal Trade Commission.

contracting parties. For example, attempts were made to include competition matters under the Doha Round[201] but such efforts failed especially from the protest of less developed countries who argued that such a development would be catastrophic as their firms had not yet reached a level where they would fairly compete with firms in the developed countries. As observed by some scholars, a general approach to international trade agreements suggests that DEEs had nothing to gain from the proposal that was on the table.[202]

24. It has been observed that the multilateral economic system contains a major shortcoming. Although governments have committed themselves to a rule-based multilateral trade policy regime in the World Trade Organisation, private companies that operate in the global market face no such multilateral discipline. To address this gap, a series of bilateral and regional agreements have been concluded both to facilitate competition enforcement in transnational cases and to avoid the drawbacks of the lack of extra-territorial application of national anti-trust legislation. Still on the multilateral level, it has been impossible to agree on a coherent framework for competition rules.[203] Going as far back as the days of the Havana Charter, through to the Doha Round, efforts to introduce competition policy into plurilateral trade systems have largely been a failure. There was a sigh of relief in 1996 when the Singapore Ministerial Declaration revived talks on the need for a plurilateral competition policy. *Alas*, it was short-lived because in August 2004, the WTO decided to remove competition matters from the Doha Agenda.

25. The adoption of a Multilateral Treaty to regulate international anti-trust cases is close to impossible. This is largely due to the differences in the economic, political, social and legal order of the countries involved.[204] Borrowing the words of some

---

[201] The Doha round of trade talks was an attempted multilateral trade agreement. It would have been between every member of the World Trade Organization (WTO). It was launched at the Doha, Qatar, WTO meeting in November 2001. It sought to lower trade barriers for almost every country in the world. https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365 Under *"Settings"*, (accessed on 17th December 2017 at 6.21 pm)

[202] Aditiya Bhattacharjea, "The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective", Journal of International Economic Law 9(2), 293 – 323. May 2006. under *"Settings"* https://academic.oup.com/jiel/article/9/2/293/870642 (accessed on 18 October 2019)

[203] https://www.jstor.org/stable/27800267?seq=1#page_scan_tab_contents (accessed on 27 February 2019)

[204] OECD Reports. Global Forum on Competition 2001. under *"Settings"* http://www.oecd.org/daf/competition/prosecutionandlawenforcement/23716869.pdf (accessed on 18 October 2019)

commentators, the failure of the Doha round of negotiations has increased bilateral agreements because they are easier to negotiate.[205] The failure of Doha also means future multilateral trade agreements are also probably doomed to fail for the same reasons as Doha.[206] The same is true for a pure multilateral agreement on competition regulation. Even the OECD with a relatively small and homogenous group has failed to achieve this end. DEEs with their little experience of enforcing anti-trust laws and given the peculiar nature of their markets would even find it difficult to realise this dream. This coupled with sovereignty issues which countries are largely reluctant to cede, to a greater extent compounds the challenge. Additionally, a Multilateral Treaty would most likely entail more substantive reform at municipal level and not just procedural reforms. However, substantive reforms of such magnitude would require a greater preponderance of philosophical reform. The current tripartite negotiations among COMESA, EAC and SADC at regional level and the Continental Free Trade Agreement at the African Union level appear overzealous. Notable is that competition matters are among the elements of negotiations in these agreements. It remains to be seen how successful these negotiations shall be.

26. However, not all hope is lost. This process can begin at a lower level within regional economic groupings where countries are already bound by an overarching Treaty and share common heritage and destiny. This has happened in the EU through the TFEU and for DEEs in COMESA through the Treaty establishing COMESA among other regional economic communities and their corresponding competition authorities. It however, remains to be seen in DEEs whether these developments have addressed some of the challenges identified above especially in the case of COMESA which is composed of DEEs and has a fully functional competition authority. Literature suggests that DEEs face the most challenges in the regulation of cross-border mergers.

[205] https://www.thebalance.com/what-is-the-doha-round-of-trade-talks-3306365 (accessed on 18 October 2019)
[206] Susan C. Schwab, After Doha: Why Negotiations Are Doomed And What We Should Do About It, May/June 2011. under *"Settings"* https://www.jstor.org/stable/23039412 (accessed on 27 February 2019)

8.3 Conclusion

27. The Regulation of cross-border mergers can be done either through national law or supra-national law depending on the regulatory framework of a given region. However national laws may not effectively address cross-border mergers. Every practitioner of not just competition law but international law would agree that the regulation of cross-border mergers is not free from challenges. It has been noted that in order to effectively regulate cross-border mergers, there is need for effective cooperation among the countries involved. Nevertheless, this does not always yield the desired results as countries lack incentives to cooperate if it is not symbiotically beneficial or if they have no confidence in each other's systems. Since cooperation is not absolute legal obligation, the countries involved may elect to ignore it without significant consequences. The solution to this challenge appears to lie in the promulgation of a multilateral Treaty to regulate competition. However, promulgating such a Treaty is improbable as seen from the failed Doha trade negotiations.

28. It has been observed however, that though it has been difficult to promulgate a multilateral Treaty to regulate competition, regional laws in both developed countries and DEEs have been enacted to regulate cross-border mergers. In DEEs, this is true for COMESA among other RECs. In COMESA, it is yet to be seen if this has addressed the challenges of cross-border merger regulation. In the chapters that follow, the dissertation shall discuss in detail the challenges encountered in cross-border merger regulation. For convenience of reading and logical flow of work, the challenges faced by the merging parties shall first be discussed, followed by those faced by national competition authorities. Suffice to reiterate the point here that the focus is on DEEs in particular COMESA notwithstanding the fact that developed countries may face similar challenges. However, developed countries have developed ways of addressing these challenges through accumulated years of experience. In this discourse, before discussing the challenges and whether they have been resolved by a supra-national merger control regime, the dissertation shall first discuss the genesis of a regional competition law in COMESA.

Chapter Nine

9.0 Genesis of the Regional Competition Law in COMESA

9.1 Composition of COMESA

1. COMESA[207] is created under the Treaty establishing the Common Market for Eastern and Southern Africa (the "Treaty"). It is composed of twenty-one Member States who have a common objective of regional/market integration through the enhancement of free and liberalised trade and the development of natural and human resources for the benefit of its inhabitants.

9.2 Aims and Objectives of COMESA

2. COMESA succeeded the Preferential Trade Area for Eastern and Southern Africa (PTA) which was established in 1981 within the framework of the Organisation of African Unity's (OAU)[208], Lagos Plan of Action and the Final Act of Lagos. The PTA was transformed into COMESA in 1994. COMESA was established on November 5, 1993, in Kampala, Uganda when the Treaty was signed, and then ratified the following year in Lilongwe, Malawi, on 8 December 1994.[209]

3. COMESA was established to take advantage of a larger market size, to share the region's common heritage and destiny and to allow for greater social and economic cooperation.[210] A number of economic benefits were expected to flow from the establishment of the Common Market. It envisaged the taking advantage and full exploitation of the principles of comparative advantage i.e. that goods and services could be produced in regions with the lowest opportunity cost to do so and sold in other regions where they were needed, while these other regions would also focus on the production of goods and services in which they had comparative advantage. This

[207] In this dissertation, Common Market is used synonymously to COMESA.
[208] OAU is the predecessor of the African Union.
[209] *Country Memo Provided by: globalEDGE.msu.edu and EXPORT.GOV.* under *"Settings*," *globaledge.msu.edu/trade-blocs/**comesa**/memo.* (Accessed on 15 May 2016).
[210] COMESA in Brief 2014

would ultimately lead to improved welfare for the inhabitants of COMESA. Among other things, the Member States agreed on the need to create and maintain:[211]

(a) A free trade area guaranteeing the free movement of goods and services produced within COMESA and the removal of all tariffs and non-tariff barriers;

(b) A customs union under which goods and services imported from non-COMESA countries will attract an agreed single tariff in all Member States;

(c) Free movement of capital and investment supported by the adoption of a common investment area to create a more favourable investment climate for the COMESA region;

(d) Gradual establishment of a payment union based on the COMESA Clearing House and the eventual establishment of a monetary union with a common currency; and

(e) The adoption of common visa arrangements, including the right of establishment leading eventually to the free movement of *bona fide* persons.

4. COMESA's vision is to be a fully integrated economic community that is prosperous, internationally competitive, and ready to merge into the African Union.

9.3 Institutional Set Up of COMESA

5. The decision-making structure of COMESA is as follows:[212]

(i) **The Authority of Heads of State and Government:** This is the supreme organ of the Common Market and is composed of the Heads of States and Government of all the Member States.

---

[211] COMESA in Brief 2014
[212] Ibid

(ii) **The Council of Ministers:** This is composed of Ministers from the Coordinating Ministries of all the Member States. It is responsible for overseeing the functioning and development of the Common Market and ensuring the implementation of agreed policies.

(iii) **The Technical Committees:** These are responsible for the preparation of comprehensive implementation programmes and timetables, which serve to prioritise the programmes with respect to each sector. In addition, they monitor and review the implementation of the programmes on co-operation and may request the Secretary-General to undertake specific investigations.

9.4 Realisation of Aims and Objectives of COMESA

6. In order to realise the objectives of the Common Market, goods, services, capital and *bona fide* persons should be free to move throughout the Common Market unrestricted by artificial national borders. Further, firms from other Member States should be free to establish themselves in any Member States unhindered by foreclosure attempts from incumbent firms. This therefore requires the abolition or significant reduction of tariff and non-tariff barriers *(de jure barriers to trade)*. This notwithstanding, the abolition or significant reduction of the *de jure* barriers to trade may not achieve the objectives of the Common Market if the firms operating in the Common Market engage in conduct that result in *de facto* barriers to trade. *De facto* barriers to trade may have far reaching consequences in terms of partitioning the market and may frustrate liberalisation policies such as the removal of than the *de jure* barriers to trade. Some examples of firm conduct that may lead to partitioning the market and frustrate the single market imperative include cartels, abuse of dominance and anti-competitive mergers. It would therefore be of no consequence to dismantle public obstacles to trade between Member States if these could be replaced by restrictive business practices, under which firms in different Member States may prevent the entry of other firms from other Member States. A regional competition law is needed to address this conduct by undertakings operating in the Common Market.

7. Conduct restricting competition in the Common Market is regulated by the Regulations. It is therefore important to recall how the Regulations were promulgated. It is also important to recall that COMESA is established under the Treaty and therefore any legal instrument developed in the Common Market to further market integration should be born from the Treaty otherwise it is null and void. Therefore, the Regulations should draw their legitimacy from the Treaty.

9.5 Promulgation of the Regulations

8. Discussions leading to the promulgation of the Regulations began in the late 1990s and early 2000s in Livingstone, Zambia. The pioneers of this process among them George Lipimile[213], Alexander Kububa,[214] Kijira[215] and Joseph Musonda[216] saw the need of having a regional competition law when they noted the inadequacy of national competition authorities in addressing anti-competitive conduct that had effects in their countries but emanating from neighbouring countries. It also dawned upon these founding fathers that without a regional competition law, the market integration agenda may not be realised due to potential consequences of firm conduct identified above. It was also realised that certain merger remedies imposed in one jurisdiction could have serious consequences in other jurisdictions. Here the takeover of Chilanga Cement Plc by Lafarge SA[217] was cited as a case in example where ZCC[218] granted conditional approval which had negative effects in some Member States. The pioneers grappled with the question of how they were going to promulgate this supra-national competition order and one of the modes was through the negotiation of a regional Treaty to regulate competition.

9. The pioneers however realised that the negotiation of a regional Treaty to regulate competition would be a difficult and insurmountable task to undertake drawing from

[213] George Lipimile is the current Chief Executive Officer of the COMESA Competition Commission and the former Chief Executive Officer of the Zambian Competition Authority.
[214] Alexander Juvensio Kububa is the founding head of the Competition and Tariff Commission of Zimbabwe and former Chairman of the Board of the COMESA Competition Commission
[215] Mr. Kijira was the at the time the head of the Monopolies and Prices Commission, a Division in the Kenyan Ministry of Finance
[216] Mr. Joseph Musonda is a former trade expert at COMESA.
[217] ZCC Staff Paper No. 0109 on the takeover of Chilanga Cement by Lafarge SA
[218] ZCC has since changed to the Competition and Consumer Protection Commission following the repeal of the Competition and Fair Trade Act and its replacement of the Competition and Consumer Protection Act

past experience as rightly observed by Richard Whish and Diane Wood when they stated that "calls for more substantive action, such as the negotiation of a multilateral Treaty governing the regulation of mergers have been ignored or rejected".[219] Sensing this risk, the founding fathers had to look elsewhere. The original countries involved in this process were Zambia and Zimbabwe which are both SADC Member States so naturally they sort solace in the SADC Protocol on Trade (the Protocol). However, the Protocol did not help them much as its provisions on competition under Article 25 were limited to cooperation and not enforcement. This is implicit in the language of Article 22 of the Treaty of the Southern African Development Community (the "SADC Treaty"). Article 22 of the SADC Treaty calls for the conclusion of protocols as may be necessary in each area of cooperation within the Community.

10. Therefore, since Article 25 of the SADC Protocol on Trade draws its authority from the SADC Treaty, it restricts itself to ***cooperation,*** the term used under Article 22 of the SADC Treaty otherwise any enforcement measure would be *ultra vires* the SADC Treaty. The central theme of cooperation is reflected and reiterated in the SADC Declaration on Regional Cooperation in Competition and Consumer Policies.

11. Article 25 of the Protocol was not helpful as countries in the region had attempted to cooperate, but not much positive results were arising from this process. What the pioneers sought was supra-national enforcement and all they needed was to find a provision in one of the regional instruments that would give legitimacy and legal authority to the rules on competition that would be established.

12. It is important to take cognizance of the fact that Kenya was one of the key pioneer countries advocating for a supra-national competition law. Kenya is a country from East Africa so at this stage, it was only prudent to look at an organisation that encompassed both eastern and southern Africa and COMESA was identified. The pioneers reviewed and searched the Treaty and lo and behold, a moment of *eureka* came when they came across Article 55 of the Treaty. Article 55 provides that:

[219] Richard Whish and Diane Wood, 'Merger Cases in the Real World – A Study of Merger Control Procedures (OECD, 1994) ('Whish /Wood Report') 12.

1. ***The Member States agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Member States agree to prohibit any agreement between undertakings or concerted practice which has as its objective or effect the prevention, restriction or distortion of competition within the Common Market.***

2. ***The Council may declare the provisions of paragraph 1 of this Article inapplicable in the case of:***

   (a) any agreement or category thereof between undertakings;

   (b) any decision by association of undertakings;

   (c) any concerted practice or category thereof;

   which improves production or distribution of goods or promotes technical or economic progress and has the effect of enabling consumers a fair share of benefits provided that the agreement, decision or practice does not impose on the undertaking restrictions inconsistent with the attainment of the objectives of this Treaty or has the effect of eliminating competition.

3. ***The Council shall make Regulations to regulate competition within the Member States.***

13. It is important to examine Articles 55(2) and 55(3) of the Treaty. Article 55(2) provides that the Council may declare the provisions of Article 55(1) inapplicable in certain circumstances. This provision is troubling. It is observed that Article 55(2) of the Treaty invokes efficiency considerations. In competition law, standard practice is that after the competition authority has assessed a merger and determined that it raises competition concerns, it may take into account efficiency claims by the parties. If the competition authority is of the view that such efficiencies outweigh the competition concerns, the merger may be approved[220]. It is not clear in the case of Article 55(2) of

[220] Article 55(2) appear to raise efficiency claims found in model competition laws.

the Treaty how the Council of Ministers which ordinarily sits annually and is more concerned with policy issues shall consider such technical matters. Such a situation would be very impractical, uncertain and costly for the merging parties. It would also undermine the independence of the competition authority, a fundamental requirement for the successful operation of any competition authority. There is need to amend or completely delete this provision from the Treaty as it is a great source of uncertainty and interpretation disputes. It does not appear that the Council intended to get involved in such a technical exercise. In any case, there would be no *lacuna* created as regards the non- merger provisions of the Regulations if this provision is deleted completely as this has been addressed under Article 16(4) of the Regulations which draws its legitimacy from Article 55(1) of the Treaty. As regards mergers, Chapter six of this dissertation has already revealed that efficiency claims are expressly and adequately covered under Article 26(1)(a).

14. Article 55(3) of the Treaty equally gives sad reading when it provides that the Council shall make Regulations to regulate competition within the Member States. The Regulations are not intended to regulate competition within the Member States but in the Common Market. Competition within the Member States is regulated by national competition legislation where this exists. In any case, the minimum requirement for the Regulations to apply is that there should be two or more Member States involved. Therefore, the application of the Regulations to regulate competition within the Member States would have the effect of usurping the jurisdiction of national competition legislation. It does not seem this was the intention of Council when it passed the Regulations but there is need to amend this provision to avoid potential disputes.

15. Article 55(3) of the Treaty gave birth to the Regulations and bestowed upon them legal authority to regulate competition in the Common Market. To this end, the Regulations were promulgated, and assumed force of law on 17 December 2004[221]

[221] Official Gazette of the Common Market for Eastern and Southern Africa Volume No. 2. Published by order of Council and the Authority; December 2004.

although there was a period of inactivity of about nine years before their implementation finally commenced on 14th January 2013.[222]

16. The general purpose of the Regulations is contained under Article 2 which reads:

"The purpose of these Regulations is to promote and encourage competition by preventing restrictive business practices and other restrictions that deter the efficient operation of markets, thereby enhancing the welfare of the consumers in the Common Market, and to protect consumers against offensive conduct by market actors"

9.6 Scope of Application

17. The above purpose is too general and broad. Read literally and in isolation it may imply that the Regulations are meant to apply to all competition concerns arising in the Common Market. This would not only be absurd and impractical but also impossible. In view of this, the Regulations have under Article 3(2) provided guidance on conduct to which they apply when it states that:

"These Regulations apply to conduct covered by Parts 3, 4 and 5 which have an appreciable effect on trade between Member States and which restrict competition in the Common Market".

18. Article 3(2) of the Regulations therefore informs us that '*effect on trade between Member States and restriction of competition in the Common Market'* is the minimum requirement to invoke the jurisdiction of the Regulations. Further, it is not any effect on trade that would invoke the jurisdiction of the Regulations, the effect on trade should be appreciable. It is also important to note that Article 3(2) of the Regulations has used the word *'and'* as opposed to *'or'*. These words are conjunctive and not disjunctive, implying that for conduct to be captured by the Regulations, it should

[222] COMESA Competition Commission Notice Number 1/2013: Notice on the Commencement of operations of the COMESA Competition Commission. Under *"settings,"* http://www.comesa.int/competition/wp-content/uploads/2014/06/Notice-of-Commencement-of-Operations.pdf. (accessed on 7 February 2015).

both restrict competition in the Common Market and have an appreciable effect on trade between Member States. From the foregoing, the following cumulative elements should be satisfied before the jurisdiction of the Regulations can be invoked:

(a) The conduct should restrict competition within the Common Market;
(b) The conduct should have an effect on trade between two or more Member States; and
(c) The effect should be appreciable

19. If any of the above elements is not satisfied, then the jurisdiction of the Regulations cannot be established. It is difficult to imagine how an appreciable effect on trade between Member States and a restriction on competition was established in some of the first cases to come before the Commission. For example, in the two cases involving the merger between Old Mutual (Africa) Holdings Proprietary Limited (OMAH) and Oceanic Insurance Company Limited (Oceanic) and OMAH and Provident Life Assurance Company Limited (Provident)[223] which were filed to the Commission simultaneously, it is beyond dispute that the elements of appreciable effect on trade between Member States and a restriction of competition in the Common Market were not met. OMAH had operations in the Common Market but was acquiring firms that had no operations in the Common Market whatsoever. Provident, was wholly operational in Ghana while Oceanic, was wholly operational in Nigeria. Reasonable and objective assessment of these transactions would reveal that the effects were not likely be felt in the Common Market. The acquiring firm only had presence in about two Member States, namely Malawi and Swaziland.[224] Clearly the transactions lacked local nexus. This notwithstanding, the Commission went ahead to claim jurisdiction on these two merger cases and charged OMAH a million dollars[225] in merger filing fees. Clearly, the Commission erred both in law and in fact and a review of those decisions is likely to find that the Commission exceeded its legal mandate to review those mergers.

[223] The merger notifications were filed with the Commission on 19 September 2013 and unconditional approval granted by the Committee Responsible for Initial Determination on 17 December 2013
[224] Eswatini now
[225] The merger notification fees at the time were calculated at 0.5% of the combined turnover or assets of the merging parties in the Common Market whichever is higher with a ceiling of US$500 000

20. An interesting observation from the wording of Article 3(2) is that it presupposes a situation where the Regulations would only apply when conduct has already taken place and its effects established. This does not appear to have been the intention of Council. For example, the Commission has a pre-merger notification system. This means that mergers should be notified to the Commission before they are implemented. The current wording of Article 3(2) defeats this position under Part IV of the Regulations, particularly Article 24. Article 3(2) would have captured the spirit and intention of the promulgators if it had used the word *'likely'*. Therefore, the wording should have been as follows:

"These Regulations apply to conduct covered by Parts 3, 4 and 5 which have or are likely to have an appreciable effect on trade between Member States and which restrict or are likely to restrict competition in the Common Market".

9.7 Conclusion

21. In conclusion, this chapter has revealed that the regulation of competition in the Common Market was in the minds of those who promulgated the Treaty. Article 55 of the Treaty is instructive on this. This paved the way and facilitated the promulgation of the Regulations when it became evident that there was need to regulate competition matters that affected two or more Member States because of the lack of extra-territorial application of national competition laws among other challenges. However, the Regulations do not apply to all competition concerns occurring in the Common Market but only those that have an appreciable effect on trade between two or more Member States and those that restrict competition within the Common Market. Therefore, the existence of two or more Member States affected by firm conduct is a necessary but not sufficient requirement. The effect has to be appreciable.

22. The dissertation shall later determine whether the Regulations have addressed the challenges of regulating cross-border mergers in the Common Market but before that, Chapter Ten (10) shall discuss the applicability of the Treaty and the Regulations in the Member States. This is because one of the failures to address the challenges of

regulating cross-border mergers may stem from the applicability of the Treaty and Regulations in the Member States which appears to be a fundamental challenge itself.

Chapter Ten

10.0 The Application of the Treaty and Regulations in Member States

1. It should be recalled that Member States of COMESA are bound by the Treaty. It should also be noted that Treaties are among the sources of international law. International law may be defined as "that body of law which is composed for its greater part of the principles and rules of conduct which states feel themselves bound to observe, and therefore, do commonly observe in their relations with each other, and which includes also:

    a) the rules of law relating to the functioning of international institutions, their relations with each other, and their relations with States and individuals; and

    b) certain rules of law relating to individuals and non-State entities so far as the rights or duties of such individuals and non-state entities are the concern of the international community".[226]

2. The foregoing reveal that the Treaty establishing the Common Market is part of international law as are the Regulations and other instruments promulgated pursuant to it. The next issue to determine is the binding nature of the Treaty and its subsidiary instruments.

10.1 The Binding Nature of the Treaty and its Subsidiary Instruments

3. To begin this discourse, it is important to once again look at Article 55 of the Treaty which creates the Regulations.[227] A careful reading of Article 55(1) reveals that the Regulations have not been forced on the Member States, but the Member States have agreed with their contents and the subsequent effects therefrom. The general rule of the thumb is that if the Treaty is binding, the legal instruments like the Regulations

---

[226] See Hyde International Law (2nd edn, 1947)

[227] The proceeding sections are liberally borrowed from the author's article titled ***"The Binding Nature of the Regulations in the Common Market and the Individual Member States"*** presented at the Global Competition Review 2nd Annual Conference in Cape Town, South Africa in February, 2015.

promulgated pursuant to the Treaty are also binding. It is therefore startling to listen to debates that the Regulations are not binding in some or all the Member States.[228] It does not make both legal and common sense to agree to something then later reject its application without changing or amending the instrument that formed the basis of the agreement in the first place.

4. Having shown that the Treaty was promulgated with the full consent of the Member States, it is important to draw attention to some very important Articles both in the Treaty and the Regulations that explicitly and implicitly gives them their binding nature in the Member States. Article 5(1) of the Treaty gives a good prelude to this argument. It states that:

> **"the Member States shall make every effort to plan and direct their development policies with a view to creating conditions favourable for the achievement of the aims of the Common Market and the implementation of the provisions of the Treaty and shall abstain from any measures likely to jeopardize the achievement of the aims of the Common Market or the implementation of the provisions of the Treaty".**

5. This mouthful provision gives a mandatory legal obligation to the Member States to respect the provisions of the Treaty in order not to frustrate the objectives of the Treaty. This is explicit in the language of Article 5(1) of the Treaty when it uses the word ***'shall'*** and not ***'may'.*** Among the provisions of the Treaty whose implementation should not be jeopardized is Article 55 which creates the Regulations. It follows therefore that Member States are proscribed from engaging in measures that would jeopardize the operation of the Regulations and failure to recognize the Regulations may be one such measure.

6. The foregoing is buttressed by Article 5(2)(b) of the Treaty which provides that:

[228] Some responses to the author's questionnaire stated so.

"each Member State shall take steps to secure the enactment of and the continuation of such legislation to give effect to the Treaty and in particular …….. confer upon the Regulations of Council the force of law and the necessary legal effect within its territory".

7. The above provision makes interesting reading. It does also impose a mandatory obligation on the Member States through the use of the word ***'shall'***. This means that a Member State cannot act in a manner that is contrary to this provision otherwise it risks violating the Treaty. When such provisions are put in a Treaty a Member State that ratifies the Treaty without reservations is bound in *toto* by the provisions of the Treaty. Any attempt not to recognize certain provisions of the Treaty would be an infraction of both the Treaty in question and generally international law where the principle of *pacta sunt servanda* is sacrosanct. As already noted, Treaties are an outcome of consensus among the contracting parties. Treaties are therefore binding on the parties and must be executed in good faith.

8. In order to buttress the binding nature of the Regulations further, Article 10(2) of the Treaty is instructive when it states that **"a Regulation shall be binding on all the Member States in its entirety".** Note the language here. ***'Shall'*** and not ***'may'*** has been used. This provision unequivocally defeats any argument that the Regulations are not binding in the Member States. Further, not only are parts of the Regulations binding on the Member States, but they are binding in their entirety. Therefore, it may not make sound intellectual and legal argument to posit that the Competition Regulations are only applicable in certain parts and instances. This argument is not supported by Article 10(2) of the Treaty.

9. It has so far been observed that the Treaty, which gives birth to the Regulations have clothed the Regulations with a binding effect on Member States. What about the Regulations themselves; do they have any provisions clothing them with this status? A closer look at the Regulations reveals that they have very interesting provisions, some of them reminiscent to those found in the Treaty. Interesting enough some, of these provisions have the same numbering and very much similar wording as in the

Treaty. Article 5 of the Regulations is one such provision. Article 5 of the Regulations provides that:

> **"pursuant to Article 5(2)(b) of the Treaty, Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of these Regulations or resulting from action taken by the Commission under these Regulations. They shall facilitate the achievement of the objects of the Common Market. Member States shall abstain from taking any measure which could jeopardize the attainment of the objectives of these Regulations".**

10. The echoing of the language of Article 5 of the Treaty in Article 5 of the Regulations is by no way accidental. It reflects the intention of the architects of this law that the Member States are to be bound by the Regulations they created for themselves through Council. Rule 5(2) of the COMESA Competition Rules also implicitly buttresses the binding nature of the Regulations when it states that decisions rendered by the Commission shall pursuant to Article 5 of the Regulations, be binding on undertakings, governments of Member States and State Courts.

10.1.1 Case Law Principles Conferring the Treaty and Regulations with their Binding Effect on the Member States

11. It has so far been demonstrated that the Regulations are binding on Member States because of the legal provisions cited above. Nevertheless, it would be important to review the Court's interpretations and decisions on this important matter? Jurisprudence is replete with rulings on the subject. Two interesting cases are instructive on the subject. One of the cases is close to home and the judgment was made by the CCJ. In the **Polytol Paints & Adhesives Manufacturers Co. Ltd v. the Republic of Mauritius.**[229] In this case, the Respondent imposed a customs tariff that was in breach of the Treaty. In its judgment the CCJ explicated that:

[229] Polytol Paints & Adhesives Manufacturers Co. Ltd V. The Republic of Mauritius. In the COMESA Court of Justice First Instance Division Lusaka, Zambia. 31 August 2013.

"If the Respondent's Customs Tariff Regulations were consistent with the rules of the Treaty, the Applicant would have paid no customs duty on the Kapci products imported from Egypt during the relevant period. The Applicant was therefore prejudiced because of the Regulations of the Respondent that was in breach of the Treaty. The CCJ held that the argument of the Respondent that the Treaty is not directly enforceable in some jurisdictions, including Mauritius, and therefore the individuals cannot have rights emanating from the Treaty is misconceived. The CCJ added that it is indeed true that there are differences in legal systems regarding their position towards the domestication of international law. In some Member States, Treaties become directly applicable; in others they require another domestic legal instrument for their incorporation. Notwithstanding the differences in domestic legal systems the Treaty objectives can be achieved when all Member States fulfil their obligations under the Treaty. Any Member State that acts contrary to the Treaty cannot, therefore, plead the nature of its legal system as defence when citizens or residents of that State are prejudiced by its acts. This is clearly stipulated in Article 27 of the Vienna Convention on the Law of Treaties, 1969 which provides that '[a] party may not invoke the provision of its internal law as justification for its failure to perform a Treaty'.

12. There are arguments that since the Treaty is not domesticated in some Member States, it is not applicable in those Member States and therefore the Regulations promulgated pursuant to the Treaty are also not applicable in those Member States. The above judgment by the CCJ settles all such disputes and renders immaterial any justifications to put the internal house in order before the Treaty and the Regulations become applicable.

13. The decision of the CCJ above made reference to Article 27 of the Vienna Convention which establishes a mandatory obligation consistent with Articles 5 and 10 of the Treaty and Article 5 of the Regulations that a State cannot justify the non-performance of its obligations under a Treaty upon its municipal law. According to Ximena Fuentes Torrijo,[230] the *travaux preparatoire* of Article 27 support the view that this is a responsibility rule that has the sole effect of excluding national law as a

[230] International Law and Domestic Law: Definitely an Odd Couple. By Ximena Fuentes Torrijo

ground to excuse international responsibility. Indeed, all this is supported by the 3rd recital to the Vienna Convention which affirms that the principles of free consent, good faith, and *pacta sunt servanda* are universally recognized.[231] Article 26 of the Vienna Convention cements this position when it reads that all Treaties are binding on the parties thereto and must be performed by them in good faith.[232]

14. The European case of **Costa v. ENEL (1964)[233]** is another interesting case on the subject. The facts of the case were that an individual was claiming before his local court that the law nationalising production and distribution of electricity was incompatible with the EC Treaty. The European Court of Justice in its judgment emphasised the unlimited duration of the Community, the autonomy of Community power, both internally and externally, and especially the limitation of competence or transfer of powers from the States to the EC. The Court was determined to show that the "words and spirit of the treaty" necessarily implied that it is impossible for the States to set up a subsequent unilateral measure against a legal order which they have accepted on a reciprocal basis. The Court was thus able to reach a conclusion in Costa in words which have had considerable influence in national decisions.[234] The Court stated that:

"the law stemming from the Treaty, an independent source of law could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question".

15. According to Elena Papageorgiou, "the spirit of the Treaty required that they all act with equal diligence to give full effect to Community laws which they had accepted on the basis of State 'reciprocity' – meaning presumably that since each state was equally bound by laws passed for the Community as a whole, they had all agreed that no one of them would unilaterally derogate from Treaty obligations. And since the 'aims' of the Treaty were those of integration and co-operation, their achievement

[231] Vienna Convention on the Law of Treaties, 1969.
[232] Ibid
[233] Case 6/64 (1964) ECR 585; (1964) CMLR 425.
[234] Elena Papageorgiou, Law Officer of Community Law. The Law Office of the Republic of Cyprus.

would be undermined by one Member State refusing to give effect to a Community law which, should bind all".[235]

16. In summarising this section, it is evident that Statute and case law has shown that Treaties are binding on all the Member States who are parties to them. It should be noted though that Treaties are binding to the extent of the reservations made by the parties thereto. Where there are no reservations, Treaties are binding in their entirety. This research has not come across any Member State that made reservations as regards the application of Article 55 of the Treaty.

17. From a legal point of view, it does not matter whether a country follows a monist or dualist system. However, this may be a fundamental consideration when it comes to the practical implementation of Treaty obligations as will be seen later in the dissertation. The foregoing provides sound legal and theoretical principles, but it is important to look at what pertains in reality. To explore this discourse further, the dissertation shall discuss two legal systems namely; monism and dualism as these have different consequences for the application of international law in a Member State.

10.1.1.1 Dualism

18. Under this legal system, municipal law and international law are considered distinct. International law is not self-executing in a domestic legal order and must expressly be incorporated through a process called domestication in order to be enforceable at municipal level. This is usually done through a separate legal instrument such as an Act of Parliament or a Statutory Instrument. In view of this, it is not improbable for an obligation to be legally binding in international law and have effect in the international legal system but is arguably unenforceable in the municipal legal system as was the case in the Polytol case.

19. It should be noted that most COMESA Member States have dualistic legal systems and thus require the domestication of the Treaty and the Regulations in order for them

[235] Supra-note 234

to be enforced in their jurisdictions. This presents a legal nightmare to persons subject to the application of the two legal systems. This is because while they may be in order to respect an international instrument and disregard the municipal instrument, they may be sanctioned at national level for not observing the municipal legal system. This is true for example where a merger meets the COMESA thresholds. In such a case, the merging parties arguably only have the obligation to notify the merger to the Commission even when notification requirements are met in the Member States where they operate. Table 1 below shows the legal systems of selected COMESA Member States and the status of domestication at the time of writing.

Table 1: Legal Systems of Selected COMESA Member States on Domestication of International Law

Country	Approach of Constitutional Framework	Type of Legal System	Place of Community Law in Constitution	Direct Applicability of International Law	Status of Domestication of the COMESA Treaty
Egypt	Monist	French Civil Law and Islamic Law	Ratified and Published Treaties have the Force of Law. However, Treaties are not considered superior to domestic legislation and a Treaty can thus both amend Legislation and be amended by Legislation	International Law is mainly used as an Interpretive Tool	Ratified and Published Treaties have the Force of Law
Ethiopia	Monist	Continental Civil Law	Article 9(4) of the Ethiopian Constitution provides that Ratified Treaties are part of the Law	On the face of it, International Law is directly Applicable. However, it appears that	The Treaty became part of the Law of Ethiopia upon Ratification in terms of Article

			of the Land. However, in practice, there is a requirement of Publication in the Federal *Negarit Gazette*	International Law is only Applicable after Publication in the Federal *Negarit Gazette*	9 of the Ethiopian Constitution. However, it is on the same Hierarchy with other Laws
Kenya	Monist	Common Law	The 2010 Constitution provides under Section 2(6) that any Treaty or Convention Ratified by Kenya shall form part of the Law of Kenya under the Constitution	The 2010 Constitution recognises International Law as a direct source of Law in Kenya	No requirement for Domestication.
Madagascar	Monist	Civil Law	Before any ratification, the treaties are submitted by the President of the Republic, to the control of constitutionality of the High Constitutional Court. In the case of non-conformity with the Constitution, there may not be ratification until after revision of it. The treaties or agreements regularly ratified or	It does appear that once an international instrument is not in conflict with the Constitution and has been ratified, it becomes self-executing.	The Status of the Treaty is not immediately clear but the Regulations have been domesticated[237]

[237] See letter sent by the Malagasy Ministry of Trade and Consumer Affairs to the COMESA Secretariat on 16 August 2018. In that letter, the Malagasy Ministry of Trade and Consumer Affairs affirmed that Madagascar has domesticated the Regulations.

			approved have, from their publication, an authority superior to that of the laws, under reserve, for each agreement or treaty, of its application by the other party[236]		
Mauritius	Dualist	Mixed French and Civil Law and British Common Law	Article 2 of the Constitution provides that the Constitution is the Supreme Law and any Law inconsistent with the Constitution shall be void	The Constitution of Mauritius does not provide for the process of ratification of Treaties nor the Status of International Law in relation to Domestic Law	Treaty is not Domesticated though it is not clear if this is required since the Constitution is silent on the matter.
Malawi	Dualist	Common Law	The Constitution provides under Section 211 that Treaties entered into before the Commencement of the Constitution in 1994 are part of the Law of Malawi, while later Treaties require Domestication	The Supreme Court of Appeal made it clear that the applicability of the Treaty Provision is subject to Legislation in Force at the time, but that in case of conflict, the Courts will try as much as possible to avoid a clash	The Treaty is not Domesticated

[236] http://constitutions.unwomen.org/en/countries/africa/madagascar (accessed on 6 March 2019)

eSwatini	Dualist	Common Law	Treaties are not Applicable until they are Domesticated	International Law is not directly applicable until Domesticated	At the time of writing the dissertation, the eSwatini Authorities consulted were not sure whether the Treaty was Domesticated or not. However, the Regulations were domesticated.[238]
Uganda	Dualist	Common Law	Treaties are not applicable until they are Domesticated	International Law is Applicable in Uganda through Domestication	Domesticated
Zambia	Dualist	Common Law	Treaties are not applicable until they are Domesticated	International Law is Applicable in in Zambia through Domestication	Not domesticated
Zimbabwe	Dualist	Common Law	Section 111 of the Constitution on the approval of Treaties does not apply where an Act of Parliament Legislates an alternative means of Approval, Ratification and Domestication of a Particular Treaty or	Some International Instruments are directly Applicable while others may not as noted from Article 111B of the Constitution	At the time of writing the dissertation, the Zimbabwean Authorities consulted were not sure whether the Treaty was Domesticated or not.

[238] See the Swaziland Government Gazettee Vol. LV Mbabane, Friday, June, 09th 2017, No. 59.

			Class of Treaties		

Source: Research conducted by the author

20. A review of table 1 shows that none of the COMESA Member States with a dualistic legal order has domesticated the Treaty and the Regulations except Uganda and Eswatini respectively.[239] Uganda recently enacted a legal instrument to domesticate the Treaty. In 2016, Uganda passed the COMESA Treaty Implementation Act. The COMESA Treaty Implementation Act (2017) gives the force of law to the Treaty in Uganda.[240] As regards Eswatini, in domesticating the Regulations, it relied on Section 238 of the Constitution Act of Swaziland (the Constitution of Swaziland).[241] The Constitution of Swaziland appear to provide two ways in which an international agreement can become binding on the government, i.e. ratification and non-ratification for those international instruments that are self-executing. The Eswatini authorities interpreted the Treaty as being self-executing from the reading of Articles 5, 10 and 55 of thereof. The Regulations were therefore, in 2017 domesticated on this premise.

21. The case of Mauritius is interesting though. The officials at the Mauritius Competition Authority claim that domestication is required for the Regulations to be enforceable in Mauritius. Mr. Vipin Naugah submitted that Mauritius takes a dualist approach to international treaties and instruments. Therefore to have effect in Mauritius, they have to be domesticated through enactment. He averred that this is given effect by Article 2 of the Constitution of Mauritius which provides that:

> **"This Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void".**

---

[239] It should be recalled that it is the Executive Branch of Government that is charged with the responsibility of entering into international agreements and further submit them to the legislature for domestication. In most cases the Executive after ratification have gone to sleep. This shows an awful lack of seriousness and among the reasons why general economic and legal development is not impressive in the Common Market.

[240] https://www.independent.co.ug/comesa-commends-uganda-roads/ (accessed on 6 March 2019)

[241] Email exchange of 10 June 2019 between Ms. Thembelihle Dube; the Legal Counsel of the Competition Authority of Eswatini and the Author.

22. Mr. Naugar submitted that in as far as he was aware, the Treaty and Regulations were not domesticated in Mauritius.[242] However, it is difficult to conquer with Mr. Naugar's view that the Constitution in Mauritius requires international instruments to be domesticated. It is unequivocal that the Constitution is Supreme pursuant to Article 2 thereof and that all international instruments that are inconsistent with it are null and void. It follows therefore that these instruments will be unenforceable in Mauritius only to the extent that they are *ultra vires* the Constitution. This is a different matter from domestication and this research has not come across an Article in the Mauritian Constitution that requires domestication. However, this position coming from the Mauritians leaves a lot of uncertainty and it would be prudent to domesticate the Regulations to settle the matter. It has to be recalled that the Mauritian authorities had similar arguments in the Polytol case cited above.

23. It is paramount to note that in dualistic jurisdictions, the Constitution is observed as the Supreme law of the land and anything contrary to the Constitution is null and void *ab initio* to the extent of the inconsistency. It should be pointed out however, that some domestic courts have given recognition to international instruments in their judgments like the Zambian High Court in the cases of **Nawakwi v. Attorney General**[243] and **Longwe v. Intercontinental Hotel**.[244] Nevertheless, even in these cases, the Courts did not pronounce that international instruments were binding. As a matter of fact, they stated that the international instruments were of persuasive value. For example, in the case of **The Attorney General v. Roy Clark**, the Supreme Court of Zambia held that:[245]

"In applying and construing our Statutes, we can take into consideration international instruments to which Zambia is a signatory. However, these international instruments are of persuasive value unless they are domesticated in our laws".

[242] Email exchange of 10 June 2019 between Mr. Vipin Naugar of the Competition Commission of Mauritius and the Author.
[243] 1990/HP/1724 (HC). See M. Hansungule "Domestication of International Human Rights Law in Zambia" in M. Kilander (ed) *International Law and Domestic Human Rights Litigation in Africa* (2010) 83 -108, 76.
[244] 1992/HP/765 (HC).
[245] The Attorney General v. Roy Clark, Supreme Court of Zambia NO. 4 of 2008

24. While this is comforting in that Courts in some jurisdictions will give due regard to international instruments it does not erase the uncertainty it raises on the merging parties who may want to claim their rights under the Regulations and National Competition Authorities who may wish to exercise their powers under their municipal laws. In the absence of absolute domestication, it is not certain how the Courts may elect to interpret international legal instruments. Other cases support this view. For example, in the case of **Zambia Sugar Plc v. Fellow Nanzaluka, Appeal No. 82/2001**, the court observed thus:

"International instruments on any law, although ratified and assented to by a State, cannot be applied unless domesticated".

25. Therefore, it is notable that before an international instrument can be recognised as binding law in Zambia it must be transformed into municipal law through the process of domestication. Suffice to observe that the Zambian CCPA does appear to give recognition to the COMESA legal instruments *albeit* devoid of absolute clarity. Section 65 of the CCPA provides that:

(1) "Subject to the provisions of subsection (2), a foreign competition authority may, where it has reasonable grounds to believe that anti-competitive practices in Zambia are damaging competition in the country of the authority, request the Commission to investigate and make an appropriate determination.

(2) Subsection (1) applies –

***(a)* to requests from other members of the Common Market for Eastern and Southern Africa or of the Southern African Development Community by virtue of the obligations assumed by Zambia towards these organisations; and**

***(b)* where the Minister has certified by order, in the Gazette, that Zambia has entered into an agreement with one or more States or organisations whereby,**

on a basis of reciprocity, each party to the agreement shall exercise the principles of comity on the basis described in subsection (1) in investigating and determining cases falling within its jurisdiction".

26. A cursory reading of these provisions in the Zambian CCPA gives some sense of hope that CCPC would respect its obligations through Treaties and other legal instruments to which Zambia has assented. After all, this is the appropriate thing to do by virtue of the principle of *pacta sunt servanda.* One would surmise that this could be the provision the CCPC has found solace in submitting to the jurisdiction of the Commission. The foregoing notwithstanding, a careful and detailed review of the CCPA brings back the same uncertainty. Section 65(2)(b) of the CCPA informs us that such investigations or recognition are based on reciprocity and comity. The disadvantages of 'comity' have already been identified in the introduction section of the dissertation. Comity is not *stricto sensu* a legal obligation but a good faith requirement to conduct affairs in a manner agreed by the higher contracting parties. It therefore does not provide absolute certainty that the CCPC and Zambia generally would respect their obligations in the Treaty under all circumstances. Secondly, Section 65 of the CCPA has referred to the principle of 'reciprocity'. This brings another troubling reading to a provision that *prima facie* appeared to have given the CCPC legal authority to respect the provisions of the Treaty with absolute certainty. Reciprocity in simple terms means that one Member States would only perform its obligations under an agreement if the other Member States are doing the same. This requirement under international law was explicated in the Costa v. Enel case cited above. The implementation of section 65(2)(b) of the CCPA is therefore questionable as not all Member States would comply with the Regulations nor the Treaty under all circumstances as demonstrated in the Polytol case. Further, observance of international legal instruments by the Courts of one Jurisdiction does not guarantee the same in another.

27. A review of section 65 of the CCPA also discloses that what is actually contemplated is not an investigation using the law of another country or indeed a regional law in the case of COMESA but an investigation with the CCPA having jurisdiction. This brings back the same uncertainty as to whether the Regulations would be enforceable in

Zambia. There are indications that Zambia may incorporate the Regulations in the proposed amendments to the CCPA which would provide relief to the enforcement of the Regulations in Zambia.[246]

28. Placing further emphasis on domestication, it has been observed that most dualistic Constitutions require international legal instruments to be domesticated for them to be legally enforceable. Suffice to mention that this situation is not a secret or merely academic in order to earn a PhD. This situation is very real as could be seen from the remarks and positions of High Court Judges of the COMESA Member States organised by the Commission in August 2016 in Mangochi, Malawi. The Judges were unanimous in their view that the Regulations and the Treaty could only be recognised in dualistic legal systems if they were domesticated. For example, the Judge-in-Charge of the High Court of Malawi (Commercial Division), John Kapsala stated that the Courts in Malawi would only consider the Treaty as forming part of Malawi law if the Treaty is domesticated in Malawi through an Act of Parliament. Short of domestication through an Act of Parliament, Malawian courts cannot rely on a Treaty in dealing with violations of the provisions of the Treaty. If this is coming from high authorities like High Court Judges, then the situation is not as simple as it may appear and poses a great risk to the success of the implementation of the Treaty, Regulations and ultimately the single market imperative.

29. The procedure for domestication in Malawi is addressed under section 211 of the Constitution which guides that international agreements entered into after the commencement of this Constitution shall form part of the law of the Republic if so provided by an Act of Parliament. The meaning of this is that a Treaty cannot be enforced in Malawi if it is not domesticated as per the provisions of section 211 of the Constitution. This is supported by Court Judgments like in the celebrated case of **Chihana v R (MSCA Criminal Appeal No. 9 of 1992) [1993] MWSC 1 (29 March 1993).** In that case, the Supreme Court of Malawi posited that a Treaty would only be considered as been part of the Malawian legal system if it was domesticated through an Act of Parliament. As already observed, this is not only unique to Malawi but other Member States who have a dualistic legal system.

[246] Conversation with Mr. Chilufya Sampa, the Chief Executive Officer of CCPC during the meeting regarding the implementation of the MOU between CCPC and the Commission at CCPC's offices on 15 February 2019.

30. How then should the dichotomy that the Regulations are binding by virtue of the Treaty, Vienna Convention and Case law be reconciled? The starting point is to understand that *'domestication'* though closely related is different from the principle of *'binding'*. Further, the Treaty binds the State and non-observance of it may result in sanctions meted on the State at international level. Therefore, legally and rightly so, the domestic institutions including persons may decline to recognise the Treaty or Regulations due to lack of domestication in a dualistic State even if they are binding at international level. The consequences of such would be at State level. Such consequences are provided for under Article 171 of the Treaty where the Member States have reiterated the importance of observing the obligations of the Treaty by agreeing that for the attainment of the objectives of the Common Market, full commitment of each Member State to the fulfilment of the obligations contained in this Treaty shall be required. To this end, the Member States have agreed that specific sanctions may be imposed by the Authority to secure fulfilment by the Member States of their obligations under this Treaty. The lack of domestication therefore remains a serious hindrance to the enforcement of the Regulations.

10.1.1.2 Monism

31. Under this legal system, international legal instruments are self-executing. What this means is that immediately a State ratifies an international legal instrument, it automatically becomes binding and enforceable in the jurisdiction of that State. In a monist system, international legal instruments are given higher regard than municipal law which is viewed as subservient to the former. It therefore means that where there is a conflict between municipal law and international law, the latter would supersede. There are a few countries with seemingly monist legal systems in the Common Market among them Democratic Republic of Congo, Djibouti and Kenya. These Member States appear to have a semblance of a monist legal system because carefully reviewed, they do not squarely fit into the theoretical fundamentals of a pure monist system and this raises similar risks as in the dualist system discussed above. The next sections shed more light on this view.

32. Section 2(6) of the Kenyan Constitution provides that any Treaty or convention ratified by Kenya shall form part of the law of Kenya under the Constitution. Section 2(6) of the Kenyan Constitution appear to be very clear that Kenya follows a monist system. However, different legal scholars have argued that this is in fact not the case as Kenya still follows the tenets of a dualist system. They cite Article 94(5) for these purposes which provides that no person or body, other than Parliament, has the power to make provisions having the force of law in Kenya except under authority conferred by the Constitution or by legislation.[247] The argument is that since Treaties are entered into by the Executive, they cannot automatically become enforceable as authority has to be conferred by the Constitution or by legislation. With all due respect this argument sounds unreasoned. The Constitution has under Article 2(6) implicitly granted authority to the Executive which enters into Treaties by making them automatically enforceable in Kenya. However, what this tells us is that as long as there is no Court interpretation, the risk that Kenya stills follows a dualistic approach remains.

33. The Democratic Republic of Congo (DRC) appear to have a clear monistic system with less room for debate. According to Section 215 of the DRC 2006 Constitution, international Treaties to which the DRC is a State Party supersede domestic law. However, there is a caveat to this. Section 215 adds that this is without prejudice to its application by the other party. It is not immediately clear what this means but it is not far-fetched to conclude that this status is only accorded on condition that other State parties also give due respect to their Treaty obligations. This poses a risk in that Member States with dualist legal systems may not fully observe their obligations if the Treaty and the Regulations have not been domesticated. It remains to be seen how the Courts shall interpret this provision should they be faced with a case requiring such a pronouncement. Nevertheless, currently, what is clear is that the DRC follows a monist legal system as confirmed by the decision of the Military Tribunal of Ituri in **Military Prosecutor v. Massaba (Blaise Bongi) Criminal Trial Judgment and**

[247] See Asher, E.O. 2013. "Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya". International Journal of Humanities and Social Science. Vol. 3, No. 11; June 2013. Under *settings* http://www.ijhssnet.com/journals/Vol_3_No_11_June_2013/29.pdf (accessed on 9 March 2019)

accompanying civil action for damages, RP No. 018/2006, RMP No. 242/PEN/06, ILDC 387 (CD 2006), 24th March 2006, Military Tribunal. In that case, questions of primacy as regards international law and municipal law were raised. The international legal instrument in question was the 1998 Rome Statute of the International Criminal Court. The DRC applied the provisions of this Statute based on the monist legal system.

10.2. Conclusion

34. In conclusion, it has been observed that domestication is indispensable for the effective implementation of the Regulations. There are some Member States with a monist legal approach, but it appears that even then, practical challenges of enforcement may arise, as the principles of reciprocity may jeopardize the effectiveness of such a system. The challenge posed by the lack of domestication affects both the merging parties and the National Competition Authorities as it results in significant legal uncertainty, a very inappropriate situation in law. This situation may jeopardise the attainment of the objectives of the Common Market and indeed the Regulations.

35. The application of the Treaty and the Regulations forms the foundation of the resolution of the challenges encountered in cross-border merger regulation. Where this remains, it is difficult to see how the Regulations may effectively address other challenges of cross-border merger regulation. For example, the dominance of national policies especially public interest and sovereignty may lead to some Member States to dubiously disregard the recognition of the Regulations based on non-domestication. At the advent of enforcement of the Regulations, Kenya raised these matters as reasons for not yielding to the jurisdiction of the Regulations. The next chapter shall review some other challenges encountered in cross-border merger control and whether the Regulations have resolved them.

Chapter Eleven

11.0 Challenges for the Merging Parties and whether the Regulations have resolved these Challenges

11.1 Costs of Multi-jurisdictional Merger Review Processes

1. Research undertaken on cross-border mergers reveals that its regulation poses challenges to both the merging parties and the national competition authorities. This dissertation has also investigated some of these challenges and verified their existence. The dissertation has thereafter expounded on whether the promulgation of the Regulations has addressed these challenges.

2. The challenges arguably raise the cost of concluding mergers. Chapter Eleven has focussed on the challenges encountered by the merging parties. The dissertation has focused on identified challenges it deemed significant and serious enough to require immediate attention.[248] Below are the challenges the research has identified as serious and those it will discuss in greater detail in the subsequent sections of Chapter Eleven:

   (i) Information Requirements for Different Jurisdictions
   (ii) Voluntary vs. Mandatory Merger Notification Regimes
   (iii) Suspensory vs. Non-suspensory Merger Control Regimes
   (iv) Inconsistent Approaches and Decisions by National Competition Authorities Involved
   (v) High Merger Notification Fees
   (vi) Waiting Periods after Notification
   (vii) Triggering Events for Notification
   (viii) Local Nexus
   (ix) Non-Domestication of the Treaty and the Regulations
   (x) Insufficient Precedent on Merger Determinations

[248] It should be noted that there are other challenges established by various researches undertaken on the subject. However, for purposes of this research and in the context of the Common Market, the challenges identified in this Chapter are serious, hence require attention.

(xi) Policy Imperatives beyond the Conventional Consideration of Mergers under the Test of Substantial Lessening of Competition

3. Each of the above identified challenges has been discussed in detail below. The dissertation has also considered whether or not the Regulations have addressed these challenges.

11.1.1 Information Requirements for Different Jurisdictions

4. Parties to a merger face challenges when their transaction is subject to a multiplicity of review processes. Merging parties whose transaction is subject to review by two or more jurisdictions have to familiarise themselves with different notification requirements where their merger satisfies the merger notification requirements. This may be a very onerous, time consuming and costly exercise. For example, the Bayer Aktiengesellchaft/Mosanto merger notified to the Commission on 16 February 2017 took over four months to be notified from the time the decision to merge was made.[249] The parties' legal representatives, Messrs Nkonzo Hlatshwayo and Lesely Morphet of Hogan Lovells lamented that the information requirements and the burden of putting together a mechanism for notifications in various jurisdiction was massive. This is clearly an infraction of Article 24(1) of the Regulations which requires mergers to be notified within 30 days of the parties' decision to merge.[250]

5. It is quite clear that different competition regimes have different standards and quantity of information required for filing a merger. Others require more information. Still the information required by other jurisdictions is vague. The questions posed to the merging parties in the merger notification forms or any other such instruments are not uniform. In fact, the Whish/Diane report[251] has identified harmonising information

[249] The parties' legal representatives, Messrs Nkonzo Hlatshwayo and Lesely Morphet of Hogan Lovells lamented that the information requirements and the burden of putting together a mechanism for notifications in various jurisdiction was massive.
[250] The parties had however engaged the Commission in October 2016 on the matter and explained that it was impossible to submit the merger within the stipulated time due to the huge and different information requirements for different jurisdictions. The Commission chose to interpret Article 24(1) expansively and purposively and construed the initial engagement with the parties as the commencement of the notification process pending complete notification.
[251] Supra-note 219.

requirements in the notification forms as a possible and greater step towards convergence.

6. However, the utilisation of a common filing form with common filing requirements may not be easy as observed by the same report. The report observed that harmonising such a document would require the harmonisation of substantive requirements where the notification forms are premised. Most notification forms are promulgated as subsidiary legislation to an enabling law. Sometimes amending a subsidiary law without amending the enabling law may result in the subsidiary legislation been *ultra vires* and therefore null and void. It follows therefore that although such attempts are more realistic than attempts to harmonise substantive laws, it is still a long way before such a goal is achieved within a multilateral framework. Further, it appears difficult to reconcile common information requirements for the different jurisdictions involved when they are likely to have different policy considerations like public interest which may mean different things in different jurisdictions. Interestingly, this research revealed that the merger notification forms in the Member States are largely uniform in terms of the information required. Therefore, even in the absence of a 'one-stop-shop', it is unlikely that such information requirement in the different jurisdictions would cause confusion in terms of the type of information required.

7. Worth noting is that some jurisdictions in the Common Market have a two-phase approach to merger assessment. This means that there is a Phase One under which mergers that are manifestly unlikely to raise competition concerns are considered and Phase Two under which mergers that are likely to raise competition concerns are considered. In most jurisdictions, this is not enshrined in legislation but in some guideline or office practice note to clear or dispose of those mergers that are unlikely to raise significant competition concerns under any conceivable standard of assessment. However, it is unfortunate that for most if not all competition authorities in the Common Market, the information requirements and the corresponding notification forms are the same for both phases. Competition authorities should not burden the parties by asking for information that may be irrelevant to the assessment of a merger transaction.

Have the Regulations Resolved this Challenge?

8. Undoubtedly the Promulgation of the Regulations has resolved this challenge with regard to merger notification in eighteen (18) Member States[252] with the exception of Kenya which still disputes the jurisdiction of the Regulations and the 'one-stop-shop principle'.[253] The merger parties do not need to comply with the information requirements of various Member States which regulate mergers because once a merger has met the regional dimension requirement, notification is done only with the Commission pursuant to the 'one-stop-shop' principle the primordial of supra-national merger control. In any case, this research revealed that this challenge is not insurmountable as information requirements are almost uniform in all the Member States.

9. Nevertheless, reform needs to be done at COMESA level to streamline the information requirement especially under the Phase One stage of assessment. The Regulations do not provide for a two-stage merger assessment process, but the Guidelines under Section 6 provide for a two-stage merger assessment process (Phases One and Two) Mergers that are on a higher balance of probability unlikely to raise significant competition concerns are assessed under Phase One within 45 days. However, the instrument for filing these mergers and submitting the information to the Commission is the same COMESA Merger Notification Form 12 (Form 12). There is need for the Commission to address this by following the practice in the EU where there are two forms for the two processes. The Form CO and Short Form used by the DG Comp of the EC may be adopted by the Commission. In the Short Form, there is less information requested for and is based suited for a Phase One assessment. The Form CO is best suited for Phase Two mergers, i.e. those that have a greater likelihood of raising significant competition concerns. Correspondingly, such merger

[252] Tunisia and Somalia have been left out here because at the time of writing the dissertation, it was not clear whether these countries submitted to the jurisdiction of the Regulations as there was nothing on record to clarify this position.
[253] It should be noted that at the time of writing, the Competition Authority of Kenya and the Commission had reached an advanced stage in resolving the notification requirement in Kenya for mergers that have a regional dimension. Kenya had at the time put for comments on its website the draft guidelines which among other things resolves the problem of double notification. See https://www.cak.go.ke/index.php/statute-regulation#faqnoanchor (accessed on 17 May 2018).

assessments require a substantial amount of information to be comprehensively reviewed.

10. Further, the Commission Form 12, requests unnecessary information even for mergers that are likely to be assessed under phase two. The information is unnecessary in the sense that it is never used for purposes of reviewing the merger. For example, Part VII of the Form 12 under the heading ***"Statement of Merger Information"*** is deeply worrying in some sections, particularly section 1. This part is ostensibly onerous on the merging parties when it obliges them to use the 5 – digit Standard Industrial Classification Codes (SIC) to identify the product(s) and/or services. Clearly this information is irrelevant especially in DEEs and in the Common Market in particular to the extent that it relates to merger assessment. It is observed that its absence does not alter the trajectory of the investigation or the assessment of a merger transaction.[254]

11. An inspection of the merger reports at the Commission's registry reveals that since inception and of the over 240 merger cases the Commission has reviewed thus far, the SIC has never been used for purposes of merger assessment. This confirms the conclusion that this information requirement is onerous on the parties and superfluous.

11.1.2 Voluntary vs. Mandatory Regimes

12. In jurisdictions where merger notification is voluntary, the parties may conduct their own assessment and elect not to notify the merger where their determination reveals that the merger is unlikely to cause significant injury to the market. In contradistinction, in mandatory merger notification regimes, all merger transactions that meet the pre-set criteria are subject to notification and the determination of whether they result in significant competitive harm is the preserve of a competition authority. Among the problems identified by the instant research were the ambiguous laws which may make it difficult to establish with sufficient certainty whether the regime is mandatory or voluntary. This is worsened by difficulties in establishing with

[254] Suffice to not that with the robust advancement of the digital economy and markets, this may become a necessity soon even in DEEs

sufficient certainty that the transaction is unlikely to lead to significant competitive harm and therefore does not require notification in a voluntary regime. Mauritius and Malawi were identified and chosen to explain the identified challenges with regard to voluntary and mandatory merger notification requirements.

13. Mauritius has a voluntary merger review regime whereas most Member States of COMESA require mandatory notification of mergers once the notification requirements are met. The Mauritian competition legislation for example provides under section 48 that a merger is subject to review by the competition authority where:

- all the parties to the merger supply or acquire goods or services of any description, and following the merger, the merged entity will supply or acquire 30% or more of all those goods or services in the market;
- prior to the merger, one of the parties to the merger alone supplies or acquires 30% or more of goods or services of any description on the market;[255] and
- the competition authority has reasonable grounds to believe that the creation of the merger situation has resulted in, or is likely to result in, a substantial lessening of competition within any market for goods or services.

14. At first glance, the text may suggest that merger notification is mandatory where it meets the conditions laid down in the competition legislation. However, section 47(4) of the Mauritian Competition Act suggests that the merger notification regime in Mauritius is voluntary when it provides that:

> **"where two or more enterprises intend to be in a merger situation, any one of the enterprises may apply to the Commission for guidance as to whether the proposed merger situation is likely to result in a substantial lessening of competition within any market for goods or services"**

[255] This provision is worrying in that it presupposes a situation where the competition authority may claim jurisdiction on a merger where one of the parties to the transaction has insignificant market shares and thereby calling into question the requirement of local nexus.

15. This provision of the Mauritian competition law does not impose a mandatory notification obligation on the parties but simply advises them to seek guidance. This position has been confirmed by officials from the Mauritian competition authority that the Mauritian merger regime is voluntary.[256]

16. Mauritius is not the only Member State with a voluntary merger review regime. Malawi also has a voluntary merger review regime as clarified by the High Court of Malawi, in the ex parte matter: In **Re the State and the Competition and Fair Trading Commission, Miscellaneous Case No. 1 of 2013 (Application for Judicial Review).** Before this judgment, the Competition and Fair Trading Commission (CFTC) of Malawi took the approach that merger notification was mandatory in Malawi. However, confusion still remains even in the wake of the Court judgment. Mr. Richard Chiputula, the Head of the Mergers and Acquisitions Department at CFTC at the time of writing succinctly observed that the view that the regime is voluntary comes from the fact that the wording of the relevant provisions is silent on whether it is mandatory or voluntary. Section 35(1) of the Competition and Fair Trading Act (CFTA) creates an offence for anyone who consummates a merger without authorisation from the CFTC if that merger would likely have negative effect on competition. Further, pursuant to section 35(2), mergers consummated without this authorisation lack legal effect. It is tempting to think that if it is an offence to engage in a merger that leads to a substantial lessening of competition and indeed if such mergers have no legal effect, then logic and common sense would dictate that the mergers should be notified to the CFTC to make a determination on whether they would have such a consequence.

17. According to Mr. Chiputula, their interpretation of section 35 is that the determination of whether a merger would have negative effect on competition or not rests with the CFTC and it cannot make a determination without information. Hence the parties are required to provide relevant information to the CFTC for assessment. Therefore, parties are under obligation to notify any transaction particularly that the law does not

[256] Among these are former officials of the Authority namely; Ms. Sandya Booluck and Mr. Rajeev Hasnah. Mr. Deshmook Kowlesur, the Chief Executive Officer of the Competition Commission of Mauritius confirmed this position at the Media Workshop held by the Competition Commission of Mauritius in Port Louise, Mauritius on 20 March, 2017.

provide for thresholds. Mr. Chiputula submitted that some legal practitioners have interpreted section 36 of the CFTA as providing for voluntary notification. However, according to Mr. Chiputula, the CFTC's interpretation of section 36 is that it refers to persons who may submit a notification to the CFTC as opposed to the notifiability of transactions. This view by Mr. Chiputula appears to be correct. Section 36 of the CFTA provides that **"any person may apply to the CFTC for an order authorising that person to effect a merger or takeover"**. It does appear that any person with an interest to a merger may make application to the authority but not that the merger notification itself is subject to the word ***'may'.*** Nevertheless, this debate is academic as merger notification in Malawi is currently voluntary as per the Court Ruling.

18. To reconcile the two divergent interpretations the CFTC has taken a position that parties can choose to notify or not but the CFTC as a regulator can require parties to notify any transaction where it suspects the transaction may infringe section 35.[257] CFTC strongly believes that the High Court of Malawi erred in its ruling on this subject. According to Mr. Chiputula, the court ruling nullifies the CFTC's mandate over mergers.

19. It does not however appear true that the High Court ruling nullified the CFTC's mandate on mergers. It is difficult to comprehend such an outcome from the honourable court judgment. The Court appears to have held that parties are not obliged to notify mergers, but it is up to the Commission to review these mergers if they threaten to harm the competitive structures of markets. Such parties may be summoned to submit information for these purposes.

20. What then is the challenge of Voluntary vs. Mandatory merger notification requirements for the merging parties? The existence of both regimes presents concern for merging parties. Firstly, sometimes it is not conspicuously the situation that criteria for notification in a voluntary merger notification regime is met as is the case with Malawi for example. In this case, the merging parties may have to take a great deal of risk due to the uncertainty surrounding the merger regimes in such jurisdictions. Should the parties go ahead and implement such a merger which is then

[257] The author's research revealed that this is the exact practice in Mauritius as well.

determined to be a notifiable merger, legal, financial and practical trouble may ensue. Firstly, the wording of some legislation like the Malawi competition legislation are far from clear. For these purposes, it is worthwhile to look at section 35 of the CFTA again which provides that:

(1) "Any person who, in the absence of authority from the Commission (CFTC), whether as a principal or agent and whether by another enterprise, or his agent, participates in effecting –

(a) a merger between two or more independent enterprises;
(b) a takeover of one or more such enterprises by another enterprise, or, by a person who controls another such enterprise,

where such a merger or takeover is likely to result in substantial lessening of competition in any market shall be guilty of an offence".

(2) No merger or takeover made in contravention to subsection (1) shall have any legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable.

21. As observed in chapter six, what amounts to a substantial lessening of competition cannot be determined with mathematical precision. No matter how competition authorities may stress the importance of objective consideration of mergers, there is still some degree of value judgments and subjective considerations in merger assessment. It is this factor that may lead to a competition authority and the merging parties to arrive at different conclusions regarding the notifiability of a merger in a voluntary merger review regime. In the case of Malawi, such a development may be worrying as section 35 of the CFTA gives an indication that a merger which is deemed notifiable if implemented without notification would lead to a trespass of the law and would attract the consequent sanctions. Further, such a merger would immediately be deemed illegal, meaning all contracts it would have engaged in with various third parties would be rendered illegal and unenforceable. This is a very alarming imagination and nightmare for the parties to find themselves in. It does not

make legal and practical sense to punish merging parties for lack of notification in a voluntary merger notification system. It is for the Competition Authority to call for the notification of such a merger where it is convinced that the merger may be injurious to the competitive process.

22. The Mauritian competition legislation appears to be clearer on whether the parties would be liable for a breach of the law for implementing a merger should the Competition Authority of Mauritius determine that the merger is in fact notifiable. The legislation focusses on remedying the situation as opposed to imposing sanctions. However, remedying the situation post-merger may also have undesirable consequences. The legislation has provided that one of the ways through which the remedy would be implemented is through divestiture. Divestiture may be a very costly undertaking post-merger and a lot of contracts undertaken by the merged entity may have to be renegotiated otherwise there is a risk of them being frustrated due to the possibility of the formation of new legal entities that may be created after the divestiture. Every businessman and lawyer understands the ominous consequences of frustrated contracts.

23. The risk of divestiture is very real as it is possible for the competition authority of Mauritius and the parties to arrive at a different conclusion. This is because the merger notification thresholds in Mauritius are vague and opaque, i.e. they are not based on objective criteria, but are based on market shares. The determination of market shares as already observed in chapter six may not be done with absolute clarity. More objective thresholds like turnover are better as sales are straightforward to compute. The Mauritian competition legislation makes a merger transaction subject to notification if the merged entity's minimum market share is 30%. To determine this market share, there is need to conduct an assessment and determine the relevant market, a process which is not always objective. Therefore, due to value judgments, merging parties may define their relevant market widely so that their market shares are diluted and avoid notification. On the other hand, there may be temptation from the competition authorities to define the market narrowly to capture as many mergers as possible. Therefore, for purposes of certainty, there is need to have objective and

verifiable criteria of determining merger notification thresholds and international best practice favours turnover values in this regard.

24. A careful review of the analysis of voluntary and mandatory regimes reveal that uncertainty is the most worrying factor. It has been observed that some jurisdictions like Malawi make it an offence to implement mergers that result in a substantial lessening of competition even when arguably as seen above, merger notification is voluntary. Determining whether a merger will result in a substantial lessening of competition is not always an easy task as seen in chapter six of this dissertation. Therefore, what the parties may consider to be a pro-competitive merger, a competition authority may consider to be anti-competitive. Similarly, in some jurisdictions like Mauritius, the determination of mergers that may be subject to notification is based on market share thresholds. However, market shares are a crude way of determining thresholds as their determination is not always objective. Therefore, the parties may not always be certain that their transaction has met the market share threshold for possible notification. Cognate to this is the trouble of identifying which jurisdictions are mandatory and those that are voluntary. This can sometimes take a lot of time and indeed has cost implications and may delay the final implementation of the transaction.

Have the Regulations Resolved this Challenge?

25. To the extent that the Regulations create a 'One-Stop-Shop', the challenges posed by voluntary and mandatory regimes have been resolved as transactions that have a regional dimension have to be notified only with the Commission. This therefore creates clarity of what exactly the parties need to do and reduces the burden of having to identify jurisdictions where the merger should be notified. The Commission's merger notification regime is mandatory pursuant to Article 24 of the Regulations.

11.1.3 Suspensory vs. Non-Suspensory Regimes

26. Further, there are some COMESA Member States with suspensory merger review regimes among them Eswatini, Kenya and Zambia. Section 37 of the CCPA makes

the Zambian merger regime suspensory in that it is a mischief at law to intentionally or negligently implement a merger that is reviewable by the CCPC without the approval of the CCPC. Section 42(2) of the Competition Act No. 12 of 2010 of the Laws of Kenya is even more express on the subject of suspending the merger pending review. It reads thus:

> **"No person either individually or jointly or in concert with any other person, may implement a proposed merger to which this part applies, unless the proposed merger is–**
> **a) approved by the authority; and**
> **b) implemented in accordance with any conditions attached to the approval"**

27. The Malawian competition legislation is equally explicit on the matter when it provides under section 35 that:

> **"any person who, in the absence of authority from the Commission, whether as a principal or agent and whether by another enterprise, or his agent participates in effecting a merger between two or more enterprises or a takeover of one or more such enterprises by another enterprise, or by a person who controls another such enterprise, where such a merger or takeover is likely to result in substantial lessening of competition in any market shall be guilty of an offence. Any merger or takeover made in contravention of the foregoing shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger or takeover shall be legally enforceable".**

28. It would be overzealous to engage in further explanations on the foregoing as it is beyond dispute that the regime is suspensory where the notification requirements are met.[258] Section 35 of the eSwatini Competition Act No. 8 of 2007 is similarly worded.

[258] The situation in Malawi is however confusing. If indeed the regime is voluntary, one wonders then how such a system can operate simultaneously with the suspensory system. The Malawian competition legislation needs to be amended to bring clarity.

29. A strict interpretation of the Fair Competition Act 2009 (FCA) of Seychelles reveals that it also has a suspensory merger control regime. However, the FCA also has imprecise language that may cause legal confusion to those who may conveniently elect to do so. The FCA stipulates that where an enterprise wishes to establish a merger, it shall apply to the competition authority for permission to carry out or implement a merger. However, the FCA does not appear to expressly proscribe the implementation of the merger without the permission of the competition authority. This is implied in the language of the FCA when it states that where the authority determines after investigation that enterprises have effected a merger without the authority's permission, the authority may by notice in writing direct the enterprises concerned so that the merger may be determined within such time specified in the direction.

30. A cursory reading of this provision in the FCA appears to suggest that it is for the authority to investigate those mergers and ask the parties through an order to rectify the situation. However, the risk of confusion is not significant as the law is express when it provides that *'a notifiable merger is one which involves an enterprise that by itself controls or, together with any other enterprise party to the proposed merger is likely to control 40% or more of the market or such other amounts as they minister may prescribe. Notifiable mergers are prohibited unless permitted by the competition authority'*. In any case, the law has to be amended to avoid confusion and introduce an element of clarity. The Competition Authority of the Seychelles may also clarify this in the Guidelines.

31. The problem raised by the existence of suspensory and non-suspensory regimes is that it takes a lot of time and work for the merging parties to gather this information and comply with the different procedural requirements by the various authorities. This compounds the problem of costs in both administrative and pecuniary respects. A lot of money is paid by the parties to the attorneys and other professionals to gather all this information and ensure that it is accurate. Anything short of this would lead to serious uncertainty as regards compliance with the different competition legislation in various jurisdictions.

Have the Regulations Resolved this Challenge?

32. To the extent that the Regulations create a 'one-stop-shop' with respect to cross-border mergers, it may appear that they have resolved this challenge. Nevertheless, a careful review of the Regulations discloses that a fundamental challenge has been conceived as regards this matter.

33. The COMESA merger control regime itself is a non-suspensory regime as observed from the wording of Article 24, contrary to the Commission officials' interpretation. Article 24 **appears** ***(emphasis)*** to proscribe the implementation of a merger before notification to the Commission but is silent on the implementation of the merger before the Commission's approval. The language of the legislation is not as express as the language in the Kenyan, Eswatini or Zambian competition statutes which expressly proscribe the implementation of mergers before the approval. In the Regulations, the relevant Articles for these purposes are Articles 24(1) and (2) of the Regulations which provides that:

1. **"A party to a notifiable merger shall notify the Commission in writing of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge.**

2. **Any notifiable merger carried out in contravention of this part shall have no legal effect and no rights or obligations imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable in the Common Market.**

34. An analysis of these provisions reveals that the Regulations do not outlaw the implementation of a merger before approval. What appears to be the case especially from Article 24(1) is that a merger has to be notified before it is implemented. Even this is a logical and practical conclusion but not a legal conclusion. Indeed, the requirement to notify a merger 30 days after a decision to merge[259] has been arrived at by the parties makes it almost always the case that a merger cannot be implemented

[259] What amounts to *'decision to merge'* has been discussed in later sections of the dissertation.

before notification. This is because practice has shown that implementing most mergers involves an array of processes and procedures that usually cannot be concluded in 30 days. From this angle, one would be correct therefore to argue that the Regulations in practice proscribe the implementation of a merger before Notification. However, legally and in theory, this position is not true. If the parties implement and are able to notify a merger before the expiration of the 30-day period within which notification of the merger should be done after the decision to merge has been reached, there is no breach of law. Therefore, legally, the COMESA merger control regime is actually non-suspensory contrary to what the Commission's officials preach at various fora.[260] This legal analysis is actually consistent with the Guidelines which the Commission officials have chosen to ignore either deliberately or because they have not read the Guidelines in full. Section 5.32 of the Guidelines provides that:

> *"The Regulations do not prohibit the parties from implementing a notifiable merger before making a notification or before the Commission issues a decision declaring that it does not object to the merger. However, parties should be cautious when implementing a notifiable merger before receiving such a decision. If upon review the Commission determines that such a merger is unlawful under Article 26(7) of the Regulations, the parties may be required to dissolve the merger or take steps as may be determined by the Commission under the Regulations to make the merger lawful".*

35. Section 5.32 of the Guidelines is express and very consistent with the analysis in this dissertation. Article 24 has not made any reference to implementation of a merger when it outlines the sanctions for failure to obey the merger law. Nevertheless, there is still a lot of uncertainty as regards the question of whether the COMESA merger regime is suspensory or non-suspensory. The position of the Commission officials who indicate that it is suspensory exacerbates the problem. The Guidelines under section 5.32 are clear but the lack of attention by both the Commission staff and the stakeholders does not help the situation.

[260] Mr. George Lipimile has been cited at several fora stating that it is not lawful to implement a merger before the Commission's decision. This was reiterated at the Media Workshop organized by the Competition Commission of Mauritius held in Port Louise on 20 March 2017.

36. Further the Guidelines are not binding. Therefore, when the Commission is confronted with a contrary view, it may elect to ignore the Guidelines. The Regulations need to be amended to make it clear that they are either suspensory or non-suspensory. The Regulations need to provide for an express suspensory merger control regime for two reasons. The first reason is that a suspensory regime provides certainty as the parties may not have to worry whether or not they will have to unwind their merger or comply to certain conditions like divestiture after they have already merged which may be a very costly and onerous exercise. Guidance and inference can be sought from the EUMR which provides for the suspension of the merger before the EC issues a decision.[261] In fact the EUMR instructs against implementation of mergers before notification.[262] The rationale behind this in the EU may have been to avoid some of the concerns raised above.

37. Secondly, the Regulations under Article 24(8) provide for a referral of some mergers on certain grounds.[263] After the referral, the part of the merger referred is supposed to be reviewed under the domestic law of the Member State which has asked for a referral. Article 24(8) of the Regulations provides that:

> **"A Member State having attained knowledge of a merger notification submitted to the Commission may request the Commission to refer the merger for consideration under the Member State's national competition law if the Member State is satisfied that the merger, if carried out, is likely to disproportionately reduce competition to a material extent in the Member State or any part of the Member State".**

38. The confusion Article 24(8) creates is the position of the parties whose merger was notified to the Commission but later referred to a Member State like Kenya, eSwatini or Zambia whose national competition laws provide for a suspensory merger review regime. *Stricto sensu*, it may mean that the parties would have trespassed the national

[261] See Article 7 of the EUMR
[262] See Article 4 of the EUMR
[263] It has to be recalled that Article 24(8) of the Regulations provides that after the referral, the transaction shall be reviewed under the Member State's national law potentially making the merger illegal and the merging parties violating national law if it has a suspensory merger control regime. May be this has been addressed under Article 24(9) as one of the reasons why the Commission may refuse to grant referral to a Member State i.e. if such referral shall disadvantage the parties. The position has to be weeded of ambiguity and made clearer.

competition laws of these countries and may have to face the sanctions/penalties under those respective laws. This is troubling and a great source of concern to the parties as they are likely to be caught in violation of laws not of their volition but due to procedural arrangements. The Guidelines have attempted to address this issue under section 5.28 when the provide that:

> *"The Regulations do not prevent the merging parties from implementing mergers before notification or the completion of an assessment…….. The Commission considers that the parties to an implemented merger notified in accordance with the Regulations and these Guidelines should not, upon referral to a Member State authority, be penalised for having implemented the merger or not previously notifying such authority. The Commission will therefore only refer a merger to a Member State authority that requires notification and assessment of a merger prior to implementation if such authority undertakes in its referral request not to impose penalties on the parties or prejudice its review of the merger due to the implementation of the merger…".*

39. Therefore, the Guidelines make it unequivocally clear that referral can only be made if a national competition authority undertakes not to penalise the parties, its suspensory merger regime as dictated by statute notwithstanding. It is important to recall that the Guidelines are clearly *ultra-vires* the Regulations in this regard as the Regulations do not attempt to amend the national competition law to suit this situation, they simply provide that consideration of a merger after referral shall be in accordance with the Member State's national competition law.

40. So far, no litigation has arisen as result of this *lacuna*. Referrals have been made to Zambia and Zimbabwe. Zambia's merger notification regime is suspensory. However, no issues arose. One reason is that the parties in some of these mergers did not implement the mergers as they were waiting for the Commission's decision to avoid the uncertainty. It should be recalled that parties who elect to implement a merger before the decision of the Commission do so at their own peril should the Commission determine that the merger is incompatible with the Common Market.

The other reason may be that both Zambia and Zimbabwe unlike Kenya have yielded to the jurisdiction of the Commission since its inception. The situation may not be the same in Kenya which as a matter of fact still calls for merger notifications despite the ‘one-stop-shop’ principle which the Regulations attempts to create. Even in Zambia and Zimbabwe for example, it is possible that some stakeholders may raise issues observed above if a merger is referred to their country to be considered under their national competition laws. Clearly, the Regulations have not resolved the challenge under this heading and amending them to make the COMESA merger regime suspensory will completely eliminate this challenge.

11.1.4 Inconsistent Approaches and Decisions

41. Because cross-border mergers are subject to the review of two or more jurisdictions, it is not unusual though infrequent that inconsistent outcomes may be arrived at due to the different policy considerations and market peculiarities in different jurisdictions. This is not a challenge in DEEs alone but developed countries as well. The most spectacular and divergent outcome was in the GE/Honeywell merger where the United States of America Anti-trust agencies had cleared the merger but the EC decided to block it. It appears that the European anti-trust agency based its arguments for rejecting the merger on frivolous grounds which were very remote or far from being close to the merger specific requirements. The fear of the EC was that the merger would lead to mixed bundling which would enable the merged entity to price its bundled products cheaply than it would sell individual products and that no competitor on the market would counter this. It is beyond the scope of the dissertation to reveal in greater detail the divergent approaches of the EU and US anti-trust agencies but it appears the findings of the EC where not based on sound evidence but speculation. Even a cursory reading of that case does not show that the EC had based their concerns on sound economic analysis and evidence.[264]

42. The US$15 billion Boeing/McDonnell Douglas merger is another high-profile example of such conflict. Despite the transaction receiving approval from the Federal Trade Commission in the USA, the EC opposed Boeing’s exclusive supply

[264] For a detailed discussion on this, see Chapter 5 of this Dissertation.

arrangements with three US airlines because it believed the merged entity would control too much of the global market for commercial aircraft.[265] Boeing was required to scrap its exclusive arrangements and provide competitors with certain aviation technology in order to secure approval for the transaction in the EU.[266] Conversely, when Ciba-Geigy and Sandoz proposed to merge to form Novartis, the Federal Trade Commission exerted much harsher remedies than did the European Commission in various cross-border markets.[267]

43. Divergent outcomes have been noted even closer to home in the Common Market, for example in the 2012 merger involving Tsusho Corporation and Pinault Printemps Redoute (Group), the Zambian Competition Authority[268] rejected the merger, the Malawians approved it with conditions and the Kenyans approved it unconditionally. A similar scenario was observed in the Walmart/Massmart Merger.[269] Nevertheless, care has to be taken to put the argument in context. There is nothing wrong with arriving at divergent outcomes as long as they are premised on consistent and sound competition principles. This is because they relate to characteristics of distinct markets. It should be recalled that Merger determination is highly fact dependent. What is worrying is when the divergent outcomes are as a result of inconsistent approaches and different vested interests contrary to competition law principles. Such possibilities also raise the uncertainty suffered by the parties to the merger.

44. Suffice to mention that divergent outcomes where they raise concern are a function of substantive policy consideration and not as much due to procedural issues. As observed by William Rowley, "the actual working out of substantive principles depends a great deal on precisely who is deciding on the merger application. Potential market effects in many merger cases are so elusive or double-edged that different decision makers have a good deal of room to come to different conclusions. This can

[265] Case No. IV/M 877 – Boeing/McDonnell Douglas.
[266] See Boeing/McDonnell Douglas (December 8, 1997) O.J. L336; and the commentaries in D. Bencivenga, "International Antitrust: Nations Respond to Greater Need for Cooperation" (23 October 1997) New York Law Journal 5; and M.J. Reynolds, "Opinion" (August/September 1997) Global Competition Review 4.
[267] See In the Matter of Ciba-Geigy Limited, Ciba-Geigy Corporation, Chiron Corporation, Sandoz Ltd., Sandoz Corporation, Novartis AG, Docket No. C-3725, Decision and Consent Order (http://www.ftc.gov/ftc/news.htm); Ciba-Geigy/Sandoz (November 5, 1996) O.J. C140; and the commentary in A.N. Campbell and J.P. Roode, "The 'Highest Common Denominator Effect'" (August/September 1997) Global Competition Review 29.
[268] CCPC Staff Paper No. 584, November 2012.
[269] For more details on this matter, see Chapter 8 of this Dissertation

mean a single minded anti-trust agency applying a 'public interest' test may well be tougher on mergers than a politically motivated Cabinet Minister who is called upon to apply a substantial lessening of competition' standard".[270] These views are sound in that where substantive considerations due to different policy considerations of different jurisdictions differ, it is likely that divergent determination of mergers will arise.

45. In the Common Market and currently in most jurisdictions the world-over, this concern is not as serious as it was two decades ago. A perusal of the merger laws of different jurisdictions with a focus in the Common Market discloses that there is significant convergence in the analytical tools and tests used in the assessment of mergers. For example, a review of the Kenyan, Malawian, eSwatini and Zambian competition legislation shows that there is a greater extent of convergence in this area. Most of the competition authorities in the Common Market consider the elements of assessments discussed in chapter Six (6) of this dissertation. This convergence in the elements of analysis reduce to a considerable extent the possibility of inconsistent decisions. As Pitofsky has noted in the U.S/E.U. context, "both jurisdictions have come to share economic premises about the benefits and competitive threats of mergers. Once premises are shared, common approaches may not be inevitable but they are far more likely."[271]

Have the Regulations Resolved the Challenge of Inconsistent Approaches and Decisions?

46. This challenge appears to have been resolved by the Regulations in that an inconsistent decision cannot be made as it is only the Commission that reviews and makes determinations on mergers with a regional dimension. The Commission reviews these mergers in consultation with the Member States as mandated by Article 26(6) of the Regulations. Article 26(6) enjoins the Commission to take all reasonable steps to notify the relevant Member States before embarking on a merger inquiry. The notice includes the nature of the proposed inquiry and calls upon any interested

[270] J William Rowley QC, The Internationalisation of Merger Review: The Need for Global Solutions.
[271] Robert Pitofsky, "E.U. and U.S. Approaches to International Mergers – Views from the U.S. Federal Trade Commission," E.C. Merger Control 10th Anniversary Conference, Brussels, Belgium (September 14-15, 2000).

persons who wish to submit written representations to the Commission with regard to the subject matter of the proposed inquiry. A check on the Commission's website[272] revealed that the Commission has done extremely well in this area and the Member States interviewed revealed that the Commission does consult them in every merger that may have an effect in their respective jurisdictions. With this in mind, an inconsistent decision is unlikely to arise as only the Commission in consultation with the Member States makes a determination on the merger.

47. It is important however, to note that not all Member States have submitted to the jurisdiction of the Commission as a 'one-stop-shop'. All the other Member States except Kenya have submitted to the Commission's jurisdiction. Kenya still calls for the notification of mergers that meet the regional dimension requirement. This situation is likely to raise the possibility of inconsistent outcomes. For example, it is not impossible that the Commission may clear a merger at regional level which includes Kenya, but the merger may be rejected in Kenya due to policy considerations like public interest which may not be paramount under the Regulations. This may lead to inconsistent outcomes in the same merger.

48. This concern was very real especially in the early days of the Commission's existence when Kenya publicly, blatantly and sometimes arrogantly rejected the Commission's jurisdiction on cross-border mergers.[273] However, the turf war between the Commission and the Competition Authority of Kenya (CAK) has subsided as seen from the MOU signed between the two Authorities on 19th April, 2016 in Nairobi, Kenya. Further, there has been comprehensive cooperation and coordination in the assessment of cross-border merger cases in apparent recognition that this is for the good of the Common Market.[274] This has helped a great deal in avoiding inconsistent outcomes as was seen in the merger involving Total Outre Mer S.A and Gapco Africa Petroleum Corporation approved by the Commission on 22 November, 2016. If this merger was notified before the turf between the Commission and CAK subsided, it

[272] See Notices of Mergers posted on https://www.comesacompetition.org
[273] See for example http://www.nation.co.ke/business/news/Authority-criticises-Comesa-over-rollout-of-competition-rules/-/1006/1722692/-/127w7qb/-/index.html (accessed on 21 March 2017 at 21:08 hours)
[274] This position was confirmed by Mr. Francis Wang'ombe Kariuki, the Director General of CAK on 23rd March, 2017 at the Media Workshop held by the Competition Commission of Mauritius in Port Louise, Mauritius.

was possible that different outcomes would have occurred. The Commission could have approved the merger unconditionally while CAK would have approved it with conditions.[275] This is because Kenya raised public interest concerns *inter alia,* employment, that were not paramount to the Commission's determination of the merger. However, because the two authorities coordinated and cooperated extensively on the case, they ended up giving the exact decision on the matter, a situation that is comforting to the business community. The ideal situation is to see Kenya ceding jurisdiction to the Commission on mergers that meet the regional dimension requirement.

11.1.5 High Notification Fees

49. Generally filing fees should be used to cover the costs of investigating a merger. However, it does appear that most jurisdictions in the Common Market and beyond use merger notification fees to fund general operations of competition authorities. The Commission has for example employed since 2016 six economists and one lawyer whose salaries are paid from merger filing fees. What is interesting is that all of these staff members except two are not even employed in the Mergers and Acquisitions Division but the Enforcement and Exemptions, Consumer and Legal Divisions which deal with restrictive business practices, consumer matters and general legal matters at the Commission. This is not right as competition authorities are motivated to charge high filing fees which tend to act as a tax on the merging parties.

50. Competition authorities' focus should not be on merger filing fees but the need to ensure that mergers do not have the effect of substantially lessening competition. However, in most jurisdictions, anecdotal evidence suggests that the prime interest of competition authorities for charging merger fees is to mainly fund other operations of the authorities not related to merger control. The problem with this is that competition authorities may be tempted to capture mergers that have no nexus just to receive filing fees. Much research has been done on the negative consequences of unreasonably

[275] It should be noted that the transaction was approved by both authorities on condition among others that no job should be lost by virtue of the merger.

high filing fees, for example the PricewaterhouseCoopers survey[276] on the costs involved in multi-jurisdictional merger review. The survey indicated that the burden imposed upon firms represents a 0.11% regressive tax on mergers.[277] Merger application should not attract such unnecessary costs as they raise the cost of doing business.

51. The fees charged by the Commission are seemingly high capped at US$200,000 but they are not an exception to the notorious high filing fees as it has been observed in some jurisdictions in the Common Market such as Malawi and Zambia. The merger notification fee in Malawi is calculated at 0.1% of the combined turnover or value of assets whichever is higher of the merging parties in Malawi. While the relative fee appears to be reasonable, the absolute fee may be astonishingly high as Malawi does not have a cap on the filing fees that should be paid. Zambia also has shocking high merger notification fees *albeit* it has a cap. The filing fee in Zambia is calculated at 0.1% of the parties' combined turnover or assets in Zambia, whichever is higher, subject to a cap equivalent to approximately 5,000,000.1 ZMW[278] (which equates to approximately US$ 415,839).[279] Below is a table showing filing fees in the selected COMESA Member States.

Table 2: Merger Notification Fees in Selected COMESA Member States[280]

Country	Formula	Maximum Filing Fee Payable
COMESA	0.1% of the combined turnover or asset value of the	US$200,000

[276] See the Pricewaterhouse Coopers survey (commissioned by the International and American Bar Associations), A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews, June 2003. PWC survey available at http://www.globalcompetitionforum.org/gcfpaper.htm (accessed on 14 February 2016)

[277] A word of caution has to be entered here. This regressive tax as a result of costs imposed on the merging parties in multi-jurisdictional merger review represent several cost elements and not only merger filing fees. However, it is still a crude indication of the costs imposed by merger filing fees in multi-jurisdictional merger review.

[278]Filing fees payable to the Zambian Competition Authority are provided for in the Competition and Consumer Protection (General) Regulations, 2011, Second Schedule (Regulation 21), Prescribed Fees.

[279]https://www.xe.com/currencyconverter/convert/?Amount=5%2C000%2C000.10&From=ZMW&To=USD (accessed on 10 March 2019).

[280] All the exchange rate conversions in tables 2 and 3 were obtained on 10 March 2019 from XE Currency Converter – Live Rates – XE.com available at https://www.xe.com

	merging parties, whichever is higher in the Common Market	
Egypt	No fees charged	No fees charged
Kenya	Turnover Ranges	KES2000,000=US$20, 077.38
Mauritius	No fees charged	No fees charged
Swaziland	0.1% of the combined turnover or assets of the merging parties whichever is higher	E600,000 = US$41,557.91
Zambia	0.1% of the combined turnover or assets whichever is higher of the merging parties in Zambia	16 666 667 fee units = ZMW5000,000.1 = US$415,839
Zimbabwe	0.5% of the combined turnover or combined value of assets in Zimbabwe of the merging parties, whichever is higher.	US$50,000

Source: Author's research

52. Suffice to point out that the high filing fees are not just a feature of the Common Market but other jurisdictions the world over. Startlingly even the arguably most developed anti-trust regime in the world, the USA has exceptionally high filing fees in some cases to a maximum of US$280 000. Below is a table showing the jurisdictions which impose filing fees and their values.

Table 3: Comparison with Other Jurisdictions

Country	**Criteria**	**Minimum Fee**	**Maximum Fee**
COMESA	0.1% of the combined turnover or asset values	US$50 000	US$200 000

	whichever is higher in the Common Market		
South Africa	Turnover Ranges	ZAR100 000 = US$6,926.40	ZAR350 000 = US$24,242.40
Botswana	0.01% of combined turnover or value of assets whichever is higher in Botswana	N.A	N.A
Tanzania	Turnover Ranges	TZS25 000 000 = US$10,664.932	TZS100 000 000 = US$42,659.73
Switzerland	Flat Fees	Flat Fee of 5 000 Swiss Francs for Phase 1 = US$4,960.54	Between 100 and 400 Swiss Francs per hour = US$99.21 – US$396.84 per hour.
United Kingdom	Turnover Ranges	GBP40 000 = US$52,064	GBP160 000 = US$208 257.04
Italy before January 2013	1.2% of the Value of the Transaction	EUR3,000 = US$3,370.97	EUR60,000 = US$67,416.18
Italy Current	“Competition Tax” 0.008% of the Annual Turnover of any Company Operating in Italy	EUR4,000 = US$4 479.91	EUR400,000 = US$447 942.92
Germany	The Amount of the Fee is Determined by the FCO at its own discretion after the procedure on the basis of the economic significance of the transaction as well as	For Phase 1: EUR5000 – EUR15 000 = US$5,618.01 – US$16 854.04	EUR50,000 and in Exceptional Cases, EUR100,000 = US$56,180.15 – US$112,355.93

	costs incurred for the investigation		
United States of America	Size of Transaction Ranges	US$45,000	US$280,000

Source: Author's own research

53. The other problem is with regard to the calculation of filing fees based on assets. This is because assets may not always give a true indication of the parties' activities in the market. The Guidelines have recognised this fact *albeit* implicitly when they provide that only those assets with a market presence and to which a turnover can be clearly attributed should be taken into consideration.[281] It should be recalled that assets and turnover are used as proxies for these purposes to indicate the level of economic activity of the parties in the market. Some firms may have huge assets which may inflate the filing fees but the actual level of economic activity of the firm in a particular market is negligible.

54. In some countries like Zambia, recent Competition and Consumer Protection Tribunal (the Tribunal) judgements have indicated that in calculating filing fees, recourse should be made to only those assets that are used for the business line in issue. For example, in 2014, the Tribunal[282] in a transaction involving the First National Bank Zambia Limited and Afgri Leasing Services Limited ruled that in determining filing fees, the basis should not be all the assets of the acquiring undertaking but only those assets that are related to the relevant market under consideration. While this is welcome especially to the merging parties in that it somehow reduces the burden of high filing fees, it sets dangerous uncertainty in that there may be a requirement to carry out an assessment of the market to determine the relevant market before the filing fee is determined. It is to be recalled that relevant market definition is sometimes subject to disputes between the parties and competition authorities.

[281] See section 2.20 of the Guidelines. It should be noted that the discussion of assets in this section is with reference to the definition of control and not filing fee. However, it can be inferred that the same principle can be applied to filing fees as only assets which has a market presence and to which turnover can be clearly attributed are the only assets that could lead to economic activity in the market place.

[282] First National Bank Zambia Ltd and Others v. The Competition and Consumer Protection Tribunal; 2014/CCPT/006

55. It is observed that with cross-border mergers, the burden of high filing fees is even exacerbated in that the merging parties would have to pay filing fees in all the jurisdictions where the notification requirements are met and where merger notification fees are a requirement.

Have the Regulations Resolved this Challenge?

56. In the Common Market, the Regulations appear to have reduced this cost although not to satisfactory levels. This is because it does appear that the filing fees are still disproportionately[283] high. It is necessary to first show how the Regulations have reduced this burden and then demonstrate that improvement is possible.

57. When the Commission commenced operations in January 2013, the merger notification fees were calculated as 0.5% of the combined turnover or value of assets of the merging parties whichever was higher in the Common Market with a ceiling at US$500 000. This raised controversy and the stakeholders complained that the filing fees were too high. Some observers commented that the Commission was stealing from the merging parties through unjustifiably high filing fees. Some observed that the notorious high filing fees undermined the credibility of the nascent Commission and threatened its very existence and durability as it increased the risk that stakeholders would not submit to its jurisdiction. This astounding high level of filing fees also threatened the very *raison d'etre* of COMESA, i.e. to enhance regional investment, regional trade and ultimately attain full market integration. The high filing fees coupled with the zero notification thresholds and lack of guidance on the method of calculation of turnover and assets to take into account when computing the filing fees raised concern about the onerous cost implications on the business community.

58. Something had to be done urgently. However, since filing fees are provided for in the COMESA Competition Rules which are law, it was difficult to amend them within the first year of the Commission's existence. Lawyers would agree that laws, let alone supra-national laws are not amended with astronomical speed,.

[283] Disproportionate in the sense that the fees do not appear to correspond with the cost of investigating a merger.

59. In March 2015, Rule 55 of the COMESA Competition Rules 2004 (which deals with matters of notification fees) was amended to reduce the merger filing fee to 0.1% of the combined turnover or value of assets in the Common Market of the merging parties whichever is higher with a ceiling of US$200,000. This was a tremendous and welcome reduction as it represented a reduction in filing fees of over 65%. It should also be noted that before the enactment of the Regulations, mergers that affected more than one Member State had to be notified and filing fees paid as long as the notification criteria was satisfied in those Member States. This is no longer the case as transactions that meet the regional dimension requirement are only notified and filing fees paid to the Commission only.[284] In view of this, it may be argued that the enactment of the Regulations reduced the cost of multi-jurisdictional merger review through merger fees in the Common Market by a significant proportion especially that cross-border mergers in the Common Market are only notified to the Commission.

60. A merger of multinationals having operations in a number of Member States would have had to pay significant amounts in filing fees but with the existence of the Regulations, the filing fee would in any case be a maximum of US$200 000. For example, in the 2011 transaction involving the acquisition of all the issued and outstanding common shares of Equinox Minerals Limited by Barrick Gold Corporation,[285] the parties paid more than US$700 000[286] to the CCPC in merger filing fees in addition to the filing fees they could have paid in other jurisdictions where the transaction was notifiable. If this transaction was to take place today, the parties would have paid US$200,000 to the Commission since the transaction would have had a regional dimension as the parties were present in some other Member States like the Democratic Republic of Congo. Similarly, barely a few months after the Equinox/Barrick merger, Glencore acquired Mopani Copper Mines in Zambia and paid over US$600 000[287] in merger filing fees to the CCPC. Had this transaction taken place after the Commission had commenced operations, the parties would have

[284] As already observed in this dissertation, this does not include Kenya.
[285] See Competition and Consumer Protection Commission Staff Paper Number 417 of May 2011.
[286] At that time, the Zambian Merger Regime had not introduced a cap on the merger notification fees.
[287] It is this transaction that precipitated the discussions leading to the introduction of a cap through a Statutory Instrument. The author was the case officer in this matter and was instrumental in the capping of the fees with the then Minister of Commerce, Trade and Industry, Honourable Felix Mutati and Liya Tembo, the then Head of the Legal Division of the Competition and Consumer Protection Commission.

paid US$200 000 to the Commission since the transaction would have had a regional dimension as the parties were present in other Member States.

61. A careful review of some of the cases reviewed by the Commission shows that in the absence of the Regulations, the parties would have paid more in notification fees as they would have had to file their mergers in a number of Member States. The table below shows the filing fees paid to the Commission in a selected number of mergers and the minimum they would have paid if the transactions were notified in the various Member States with notification requirements. This research revealed that more than 66% of the selected mergers that have been notified to the Commission have paid less in merger notification fees than what they would have paid if the transactions were notified at national level. It is therefore beyond dispute that the regional merger control system has resulted in reduction in the cost of merging in the Common Market.

Table 4: Comparison of Filing Fees of Selected Mergers at Regional and National Levels.

Merger Name	**Notification Date**[288]	**Fees at Regional Level (US$)**	**Minimum Fee at Member State level (US$)**[289]
Acquisition of Chevron Swaziland by Puma Energy Mauritius Investments Limited	5 June 2014	500 000	672 517
Acquisition of the Entire Issued Share Capital of Shell Marketing Egypt and Shell Compressed	2 July 2013	500 000	583 911

[288] Note that before 27 March 2015, the filing fees at the Commission was a maximum of US$500 000. It has since that date been reduced to US$200 000.
[289] Minimum in the sense not all Member States where the transactions were notifiable were identified by the research. It follows therefore that the filing fees are more likely to be higher than what is depicted in the table.

Natural Gas Egypt Company by Total Outre Mer S.A			
Acquisition of Gulf Africa Petroleum Corporation by Total Outre Mer S.A	5 July 2016	200 000	560 077
Acquisition of DFCU Limited and Zambia National Commercial Bank Plc by Arise B.V	27 February 2017	200 000	619 388
Merger between Holcim Limited and Lafarge S.A	8 July 2014	500 000	192 291
Zambeef/CDC/RCL Merger		200 000	240 157
Merger between Carlsberg and Castel	14 December 2016	200 000	50 745
Merger between Total Egypt LLC/Chevron Egypt SAE	14 November 2013	500 000	603 298
Merger between Coca-Cola Sabco Proprietary Limited and Coca-Cola Beverages Africa Limited	15 April 2015	200 000	110 275
Merger between Dow Chemical Company and El du Pont de Nemour Company	13 June 2013	200 000	46 766

Source: Author's Research

62. The table reveals that the Regulations have reduced the cost incurred through filing fees by the merging parties when filing their transactions with different national competition authorities. However, a survey of the market reveals that many stakeholders still think filing fees imposed by the Commission are on a high side. More than 95% of the respondents interviewed stated that the filing fees imposed by the Commission were too high.[290] Most stakeholders were attorneys and the business community. National Competition Authorities and other Government agencies had varying views with some saying the fees were high and others saying they were low, and still others being indifferent. Although this method gives a crude indication that the filing fees are high, care must be taken before generalising the conclusion. For example, the attorneys and business community would naturally state that the fees are high because their clients are responsible for paying and they would want the figure to be as low as possible. The National Competition Authorities and other Government agencies on the other hand would want the fee to be high as they have an incentive through the revenue sharing of the merger notification fees collected by the Commission.

63. Therefore, to corroborate these findings, research was undertaken on the principles governing the determination of merger filing fees. It should however be noted that the determination of merger filing fees is not an exact science as a number of value judgments are taken into account. The April 2005 report of the International Competition Network on Merger Notification Filing Fees has stated that *"the primary reason that jurisdictions have introduced filing fees is full or partial recovery of the cost of merger review and/or the competition agency's total budget"*. According to the Report, in the latter case, merger filing fees contribute to covering the cost of the agency's activities other than merger review. This appears to be the case with the Commission that has even gone ahead to employee staff using the merger notification fees.[291]

[290] This is supported by information in Table 4 which reveals that in some instances, parties still pay higher filing fees at regional level than they would have paid at national level.
[291] This is corroborated by the evidence that the adverts for these jobs was on condition that renewal after three years was subject to the availability of funds, implying that since the flow of merger funds is not guaranteed, the Commission may even find itself in a situation where it cannot afford to pay these officers.

64. Merger notification fees should reflect to an extent the cost incurred by competition authorities to review those mergers and anything outside this is bad practice and imposes an unnecessary cost on the merging parties. In fact, there is growing debate with some vocal critics positing that merging parties should not be subjected to paying merger notification fees[292] as this is the responsibility of governments to ensure that markets function properly and optimally for the benefit of the general populace. Competition Authorities that receive funding from the Central Government for merger assessment and other operations of the Competition Authority may not have convincing policy rationale for charging merger filing fees. Proponents however argue that the merging parties should bear this cost as it is their transactions that potentially threaten the optimal operation of markets.

65. So, what should be the ideal merger notification fees under the COMESA Merger Control Regime? The starting point is to appreciate that the setting of merger filing fees is not an exact science determined with mathematical precision. A lot of factors including policy considerations should be taken into account when considering this inquiry. The dissertation shall consider some of these factors, and then focus on the internationally accepted best practice.

66. As noted already, merger filing fees are charged for various reasons among Competition Authorities. Some of these may *inter alia,* include the need to recover the administrative costs incurred in the assessment and review of a merger, the need to fund the operations of the entire Competition Authority as it appears at least in part for the Commission and the need to fund other Government programs, institutions or other COMESA institutions[293] and programs in the case of the Commission. There does not appear to be available any policy document from the Commission or from the COMESA Secretariat highlighting the policy considerations behind the merger notification fees. Therefore, one can only surmise what these policy considerations may be by reviewing a number of activities and practices of the Commission since its establishment in January 2013.

[292] Note that the terms 'merger notification fees' have been used interchangeably with the terms 'merger filing fees' throughout this dissertation.
[293] The Council of Ministers sitting in 2016 instructed the Commission to purchase an accounting package for the Federation of National Association of Women in Business, another COMESA Institution using merger notification fees.

67. The Commission does share the merger fees with the Member States affected[294] by a merger pursuant to Rules 8(1) and 8(2) of the Rules on COMESA Revenue Sharing of Merger Filing Fees. The Commission retains 50% of the merger fees and the remaining 50% is shared by the Member States on a *pro-rata* basis, i.e. based on the amount of turnover derived by the parties in the respective affected Member States. This may imply that it is intended to fund National Competition Authorities' activities in assessing these mergers, an input they feed to the Commission for the ultimate determination of the merger. The reason for this assumption is that turnover figures are used as a proxy to give crude indications of the level of activity and the likely influence on competition an undertaking may have in the market place. Therefore, giving a larger share of the filing fees to a country where the merging parties derive their largest combined turnover may be based on the premise that these countries may have to do more work in the determination of the likely harm of the merger on the market and may need more resources.

68. However, the supposition above may not always be supported by empirical evidence. It may not always be true and may in some instances be flawed to conclude that countries with the largest share of combined turnover are more susceptible to the competition injury likely to be inflicted by a merger. A country with a smaller share of the combined turnover of the merging parties may suffer competition harm in contradistinction to a country with a larger share of the combined turnover of the merging parties. Competition harm is usually related to the structure of the market discussed in Chapter Six of the dissertation. It may be the case that the parties derive a smaller amount of turnover in a certain Member State because it has a small economy with very few players compared to a Member State with a bigger economy and a greater number of players. In such a situation, a merger may raise competition concerns in a Member State with a relatively smaller share of the combined turnover in the Common Market.

69. Further, it may also be the case that one of the parties to a merger has a smaller turnover while another has a disproportionately huge turnover in a particular Member

[294] According to the Guidelines and the Commission's practices, Member States affected by a merger are those where the merging parties have operations by way of deriving turnover or assets held therein.

State making the combined turnover proportion larger than in countries where both the merging parties derive similar amounts of turnover. In the former case, the impact on competition may not be significant because of the presumption that the party with a significantly smaller turnover may not have considerable market share and hence there would be little or no change to the market structure. However, such a Member State would receive a larger share of the merger filing fees.

70. Nevertheless, if the revenue sharing mechanism is intended to share the merger fees with competition authorities who contribute to the assessment of the merger because it affects their jurisdiction and that the share is intended to cover the cost of this assessment, then another concern would arise. This is in a case where the Commission decides to refer the case to a Member State pursuant to Article 24(8) of the Regulations. It would be difficult to understand in those instances why even after referral of the case, the Commission retains the exact amount of the merger filing fees. One would reasonably opine that the Commission should cede that portion of the merger notification fees since it does not incur any costs to review that part of the merger.

71. An engagement with George Lipimile and other officials who were involved in the promulgation of the Regulations and Rules revealed that the revenue sharing formula was constructed to act as an incentive for Member States to yield to the jurisdiction of the Commission. It was clear that the National Competition Authorities would incur costs when assessing transactions in collaboration with the Commission, therefore without any form of revenue from the Commission, such a system would collapse. This system further provided an incentive to submit to the regional competition law because Member States would have some further source of funding.[295] Ultimately, the system contributes to the overall success of the regional merger control regime.

72. Further, as already observed in Chapter Seven, it is largely accepted that effective merger control of cross-border mergers requires that the countries involved have

[295] Note that because of the regional merger control regime, the revenue that some Member States would have been receiving through the notification of mergers at national level has arguably reduced. Countries like Zambia and Malawi that charge unreasonably high merger filing fees have lost a great deal of revenue as a result. Therefore, the revenue sharing of the merger filing fee may act as an adhesive to hold together the regional merger control regime by incentivizing the Member States to submit to its jurisdiction

effective merger control regimes and this is one way of making the national competition authorities in the Member States effective. The portion of the merger fees disbursed to the Member States is intended among other things to enhance the capacity and effectiveness of the national competition authorities to assess cross-border mergers. This is expressly provided for under Rule 4(4) of the Rules on COMESA Revenue Sharing of Merger Filing Fees (Amendment), 2017 (No. 1) which states that:

> **"The Member States shall ensure that the fifty percent share of the merger filing revenue distributed to the designated Member States is utilised for the development and strengthening of their national competition laws and capacity building in their national competition authorities".**

73. Most national competition authorities are still incompetent to handle mergers with a regional dimension. Only a few like Kenya, Zambia and Zimbabwe appear to have this competence.[296] This however is a double-edged sword. While high filing fees help to build a successful merger control regime, they are not in line with international best practice. Further, the system itself is not currently functioning properly. While the merger fees shared with the national competition authorities are intended to strengthen the capacity of the national competition authorities, it is a notorious fact that in some Member States, this money goes to the Central Government which then decides generally how to deal with it depending on pressing needs in their budgets. Examples include the Democratic Republic of Congo, Egypt, Madagascar and Zambia.

74. One thing that is important to note when setting merger notification fees is that they may raise the preponderance of non-compliance by the undertakings subject to merger review, incidences of corruption orchestrated by the competition authority officials and the merging parties if it is less costly to evade the system than complying with it. Further, high filing fees may frustrate merger transactions that are pro-competitive and that would enhance efficiencies and contribute to the realisation of the single market imperative.

[296] This is on the premise that these countries have a long history of competition law enforcement, have handled high profile cases.

11.1.5.1 Principles for Setting Merger Notification Fees.

75. International best practices for setting merger filing fees as enunciated by the ICN, the OECD and other similar reputable bodies in the field of competition law include the following:[297]

- The fee should cover the government's costs of providing the service in a sustainable manner
- The fee should not exceed the full costs of providing the services otherwise the fee becomes a tax on the firms or persons that request the service
- The fees schedule should be set in a way that welfare-enhancing actions are not discouraged while harmful actions are deterred

76. As already observed, the fee should be computed or determined in such a manner that it covers the cost of reviewing the merger. In some jurisdictions like the United States of America, the merger filing fees are determined based on the size of the transaction. This may not be a good basis for determining the merger filing fees. This is because the fee paid may not be proportionate to the complexity of the case. It is not always the case that larger transactions by value lead to serious competition concerns requiring detailed and rigorous review. Sometimes smaller transactions by value may raise significant competition concerns compared to larger transactions and cause the competition authority to spend much more resources through rigorous review. What is important therefore is the nature and structure of the market[298] in which the transaction occurs. If the transaction occurs in a market that is highly concentrated and characterised with high barriers to entry and lack of countervailing power, it may raise significant competition concerns regardless of its size.

[297] Global Forum on Competition, 2011. Available at http://search.oecd.org/competition/globalforum/GlobalForum-February2011.pdf?cv=1v (accessed on 10 November 2019).

[298] Markets are analysed with reference to the competition factors considered in Chapter Six of this dissertation.

11.1.5.2 International Best Practices on Determination of Merger Notification Fee

77. What then is the international best practice on the determination of the merger filing fees? There are different forms of computation and methods for determination of merger filing fees. For purposes of emphasis, below are some of the methods used by different jurisdictions:

- Reimbursed fees if the merger is cleared (e.g., New Zealand, Germany)
- Differentiated fees by type (complexity) of merger case (e.g,. New Zealand, Netherlands, South Africa)
- Fees that depend on the value of the transaction (e.g., USA)
- Minimum and Maximum absolute value with a fee based on percentage of the turnover or asset value (e.g. COMESA)

78. In terms of the absolute values, the COMESA merger filing fees compare very well with the fees charged in other jurisdictions including some Member States. Some countries' absolute maximum fees as observed in table 3 can be very high. Some of the absolute figures that are higher than the COMESA merger filing fees include:[299]

- Malawi, which has no maximum filing fees. The filing fees can go as high depending on the value of assets or turnover of the merging parties in Malawi
- Zambia whose maximum filing fee is approximately US$415,839 depending on the exchange rate
- United Kingdom whose maximum filing fee is GBP160,000 which is approximately equal to US$208,257.04
- Italy whose maximum filing fee is EUR400,000 which is approximately equal to US$448,263.31
- United States of America, whose maximum filing fee is US$280,000

79. From the perspective of the absolute fee, the COMESA merger filing fee may not appear to be that high. Nevertheless, this may be misleading as the fees should be

[299] The exchange rates used in this part were obtained from http://www.xe.com/currencyconverter/convert/? (accessed on 19th May 2017)

determined relative to some parameter like the cost of reviewing the merger or the size of the economy.

11.1.5.3 Merger Notification Fees Based on Size of the Economy

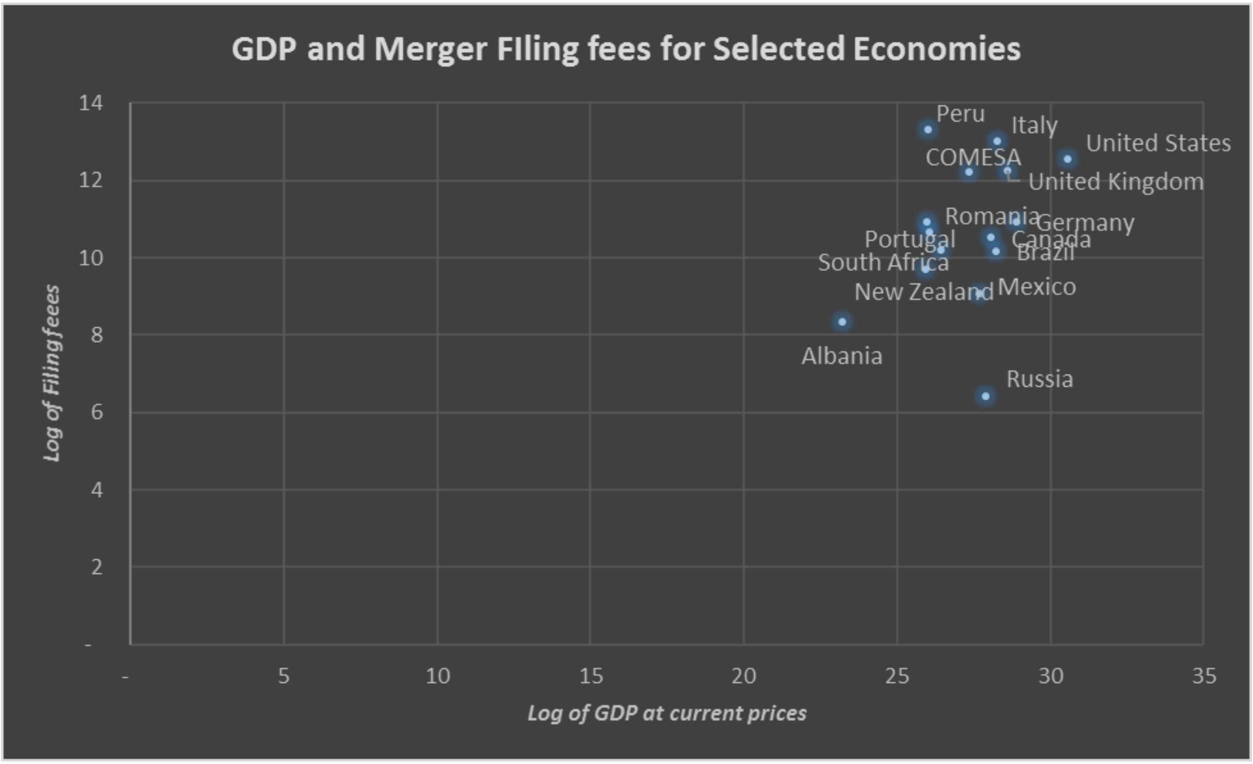
80. This inquiry begins by taking the sizes of the economies into account and see how the COMESA merger fees compare. The comparisons shall not include the Member States since they are part of the Common Market and it shall be liberally assumed that any national notification fee higher than the COMESA merger fee is disproportionately high from the basis of the size of the economy as a Member State cannot have an economy larger than the Common Market. It is acknowledged here that this is a simplistic view as a lot of factors have been held constant. Further, the size of a particular economy is not a good determinant of merger notification fees as it is remotely related to merger review. Nevertheless, it still gives us a useful *albeit* crude indication about the reasonableness of the COMESA merger filing fee.

81. Based on research and calculations, it can be inferred that the COMESA merger filing fees are high relative to the COMESA economy.[300] Figure 2 below illustrates this inference. Further, it has to be recalled that the Commission under the Guidelines have introduced a two-phased merger review process. However, the filing fees have remained the same despite this development. This is irregular as the phase one by nature and in practice implies that the transaction is unlikely to raise significant concerns of competition injury to the relevant market and therefore does not require rigorous and comprehensive review. Likewise, the amount of resources spent on reviewing such a merger may not be comparable to the phase two review. International best practice informs us that for those jurisdictions that have a two-phased merger review approach, different merger filing fees are charged for each phase reflecting the differences in the costs incurred to review the merger under each phase. The Netherlands is an example where the first phase review is restricted to 28

[300] The figures relate to the 2016 filing fees and GDP.

days and the associated fee is EUR 17 450 whereas the second phase attracts a filing fee of EUR34 900.[301]

Figure 2: Merger Filing Fess as a Function of GDP



Source: World Bank Group's Competition Policy Thematic Group, Investment Climate Department.

82. Caution must be taken though, when making comparisons on this basis as the COMESA merger control regime is supra-national. A supra-national merger control regime may have factors such as geopolitics, heterogeneous market structures, culture, extended geographical coverages among other factors influencing the cost of merger review. However, since the comparison is on a *ceteris paribus* basis, the results of this inference still gives a useful indicator. The other fully functional supra-national merger review regime, the European Commission has not been referred to because it does not charge merger filing fees. The Eurasian Economic Commission is also a supra-national competition authority but has no mandate on mergers. It does therefore appear that the only measure of determining merger filing fees with some

[301] https://uk.practicallaw.thomsonreuters.com/9-384-6266?__lrTS=20170409131535581&transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1 (accessed on 9 April 2017).

semblance of objectivity is the calculation of merger filing fees based on the costs incurred in the review of a particular merger, i.e. cost-based merger filing fee.

11.1.5.4 Cost Based Merger Notification Fees

1. It is beyond dispute that every merger assessment does lead to expending resources. It is therefore logical that competition authorities do recover these costs that are incurred to review merger transactions through charging merger filing fees. However, care should be taken in computing these fees as in some cases, the figures used may inflate the filing fees. For example, including the cost of salaries of officials involved in the assessment of mergers may be misleading as these officials would receive the same salaries whether or not the authority has reviewed the merger. However, since the establishment of such a system is far from perfect, these factors shall be considered for purposes of comparing different scenarios. Further and as already observed in the dissertation, the fact that simple mergers require few resources to conclude than the complex mergers, entails that there should be two separate filing fees for simple and complex mergers to reflect this reality. An interview with the Commission's officials[302] revealed that since the system was introduced in October 2014, it handles on average 6 phase one merger cases per annum.[303]

2. The analysis begins by recalling that according to Rules 8(1) and 8(2) of the Rules on COMESA Revenue Sharing of Merger Filing Fees, the Commission retains 50% of the fees in every merger application while the remaining 50% is shared among the Member States on a *pro-rata* basis considering the turnover realised by the merging parties in the respective Member States. We may therefore liberally assume that the 50% of the portion of the merger filing fees retained by the Commission reflects the cost incurred by the Commission in the assessment of the merger and the other 50% shared by the Member States represents the cost of assessing the merger in the respective jurisdictions. We shall therefore consider the cost elements that are

[302] Interview on 17 June 2018 with Mr. Ali Kamanga, Senior Economist; Mergers and Acquisitions at the Commission.
[303] These statistics may be misleading. The author's research revealed that currently, the Commission considers mostly all the transaction under Phase II unless the parties make a specific request during notification. The reason is that the Commission is very under-staffed with only 3 officials in the mergers division such that if they considered most transactions under Phase I, they would be overwhelmed. As a matter of fact, most of the merger cases dealt with by the Commission qualify to be Phase I.

involved in the assessment of mergers at regional level and liberally assume that the same cost elements are involved in the assessment of mergers at national level.[304] Table 5 below shows estimates of administrative costs incurred by the Commission on a monthly basis in investigating a merger.

Table 5: Monthly Costs Incurred by the Commission

Element	**Unit[305]**	**US$**
Director	Monthly Salary	7 500
Manager; Legal	Monthly Salary	6 500
Manager; Mergers	Monthly Salary	6 500
Economist	Monthly Salary	5 500
Legal Officer	Monthly Salary	5 500
Registrar	Monthly Salary	5 500
Accountant	Monthly Salary	3 500
Administration Costs	Monthly Expenditure	31000/12 = 2583
Advocacy and Awareness	Monthly Expenditure	240000/12 = 20000
Investigation of Merger Notifications	Monthly Expenditure	10 000/12 = 833
Expenditure on Committee Responsible for Initial Determination Meetings	Monthly Expenditure	45000/12 = 3750
TOTAL		**67666**

Source: COMESA Competition Commission

3. It should be noted that the administrative costs are not only used to cover mergers activities at the Commission. Other activities such as Consumer and Restrictive Business Practice Activities are covered under the same administrative costs. Therefore, in order to have an indication of how much administrative costs cover

[304] It should be noted that this is an exaggerated way of determining the merger notification fees. For example, the staff would still receive their salaries whether or not the Commission has received a merger notification. Further it is information in public domain that staff at the Commission generally receive better salaries than their counterparts at national competition authorities. Therefore, it is not entirely true to state that the same costs are incurred at national level. Nevertheless, this method has been used because it still does give us some useful indication in the absence of any criteria of merger notification fee determination with Rocket Science precision.

[305] A month is liberally taken to mean 30 calendar days in this Dissertation

mergers, each activity is given a weighting depending on the levels of enforcement activity.[306] Table 6 below illustrates this:

Table 6: Allocation of the Commissions Resources by Function[307]

Activity	Proportion
Mergers and Acquisitions	50%
Restrictive Business Practices	40%
Consumer Protection	10%

4. In order to have an exact amount of the costs incurred on the assessment of mergers, we shall estimate how much time in days each human resource depicted in table 5 above spends on a merger case. Table 7 below depicts this:

Table 7: Human Resource Effort in Days on a Merger Review

Human Resource	Pre-merger Notification Meetings	Merger Review Phase 1	Corresponding Cost in US$ on the Basis of Figures in Table 5	Merger Review Phase 2	Corresponding Cost in US$ on the Basis of Figures in Table 5
Director	0	2	7500*2/30 = 500	17	7500*17/30 = 4250
Manager; Legal	0	0	0	7	6500*7/30 = 1517
Manager; Mergers	0	4	6500*4/30 = 867	34	6500*34/30 = 7,367
Economist	4	45[308]	5500*45/30 =	120[309]	5500*120/30 =

[306] This assumption is based on reviewing case trends at the Commission.
[307] This information is according to the author's own estimates on the basis of the volume and prioritization of work at the Commission at the time the research was undertaken.
[308] The maximum period allowable for a phase 1 merger review under the Guidelines is 45 calendar days. We liberally assume that since the economists are responsible for the assessment of mergers, they would be involved at every stage until the merger is disposed of. It should be noted that this is a broad assumption as not all phase 1 mergers exhaust the 45 calendar days.
[309] The maximum period allowable for a phase 2 merger review under the Regulations is 120 calendar days. We liberally assume that since the economists are responsible for the assessment of mergers, they would be involved at every stage until the merger is disposed of. It should be noted that this is a broad assumption as not all phase 2 mergers exhaust the 120 calendar days.

			8250		22000
Legal Officer	4	0	0	14	5500*14/30 = 2567
Registrar	1	3	5500*3/30 = 550	3	5500*3/30 = 550
Accountant	0	2	3500*2/30 = 233	2	3500*2/30 = 233
Total			**10400**		**38484**

Source: COMESA Competition Commission and Author's own estimates

5. It should be noted that the efforts of the Commission's human resources are not expended on mergers only. In order to have an idea of how much is expended on a merger, recourse should be made to the proportion of resources expended on each Commission activity as depicted in table 6 above. The table shows that 50% of the Commission's expenses are expended on mergers. Therefore, in order to find out how much is spent on both phase 1 and phase 2 merger reviews, the corresponding costs for phase 1 and phase 2 in table 7 above are divided by 2 as follows:

Phase 1: 10400/2 = 5200

Phase 2: 38484/2 = 19242

6. Care has to be taken not to conclude that the human resource effort is the only cost incurred in the review of mergers. Table 5 shows that there are other costs that are incurred. Indirect costs like merger advocacy to strengthen merger assessment in the Common Market are also incurred. The total amount incurred on each merger should therefore include the following elements:
   a) Costs for hosting the Committee Responsible for Initial Determination Meeting
   b) Advocacy Costs
   c) Administration Costs like communication, printing etc,
   d) Costs incurred in the actual investigation of a merger[310]

[310] We liberally assume that these costs include the costs of air tickets in visiting Member States affected by a merger. It should be noted that this scenario while not impossible is far-fetched. This is because the Commission has never since its inception visited any Member State to investigate a merger. The explanation for this is that

7. Since most of these costs have been determined on an annual basis, it is important to determine how many mergers the Commission reviews on an annual basis.[311] An interview with the Commission's officials revealed that the average number of phase 1 mergers reviewed by the Commission in a year is 6 while the average number of phase 2 mergers reviewed by the Commission in a year is 28.[312] In order to get the approximate amount of the merger notification fee, we should determine how much is incurred on an individual merger case.

8. A look at the Commission's annual work plan revealed that a total of 4 CID meetings are held annually. Table 5 also shows that the total amount incurred on 4 CID meetings per annum is US$45000. However, only 50% of the cost is attributed to mergers. Therefore, US$22500 per annum is attributed to mergers. This therefore means that 4 CID meetings are equivalent to 28 merger cases, which are correspondingly equivalent to US$22500. The mathematical representation of this arrangement is depicted below:

   4 CID meetings = 12 Months = 28 Cases = US$22500

   I Case is therefore equal to: 22,500/28 = 803.57.

9. The calculation above reveals that the CID cost incurred per merger is equal to **US$803.57.**

10. The CID cost for phase 1 mergers is naught. This is because phase 1 mergers are determined by the Director pursuant to section 6.9 of the Guidelines. There is no need for the CID to make a determination on phase 1 mergers.

---

the Commission has developed an elaborate system with affected Member States facilitated by Article 26 of the Regulations. Under this arrangement, the affected Member States carry out investigations in their jurisdictions and feed into the Commission's assessment. Teleconferences are used as a medium for such discussions and are covered through the administration costs depicted in table 5.

[311] Note that the reference period is from 31 October 2014 being the date on which the two-Phase Merger Review System became implementable.

[312] Though the two phased assessment approach was introduced in October 2014, for purposes of computation in this dissertation, all mergers reviewed in 2014 have been taken into account. This inflated figure has been compensated by assuming the number of mergers considered in November 2019 shall remain the same until the year ends. The research concluded in November 2019.

11. As regards advocacy, table 5 shows that US$240000 is incurred for merger advocacy per annum. Therefore, the contribution in terms of money each merger should contribute to the advocacy costs is determined as follows:

US$240000 = 12 Months = 28 Merger Cases.

12. Therefore, the advocacy costs per merger is equal to 240000/28 = **US$8571.43.**[313]

13. As regards the administration costs, table 5 shows that the Commission incurs about US$31000 in administration costs. However, according to table 6, only 50% of these administration costs are spent on merger assessments. Therefore, the costs of administration related to an individual merger case is determined as follows:

31000/2 = 12 Months = 15500 = 36 Merger Cases.

14. Therefore, the administration costs per merger is equal to 15500/36 = **US$430.56**[314]

15. As regards the costs incurred in investigating the merger, table 5 informs us that the Commission incurs US$10,000 per annum. The mathematical representation of this is shown below:

US$10000 = 12 Months = 28 Merger Cases.

16. Therefore, the investigation costs per merger is equal to 10000/28 = **US$357.14.**

17. We assume with a high degree of probability that there are little or no costs involved in the investigation of phase 1 mergers as the Commission staff do not have to go out to Member States to conduct merger investigations.[315]

---

[313] Since phase 2 mergers are assumed to be more complex than phase 1 mergers, an assumption is made that more advocacy is towards phase 2 mergers and therefore the cost incurred in advocacy should be recovered from the review of phase 2 mergers.

[314] This includes 6 Phase 1 and 28 Phase 2 Mergers. It should however, be stressed that this approach is simplistic as phase 1 mergers are supposed to attract less administration costs compared to phase 2 mergers since less work is undertaken on phase 1 mergers.

18. Table 8 shows the estimated costs of conducting merger reviews under both phase 1 and phase 2 procedures.

Table 8: Costs Incurred by the Commission in the Review of Mergers.

Cost Element	**Cost in US$ (Phase 1)**	**Cost in US$ (Phase 2)**
Human Resource	5200	19462
CID Meetings	0	803.57
Merger Advocacy	0	8571.43
Administration Cost	430.56	430.56
Merger Investigation	0	357.14[316]
Total	**5630.56**	**29624.7**

19. It is recalled that the Rules on the sharing of revenue mandates the Commission to share 50% of its merger fees with the Member States affected by a particular merger. We can therefore assume that the Member States collectively incur a similar amount of costs in the assessment of the mergers in question.

20. Therefore, the total amount incurred in reviewing a merger is 56630.56*2 = **US$11,261.12** for phase 1 and 29624.7*2 = **US$59,249.4** for phase 2.

21. In the absence of any method carrying with it a high degree of mathematical precision, the above show some semblance of the ideal maximum merger notification fees that should be charged by the Commission. It should be noted that these figures are way below the current merger notification fees in COMESA. It should be noted that the Commission does not even charge a different fee for phase 1 mergers when it is evident that the introduction of a two-phase merger review indicate that phase 1 merger reviews do not require rigorous assessment and therefore incur less costs compared to phase 2 merger assessment. It should also be noted that these figures are

[315] Merger investigation as used in this context refers to a situation where the Commission staff go to affected Member State to conduct investigations on a particular merger.
[316] This figure does not sound reasonable but is inferred from the Commission's budget. And in any case as observed in the dissertation, the Commission has never ever gone to a Member State to investigate a merger. This is because of an organized system of collaboration developed between the Commission and the National Competition Authorities facilitated by Article 26 of the Regulations.

inflated due to a number of assumptions made. For example, the human resource costs would still be incurred even in the absence of merger notification.

22. However, the computation has also omitted certain elements indispensable in the assessment of a merger in an ideal situation.[317] Therefore, in a Phase 2 merger review, we can add a realistic cost of investigating a merger by visiting the affected Member States. Research revealed that the average number of affected Member States in a single merger is about 8.[318] The cost of an air ticket to these Member States may be an average of US$1000. We assume that all the 8 Member States would be visited in a phase 2 merger review and that two Commission officers would visit each Member State for 5 days. The total number of days would therefore be 40. The amounts incurred in such an exercise are depicted in table 9 below:

Table 9: Adjusted Merger Notification Fees for Phase 2 Merger Review[319]

Cost Element	Cost in US$
Air Ticket for Two Members of Staff to 8 Member States	2(8*1000) = 16000
DSA for Members of Staff	2(250[320]*40) = 20000
Contingency in any Member State	8*400[321] = 3200
CID Meeting	803.57
Merger Advocacy	8571.43
Administration Costs	430.56
Total	**49005.56**

23. Therefore, using the above method which appears to be more accurate and reasonable, the maximum merger fee charged by the Commission in a phase 2 merger review should be **US$49,005.56.**

[317] The terms 'ideal situation' has been used because there is no evidence the Commission has ever conducted an investigation of a merger by visiting any of the affected Member States.

[318] Author interview with Mr. Ali Kamanga; Senior Economist in the Mergers Division at the Commission on 17 June 2019

[319] Human Resource costs have been removed from determining the cost incurred in investigating a Phase Two merger as such cost are incurred whether the Commission has reviewed any merger or not.

[320] The COMESA Staff Rule and Regulations staff the Daily Subsistence Allowance at US$250 per day to any country in Africa.

[321] The practice at the Commission is to carry a contingency of US$400 whenever there is a mission in a Member State. Contingency covers transport costs among other things.

24. As regards phase 1 merger review, we should only deduct the human resource cost in table 8 as such costs would have to be incurred whether or not there is a merger notification. The other elements included for phase 2 merger cases in table 9 above shall not be included for phase 1 as Commission staff do not have to travel to affected Member States to investigate mergers. Therefore, the realistic maximum merger notification fee for a phase 1 merger review should be 5630.56 -5200 = **US$430.56.**[322]

25. Recalling the assumption that Member States incur a similar cost on the basis of the merger fee sharing formula which mandates the Commission to share 50% of its merger fees with the Member States affected by a particular merger, the mergers filing fees for both phases have to be multiplied by two respectively.

26. Therefore, the total amount incurred in reviewing a merger is 430.56*2 = **US$861.12** for phase 1 and 49005.56*2 = **US$98,011.12** for phase 2.[323]

27. As regards the challenge brought by the different methods of valuating assets in the different Member States, the COMESA merger control regime has effectively resolved this challenge. This is because once a transaction has a regional dimension, only the COMESA method of determining and valuating assets as enunciated under Rule 4 of the COMESA Competition Rules on the Determination of Merger Notification Thresholds and Method of Calculation as well as the Guidelines is used.[324]

28. However, what the regional merger control regime has not resolved is the challenge posed by the determination of merger filing fees on the basis of asset value. Basing the determination of filing fees on asset value has the risk of misleading conclusion that a merger involving parties with huge asset values is likely to raise significant competition concerns. This therefore implies that rigorous scrutiny warranting more

---

[322] This confirms that little costs are incurred on Phase 1 cases. The main cost is the administration cost.

[323] It should be recalled that the filing fee computation here is an indication. However, the deviation from this indication should not be unreasonably high.

[324] Suffice to mention that the methods discussed in these documents refer to merger notification thresholds and not to merger notification fees. However, practice at the Commission reveals that the same methods are followed for purposes of merger notification fees

resources for such an exercise is required. The solution is to do away with determining merger notification fees on the basis of asset values and focus such determination on the basis of turnover values which provide a greater degree of certainty and objectivity.

29. In conclusion, the analysis in this section reveals that the establishment of a supra-national merger control system has contributed to a reduction of merger notification fees in the Common Market due to the one-stop-shop principle. However, it is also observable that the filing fees are still high as they do not reflect the true cost of investigating a merger. Therefore, there is need to reduce the merger filing fees if the Commission is to contribute to attracting investments in the Common Market. There is also need to set different filing fees for the different phases of mergers introduced under section 6 of the Guidelines. This is because the different phases depict differences in complexity and therefore cannot incur the exact costs in assessment.

11.1.6 Long Waiting Periods

30. This subject is closely related to suspensory and non-suspensory matters discussed above. The context here however, is what effect if any would waiting periods (i.e. periods between notification and decision in a suspensory regime) have on the transaction and merging parties.

31. Waiting periods in some jurisdictions may be unreasonably long that it leads to cost implications in terms of falling shares on the stock markets which are uncertain of the transaction until determination, financial cost in terms of retaining attorneys until a merger is disposed of and costs resulting from lost merger synergies pending review if it is unnecessarily long. One astonishing example of a country outside the Common Market with very long waiting periods is Brazil which suspends the transaction for a maximum of 240 days with a possible extension of 90 days.[325] Another is India where a merger transaction is suspended for 210 days[326] within which the Competition

[325] OECD; Directorate for Financial and Enterprise Affairs Competition Committee. Suspensory Effects of Merger Notifications and Gun Jumping. 20 February 2019.
[326] Note that Jonathan Galloway views the 210 day period of suspending a merger in India pending review to be unnecessarily long. See Jonathan Galloway, “Convergence in International Merger Control”, Volume 5 Issue 2 pp 179- 192

Commission of India should clear the merger otherwise it is considered approved by operation of the law or effluxion of time.[327] Within the Common Market, countries like Zambia,[328] Kenya[329] and Malawi[330] have waiting periods of 90, 60 and 45 respectively. Countries like Eswatini and Zimbabwe have evidently unusual provisions with respect to waiting periods. The Competition Act No. 8 of 2007 under section 35(3) provides that the Swaziland Competition Authority shall within a reasonable time after the receipt of an application or date on which the applicants provide the information sought by the Competition Authority if the date is latter make an order concerning an application for authorisation of a merger or takeover. The foregoing implies that the period for merger review in Eswatini is indefinite and the determination is at the discretion of the Competition Authority. This situation creates a huge degree of uncertainty in the market, which is not appropriate for business. Similarly for Zimbabwe, section 34A of the Zimbabwe Competition Act read together

---

[327] Section 31(11) of the Indian Competition Law 2002, as amended. It should be observed here that the 210-day review period by far exceeds the ICN best practice note. See also https://iclg.com/practice-areas/merger-control-laws-and-regulations/india (accessed on 10 November 2018)

[328] In Zambia, the maximum period may reach 120 days as the CCPC may where it has reasons to do so extend the time for review for 30 days. What amounted to days was a subject of dispute between the CCPC and the parties in Zambia. The CCPC contended that the days were working days while the parties contended that the days were calendar days. The CCPC's interpretation meant that in effect, the CCPC had more than 6 months to review a merger transaction. This period was extremely too long. Although in practice the CCPC rarely exhausted all the time, this possibility was alarming to business. This dispute was later resolved by referring to Zambia's General Provisions Interpretation Act Cap 2 of the Laws of Zambia, which guided that such days are calendar days.

[329] The time periods in Kenya can reach 180 days as the law provides for an extension of 60 days where the authority has reason to believe that this is required. Section 44 of the Act provides that the Authority shall consider and make a determination in relation to a proposed merger of which it has received notification within 60 days after the date on which the Authority receives that notification or if the Authority requests further information, within 60 days after the date of receipt by the Authority of such information, or if a hearing conference is convened, within 30 days after the date of the conclusion of the conference. Where the Authority is of the opinion that the period referred to above should be extended due to the complexity of the issues involved, it may before the expiry of that period by Notice in writing to the undertakings involved extend the relevant period for a further period, not exceeding 60 days, specified in the Notice. A careful observation of the foregoing raises worrying concerns. It is noted that the Authority can elect to extend the time period allowable for review on the basis of an opinion. This is not right. The opinion should be a sound and reasoned opinion on the basis of objective factors of law and fact. Further, a careful calculation of the days in consideration reveals that the maximum time period may reach a total of 180 days which by reasonable standards is long for merger review.

[330] The time periods under the Malawi legislation appear to be very reasonable and probably an indication and inspiration of what should inform international best practice. Section 39(1) of the Malawi Competition and Fair Trading Act, 1998, provides that the Commission shall, within 45 days of receipt of an application or the date on which the applicants provide the information sought by the Commission if that date is later, make an order concerning an application for authorisation of a merger or takeover. Further, there is no room for extending the time period for reviewing mergers. An interview with Richard Chiputula, the Director of Mergers and Acquisitions at the validation workshop of the COMESA Competition Restrictive Business Practice and Abuse of a Dominant Position Guidelines on 20 May, 2017 in Victoria Falls Town of Zimbabwe supported this view. Mr. Chiputula stated that the days contemplated under the Act are calendar days and that the Act does not provide for extension but the clock can be stopped when the parties are asked to provide additional information.

with Statutory Instrument 270 of 2002 particularly Section 5 on "Determination of Notification" shows that the law does not provide for statutory maximum time periods for reviewing a merger.[331] This creates a deeply worrying concern that should be addressed. It is important to note here that the dissertation is only concerned with the maximum periods allowed under each statute. This is to ensure consistency and uniformity of comparison, as some merger control regimes do not have a two phased merger review.

32. Surprisingly, even the EUMR have relatively long review periods. Article 10 of the EUMR, provides time limits for each phase, i.e. 25 working days for the first phase which can in some cases be extended to 35 working days, and an additional 90 working days for the second phase which can be extended in a number of situations. These review periods are alarming coming from an advanced jurisdiction like the EU. When the Commission commenced operations, it was severely criticised for its review periods of a maximum of 120 days coupled with its earlier interpretation that these were working days.[332] It is strange to know that most critics on this came from the EU, i.e. EU based lawyers among others. Note that in the EU, the days are not calendar days but working days, which can extend to 6 months of reviewing a merger in some circumstances. This is not only strange but also inconsistent with international best practice.

33. Suffice to mention here that the determination of the time period allowable for merger review is also not an exact science based on mathematical precision. It depends on a number of factors like nature and complexity of transactions, the nature and development of markets among others. Therefore, the view that the above waiting periods are long is drawn from experience and responses of the interviewees. From experience at the Commission and from most competition authorities engaged, it does appear that the time period for merger review should not exceed 60 days and there should be a safeguard for reasonable extension should circumstances demand such a

[331] With regard to the Zimbabwe, the only comfort is that the regime is non-suspensory as the parties may implement the merger before the authority clears it. However, in most cases, the parties choose to wait for the authority's clearance before implementing the merger to avoid consequences of dissolving the merger or complying with undertalings should the merger be declared anti-competitive. It therefore, follows that longer waiting periods may have similar effects in non-suspensory regimes just like they do in suspensory regimes.

[332] Since October 2014, the Commission interprets the days under Article 25 to be calendar days. See the definition of *'day'* in the Guidelines.

situation. Experience has shown that most mergers are not injurious to the process of competition and should be cleared within a relatively short period of time. Merger approvals are in most cases a condition precedent to the conclusion of a merger either by operation of law or through contract. Unnecessary delay in the review of a merger by a competition authority may lead to time sensitive factors like financing arrangements to be jeopardized and ultimate collapse of the merger.

34. Having multiple authorities reviewing a transaction does not make matters any better. Different authorities may issue decisions at different times depending on the time the transaction was notified to the respective authorities. It does appear that with the challenges of multiple notifications observed and analysed above, it is not possible to completely synchronise the timing of notifications to different competition authorities.

35. Another observed challenge as regards the different waiting periods in different jurisdictions is that competition authorities that have not issued a decision on a merger transaction are to a great extent under pressure and undue influence to conclude and arrive at a similar decision in the same merger case. This may result in lack of objectivity and due consideration on the examination of the merger. Such an outcome is irreconcilable with the fundamental objectives of merger review and may result in arriving at erroneous decisions with harmful consequences on the competition landscape of a given relevant market. Further, an erroneous decision may result in the rejection of a pro-competitive merger and injure the interests of the merging parties. Related to this matter, similar views were held by the Financial Times editorial which stated that if every country looks at every deal, then not only will the increased bureaucracy mean cost and delay, but the country with the toughest anti-trust interpretation of a particular transaction will make a *de facto* decision for everybody else.[333]

36. Suffice to mention here that this particular challenge is not only on the merging parties but on competition authorities and in most cases initiated by the merging parties who refer to other competition authorities that have made a decision and refer to the actual decision itself. The merging parties put significant pressure on the

[333] 'Editorial: Anti-trust explosion', Financial Times, July 28, 2008.

competition authorities to arrive at the same conclusion forgetting that merger examination and determination is fact dependent and it is not usually the case that different competition authorities will arrive at the same decisions. This is because the markets under their review in the same merger may present characteristics of a distinct market and other peculiarities.

Have the Regulations resolved the Challenge of Long Waiting Periods?

37. Within the context of the COMESA merger control framework, the Regulations appear to have resolved the challenge of unreasonably long suspension periods of transactions after notification. Firstly, the fact that the merging parties do not have to notify multiple competition authorities means that there aren't several staggered waiting review periods as the only review period is that under the Regulations. Secondly, the time periods under the Regulations as interpreted in the Guidelines compare very well with international best practice and in some cases are much better than some waiting periods under the national competition authorities and other jurisdictions like Brazil and India cited above. In practice, the Commission completes the assessment of mergers way below the maximum 120 days[334] permissible under Article 25 of the Regulations as can be observed from its website. The guidance in section 6.1 of the Guidelines that the Commission can seek extension from the Board but just for a maximum of 30 days gives comfort to the merging parties that such extension would not be unreasonable. The obligation to seek permission from the Board[335] provides further comfort that the extension would not be arbitrary and for reasons of getting around the Commission's incompetence of completing the assessment of the merger within the allowable time.

---

[334] The 120 days period for review compare well with international best practice (See ICN Recommended Practices for Merger Notification and Review Procedures). Further the introduction of an expedited process in the Guidelines through a phased review system allows transactions that do not raise competitive concerns to be cleared fairly quickly.

[335] The Board of Commissioners in terms of the institutional set up of the Commission is independent from the Commission and is the Supreme Policy Body of the Commission pursuant to Article 13 of the Regulations. It also plays an adjudicative role in cases where there are disputes between the Commission and the merging parties. Due to this independence, there is comfort on the merging parties that the Board shall be impartial in making decisions as regards the request by the Commission to extend the time for review under Article 25. Such extensions must be based on objective and reasonable grounds.

38. Lastly, the fact that notification is made only to the supra-national competition authority for mergers with a regional dimension means there is no undue influence to conclude the transaction and arrive at a similar decision once one national competition authority has concluded the assessment of a transaction and issued a decision. It should be noted that this risk is still real as regards the relationship between competition authorities outside the Common Market and the Commission though this is not the focus of attention of the research.

11.1.7 Triggering Event for Notification

39. The triggering event for notification refers to the occurrence of an event that should initiate the obligation to notify a merger to a competition authority. Different jurisdictions may have different trigger events while others may not. Further, some jurisdictions like COMESA, Zimbabwe, Brazil and Argentina impose deadlines within which a merger should be notified after the trigger event has materialised while others may not. The obligation to notify a merger within a specified time after the triggering event has occurred may raise concern in multi-jurisdictional merger review.

40. Triggering events are usually included in merger legislation to prevent premature notification which may be costly on the parties in terms of merger notification fees and other administrative requirements should the transaction fail to materialise. Premature notifications may also waste the Commission's time and efforts which may be used on other priority cases. Therefore, triggering events operate as a safeguard and ensure that resources are used effectively and efficiently for both the merging parties and the competition authorities. What may be a problem in most cases is that what amounts to a triggering event is not defined expressly leading to significant uncertainty. For example, in Brazil, notification is required within 15 business days from the date that the transaction was "realized." William Rowley and Omar Wakil observed that initially, most attorneys took the view that the realization date was the transaction closing date. However, the antitrust authorities later established that the term should be interpreted to mean the execution of the first binding document between the parties – but what that is can be uncertain. As a consequence, Brazilian lawyers usually identify the triggering event on a case-by-case basis, because in some

cases preliminary arrangements between the parties could trigger the notification requirement. Fines for failing to file or filing late range from approximately US$27,000 to US$2.7 million; although the average fine for late filing does not usually exceed US$400,000, which is still high by any standard. The authorities have historically been aggressive in enforcing violations of these uncertain laws.[336]

41. A well-defined triggering event brings certainty and predictability to both the merging parties and the Competition Authority. The ICN provide guidance on what amounts to a triggering event for merger notification through the ICN Recommended Practices for Merger Notification and Review Procedures. In this document, it is stated that parties should be permitted to notify a proposed merger upon the certification of good faith intention (*bona fide intent*) to consummate a proposed transaction. Even with this clarification, what amounts to good faith intention to consummate a merger may be different in different jurisdictions complicating the burden of multi-jurisdictional review. The problem is exacerbated further when jurisdictions impose a deadline within which notification should be made after the triggering event.

42. There is general recognition that deadlines should be flexible enough to allow the parties time to organise the merger transaction and lodge a notification. What begs the question is the relevance of the deadline for jurisdictions that suspend the merger pending approval. For such jurisdictions, it is not in the interest of the merging parties to consummate a merger before approval as there are penalties for such. Therefore, it would almost always be the case that parties to a merger in a suspensory regime would notify a merger within reasonable time so that they obtain the approval they need to facilitate the implementation of the merger and other time sensitive exigencies such as funding agreements. The triggering event should be there to protect the parties' interests in only notifying those transactions they are sure with a sufficient degree of probability that they would be concluded. The tight deadline for making the notification after the triggering event is onerous on the parties.

---

[336] International Mergers: The Problem of Proliferation. By J. William Rowley QC and Omar K Wakil. A paper presented at the 33rd Annual Conference on International Antitrust Law and Policy. Under "settings" http://www.mcmillan.ca/Files/JRowley_International_Mergers_Fordham%20Conference.pdf (accessed on 20 May 2017).

43. As regards jurisdictions that are non-suspensory, the argument for imposing a deadline after the triggering event has been that the competition authority would need reasonable time within which to review the merger and deal expediently with any post-merger issues that may arise.

Have the Regulations resolved the Challenge Posed by the Requirement of a Triggering Event after Notification?

44. The Regulations equally have a triggering event for merger notification and additionally imposes deadlines for notification after the triggering event. Article 24(1) of the Regulations provides that a party to a notifiable merger shall notify the Commission in writing of the proposed merger as soon as it is practicable but in no event later than 30 days of the parties' decision to merge. Further, Article 24(2) of the Regulations makes any merger implemented in contravention of Article 24(1) of the Regulations a nullity. Article 25(5) imposes a fine on the merging parties by imposing a maximum of 10% of either or both of the merging parties' annual turnover in the Common Market as reflected in the accounts of any party concerned for the preceding financial year.

45. It does appear that this system raises some concerns already identified in this section. It should be recalled that when the Commission commenced operations, it had an expansive interpretation of what amounted to *'decision to merge'*. The Commission interpreted the terms to mean a point in time when there is a meeting of minds or *consensus ad idem* to consummate a merger. This was an absurd interpretation as a meeting of minds and/or intention to merge may not always culminate in a merger. This still leaves a lot of ambiguity. Obviously proving intent is a mental or psychological matter that may not be free from trouble and may be subject to bias and subjective considerations. The Commission has since addressed this concern by interpreting what *'decision to merge'* means in the Guidelines. The Commission considers that a decision to merge must either be (i) a joint decision taken by the merging parties and so comprise the conclusion of a definitive, legally binding agreement to carry out the merger (which may or may not be subject to conditions

precedent), or (ii) the announcement of a public bid in the case of publicly traded securities. This interpretation appears sound and introduces certainty.

46. Notably, the Regulations also impose a deadline within which to notify a merger after the triggering event. The deadline is 30 days which is just as tight as in Zimbabwe, Brazil and Argentina. It appears that this gives little room for the parties to compose themselves in terms fulfilling all the requirements necessary for a merger notification. What is comforting to observe is that the Commission has taken a pragmatic approach on this matter and has never punished any firm for failure to notify the merger after the deadline. This is different from the position of the Brazillian and Argentinian Authorities who have followed a strict interpretation of the law and imposed hefty fines on merging parties in the past. The mischief that the imposition of the deadline attempts to address is far from clear. This shows that the provision is superfluous and needs to be amended for legal certainty.

47. The main comfort the Regulations have brought in this area however is that while in the past, the parties would have to comply with different trigger events and deadlines if a merger involved more than one Member State, currently they just have to comply with the trigger event and deadline under the Regulations. This reduces the risk of failure to meet the legal requirement and subject to sanctions. Further, the soft and pragmatic approach by the Commission brings comfort to the parties although the noble thing to do would be to strike out this provision which evidently cures no mischief and burdens the merging parties. Consistent with this analysis Thula Kaira[337] observed that:

> *"Parties may announce a merger but it is when they are ready to notify that they should notify. An announcement to marry does not bring with it deadline when to actually tie the knot."*

[337] Thula Kaira was the second Head of the Competition and Consumer Protection Commission of Zambia. He later became the first Head of the Botswana Competition Authority. He is currently a consultant responsible for Competition and Regulatory Affairs at AB & David

11.1.8 Local Nexus

48. It is a requirement under international best practice that a merger to be reviewed should have local nexus to the reviewing jurisdiction. In simple terms, this means that the merger transaction should raise the likelihood of affecting competition in the reviewing jurisdiction. Mergers should only be notified in jurisdictions where there is proximate and material nexus. Those jurisdictions where a merger does not have material and proximate nexus, should not call for the mandatory notification of such mergers as it unnecessarily increases the burden on the merging parties. The nexus is basically determined by the merger notification thresholds. However, it is surprisingly observable that most jurisdictions in the Common Market commenced their merger control regimes with zero notification thresholds. Some of them still implement zero merger notification threshold regimes. Among these countries are Malawi, Swaziland and Kenya.[338]

49. It should be noted that just like the setting of merger filing fees, the setting of merger notification thresholds is also not conducted within the confines of mathematical precision. A lot of considerations are taken into account some of which may be subjective. The ICN gives guidance on this as follows:[339]

   a) Identify goals of reform
   b) Consider the type of thresholds
   c) Consider exempting transactions that do not raise competitive concerns
   d) Engage in benchmarking based on historical information
   e) Consider identifying a desirable number of transactions to review annually

---

[338] Until just recently, the Kenyan Competition Legislation was not explicit on merger notification thresholds. Implicitly, Kenya implemented a zero merger notification regime. The Competition Amendment Act of 2016 which was assented to on 23 December 2016 and took effect on 13 January 2017 now allows the competition authority in consultation with stakeholders to set thresholds for any proposed merger to be excluded from the merger control provisions of the competition legislation. The proposed thresholds had not yet been enacted at the time of writing the dissertation but has reached an advanced level of Parliamentary approval. This position was provided by Mr. Boniface Makongo during their visit to their counterparts at the Commission on 13 – 15 March 2019 to discuss the MOU Implementation Plan for the Competition Authority of Kenya and the Commission. However, the Competition Commission of Kenya Administrative Guidelines allows for the exclusion of proposed mergers from the provisions of the Competition Act. The Administrative Guidelines are not binding but they give guidance as regards transactions Competition Authority of Kenya is likely to exclude from the provisions of the Competition Act

[339] International Competition Network Merger Working Group Notification and Procedures sub-group: Setting Notification Thresholds for Merger Review.

f) Consider the size of the economy

g) Compare thresholds used in other jurisdictions

h) Thresholds may be higher where agencies have residual jurisdiction to review non-notifiable transactions

i) Consultations with stakeholders can help build support for threshold reforms

j) Adjusting thresholds should be a continuous process.

50. Competition Authorities should however not be condemned for setting thresholds on the low side in their nascent stages of development as usually there is little data for benchmarking in the authority's jurisdiction. Nonetheless, an absent notification threshold is absurd under any conceivable situation. It is difficult to imagine a situation where a merger involving firms with insignificant operations in a certain jurisdiction would raise competition concerns. Very few Member States have thresholds in the Common Market, the notable ones been Mauritius, Seychelles, Zambia and Zimbabwe.

51. Kenya has issued Guidelines on thresholds but these are not binding. Table 10 below shows the current merger notification thresholds in selected Member States.

Table 10: Merger Notification Thresholds in Selected Member States

Country	Type	Individual Worldwide	Combined Local	Individual Local
Kenya	Turnover		US$11,496,949	US$1,149,695
Zambia	Higher of Turnover/Assets		ZMW15,000,000[340] = US$1,247,491.46[341]	
Zimbabwe	Higher of Turnover/Assets		US$1,200,000	

Source: Author's research

[340] Section 8(1) of the Competition and Consumer Protection (General) Regulations, 2011 stipulate that a merger transaction shall require authorization by the Commission where the combined turnover or assets whichever is higher in Zambia of the merging parties, is at least fifty million fee units in their latest full financial year, for which figures are available. Accordingly 1 fee unit equates to 0.3 Zambian Kwacha (see the Fees and Fines Act Cap 45 of the Laws of Zambia).

[341] https://www.xe.com/currencyconverter/convert/?Amount=15%2C000%2C000&From=ZMW&To=USD (accessed on 11 March 2019).

52. A few comments are worth mentioning regarding these thresholds. With regard to Zambia, an interesting scenario arises from a careful reading of section 8(1) the Competition and Consumer Protection (General) Regulations, 2011 which stipulates that a merger transaction shall require authorization by the CCPC where the combined turnover or assets whichever is higher in Zambia of the merging parties, is at least fifty million fee units in their latest full financial year, for which figures are available. This provision does not appear to take into account the requirement of the target firm having individual local turnover in Zambia. It is possible for the acquiring firm to have for example a turnover of fifty five million fee units in Zambia with a target having only a paltry turnover or even naught and yet the transaction qualifying for notification. This is because the combined turnover in this case would exceed the merger notification thresholds. Evidently, such a transaction would not have local nexus and it is unlikely to raise competition concerns. The same comments apply to Zimbabwe. However, research revealed that CCPC has changed its practice and has for a long time now not been reviewing merger transactions where at least one of the parties to the transaction does not have local nexus. This change of practice is commendable but the acceptable thing to do is to amend the law.

53. The Kenyan merger thresholds are well designed. They only capture transactions of a certain magnitude and in addition, incorporates the requirement for an individual local turnover which excludes mergers involving large and significantly small firms from notification. Nevertheless, these are only Guidelines and not binding and therefore do not give great certainty to the parties.

54. Other jurisdictions like Mauritius have voluntary merger notification systems but the Mauritian competition legislation makes a merger transaction subject to notification if the merged entity's minimum market share is 30%. Seychelles is another jurisdiction that bases the competition authority's intervention on a merger on market shares. The competition legislation in Seychelles provides that a notifiable merger is one which involves an enterprise that by itself controls or, together with any other enterprise with which it intends to effect the merger, is likely to control, 40% or more of a market, or such other amounts as the Minister may prescribe. The dissertation has already discussed in Chapter Six the challenges presented by basing thresholds on market

shares. Some notification thresholds discussed above raise challenges not only on the merging parties but the competition authorities also.

55. It can be observed that a number of countries in the Common Market do not have meaningful merger notification thresholds. This raises the cost of doing business in the Common Market and ultimately frustrates business development, investment and the regional integration imperative. In the absence of meaningful thresholds, it means that the parties would have to notify their transactions and in some cases pay merger notifications fees regardless of the size of the transaction and the likelihood that it would raise any competition concerns. This is irregular and clearly inconsistent with international best practice. The situation also presents a challenge to competition authorities in that they would have to devote human resources to reviewing mergers that have no consequence on competition instead of focusing on transactions of importance or other anti-trust cases like cartels and abuse of dominance that may cause much damage to markets than mergers. Cognate to this are jurisdictions without the criteria of combined local turnover for the merging parties. This results in capturing transaction without local nexus and anti-trust importance.

56. Further, basing merger thresholds on market shares is problematic as it is not objective and gives both the merging parties and competition authorities the task of defining the relevant market before notification. The greater likelihood is that the merging parties and the competition authorities are likely to arrive at different definitions of the market and therefore different market shares. Recall from Chapter Six of the dissertation that the definition of the market is not a very simple task based on scientific precision. Therefore, uncertainty looms on both the merging parties and the competition authorities where the notification thresholds are based on market shares.

Have the Regulations Resolved the Challenge of Reviewing Mergers Lacking Local Nexus?

57. The Regulations appear to have resolved this challenge to a very large extent. With the exception of Kenya, the merging parties do not have to notify several jurisdictions with different merger notification thresholds for transactions that meet the merger notification thresholds stipulated in Rule 4 of the COMESA Competition Rules on the Determination of Merger Notification Thresholds and Method of Calculation. The aforementioned Rule provide that:

> **"a merger is notifiable to the Commission where the combined turnover or value of assets of the merging parties whichever is higher in the Common Market equals or exceeds US$50 million and that the annual turnover or value of assets, whichever is higher, in the Common Market of each of at least two of the parties to a merger equals or exceeds COM$ 10 million, unless each of the parties to a merger achieves at least two-thirds of its aggregate turnover or assets in the Common Market within one and the same Member State".**

58. This is important to the merging parties in that the notification thresholds under the COMESA regime are clear and certain and that they are not vague and opaque as they are based on objective and verifiable criteria.[342] Further, the Rules also provide guidance on the turnover and asset values[343] to take into account when determining merger notification thresholds, an element absent in most merger control regimes. The element of local nexus has well been addressed by the requirement that each of at least two parties to the merger should derive a certain turnover in the Common Market. Therefore the possibility of capturing mergers with firms that have no operations or whose operations in the Common Market are significantly low is to a great extent diminished unless the Commission elects to do so by invoking Article 23(6) of the Regulations which stipulates that the Commission may require parties to a non-notifiable merger to notify the Commission of that merger if it appears to the Commission that the merger is likely to substantially prevent or lessen competition or is likely to be contrary to public interest. According to Article 23(5) a non-notifiable merger means a merger or proposed merger with a value below the prescribed threshold. The Commission would only invoke Article 23(6) in exceptional

[342] Note that the criteria in the COMESA Competition Rules is consistent with the ICN recommended practices cited in this section.
[343] See Rule 5 of the COMESA Competition Rules on the Determination of Merger Notification Thresholds and Method of Calculation

circumstances and from inception to the time of writing this dissertation, the Commission has only invoked this provision once in the case involving the takeover of **Careem Inc** by **Uber Technologies** in June 2019. It is also commendable that unlike their EU counterparts, the COMESA merger regime has focussed on local (COMESA wide) turnover or asset value as opposed to worldwide turnover thereby closing any debate as regards local nexus.

59. Evidently observable in the COMESA Competition Rules on the Determination of Merger Notification Thresholds and Method of Calculation is that the local nexus requirement is cemented by introducing the two-third rule. It works to ensure that where a merger has nexus in one Member State despite deriving a minimum combined turnover or value of assets of US$50 million and at least two of each of the parties to a merger deriving a minimum of US$10 million turnover or value of assets in the Common Market, that merger should be notified to that Member State only. Therefore, if two-thirds of each of the merging parties' turnover or value of assets is derived in one and the same Member State, the transaction lacks COMESA nexus and should be reviewed by that particular Member State.

60. It should be recalled that when the Commission commenced operations, it also started with zero notification thresholds. The argument by the Commission was that there was no historical data to benchmark on and the Commission needed to review mergers until such a time when it was able to find the right policy balance. This argument was sound and consistent with the ICN views that the determination of merger notification thresholds may be based on historical information. However, it is still absurd that the notification thresholds were at zero. The Commission should have used other parameters like the size of the economy and comparing thresholds in other jurisdictions. The Commission could have started with the thresholds used in one of the Member States and later raised the thresholds as adjusting thresholds should be a continuous process.

61. The argument that stands now is whether the COMESA merger notification thresholds are optimal. The merger notification thresholds appear to be optimal in that their promulgation was subjected to rigorous stakeholder consultations who agreed on

this threshold level. There is still room for the thresholds to be adjusted upwards should need be in the future. It is therefore concluded that the Regulations have resolved this challenge of lack of local nexus in reviewing mergers with a regional dimension.

62. However, a word of caution should be entered. The Rules appear to be *ultra vires* Article 23(3)(a) which presupposes a situation where a merger involving a party that is absent in the Common Market may be notified as long as one of the parties has operations in two or more Member States. Further, the wording of the Rules also does not completely eliminate the uncertainty in that it is still possible to have each of at least two parties to a merger derive a turnover or hold assets of US$10 million or more in the Common Market and yet the target has no operations therein. This may be in a situation where there are two acquiring parties. The Rules should have been specific that at least one acquiring firm and one target firm should derive a turnover or hold assets of not less than US$10 million in the Common Market.

11.1.9 Non-Domestication of the Treaty and the Regulations

63. This challenge is not just unique to the merging parties but also to National Competition Authorities. The challenge for the merging parties is that they are threatened by some Member States if they do not notify therein notwithstanding that they have notified at COMESA level because the Regulations and the Treaty are not domesticated in that particular country. This creates a lot of uncertainty for the merging parties. For example, this situation was serious when the Commission commenced its operations as Kenya threatened undertakings to notify with the CAK despite notifying the Commission. As a matter of fact, there is case involving the Coca-Cola Beverages Africa (CCBA). In this matter, CCBA notified the Commission of the merger in 2015 and the transaction was approved unconditionally. One of the Member States where the parties had operations was Ethiopia. Subsequently, in 2019, the Ethiopian Authorities ruled that the parties had engaged in an unlawful merger because they did not notify the Ethiopian Authorities. The parties contended that they were not obliged to notify the Ethiopian Authorities as the transaction was cross-border and hence it was enough to notify with the Commission. The Ethiopian

Authorities disregarded the Regulations on account that they were not domesticated in Ethiopia. The parties have appealed the case and it remains to be seen how it will conclude.

Have the Regulations Resolved the Challenge of Non-Domestication of the Treaty and the Regulations?

64. Clearly the Regulations have not resolved this challenge as has been established in Chapter 10 of this dissertation. There is need to rest this ghost by COMESA ensuring that all the Member States put their internal houses in order by domesticating the Treaty. It should also be noted that respect of the Treaty and the Regulations at national level may be beyond legal considerations. It may be argued that for countries to respect their obligations under a Treaty or any other regional trade agreement, they are not only compelled by their conscience to respect laws but also by political and other interests beyond legal responsibility.

65. There should be strong common interests tying the countries together. For example, their economies and legal system should be interwoven to the extent that without one of them participating, the entire common market is at stake. This is the case in Europe and may be the reason why it has been very difficult to reach an amicable divorce between the EU and the United Kingdom. It can also be argued that this project has succeeded in the EU because of little disparities in the Member States' economies and more so because the European project began as a result of rebuilding after the world-wars. Therefore there was common interest of reconstruction. In COMESA, this is largely absent as can be attested from the very low levels of intra-COMESA Trade, fragmented and divergent legal frameworks. This situation is exacerbated by the rise of national interests which is rife and poses a threat to the durability of supra-national merger control arrangement.

11.1.10 Less Jurisprudence on merger Assessment in the Common Market

66. This poses a huge challenge to the merging parties in that it becomes difficult to structure their transactions and devise commercial and legal strategies within the

parameters of assessment discussed in Chapter Six of this dissertation. While assessment follows a scientific approach, it is not crystal mathematics which leaves little or no room for disputes. The assessment criteria are not based on pure objectivity that the merging parties would only know the competition authority's possible approach through guidelines, assessment reports and judicial decisions regarding mergers.

67. However, this research has revealed that not all Member States have merger assessment guidelines to direct the merging parties as regards the authority's thinking and approach in merger assessment. The situation is even more notable when it comes to issuing decisions as in most cases the competition authorities simply approve the mergers unconditionally or conditionally and in rare circumstances prohibit mergers without giving clear details and reasons for their determination. Such detailed decisions could create precedent for the merging parties as they would know the precise approaches of the competition authorities. This concern was echoed by Mark Griffiths; an attorney at Norton Rose Fulbright who observed that in most cases when they were filing a transaction before the Commission, they relied on precedents of the EC.[344] This is not right as market circumstances and other imperatives may differ between Europe and the Common Market. Europe has a long history of merger law enforcement, political and market integration is enhanced, the reasons that motivated the establishment of the EU are different among other factors.

68. Further, there is less judicial precedent in most Member States as regards merger regulation. It is regrettable that even respected jurisdictions like Zambia have had a paltry number of cases considered by the Courts. At the time of writing this dissertation, Zambia had less than 10 merger cases determined by the courts of law after been in existence for over 20 years while the Republic of Mauritius at the time of writing the dissertation never had any merger determined by the courts of law. One explanation for this may be a lack of culture of litigation in the Common Market and/or lack of faith in judicial institutions. However, a detailed research may be needed on this as it is beyond the scope of this dissertation.

[344] Views of Mark Griffiths at the COMESA Competition Validation Workshop for Guidelines regarding the implementation of Articles 16 and 18 of the COMESA Competition Regulations held on 18 – 20 May 2017 in Victoria Falls Town in Zimbabwe.

Have the Regulations Resolved the Challenge of Less Precedent on Merger Assessment in the Common Market?

69. This inquiry begins by observing that the Commission has issued a comprehensive set of Guidelines as regards its approach on merger assessment. It should be noted that these Guidelines are well drafted and very consistent with international best practice in many respects. This is commendable especially that the Commission issued these Guidelines barely one year after commencing operations. This demonstrates the Commission's appetite to have a perfect regional merger control regime. However, the impressive situation ends here. A check at the Commission's website for the decisions it issues to the parties revealed that the practice is not different from that in most Member States. The decisions issued and made public are shallow that they contain no detailed reasons for arriving at the determination. Fortunately, no merger has thus far been prohibited by the Commission. Prohibitions would require detailed reasoning so that the parties know exactly the approach the Commission takes to review their transactions.

70. As regards lack of judicial precedent, the situation is not any better at COMESA level. There have been no cases that have been taken to the CCJ for determination. The only case that has been considered by the CCJ is that of Polytol and it did not relate to mergers although it touched on fundamental imperatives of market integration and the Supremacy of the Treaty, matters that have consequences on merger control in the Common Market as discussed in Chapter 10 of the dissertation.

11.1.11 Policy Imperatives beyond the Conventional Consideration of Mergers under the Test of Substantial Lessening of Competition

71. The main reason of assessing mergers is to determine whether they would lead to a substantial lessening of competition. The tests used to determine the competition effects are almost standard in almost all laws that have merger control provisions in the Common Market. These tests have been comprehensively covered in Chapter Six of this dissertation. However, it is interesting that most jurisdictions like Kenya,

Zambia, Malawi and Swaziland in addition to the substantial prevention of competition test also consider other policy imperatives either by practice or Statute to determine mergers. While such practice departs from pure competition consideration, it is not unusual as competition laws do not exist in a vacuum but operate in line with other government policies. What is important is that these considerations should be predictable, consistent and not arbitrarily invoked to satisfy interests not related to merger review.

72. The main policy imperative considered in most jurisdictions including the ones cited above is public interest. A detailed discussion on this was provided in Chapter Six. The challenge on the merging parties is to determine what amounts to public interest[345] as it is vague in most jurisdictions. The other challenge is complying with a myriad of public interest obligations which may be different from one Member State to another.

Have the Regulations Resolved the Challenge Policy Imperatives beyond the Conventional Consideration of Mergers under the Test of Substantial Lessening of Competition?

73. A careful review of the relevant Articles under the Regulations would support the rushed conclusion that this challenge has been resolved. The Regulation appears to focus only on competition matters. Public Interest has been mentioned in the Regulations but with specific connection to competition tests i.e. Dominance and Substantial Lessening of Competition. The specific wording of the law makes it impermissible for the Commission to take into account the traditional public interest considerations discussed above. Article 26 informs us that if the merger is likely to substantially prevent or lessen competition, the Commission must determine whether there is overriding technological efficiency or other procompetitive gain and whether the merger can be justified on substantial public interest grounds. Article 26(3) provides that a merger shall be contrary to the public interest if the Commission is satisfied that the merger:

[345] The main public interest factor considered by national competition authorities is the preservation of jobs.

a) **has lessened substantially or is likely to lessen substantially the degree of competition in the Common Market or any part thereof; or**

b) has resulted, or is likely to result in, or strengthen a position of dominance which is or will be contrary to the public interest.

74. Article 26(4) stipulates that in order for the Commission to determine whether a merger is or will be contrary to public interest, the Commission shall take into account all matters that it considers relevant in the circumstances and shall have regard to the desirability of:

a) **maintaining and promoting effective competition between persons producing or distributing commodities and services in the region;**

b) promoting the interests of consumers, purchasers, and other users in the region, in regard to the prices, quality and variety of such commodities and services;

c) promoting through competition, the reduction of costs and the development of new commodities, and facilitating the entry of new competitors into existing markets.

75. The rule of *ejusdem generis* is clearly at play as all the public interest elements mentioned relate to competition considerations. The challenge of uncertainty has therefore been eliminated as it is clear that the only public interest issues the Commission shall take into account are competition related. Further, the fact that the Commission is supposed to be a 'one-stop-shop' means that only the Commission's assessment would be taken into account for mergers meeting the regional dimension requirement.

76. The foregoing notwithstanding, it appears that challenges still remain. They were good signs when the Commission commenced operations in that it resisted to be drawn into wide public interest considerations invoked by Member States and it chose to interpret the Regulations strictly. A review of the Commission's current practice

informs us that this is no longer the case as the Commission has also began to approve non-pernicious mergers on condition that no jobs are lost. Further, the Commission's officials have recently been quoted as stating that they are a Member State based institution and there is no way they can avoid taking such public interest considerations if it reflects the desires of Member States. This is deeply troubling as some Member States' desires may simply be political, disguised under public interest. This situation is serious as some Member States indicated[346] that the dichotomy in public interest considerations between the Commission and the Member States is an anomaly that should be addressed by amending the Regulations to expressly address traditional public interest elements.

77. To buttress the point on the uncertainty the treatment of public interest raises even under the Regulations, this research considered the deliberations by the Commission and the National Competition Authorities at a workshop held in Eswatini on 23 – 24 October, 2018 to discuss remedies and public interest matters in regional merger review. In that meeting, it was considered that the Commission should consider public interest matters. The participants chose an expansive interpretation of the definition of the term *'Competition'* under Article 1 of the Regulation which provides that:

> **"Competition means the striving or potential striving of two or more persons or organisations engaged in production, distribution, supply, purchase or consumption of goods and services in a given market against one another which results in greater efficiency, high economic growth, increasing employment opportunities, lower prices and improved choice for consumers".**

78. The participants argued that some of the elements like employment and economic growth bordered on public interest and therefore clothed the Commission with the jurisdiction to consider public interest in merger review. It should be stated that there is nothing wrong with the consideration of public interest as long as there is certainty in what amounts to public interest. It was discussed at the Eswatini meeting of 23-24 October that the Commission shall draft Guidelines explaining the public interest

[346] Questionnaire responses of Member States on public interest

matters it shall consider. What was comforting at this meeting however, is that it was made clear that any public interest claim that would be in the interest of one Member State only but of detrimental concern to other Member States shall not be entertained. This is comforting in that political interference in the name of public interest may easily be screened. Suffice to mention that though the definition of competition in Article 1 of the Regulations includes the increase in employment opportunities, it does not automatically mean that any merger that results in short term employment losses[347] should be prohibited. The merger may result in long term opportunities for increasing employment through efficiencies created.

11.2 Conclusion

79. This Chapter has discussed some of the challenges faced by the merging parties in multi-jurisdictional merger review and whether the creation of a supra-national competition authority has resolved these particular challenges in the Common Market. It has been determined that while the supra-national merger control regime has eased some burden, challenges remain stemming from both legal and practical uncertainty. The next chapter shall discuss some of the challenges faced by the NCAs in multi-jurisdictional merger review and determine if these have been resolved by the supra-national merger control regime.

[347] Such employment loss should be substantial. See also the discussions on this subject in Chapter six of the dissertation.

Chapter Twelve

12.0 Challenges for National Competition Authorities and whether the Regulations have resolved these Challenges

1. It is recalled from Chapter One of this dissertation that a number of challenges in the regulation of cross-border mergers were identified. Those that relate to NCAs include:

   (i) The lack of extra-territorial application of national competition laws
   (ii) Lack of skills and expertise
   (iii) Lack of financial resources
   (iv) Poor coordination and cooperation arrangements among the institutions involved

2. It should be noted that that there may be several challenges but in order to be focussed and realistic, the dissertation has elected to focus on the above challenges identified by other researches and appearing relevant to the current research. Under this Chapter, these challenges have been addressed.

12.1 Lack of Extra-territorial Application of National Competition Laws

3. Extra-territorial jurisdiction refers to a situation where a national law is extended to apply to conduct initiated outside its boundaries but having effects within its borders. It should be noted that most countries in the Common Market purport to have extra-territorial jurisdiction on the basis of the effects doctrine, i.e. as long as conduct has effect in their territories, their national laws apply. The effectiveness with which this is done is highly questionable. Notable is that even advanced jurisdictions in the field of anti-trust law are not yet settled on how to address this concern and mostly they get around it through rich experience of cooperation and trust in each other's systems.[348]

[348] In an email conversation of 11 October, 2016, Maria Coppola of the Federal Trade Commission of the United States of America admitted that even the United States anti-trust authorities have problems addressing anti-trust infringements emanating from outside but having effect inside the United States. However, it may be argued that these jurisdictions have managed to get around this challenge through accumulated experience of competition law enforcement and effective cooperation with other competition authorities as can be attested from the cooperation between the United States of America competition authorities and the European Commission. The author also interviewed Russell W. Damtoft and Caldwell Harrop of the U.S Department of Justice and the Federal Trade Commission respectively at the United Nations Conference on Trade and

Maria Coppola, in an email interview regarding extra-territoriality remarked as follows:[349]

"In theory we can get evidence abroad but in practice it is so difficult we almost never do. Usually we will get evidence from a foreign company through a US subsidiary or parent, or their US lawyers. We have even less experience with fines since we rarely seek monetary penalties".

4. However, before pre-empting the assessment of this matter in the Common Market, it is imperative to look at the national competition laws of selected Member States. We begin the inquiry by inspecting the Ethiopian competition legislation to identify provisions that clothe it with extra-territorial application. Article 4(1) of the Trade Competition and Consumer Protection Proclamation (TCCPP) states that the Proclamation shall apply to any commercial activity or transaction in goods or services conducted or having effect within the Federal Democratic Republic of Ethiopia. They key word is 'effect'. The 'effects' doctrine respects no borders as conduct may be consummated in one country, but effects would transcend national borders. Therefore, the wording of the law presupposes a situation where the TCCPP would be apply on an undertaking that is located in another jurisdiction as long as the effects of its anti-competitive behaviour are experienced in Ethiopia. Similarly, section 3 of the Mauritian competition legislation provides that it applies to every economic activity that has effect in Mauritius. A check in the Zambian competition Statute gives similar reading. Principally, section 3(1) of the CCPA provides extra-territorial connotation in application, as follows:

"Except as otherwise provided for in this Act, this Act applies to all economic activity within, or having an effect within, Zambia".

5. This means conduct need not necessarily originate from Zambia to have effect, but it can originate from outside the country. Further section 27(1)(d) of the CCPA, gives the CCPC authority to review a merger even if it is concluded outside Zambia but has

Development Sixteenth Session of the Intergovernmental Group of Experts on Competition Law and Policy held in Geneva, Switzerland from 6-7 July 2017 who both buttressed the views of Maria Coppola.

[349] Email exchange with the author on 11 October 2016.

consequences in Zambia that require further consideration. Such legislative, adjudicative and enforcement overtones of extra-territorial application of the above respective laws are impressive but are they practical? This inquiry begins by taking note of Maria Coppola's view above. It is observable that this is not only a challenge for the DEEs but developed countries alike. The challenge lies in the cooperation and the readiness of one country to enforce the laws of another. Several factors account for the fact that in most cases this is unsuccessful. Among these factors is the principle of sovereignty. It has been posited that one of the essential elements of Statehood is the occupation of a territorial area, within which State law operates. Over this area, supreme authority is vested in the State. It is considered that the concept of sovereignty signifies that within this territorial domain, jurisdiction is exercised by the State over persons and property to the exclusion of other States.[350] Max Huber, the Arbitrator in the Island of Palmas Arbitration commented the following on territorial sovereignty:[351]

"Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State".

6. It can therefore be inferred that the extra-territorial application of one law may appear to usurp the jurisdiction of another State by perceptibly ceding sovereignty, a matter most countries are sensitive to. Therefore, the claim by the above cited Statutes that they have extra-territorial reach may be academic to the extent that the jurisdictions where the culpable undertakings are located are not ready to cooperate. To circumvent this problem, countries engage in MOUs. For example, under SADC, there is a coordination system to share information amongst competition authorities. A Mergers working group has been established, and an MoU signed amongst SADC competition authorities. This system is however not immune to challenges which are usually:

(i) Information requests are made by staff who are peers and thus easily exchange such information however, where the staff do not know each other personally, information is difficult to be shared;

[350] JG Starke and IA Shearer Starke's International Law (London, Boston: Butterworths, 1994), 144.
[351] 22 AJIL (1928) 875.

(ii) Information requests is usually made informally and thus may be a subject of personal workload issues before it is responded to;

(iii) There is generally no supervisory monitoring for such to ensure that the information requested is submitted timeously and in a manner that would provide useful feedback to the requesting authority;

(iv) Legal issues in relation to confidentiality may be a challenge - including the definition of what exactly is 'confidential' information;

(v) Whom do you go to (appeal) in case an individual officer is not forthcoming with information?

7. Indeed, the challenges the application of the extra-territorial principle poses to both multi-national corporations and State agencies have long been noted. For example, John R. Stevenson[352] observed in 1970 that:

> *"multinational corporation, by definition, is established and has activities in more than one State. If a strict territorial approach is adopted, each State may regulate only those activities within its borders. Such an approach could have serious effects. It might make it impossible for the corporation to do business by subjecting it to contradictory or confusing legal regimes, or on the other hand, it might allow the corporation to escape liability for conduct whose components are legal in each of the States in which they take place but which, taken as a whole, is illegal under the laws of some or all of the States concerned".*

8. The magnitude of the problem is reflected in the fact that not even the EU which has a long history and experience on judicial precedent in competition matters has expressly decided a case on the premise of extra-territoriality. For example, it was held in the Woodpulp case[353] that ***"the application of the Regulation is justified under public international law when it is foreseeable that conduct will have an immediate and substantial effect on the Community".*** Nevertheless, in this case, the CJEU although advised to take into account the effects doctrine, a prerequisite to extra-territorial application, ended up ruling on distinct and narrow premises. Commentators like

[352] John R. Stevenson in Department of State Bulletin, 12 October 1970, p 429.
[353] OJ [1985] L 85/1

Professor Alison Jones[354] have remarked that "although the EU competition authorities may claim jurisdiction in cases involving non-EU undertakings, enforcement of this jurisdiction is more problematic". This is consistent with the EC's position in some of its publications. For example, the EC underlined in its 2008 annual report that "although the competition provisions do not explicitly provide the extraterritorial application, as EU is the major player in an increasingly globalized world economy, competition policy must also adopt a global outlook".[355]

9. The observation by the EC in the 2008 annual report gives an indication that the application of the extra-territorial principle is far from easy. As observed by Yue Xia,[356] "to justify the extra-territorial application of EU competition rules, the Commission has always been looking at the effects that those agreements and practices have on the EU market. But this criterion was not recognized by the European Courts for a very long period. The courts seem unwilling to adopt the *'effects doctrine'*. Instead, the courts have adopted two other legal theories on the extra-territorial application of EU competition rules. The first one is the 'economic entity' doctrine and the second one is the 'implementation' doctrine".[357]

10. Dyestuffs case[358] is one of the most important cases that applied economic entity doctrine. The question was whether the EC had jurisdiction over non-EU parent companies because of their EU subsidiaries' infringements. The EC established that several non-EU manufacturers had engaged in price fixing for dyestuffs sold in the internal market. However, plaintiffs argued that neither the ECJ nor the EC had jurisdiction on the matter. While the court was presented with an opportunity to decide the matter on the effects doctrine basis, the supposedly pre-requisite for establishing the extra-territorial application of EC Competition Law, it claimed jurisdiction by establishing the 'economic entity' theory.[359] The ECJ found that the

[354] Professor Alison Jones is a Professor of Law at King's College London
[355] The European Commission's 2008 Report on Competition Policy, para 164.
[356] Yue Xia, Assessing Extraterritorial Application of EU Competition Law: LLM Paper, 2016 – 2017 "Under Settings" https://lib.ugent.be/fulltxt/RUG01/002/349/640/RUG01-002349640_2017_0001_AC.pdf (accessed on 21 April 2019)
[357] Ibid
[358] Case C-48/69, Imperial Chemical Industries Limited v. Commission [1972] E.C.R. 619.
[359] In case C-48/69, Imperial Chemical Industries Limited v. Commission [1972] E.C.R. 619, para 132, the ECJ stated that: "The fact that a subsidiary has separate legal personality is not sufficient to exclude the possibility of imputing its conduct to the parent company, especially where the subsidiary does not determine its market

applicant was able to exercise decisive influence over the policy of the subsidiaries as regards selling prices in EC and in fact used such power. Therefore, the ECJ recognized the Commission's jurisdiction *ratione personae* by considering the parent companies and subsidiaries as a single economic entity.[360]

11. The single economic entity doctrine may not always be suitable to establish the application of EU law to undertakings located outside the EU without any subsidiary therein. To get around this, the ECJ has relied on the 'Implementation Doctrine'. This was observed in the Wood Pulp Case.[361] It involved price-fixing collusion of forty-one non-EU sulfate wood pulp producers with Finnish and U.S trade associations. The Plaintiffs submitted that the EC lacked jurisdiction on the case as the single economic entity doctrine could not be established. As observed by Yue Xia this huge international price-fixing case took the ECJ an unusually long time (almost four years) to reach a judgment which reflects the dilemma that on the one hand, the court faced a big challenge on justifying the extra-territorial enforcement of EU competition rules, but on the other hand, it needed a convincing theory to do this.[362] In this case, the court circumvented the 'effects doctrine' and its *ratio decidendi*, implied that jurisdiction on the matter could be claimed on the premise that the conduct was implemented in the Community, i.e. the conduct of the applicants was implemented in the internal market.[363]

conduct independently but in all material respects carries out the instructions given to it by the parent company. When the subsidiary does not enjoy any real autonomy in the determination of its course of action on the market, the prohibitions imposed by Article 85(1) may be considered inapplicable in the relations between the subsidiary and the parent company, with which it then forms one economic unit. In view of the unity of the group thus formed, the activities of the subsidiaries may, in certain circumstances, be imputed to the parent company."

[360] Yue Xia, Assessing Extraterritorial Application of EU Competition Law: LLM Paper, 2016 – 2017. Under *"Settings"* https://lib.ugent.be/fulltxt/RUG01/002/349/640/RUG01-002349640_2017_0001_AC.pdf (accessed on 21 April 2019)

[361] Joined Cases 89, 104, 114, 116, 117 and 125 to 129/85, A. Ahlström Osakeyhtiö and others v Commission (Wood Pulp), [1988] ECR 5193.

[362] Joined cases 6 and 7/73 Istituto Chemioterapico Italiano and Commercial Solvents Corp. v. E.C. Commission, [1974] 13 Common Mkt. L.R. 309.

[363] In paragraph 13 the Court stated, " those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty."

12. Suffice to mention that by 1999, the EU Courts finally adopted the ‘Effects Doctrine’ to establish extra-territoriality in the Gencor merger.[364] Gencor contested the EC’s decision on the basis that the merger was not implemented in the EU. In its judgment, the CFI introduced the criterion for ‘effects doctrine’. The Court affirmed that the concentration would not only alter the competitive structure of the market in South Africa but throughout the world.[365] This therefore meant that the competitive structure of the common market would also be affected by a merger implemented in South Africa through the ‘effects doctrine’.

Have the Regulations Resolved the Challenge of Extra-Territorial Application?

13. As observed in this dissertation, the challenge of extra-territorial reach of national laws is complex. To the extent that the Regulations theoretically and may be in practice so far have created a ‘one-stop-shop’, it may be argued that the challenge has been resolved. This is because the Regulations have jurisdiction in all the Member States and Article 10 of the Treaty and Article 3 of the Regulations are instructive on this matter. A Member State whose market has been affected by a merger of undertakings domiciled in another Member State may implore the Commission to invoke the Regulations on the premise of the *‘effects’* doctrine. Similarly, an undertaking affected by such a merger may also do the same. However, the legal risk still remains due to the lack of domestication of the Treaty and the Regulations which continue to haunt and threaten their application in the Common Market. If a Member State in whose jurisdiction the Regulations would apply is of the view that such a development is not in its best interest, it may refuse to recognise the Regulations on the basis of non-domestication and the status quo would revert to the challenges raised by the lack of extra-territorial application of national competition legislation. Member States in this instance may have to rely on their national laws to address the conduct of companies domiciled outside but whose effects are felt in their jurisdictions.

14. A similar situation may arise where an undertaking senses the possibility of a successful prosecution. It may raise arguments of domestication and lack of

[364] Case T-102/96, Gencor Ltd v. Commission, [1999] ECR II-753.
[365] Ibid

jurisdiction of the Regulations to frustrate the whole process. Therefore, domestication should be a precursor to any discussions on extra-territorial application. Though beyond the scope of this dissertation, it is worth noting that the Regulations also purport to have extra-territorial reach as regards conduct taking place outside the Common Market but having effects therein. It remains to be seen how this would be handled should the Commission be faced with such an instance. It is therefore concluded that the Regulations have not resolved this challenge as the legal risk remain until such a time the Regulations are domesticated.

12.2 Lack of Skills and Expertise

15. It is recognised the world over that merger review is a methodical process that requires competence and enforcement experience in order to arrive at accurate determinations. This is even more so with regard to cross-border mergers whose considerations should take into account not only the legal, economic, social and political fabric of one country but a number of countries. Such analysis requires a good number of highly qualified economists and lawyers. However, research conducted in selected NCAs revealed that most merger directorates are significantly understaffed with very little expertise and experience in the enforcement of the merger laws. For example, it would have been expected that with all the years of enforcement experience, Zambia would have a good number of staff in the mergers Division of the CCPC. However, at the time of writing, the mergers Division of CCPC had 5 Members of staff only who were all economists. None of them had a PhD, let alone any qualification specialised in competition law. The situation is the same for most other NCAs[366]. Such lack of specialised skill and expertise may lead to erroneous determination of cross-border mergers with undesired consequences.

Have the Regulations Resolved the Challenge of lack of Skills and Expertise?

16. The categorical answer to this question is no. The situation appears even better at Member State level especially in terms of quantity. The number of staff at the Commission is indisputably low compared to what pertains at national level. The

[366] See also the 2012 UNCTAD Voluntary Peer Reviews in Zambia and Zimbabwe.

Commission only has three dedicated members of staff to review cross-border mergers. Two of these staff are pure economists with impressive qualifications at Masters level although none has a specialised degree in competition law. The third one has a specialised Masters Degree in competition law. The qualifications may be impressive but the numbers are worrying. Such a staff complement does not reflect the status of a regional competition authority that reviews cross-border mergers. Such a workload would not be supported by three members of staff.

17. It gives great trepidation to imagine what remarks the United States of America anti-trust authorities would have on this matter looking at the scathing criticism they had on their European counterparts when they arrived at a divergent decision in the GE/Honeywell case. In their criticism, the DOJ observed that the EC was not equipped with a good number of qualified economists. Whereas the DOJ had by 2001 more than 50 PhD economists to look at mergers, the same was far from true at the EC.[367] Therefore, in the case of the Commission having only three members of staff to look at mergers in a regional economic block is truly laughable. It is recalled from Chapter Six that a lot of elements are analysed in the determination of mergers and such an exercise require highly trained staff if the determinations are to be respected.

12.3 Lack of Financial Resources

18. Indisputably the regulation of cross-border mergers is resource intensive in terms of finances.[368] However, the NCAs interviewed revealed that they were seriously constrained by small budgets that sometimes the money was not enough to run even purely national mergers. They lamented that competition law and policy is not considered a priority by central governments and hence competition authorities are on the lower end of sharing the financial cake. It is even worrying that for some competition authorities that collect fees and fines, this cannot supplement their operations as the central government collects this money and then before the beginning of the financial year allocates a budget to the competition authority which

[367] Remarks of Deborah Platt Majoras, Deputy Assistant Attorney General, Anti-trust Division; U.S Department of Justice. Before the Anti-trust Law Section, State Bar of Georgia. November 29, 2001.
[368] It is public knowledge that most competition authorities in DEEs including those in COMESA have limited resources to efficiently address mergers and anti-trust cases

in some cases is lower than the fees and fines collected. Zambia and Mauritius are good examples.

Have the Regulations Resolved the Challenge of lack Financial Resources?

19. Undoubtedly the Regulations have not resolved this challenge. It is to be recalled earlier in the dissertation that a check of the Commission's budget for merger review disclosed that US$10,000 was budgeted in 2016, 2017 and 2018 on an annual basis. This demonstrates a lack of seriousness and that the work the Commission does on the review of mergers is not comprehensive and lack quality. US$10,000 is not sufficient even to conduct mergers of national character only. Strange enough is that a number of NCAs even have higher budgets than that of the Commission for merger review. If the Commission is to be taken seriously and be respected as a regional competition authority, it should improve on this score. The Commission has money from the merger fees it collects but the prioritization appears to be wrong.

12.4 Poor Coordination and Cooperation Arrangements among the Competition Authorities Involved.

20. It has been established in the various sections discussed that cooperation among competition authorities is not always the easiest approach to take. Usually cooperation is tied to personalities at competition authorities. The personal relationship with officials in the respective authorities breaks the formal approaches and introduces informality which makes the turnaround period faster. One may argue that a formal MOU may be used to get around this problem. Nevertheless, this also has its own challenges as regards confidentiality, the admission of evidence collected through cooperation in a court of law or tribunal among other issues.

Have the Regulations Resolved the Challenge of Poor Coordination and Cooperation Arrangements among the Competition Authorities Involved?

21. The Regulations are binding law with jurisdiction in all the Member States. Therefore, the challenges identified with cooperation should in theory not arise as the Member

States are not brought together by a non-binding understanding that addresses their interests but are brought together by a law which imposes binding obligations on them. Further, as regards mergers, the Commission and the NCAs have created a robust informal mechanism of cooperation that has worked very efficiently over the time the Commission has been in existence. To consolidate this, the Commission has signed MOUs with a number of NCAs to enhance the enforcement of the Regulations. The caution here is that this aspect is also threatened by the lack of domestication of the Regulations. There is a risk that if personalities changed in these NCAs then this bond of cooperation may collapse if the new persons elect to question the jurisdiction of the Regulations in their territories. Domestication is something that should be addressed with a sense of urgency if the continued implementation of the Regulations is not be threatened.

Other Challenges

22. In addition to the challenges discussed above, the research identified other challenges it deemed worth to discuss. These are the lack of autonomy of national competition authorities and multiple membership to RECs.

12.5 Lack of Autonomy of National Competition Authorities

23. One of the fundamental ingredients of a successful competition authority is its autonomy in decision making. Where this is lacking, stakeholders have no confidence in the operations and decisions of such a competition authority. A careful distinction should be made between decisional autonomy and administrative autonomy especially for funding and organisational structure purposes. The authority can dispense with administrative autonomy and still execute its mandate effectively. After all most competition authorities in the Common Market and the world over are funded by central governments so they cannot claim to have administrative autonomy.

24. However, it is a notorious fact that most competition authorities in the Common Market lack decisional autonomy.[369] In many instances, there is a lot of political interference from the highest offices to have a decision made in a certain manner that satisfies their interests. In some cases, as already observed in this dissertation, this is done under the disguise of public interest. Suffice to state that this is not just the case for DEEs but also advanced competition authorities. However, what is worrying in DEEs is the frequency and blatant manner in which this is done and it appears, unlike in developed countries, there are less safeguards in DEEs to mitigate against this risk. Further, the disregard of the law with impunity by governments in DEEs paints a gloomy picture.

Have the Regulations Resolved the Challenge of Lack of Autonomy of National Competition Authorities?

25. It does appear that the Regulations have resolved this challenge. This supposition is based from the fact that the Commission is not subjected to only one government but 21 governments such that it is improbable to find a situation where what is in the political interest of one government is also in the political interest of all the other governments. The Commission is therefore able to stand firm and oppose the political interference of one/few Member States with the assurance that other Member States would support its position. Further, an interview with the Commission officials revealed that some Member States in certain cases have attempted to influence decisions of the Commission or have the Commission exempt a merger from notification despite the clear satisfaction of the merger notification thresholds. The Commission has made it clear to such Member States that its decisions are governed by the Regulations only.[370]

[369] Interviews conducted in December 2018 with the officials from the Malawian, Zambian and Ethiopian competition authorities verified this anecdotal evidence

[370] Interview on 13 March 2019 with Mr. Ali Kamanga, Economist in the Mergers and Acquisitions Division of the Commission.

12.6 Challenges of Multiple Membership to Regional Economic Communities

26. The challenges posed by this is that Member States may end up having conflicting obligations to different RECs pursuant to the legal instruments establishing the respective RECs. This may end up frustrating the enforcement of the respective laws governing the different RECs in the concerned Member States. For example, Kenya is a Member of both the EAC and COMESA. It remains to be seen how Kenya will submit to the jurisdiction of both Commission and the East African Community Competition Authority (EACCA) without violating its obligations under either law. For example, will Kenya call for the notification of a merger that does not meet the COMESA merger notification thresholds but does meet the EAC and Kenya notification thresholds? At this point in time, the legal and business fraternity can only speculate what would happen until such a time EACCA becomes fully operational.

Have the Regulations Resolved the Challenges of Multiple Membership to Regional Economic Communities?

27. In theory the Regulations appear to have resolved this challenge when they provide under Article 5 that:

> **"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Regulations or resulting from action taken by the Commission under these Regulations. They shall facilitate the achievement of the objects of the Common Market. Member States shall abstain from taking any measure which could jeopardize the attainment of the objectives of these Regulations".**

28. It does appear that one measure that may jeopardize the attainment of the objectives of the Regulations is membership to multiple RECs with conflicting obligations. However, in practice the challenge remains. This is because other RECS may have similar provisions in their enabling legislation, and it does not appear that a Member State may be a member of both RECs without conflict arising. Experience has shown

that countries are quick to sign regional legal instruments without appreciating the text and consequence of what they are committing to and they do not take stock of what they have already committed to in order determine any possible conflicts. This is seen from the astronomical pace at which countries in Africa are signing the Africa Continental Free Trade Area even before they fully implement their commitments under their respective RECs and at the Tripartite level in the case of EAC, SADC and COMESA.

12.7 Conclusion

29. This Chapter has disclosed that the fundamental challenges faced by NCAs in the regulation of cross-border mergers have not been resolved through the creation of a supra-national merger control regime. Among the main challenges is the lack of extra-territorial application of national competition laws that cannot be effectively resolved by the regional competition law because the latter faces the fundamental risk of non-recognition due to failure by most Member States to undertake the process of domestication.

30. The next Chapter shall make synoptic comparisons between COMESA and other selected RECS in Africa and beyond as regards the enforcement of a regional competition law. Lessons to be learnt from COMESA shall be highlighted. However, the detailed discussion of this issue is beyond the scope of the dissertation.

Chapter Thirteen

13.0 What does Experience in COMESA Teach us? Comparison with other Regional Economic Communities in Developing and Emerging Economies.

1. COMESA is not the only REC composed of DEEs with a regional competition authority.[371] Other RECs like the Economic and Monetary Community of Central Africa (CEMAC), the Economic Commission for West African States (ECOWAS),[372] the East African Community (EAC), the West African Economic and Monetary Union (WAEMU), Eurasian Economic Commission (EEC) and the Caribbean Community (CARICOM) have regional competition authorities of varying degrees of functionality. As a matter of fact, competition legislation in WAEMU acquired force of law on 1 January 2003 almost two years before the COMESA competition legislation was enacted. Others like the Southern African Development Community (SADC) do not have a regional competition authority but they have within their statutes provisions to do with cooperation on competition matters.

2. The EEC[373] has regional competition mandate but restricted to anti-competitive business practices. It has no mandate on mergers. Therefore, since the focus of the dissertation is on cross-border mergers, no further reference shall be made to the EEC suffice to mention that the Commission can draw lessons and experiences on how they have resolved sovereignty issues and had their law recognised in all the five Member States. It should be noted nevertheless that even the EEC has not completely passed over these issues as can be seen from the sentiments of the Director of the Department of Antitrust Regulation of the EEC, Aleksey Sushkevich that:[374]

---

[371] At the time this research concluded, the COMESA Competition Commission was the most recent fully operational supra-national competition authority. Further, lessons can be drawn from the COMESA Competition Commission in that it has enforced the merger law for a relatively longer period of more than six years.
[372] The Author interviewed Dr. Sacko Seydou, the Program Officer on Competition and Informal Trade at ECOWAS on 4 July 2017 at the UNCTAD Intergovernmental Group of Experts in Geneva. Dr. Seydou stated that the ECOWAS competition authority is poised to commence operations in 2018. Sadly, the competition authority had not commenced operations as at 12 March 2019.
[373] Currently there are five EEC countries: The Republic of Armenia, the Republic of Belarus, the Republic of Kazakhstan, the Kyrgyz Republic and the Russian Federation. Under *"Settings"* http://www.eurasiancommission.org/en/Pages/about.aspx (accessed on 12 June 2019)
[374] Email conversation of 12 June 2019 between Aleksey Sushkevich and the author

> *"We do face the same problem but at the lesser extent: Treaty of Eurasian economic union is above national constitutions, but some procedures need to be presupposed at national legislation in order to be implemented by the EEC in cooperation with national antimonopoly authorities (NAAs). Generally speaking, the problem of this kind can be decided mainly by administrative practice of NAAs and by some minor modification of national secondary legislation".*

3. The dissertation has elucidated the issues below for discussion on what other RECs in DEEs can learn from COMESA.

13.1 Allocation of Jurisdiction

4. COMESA was the only regional economic block that had a fully functional regional competition authority with a mandate on mergers in DEEs at the time of writing. The other regional competition authorities were not yet fully functional due to a number of reasons among them, sovereignty matters, lack of political will, lack of financial and human resources, inherent lacunae in procedural and substantive law and a poor competition culture.

5. The allocation of jurisdiction between National and supra-national competition authorities is a critical and fundamental factor for the success of supra-competition enforcement. Where national authorities are of the view that the supra-national authority is usurping their jurisdiction, they may be reluctant to submit to its jurisdiction or even oppose it. Further, such a situation may frustrate the development and growth of national competition enforcement. For example, the WAEMU Court of Justice effectively usurped the jurisdiction of national competition authorities when it ruled that all anti-trust cases in the region[375] would be handled by WAEMU. This ruling resulted in thwarting of the development and growth of some competition authorities in the region. For instance, the competition authority of Senegal ceased to operate several years ago in yielding to the jurisdiction of WAEMU which has not as of yet created a viable alternative. As a result, Senegal lost its ability to deal with most

[375] See Opinion 03/2000/CJ/UEMOA. The opinion implied that even cases of pure national character should be considered by WAEMU.

of its domestic anti-competitive conduct.[376] It is this complete loss of jurisdiction that Member States oppose.

6. It should be stated that the opinion of the WAEMU Court of Justice notwithstanding, the Treaty of Dakar does not unequivocally grant WAEMU the sole jurisdiction on competition cases in the region. There should be a balancing act between the need to address competition concerns with regional effects and not stripping Member States jurisdiction to review competition cases especially those lacking regional significance. Cases affecting only one Member State and all those affecting more than one Member State but are insignificant in effect should be addressed at national level. COMESA has done well in this area by clearly defining what cases would be of regional importance and which ones would be of national character. This is done by establishing clear and transparent thresholds that demarcate jurisdiction to avoid conflict.

7. The EAC Competition Authority is another regional competition authority that does not have a clear policy on allocation of jurisdiction and can learn from the challenges the Commission went through when it implemented a zero-threshold merger notification regime. A regional competition authority should not be seen to be usurping the jurisdiction of Member States if it has to be respected and accepted by them.

13.2 Merger Filing Fees

8. At the time of writing the dissertation, the EAC competition authority was still discussing the merger notification fees it shall be charging once implementation commences. It should not follow COMESA's footsteps of charging unreasonably high filing fees at commencement. It risks being rejected and not taken seriously by the business community, a situation that may threaten its very existence. High filing fees may negate compliance by firms. The filing fees should to a great extent reflect the

---

[376] See e.g., Daniel P. Weik, Competition Law and Policy in Senegal: 'A Cautionary Tale for Regional Integration?' 33(3) World Competition 521 (2010)

cost of reviewing a merger. COMESA has since reduced the merger filing fees but the dissertation has established that the filing fees can be reduced further.

13.3 Funding and Staff Complement

9. Adequate funding for a regional competition authority is a very important consideration. The Commission's merger review annual budget of US$10,000 is inadequate. By all reasonable standards and under any conceivable situation, the Commission cannot review more than 46 mergers in a year as it did in 2013 with this budget. The conclusion from this would be that the assessment of these mergers lack thoroughness. Other regional competition authorities should not fall into this trap. It does appear that the EAC competition authority is already falling into this trap as it is grossly under-funded.[377]

10. Further, a regional competition authority should have adequate staff numbers in order to effectively address regional mergers. It is improbable that the three staff members at the Commission's merger division have done an effective job of reviewing regional mergers. The EAC Competition Authority can learn from this mistake. As at 28 August 2019, the EAC Competition Authority had only one staff member to run all the affairs of its competition authority. This is unacceptable. The situation is the same at ECOWAS. The operationalisation of the ECOWAS Competition Authority has stalled due to administrative challenges among them lack of adequate funding and staff to implement the law.[378]

13.4 Advocacy

11. Lobby and advocacy is another very important activity other regional competition authorities should undertake. Before the commencement of the operations of the competition authority. COMESA did not do a good job on this. Most stakeholders did not know about the existence of the Regulations and the Commission. Even some

[377] The author was privileged to conduct an induction workshop for the Board of EACCA on the regulation of regional competition laws held on 1 – 2 February 2017, in Arusha, Tanzania.

[378] Email exchange between Dr. Sacko Seydou, the Program Officer on Competition and Informal Trade at ECOWAS and the author on 12 March 2019.

Member States were not aware of this. This affected the initial acceptance and submission to the jurisdiction of the Commission. RECs that are yet to commence the regulation of cross-border mergers may consider significant advocacy programs to raise awareness before the authority commences operations. Advocacy may also lead to lobbying of governments and creation of political will and support. For example, it may be argued that the CEMAC competition authority[379] has not punished any firm for any anti-trust infringement because of lack of political will and awareness to do so despite the law been directly applicable in the Member States. Suffice to mention that the Commission has repaired this shortcoming by engaging in frequent advocacy activities after the commencement of operations, a situation that has resulted in the successful operation of the Commission despite the legal bottlenecks.

13.5 Effective National Competition Authorities

12. Another important tenet observed is that in order to have an effective regional competition authority, there should be effective national competition authorities. In COMESA, a good number of Member States have competition authorities. However, only a few appear to be effective, notably, Kenya and Zambia. Effective national competition authorities assist regional competition authorities in the assessment of mergers and in the design of effective remedies since they are closer to conduct with cross-border effect implemented in their jurisdictions. Nevertheless, in comparison to some other regional competition authorities, the competition authorities/laws in COMESA appear to be better. For example, as regards institutional challenges, Dr. Kusha Haraksingh, Chairman at CARICOM Competition Commission lamented that "the majority of CARICOM Member States have not enacted competition laws and/or established national competition authorities".[380] Where there is no national

[379] The CEMAC Competition Regulations are binding in their entirety and are directly applicable in the Member States. See Article 21 of the Addendum to the CEMAC Treaty relating to the institutional and legal system of the Community. COMESA can learn from CEMAC by inserting a provision in the Treaty and the Regulations providing for Direct Applicability. The European Union legal system has similar provisions of direct applicability. It may not completely address the challenges of implementation in COMESA as domestication would still remain a challenge but it would be a step in the right direction. Notable though is that CEMAC appear not to have mandate on mergers. See for example African Competition Law Developments in 2018 and Outlook for 2019 by LEXAfrica. Under *"Settings"* https://www.lexafrica.com/competition-law-outlook-for-2019/ (Accessed on 12 June 2019).

[380] Dr. Kusha Haraksingh, Chairman of the CARICOM Competition Commission, Presentation titled *'Implementation of the Competition Provisions in the Revised Treaty of Chaguaramas, Challenges faced by the*

competition law and/or national competition authorities, then the effectiveness of the CARICOM Competition Commission in the Member States would be hampered under Article 174 of the Treaty[381]. This provision empowers national competition law to have the legal right to compel persons or institutions to provide information or appear to give evidence on behalf of the CARICOM Competition Commission.

13.6 Corporate Governance/sound and Legitimate Institutional Framework

13. There is need to ensure and safeguard the autonomy of these institutions to avoid their decisions being subjected to undue influence that would compromise their integrity. This should be done through water-tight procedural and substantive legal provisions. For example, in COMESA there is a clear separation of decision-making beginning from the Commission which investigates and makes recommendations to the Committee Responsible for Initial Determination (CID) created under Article 13 of the Regulations and Rule 24 of the COMESA Competition Rules. The decisions of the CID are appealable to the Board of the Commission established under Article 12 of the Regulations. At several fora, the Commission is on record arguing that the decision of the Board is further appealable to the CCJ. However, the Regulations do not have any provision for taking matters to the CCJ in an event of any dispute regarding the interpretation or application of the Regulations. The Regulations appear to suggest that any such disputes end with the Board as an appeal from the Committee Responsible for Initial Determination according to Rule 24 of the COMESA Competition Rules lies with the Board and no further legal path is drawn for pursing the matter further to the CCJ. Rule 24 of the COMESA Competition Rules only provides that the respondent party dissatisfied with the initial determination made by the Committee may appeal to the full Board of Commissioners. Similarly, Article 26(12) of the Regulations suggests so.

14. This *lacuna* is not only worrying but has serious implications as it conflicts with the principles of accountability, fairness and transparency. It defeats the rule of natural

CARICOM Competition Commission as a Supra-national Agency' made at the Latin America Competition Forum on 3 – 4 September 2013.

[381] Revised Treaty of Chaguaramus establishing the Caribbean Community including the CARICOM Single Market and Economy.

justice in terms of having the right to a hearing. This has to be addressed in both the Treaty and the Regulations and this fact was graciously admitted by one of the CCJ Judges, Justice Mary Kasango.[382]

15. In addition, it does appear that the decisions made by the CID may be defective at law. Article 13(4) of the Regulations provides that the Chairperson of the Board shall assign three of the Commissioners to be full-time members of the Board. The full-time Commissioners shall each have suitable qualifications and experience in law and economics and will form the CID. From the Commission's practice the Members of the CID are not permanent[383]. Further, the Regulations require that CID Members should be qualified in law and economics. However, an investigation on the qualifications of the members who have served on the CID revealed that not all of them had the required qualifications.

16. Sufficiency of institutional framework is critical in the regulation of cross-border mergers. While the Commission has put in place sufficient measures to ensure this, more can be done. For example, the Council approved the COMESA Competition Commission Appeals Board Procedure Rules to create an avenue of appealing Board decisions. However, these Rules are *ultravires* as they are made pursuant to Article 39 which from the reading of the law should only cover Part V of the Regulations which addresses consumer protection matters. Further, the Treaty, to which the Regulations are subservient does not provide for such matters as already observed in the earlier chapters of this dissertation. In addition, Article 26(12) of the Regulations appear to purport an avenue for third party action but this is only at Board level of the Commission and not beyond . Such a matter, *prima facie* cannot be taken to the CCJ as the applicants and the respondents to the CCJ under Articles 24 -28 of the Treaty does not include parties in such matters. There is need to amend the Treaty to expressly provide this avenue and prevent any latent legal dispute. Such an amendment would also enhance due process in the regional merger control regime.

17. Therefore, new and yet to commence regional competition authorities can learn from COMESA and refine their laws to ensure that there is sound institutional framework

[382] The author engaged Justice Mary Kasango of the COMESA Court of Justice on the subject on 29 June 2016.
[383] Interview with the Board Chairperson of the Commission on 27 August 2019.

to secure independence of a competition authority and effective implementation of the Regulations.

13.7 Domestication

18. Lastly, RECs should make sure that regional competition laws are recognised in their countries by processes that are provided for in domestic laws. In the absence of this, the regional law risks being ignored. The Regulations suffer this risk and it remains to be seen how Member States, the business community and other stakeholders would react once the Commission imposes sanctions which it has never done before possibly for fear of the imminent risk of challenge of jurisdiction on account of non-domestication of the Regulations. For example, Dr. Kusha Haraksingh[384] observed that the jurisdiction of the CARICOM Competition law needs to be respected in the Member States. However, some Member States like Jamaica have not enacted provisions in their national laws allowing for the recognition of the CARICOM Competition law. CARICOM may want to address this matter before they commence the full implementation of their regional law.

13.8 Conclusion

19. It may appear that COMESA was not ready for a regional competition authority as a number of things were not put in place by the time enforcement commenced. It may actually be argued that COMESA is operating illegally in most Member States as the Treaty is not domesticated therein and therefore not part of domestic law notwithstanding that under international law the Treaty is binding on the Member States. The effect of non-domestication of the Treaty and the Regulation on their practical implementation cannot be ignored. Further, the staff complement and funding at the Commission is inadequate to enable the Commission to effectively detect anti-competitive mergers of regional character and design effective remedies to address them. Other regional competition authorities in DEEs may learn from COMESA and avoid making similar mistakes.

[384] Supra note 374

Chapter Fourteen

14.0 Conclusions and Recommendations

14.1 Conclusion

1. The objective of the dissertation was to conduct an assessment of whether supra-national competition authorities addresses the challenges of cross-border regulation in DEEs. This was against the background that the regulation of such mergers poses challenges for both NCAs and the merging parties. Among the reasons why the Commission and the Regulations were promulgated was to resolve the identified challenges. The study delved into these matters and addressed the question of whether the creation of a supra-national merger control regime in the Common Market has resolved these challenges. The results of the dissertation could be extrapolated to other RECs in DEEs.

2. The study revealed that a number of concerns and challenges remain even in the wake of the establishment of a supra-national merger control system. The Commission is critically resource challenged both financially and from a human resource point of view. For it to be respected and indeed reflect the true character of a regional competition authority, it should compare well with advanced competition authorities like the United States anti-trust authorities and the EC to the extent possible reflecting different developmental levels. In its current form, the Commission risks not to be taken seriously. It is difficult to imagine how the Commission would establish the effects of a merger transaction in the Common Market with such constrained resources. The Commission risks approving mergers that may have competition concerns or reject pro-competitive mergers and fail to address the reasons why it was established.

3. Most of the concerns though serious may be easy to address. Concerns like high filing fees and others inherent in the Regulations may easily be addressed by amending the Regulations, action which is permissible at law as laws are living things that are not static. However, the research has revealed that there is one very serious concern and

challenge that threatens the existence and durability of the entire COMESA merger regime. This is the lack of domestication of the Treaty and the Regulations. This threat is so serious that there is urgent need to domesticate the Treaty or at least the Regulations. The argument that Treaty law is binding on State parties pursuant to the Vienna Convention on the Law of Treaties and the principle of *pacta sunt servanda* while sound, remains an academic argument as this is not what pertains in reality. Reality is replete with cases where parties have challenged the jurisdiction of international law on the basis that it has not been transformed into municipal law especially when litigation threatens their interest. Indeed, international courts and tribunals would rule that international law is binding but its enforcement would be a challenge as domestic institutions would be required to enforce such judgments. The CCJ has given a neat judgment on the matter of domestication in the **Polytol Paints & Adhesives Manufacturers Co. Ltd v. the Republic of Mauritius** but it remains to be seen if Mauritius shall respect this judgment. To date, there is no publicly available information stating that Mauritius has obliged to this ruling. Interviews with officials from the legal division of the COMESA Secretariat reveal that a political route to resolve the matter was subsequently followed. Political routes are not satisfactory as they do not provide binding precedents.

4. Lessons can be drawn from the demise of the SADC tribunal by reviewing the matters that led to its dissolution. It is to be recalled from Chapter Ten of the dissertation that the failure by Zimbabwe to respect the ruling of the SADC tribunal in the **Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe** case was a *coup de grace* to its existence. As rightly observed by Laurie Nathan, "the dissolution of the SADC tribunal reflects SADC's hierarchy of values in terms of which the organisation's formal commitment to a regional legal order is subordinate to the political imperatives of regime solidarity and respect for sovereignty to regional institutions".[385] In this case, the other Member States instead of imposing sanctions on Zimbabwe for abrogating the Treaty, sided with Zimbabwe and agreed with its argument based on *inter alia,* domestication. Indeed as Laurie Nathan further observes, the demise of the SADC tribunal serves as a cautionary tale, demonstrating that the jurisdiction of regional institutions derives not simply from their official

[385] The Disbanding of the SADC Tribunal: A Cautionary Tale: by Laurie Nathan. Laurie Nathan is Director of the Center for Medication in Africa at the University of Pretoria

mandates but also from the response of Member States when an international organisation rules against one of them.[386] These risks are on all fours with the inherent risk that the Commission and the Regulations are facing in the wake of non-domestication.

5. It should be noted that domestication is a prerequisite in jurisdictions that observe dualism. In such jurisdictions, it is the Executive Branch of Government that has the mandate to enter and negotiate international legal instruments. Usually the Attorney General is heavily involved in the process in conjunction with the Ministry of Foreign Affairs and other line Ministries. Once the international instrument is ratified, it is the duty of the line Ministry to introduce the domestication bill for enactment to the legislature. However, it is exceedingly disappointing that the same Ministries who ratified the international legal instruments and who are presumed to understand the contents very well drag their feet to introduce the domestication bill to the legislature. In these legal systems, it is the legislative branch of government that is responsible for the transformation of international law into domestic law. Without this process, international law cannot be observed at national level. This is consistent with the holding of the Court in the case of **Attorney General for Canada v. Attorney General for Ontario, (1937) A.C. 326 Judicial Committee of the Privy Council,** where Lord Atkin succinctly stated that:

> ***"If the national executive, the government of the day, decide to incur the obligations of a treaty which involve the alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes".***

6. The study therefore concludes that the main challenge to the effective implementation of the Regulations is the lack of domestication. From here some challenges faced by the NCAs like lack of extra-territorial reach of national law still remain on the premise that even the regional law may not be recognised in Member States. ***Therefore, the creation of a supra-national competition authority has not resolved the challenges of regulating cross-border mergers in the Common Market leading***

[386] It should be recalled that President Robert Mugabe dismissed the Tribunal's judgment as an exercise in futility and an intolerable interference in the country's domestic affairs.

failure to reject the null hypothesis. This result can be generalised to regional competition authorities whose membership is that of DEEs as their characteristics are similar to that of COMESA.

14.2 Recommendations

7. A number of recommendations can be made in order to address the concerns identified in the research. However, the research focussed on recommendations that would be most effective for the efficient implementation of the Regulations. There should be amendments to the legal and administrative frameworks.

14.2.1 Amend Article 3(2) of the Regulations to expressly make it clear that Merger Notification under the Regulations is Mandatory

8. As observed, uncertainty and ambiguity are serious concerns and costly to the merging parties. The wording of Article 3(2) presupposes a situation where a merger is consummated and if it results in affecting trade between Member States and restricting competition in the Common Market then the jurisdiction of the Regulations is invoked. It does not reflect a pre-merger notification process but post-merger assessment where there are demonstrable anti-competitive effects resulting from the merger. This is in conflict with Article 24 of the Regulations which calls for mandatory merger notification. It is therefore recommended that the Commission should embark on an exercise to amend Article 3(2) of the Regulations which clothes it with jurisdiction. The wording of Article 3(2) should therefore read:

> **"These Regulations apply to conduct covered by Parts 3, 4 and 5 which are likely to have an appreciable effect on trade between Member States and which are likely restrict competition in the Common Market".**

14.2.2 Amend Article 23(1) to Refer to 'Control' and not 'Controlling Interest'

9. It is observed that Article 23(1) of the Regulations uses the term *'controlling interest'* to define a merger. This term does not appear consistent with model competition laws

that use the term *'control'* to define a merger. The Guidelines have addressed this seemingly unusual term by defining it with reference to the term *'control'*. However, it would be sound to amend the law so that *'control'* is used therein and not *'controlling interest'*. The amendment should also ensure that the Regulations adequately capture Joint Ventures. Therefore, Article 23(1) may be amended to read as:

> **"For the purpose of this Part, merger means the direct or indirect acquisition or establishment of control by one or more persons in the whole or part of the business of another person or the creation of a joint venture by two or more persons…."**

14.2.3 Amend Article 23(3)(a) of the Regulations to Avoid Capturing Mergers Lacking Local Nexus

10. Article 23(3)(a) is also a troublesome provision for it may result in the capture of mergers lacking local nexus. Indeed, the Commission in 2013 and a greater part of 2014 captured mergers lacking local nexus on the basis of the defective wording of Article 23(3)(a) which contemplates a situation where a merger would be captured even if the target firm has no operations in the Common Market as long as the acquiring firm has operations in two or more Member States. It sounds inconceivable that such mergers would lead to negative effects on trade between Member States and a restriction on competition in the Common Market. This absurdity has been remedied in the Guidelines and to a greater extent the Rules but such remedies are *ultra vires* Article 23(3)(a). Rules and Guidelines are subservient to the Regulations.

11. Further, as already observed, even the Rules on Merger Notification Thresholds and Method of Calculation have not effectively addressed the problem and require amendment as proposed earlier in the dissertation. The wording of Rule 4 of the Rules on the Determination of Merger Notification Thresholds and Method of Calculation presupposes that it is possible to review a merger lacking nexus. For example, a merger involving two acquiring parties may be captured by the Regulations even if the target has no operations in the Common Market as long as the acquiring firms

have met the merger notification thresholds. The Rules should have been specific that at least one acquiring firm and one target firm should derive a turnover or hold assets of US$10 million or more in the Common Market. To effectively address the concern of local nexus, Article 23 can be amended to read as follows:

> **"A proposed merger shall be a 'notifiable merger' if:**
>
> (a) **the combined annual turnover or value of assets in the Common Market of all acquiring parties and target parties exceeds the prescribed threshold; and**
>
> (b) **the annual turnover or value of assets in the Common Market of each of at least one acquiring party and one target party exceeds the prescribed threshold,**
>
> **unless each of the parties to a merger achieves or holds more than the prescribed percentage of its annual turnover or value of assets in the Common Market within one and the same Member State".**

14.2.4 Introduce an Express Provision to make the COMESA Merger Control Regime Suspensory to avoid the Uncertainty of whether the Regime is Suspensory or Non-Suspensory

12. The uncertainty on whether the Regulations provide for suspensory or non-suspensory merger review may have serious legal and financial consequences. The Regulations should make it express to suspend the implementation of the merger pending competition review by the authority. This is important as it does not put the Commission in an awkward position of imposing remedies as a fire fighting solution should the merger be found to be incompatible with the Regulations post implementation. This outcome happened in the merger involving Uber and Grab in September 2018 in Singapore. In that transaction, the parties implemented the merger without notifying the Singaporean Competition Authority as required by law. The parties were subsequently fined for failure to notify the transaction and remedies were imposed to address anti-competitive concerns. Officials from the Competition Authority of Singapore lamented that had they assessed the transaction before implementation, they would have rejected it but since the merger had already been implemented, it was difficult to reverse because of a number of complexities. The

Competition Authority of Singapore was left with no option but to impose remedies on which they conceded that some of them had not addressed the concerns as expected.[387] Suspending the transaction before implementation would also help the parties to avoid costly processes of undoing the merger should the Commission demand so. Most importantly, such a system would eliminate uncertainty on both the Commission and the merging parties. Therefore, the Regulations under Article 24 should introduce provisions reading as follows:

"No person may implement a proposed merger, unless the proposed merger is—

a) **approved by the Commission; and**
b) **implemented in accordance with any conditions attached to the approval.**

No merger carried out in the absence of authorisation from the Commission, shall have any legal effect, and no obligation imposed on the participating parties by any agreement in respect of the merger shall be legally enforceable".

14.2.5 Do away with Deadline after Triggering Event

13. The Regulations should maintain the provision on the triggering event for notification. This is important as it prevents premature notifications which may be costly for the parties as well as the Commission if the proposed merger is aborted. However, the deadline within which to notify under Article 24(1) must be done away with for it practically serves no purpose especially in suspensory jurisdictions. The Commission has never invoked this provision for any parties that have violated it. This shows how it does not serve any practical purpose. Article 24(1) should therefore be completely removed from the Regulations especially that the dissertation has recommended for a suspensory system. In such a system, a deadline to notify after the trigger event is superfluous.

[387] Interview with officials from the competition authority of Singapore on 30 August 2019. It should be noted that reference to Singapore should be put in context. Pre-merger notification is mandatory in Singapore and failure of the parties was an infraction of the law. However, the challenge that resulted poses the same risk in non-suspensory regimes.

14.2.6 Address the Confusion of Public Interest under Article 26 of the Regulations which makes the Consideration of Public Interest Otiose because any Merger that results in SPLC and Dominance is Contrary to Public Interest.

14. Article 26 should be amended to eliminate the uncertainty the reference to public interest has brought in that provision. The public interest factors mentioned there are pro-competitive. It is not the traditional public interest that is known in competition assessment. The Regulations under Article 26(2) presents a best practice approach to review a merger using SLC but then has a confusing sub-article (3), which imbues SLC and Dominant test as part of a public interest process. It states thus:

> **"A merger shall be contrary to public interest if the Commission is satisfied that the merger:**
>
> **a) has lessened substantially or is likely to lessen substantially the degree of competition in the Common Market or any part thereof; or**
>
> **b) has resulted, or is likely to result in, or strengthen a position of dominance".**

15. This is a peculiar approach. Public Interest should be a completely separate process from SLC and Dominance determination. The Regulations should be amended to have a separate section for traditional public interest considerations like employment, saving the failing firm, enhancing the competitiveness of local firms at international markets etc. Such public interest considerations should be merger specific and predictable. It should be made clear that public interest that is in the interest of one Member State to the detriment of others shall not be entertained. The Commission may also consider coming up with public interest guidelines for clarity and uniformity of interpretation.

14.2.7 Consider Revising the Filing Fees Downwards

16. As already observed, merger filing fees should be used to cover the costs of investigating a merger. However, it does appear that most jurisdictions in the Common Market and beyond use merger notification fees to fund general operations

of competition authorities. This is not right as the high filing fees tend to act as a tax on the merging parties. Further, competition authorities' focus should not be merger filing fees but the need to ensure that mergers do not have the effect of substantially lessening competition. Merger application should not attract such unnecessary costs as they raise the cost of doing business. The fees charged by the Commission are seemingly high capped at US$200,000. The analysis under Chapter Eleven of the dissertation has revealed that the merger filing fees may be revised downwards. In order to gain acceptance and respect by the stakeholders, the Commission should consider revising the filing fees downwards so that they reflect the cost of reviewing a merger. This will also reduce the cost of doing business in the Common Market and encourage investments ultimately enhancing the regional imperative agenda.

14.2.8 Consider Revising the Thresholds Upwards to Capture only those Mergers with Regional Significance.

17. While the study has revealed that the current merger notification thresholds are close to optimal, the Commission may also consider revising the thresholds upwards so that it only captures mergers of regional importance and enhance its acceptance by the NCAs who may have the trepidation that the Regulations usurp their jurisdiction. From the mergers reviewed by the Commission since inception, it is clear that a majority of them have not raised competition concerns, a justification to raise the thresholds. Further, the Rules may be revised to only consider turnover and not assets for determination of thresholds as it gives a better proxy of transactions likely to raise competition concerns.

18. The Commission may also take an active lead in Africa to promulgate merger notification thresholds on transactions that are likely to escape the net of a competition law because turnover, asset or market share thresholds are an inappropriate measure in such circumstances. For example, in digital markets, some firms may not have immediate turnover and they may be offering some of their services free of charge. The profits and significant turnover may not be the immediate objective but the creation of network effects and the critical mass required for the new firm to begin realising meaningful revenues. Therefore, such companies may have a

good and significant number of users but the turnover figures may be misleading. Such a challenge arose in 2014, in the US$19 billion merger between Facebook and WhatsApp. Despite this very large transaction value, the merger escaped notification to the European Commission because it did not meet the notification thresholds under the European Merger Regulations.

19. To address this problem, competition authorities especially the Federal Cartel Office of Germany have taken the lead in discussions and looking for the solution. In Germany, under new laws, merger control will be required if the value of the consideration for a transaction exceeds €400 million in Germany (€200 million in Austria) even if the companies involved do not meet the domestic revenue thresholds.[388] It is interesting that some commentators and experts[389] in the field of competition law have given scathing attacks on the determination of merger notification thresholds based on transaction value. The argument has been that a transaction value is not a true reflection of the economic activity of the merging parties as it is possible to have a merger with a huge transaction value but relatively low economic activity in a particular jurisdiction. The converse is also true. It does appear that in the digital economy, the transaction value may give a crude indication of the importance of a particular transaction in a particular jurisdiction.

14.2.9 Increase Allocation of Resources to the Commission to make it Effective in Dealing with Regional Mergers.

20. It is to be recalled that a check of the Commission's budget for merger review disclosed that US$10,000 was budgeted in 2016, 2017 and 2018 on an annual basis. This budget is far from enough to facilitate the effective review of cross-borders.[390] Further, the number of staff at the Commission is indisputably low compared to what

---

[388] Mergers and the digital economy; White & Case LLP. Under *"Settings"*, https://www.lexology.com/library/detail.aspx?g=e642fc40-b55d-4dfc-88d3-23620ab583c8 (accessed on 26 May 2019).

[389] This includes the author. As a matter of fact, even in this dissertation the author has criticized transaction value thresholds. However, the criticism is sound as contextualized to traditional mergers. The digital market has presented peculiar characteristics requiring new tools.

[390] See Chapter Twelve for detailed discussions on the Commission's budget for merger investigation.

pertains even at national level. A workload involving the assessment of cross-border mergers would not be supported by three members of staff.

21. To address this problem, there should be more funding and increased staff complement for the Mergers Division at the Commission. In order to effectively and efficiently review cross-border mergers, the Commission's resources should be significantly increased as what is currently obtaining may not be far from joking.

14.2.10 Clothe the Regulations with Express Exclusive Jurisdiction on Mergers that Satisfy the Regional Dimension Requirement.

22. A review of the Regulations revealed that there is no express provision that provides the Commission with exclusive jurisdiction to review mergers with a regional dimension. There is a risk that Member States can still call for merger notification resulting in multiplicity of review processes and increased cost for the merging parties. This would paralyse the envisaged 'one-stop-shop' principle. There should be an express provision in the Regulations clothing them with exclusive jurisdiction on mergers that have a regional dimension. Lessons can be drawn from the EUMR which have exclusive jurisdiction on concentrations with a community dimension. Specifically, Article 21(3) of the EUMR provides that "**no Member State shall apply its national legislation on competition to any concentration that has a Community dimension".**

14.2.11 Domestication of the Treaty and the Regulations for Effective Enforcement

23. Important of all, the COMESA Secretariat and the Commission should embark on a vigorous campaign to lobby the Member States to domesticate the Treaty and the Regulations. Lack of domestication threatens the very existence and operations of the Commission and lessons can be drawn from the experience of the SADC tribunal following its decision in the **Mike Campbell and Others v. Republic of Zimbabwe.** It has been observed that domestication is indispensable for the effective implementation of the Regulations especially in dualist legal systems. This is because even if international legal instruments like the Vienna Convention on the Law of

Treaties and Case Law appear to ignore this by stating that the domestic legal order should not affect the enforcement of international law, this remains theoretical. Practice has shown that in most cases, countries do not respect such laws unless it is in their interest to do so.

24. There are some Member States with a monist legal approach, but it appears that even then, practical challenges of enforcement may arise and the principles of reciprocity may jeopardize the effectiveness of such a system. The challenge posed by lack of domestication affects both the merging parties and the National Competition Authorities as it results in significant legal uncertainty, a very inappropriate situation in law. This situation may jeopardise the attainment of the objectives of the Common Market and indeed the Regulations. Where there is risk of enforcing the Regulations because of lack of domestication, it is appropriate and legally sound to conclude that the Regulations have not yet resolved the challenges of cross-border merger regulation in the Common Market.

25. In conclusion, it is observed that the Commission has to do a lot to effectively enforce the Regulations and realise its mandate. This can be summed up in the words of Professor Eleanor Fox who observed that:[391]

> *"So many of the competition problems in and among the COMESA Member States are cross-border. The problems are bigger than any Member State. COMESA has a huge opportunity to see the big picture and to take action against conduct and mergers that hurt the community as a whole – like EU does. It has the opportunity to be the voice of competition for the community and could stand up to or be an equal with Western authorities against huge mega mergers that have a principal impact in Africa, that probably should be enjoined, and that the West always lets through. This is a big challenge that it doesn't (yet) take on".*

[391] Eleanor Fox and Mor Bakhoum, Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa (Oxford: Oxford University Press 2019) 133- 139

26. Nevertheless, hope should not be lost as this situation is not unique to COMESA and other developing regional competition authorities. Developed countries particularly the EU also went through these challenges and overcame.

Bibliography

Books

Jones, Alison, and Sufrin Brenda, EC Competition Law, 2nd ed. Oxford: Oxford University Press, 2004.

Zanetti Bruno, Cooperation between Anti-trust Agencies at the International Level. Oxford and Portland, Oregon: Hart Publishing, 2002.

Perloff Carlton, Modern Industrial Organization. New York: Addisson-Wesley Longman, Inc., 1999.

Kwang Chung, Weston Fred, and Hoag Susan, Mergers, Restructuring, and Corporate Control. New Delhi: Prentice Hall, 2004.

Maher, Dabbah, and Paul, Lasok, Merger Control Worldwide. Cambridge: 2005.

Fox Eleanor, The Competition Law of the European Union in Comparative Perspective: Cases and Materials. New York: Thomson Reuters, 2009.

Fox Eleanor and Bakhoum Mor, Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa (Oxford: Oxford University Press 2019) 133-139

Joekes Susan. Competition and Development: The Power of Competitive Markets. Canada: International Development Research Centre, 2008.

Muller, Magenheim, (1998) read as Hitt, M.A; Mergers and Acquisitions: A Guide to creating Value for Stakeholders. New York: Oxford University Press, New York, 2001.

Brassey, Martin et al., Competition Law. 1st ed. Lansdowne: Juta Law, 2002.

Organisation for Economic Cooperation and Development and World Bank. A Framework for the Design and Implementation of Competition Law and Policy, 1999.

Scherer and Ross, Industrial Market Structure and Economic Performance. Houghton Milfflin, 3rd ed, 1990

Whish, Richard. Competition Law. 5th ed. Oxford: Reed Elsevier (UK) Ltd, 2003.

Weston, F.J., and Johnson, B, What it takes for a Deal to Win Stock Market Approval, Mergers and Acquisitions, Philadelphia: 1999.

Publications

Asher, E.O. 2013. "Incorporating Transnational Norms in the Constitution of Kenya: The Place of International Law in the Legal System of Kenya". International Journal of Humanities and Social Science. Vol. 3, No. 11; June 2013.

Calvin S. Goldman, Q.C. and J.D. Bodrug. "Competition Law of Canada". Volume 2, Juris Publication, 2005, p. 13

Csaba Balogh. Analysis of Factors Determining Success of Cross-Border Mergers and Acquisitions. Budapest: PhD Thesis, 2006

M. Fevzi Toksoy, Competition Law Aspects of Mergers and Acquisitions in the EU and Turkish Law. Does Turkey Call for a Merger Reform? The Answer and a Policy Proposal. Istanbul: PhD Thesis, 2007

United Kingdom Office of Fair Trading, Abuse of a Dominant Position; Understanding Competition Law, 2004

Organisation for Economic Cooperation and Development Policy Roundtables. Cross Border Merger Control: Challenges for Developing and Emerging Economies (posted on 13th February 2012) under "settings," http://www.oecd.org/competition/mergers/50114086.pdf (accessed on 9 October 2014).

Richard Whish and Diane Wood, 'Merger Cases in the Real World – A Study of Merger Control Procedures (OECD, 1994) ('Whish /Wood Report').

Roundtable on Cross-Border Merger Control: Challenges for Developing and Emerging Economies Contribution from the European Union; 17 and 18 February 2011

The Internationalisation of Merger Review: The Need for Global Solutions" produced by the IBA's Global Forum for Competition and Trade Policy,
Policy Directions for Global Merger Review.

United Nations Conference on Trade and Development, Manual on the Formulation and Application of Competition Law. New York: United Nations, 2004.

White and Case LLP, White and Case Global Merger Control Survey Finds Flood – Tide may be Ebbing After Years on the Rise: Press Release, 16 January 2003.

<u>Other Sources</u>

Canadian Merger Enforcement Guidelines

COMESA Merger Assessment Guidelines, October 2014.

Competition and Consumer Protection Commission Guidelines for Merger Regulations

European Commission's Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law

European Union Guidelines on the Assessment of Horizontal Mergers

Merger Guidelines of Kenya

Zambia Competition Commission Staff Paper. Case File No: ZCC/CO/0I38

<u>Cases</u>

Attorney General for Canada v. Attorney General for Ontario, (1937) A.C. 326

Brown Shoe Co. v. United States, 370 U.S. 294 (1962)

Commission v Tetra Laval, Case T – 5/02 [2002] ECR II – 4381, [2002] 5 CMLR 1182

Chihana v R (MSCA Criminal Appeal No. 9 of 1992) [1993] MWSC 1 (29 March 1993).

Europemballange Corporation and Continental Can Company Inc. v. Commission [1973] ECR 215.

Franco Nevada Mining Corporation Ltd/Gold Fields Ltd (CT 77/LM/Jul00, 28.9.2000)

Gencor v. Commission, Case t-102/96, [1999] ECR II - 753

Hilton v. Guyot, 159 U.S. 113, 164 (1895)

Hoffman-La Roche & Co. AG v. Commission of the European Communities [1979] ECR 461,
para 39

JD Group Limited/Ellerine Holdings Ltd CT 78/LM/Jul00, 5.9.2000)

Kali und Salz Case IV/M190,[1993] 4 CMLR M17.

Mike Campbell (Pvt) Ltd. and Others v. Republic of Zimbabwe (2008), SADCT 2/2007

Polytol Paints & Adhesives Manufacturers Co. Ltd v. the Republic of Mauritius. Reference No. 1 of 2012 (2013)

Queensland Wire Industries Proprietary Company Limited and Another (1989) 167 CLR 177 F.C.89/004

Tetra Laval v Commission, Case T – 5/02 [2002] ECR II – 4381, [2002] 5 CMLR 1182

The Attorney General v. Roy Clark, Supreme Court of Zambia NO. 4 of 2008

United States v. Baker Hughes Inc., 908 F.2d 981, 987 (D.C. Cir. 1990)

United Brands Co. v. Commission of the European Communities. 21. Comm. Mkt. L.R. 429 (1978)

United States v. El du Pont de Nemour and Co. 351 US 377 (1956)

United States v. Philadelphia National Bank, 374 U.S. 321, 365 n.42 (1963)

United States v. Long Island Jewish Med. Ctr., 983 F. Supp.121, 136 (E.D.N.Y. 1997)

United States v. Oracle Corp., 331 F. Supp.2d 1098 (N.D. Cal. 2004).

APPENDIX ONE
COMMON MARKET ECONOMY

Gross domestic product, current prices, US$ million

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Burundi	915	1,117	1,273	1,356	1,612	1,775	2,032	2,236	2,333	2,575	2,934	3,002	3,133	4,058
Comoros	363	388	404	466	533	537	544	611	596	658	684	589	620	846
DRC	10,341	11,951	14,296	16,364	19,129	18,315	20,641	24,575	27,566	32,676	35,918	38,496	41,615	26,170
Djibouti	666	709	769	848	984	1,015	1,099	1,239	1,354	1,455	1,588	1,727	1,894	1,993
Egypt	82,855	94,127	112,902	137,055	170,797	198,316	230,024	247,726	278,769	288,007	305,567	332,075	332,349	343,473
Eritrea	1,109	1,098	1,211	1,318	1,380	1,857	2,117	2,608	3,092	3,502	4,052	4,666	5,352	5,398
Ethiopia	10,142	12,408	15,283	19,701	26,839	32,464	29,917	31,958	43,134	47,656	55,512	64,683	72,523	64,223
Kenya	18,064	21,001	25,826	31,958	35,895	37,022	40,000	41,672	50,420	55,129	61,494	63,624	68,919	71,821
Libya	32,996	47,335	54,963	67,690	83,651	56,236	73,397	38,843	89,242	62,872	33,819	29,763	33,157	118,605
Madagascar	4,364	5,039	5,516	7,343	9,413	8,550	8,730	9,893	9,920	10,602	10,674	9,744	9,740	14,583
Malawi	3,476	3,656	3,998	4,431	5,321	6,195	6,957	7,984	5,981	5,432	6,055	6,407	5,492	5,346
Mauritius	6,579	6,489	6,732	7,792	9,641	8,835	9,718	11,263	11,446	11,932	12,613	11,511	11,950	15,496
Rwanda	2,091	2,584	3,151	3,826	4,863	5,380	5,774	6,492	7,316	7,623	8,010	8,277	8,406	11,050
Seychelles	839	919	1,016	1,034	967	847	970	1,018	1,060	1,315	1,349	1,359	1,405	1,399
Sudan	21,457	26,524	35,820	45,897	54,526	53,145	65,318	66,865	62,647	65,507	71,081	81,444	94,421	89,043
Swaziland	2,859	3,245	3,351	3,526	3,356	3,648	4,498	4,878	4,755	4,420	4,301	3,929	3,770	4,130
Uganda	8,285	9,603	10,851	13,497	17,279	18,579	20,212	21,108	24,790	26,135	28,522	25,112	26,195	29,059
Zambia	6,221	8,332	12,757	14,057	17,911	15,328	20,265	23,460	25,504	28,046	27,151	21,243	21,310	34,676
Zimbabwe	8,135	7,753	7,180	6,946	5,949	8,157	9,445	10,956	12,472	13,490	14,197	14,171	14,174	17,017
COMESA	**221,757**	**264,278**	**317,299**	**385,105**	**470,046**	**476,201**	**551,658**	**555,385**	**662,397**	**669,032**	**685,521**	**721,822**	**756,425**	**858,386**

GDP, as % of COMESA total by country

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Burundi	0.4	0.4	0.4	0.4	0.3	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.4	0.5
Comoros	0.2	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
DRC	4.7	4.5	4.5	4.2	4.1	3.8	3.7	4.4	4.2	4.9	5.2	5.3	5.5	3.0
Djibouti	0.3	0.3	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.3	0.2
Egypt	37.4	35.6	35.6	35.6	36.3	41.6	41.7	44.6	42.1	43.0	44.6	46.0	43.9	40.0
Eritrea	0.5	0.4	0.4	0.3	0.3	0.4	0.4	0.5	0.5	0.5	0.6	0.6	0.7	0.6
Ethiopia	4.6	4.7	4.8	5.1	5.7	6.8	5.4	5.8	6.5	7.1	8.1	9.0	9.6	7.5
Kenya	8.1	7.9	8.1	8.3	7.6	7.8	7.3	7.5	7.6	8.2	9.0	8.8	9.1	8.4
Libya	14.9	17.9	17.3	17.6	17.8	11.8	13.3	7.0	13.5	9.4	4.9	4.1	4.4	13.8
Madagascar	2.0	1.9	1.7	1.9	2.0	1.8	1.6	1.8	1.5	1.6	1.6	1.3	1.3	1.7
Malawi	1.6	1.4	1.3	1.2	1.1	1.3	1.3	1.4	0.9	0.8	0.9	0.9	0.7	0.6
Mauritius	3.0	2.5	2.1	2.0	2.1	1.9	1.8	2.0	1.7	1.8	1.8	1.6	1.6	1.8
Rwanda	0.9	1.0	1.0	1.0	1.0	1.1	1.0	1.2	1.1	1.1	1.2	1.1	1.1	1.3
Seychelles	0.4	0.3	0.3	0.3	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Sudan	9.7	10.0	11.3	11.9	11.6	11.2	11.8	12.0	9.5	9.8	10.4	11.3	12.5	10.4
Swaziland	1.3	1.2	1.1	0.9	0.7	0.8	0.8	0.9	0.7	0.7	0.6	0.5	0.5	0.5
Uganda	3.7	3.6	3.4	3.5	3.7	3.9	3.7	3.8	3.7	3.9	4.2	3.5	3.5	3.4
Zambia	2.8	3.2	4.0	3.7	3.8	3.2	3.7	4.2	3.9	4.2	4.0	2.9	2.8	4.0
Zimbabwe	3.7	2.9	2.3	1.8	1.3	1.7	1.7	2.0	1.9	2.0	2.1	2.0	1.9	2.0
COMESA	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Population (Million people)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Burundi	7.5	7.5	7.6	7.8	8.0	8.2	8.4	8.6	8.8	9.0	9.2	9.4	9.6	9.9
Comoros	0.6	0.6	0.6	0.6	0.7	0.7	0.7	0.7	0.7	0.8	0.8	0.8	0.8	0.8
DRC	59.0	60.8	62.6	64.5	66.4	68.4	70.5	72.6	74.7	77.0	79.3	81.7	84.1	86.7
Djibouti	0.7	0.7	0.8	0.8	0.8	0.8	0.8	0.9	0.9	0.9	0.9	1.0	1.0	1.0
Egypt	69.3	70.7	72.2	73.6	75.2	76.9	78.7	80.5	82.4	84.7	86.7	89.0	90.2	91.5
Eritrea	4.4	4.5	4.7	4.9	5.0	5.2	5.4	5.5	5.7	5.9	6.1	6.3	6.5	6.5
Ethiopia	73.2	75.1	77.1	79.1	80.3	81.6	82.9	84.2	85.6	87.0	88.3	89.8	91.2	97.1
Kenya	32.9	33.8	34.7	35.7	36.7	37.7	38.5	39.5	40.7	41.8	43.0	44.2	45.5	48.5
Libya	5.5	5.6	5.7	5.8	5.9	6.0	6.0	5.9	6.3	6.3	6.3	6.3	6.4	7.0
Madagascar	17.8	18.3	18.8	19.4	19.9	20.5	21.1	21.7	22.3	22.9	23.6	24.2	24.9	25.3
Malawi	13.4	13.7	14.0	14.4	14.8	15.3	15.7	16.2	16.6	17.1	17.6	18.1	18.6	19.2
Mauritius	1.2	1.2	1.2	1.2	1.2	1.2	1.3	1.3	1.3	1.3	1.3	1.3	1.3	1.3
Rwanda	8.7	8.8	9.0	9.2	9.5	9.7	10.0	10.2	10.5	10.7	11.0	11.3	11.5	11.6
Seychelles	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1
Sudan	34.5	35.3	36.2	37.2	38.1	39.1	40.1	32.7	35.1	36.2	37.3	38.4	39.6	38.1
Swaziland	1.0	1.0	1.0	1.0	1.0	1.0	1.1	1.1	1.1	1.1	1.1	1.1	1.1	1.1
Uganda	27.8	28.7	29.7	30.7	31.8	32.9	34.0	35.1	36.3	37.6	38.7	39.9	41.1	41.9
Zambia	11.7	12.0	12.4	12.7	13.1	13.5	13.9	14.3	14.8	15.2	15.7	16.2	16.7	15.7
Zimbabwe	11.7	11.8	12.0	12.0	12.1	12.2	12.3	12.5	13.1	13.4	13.8	14.1	14.5	13.7
COMESA	**381.0**	**390.4**	**400.5**	**410.7**	**420.8**	**431.0**	**441.5**	**443.4**	**456.9**	**468.9**	**480.8**	**493.2**	**504.8**	**517.0**

Population, as % of COMESA total by country

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Burundi	2.0	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9	1.9
Comoros	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.1
DRC	15.5	15.6	15.6	15.7	15.8	15.9	16.0	16.4	16.4	16.4	16.5	16.6	16.7	16.8
Djibouti	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Egypt	18.2	18.1	18.0	17.9	17.9	17.8	17.8	18.2	18.0	18.1	18.0	18.0	17.9	17.7
Eritrea	1.2	1.2	1.2	1.2	1.2	1.2	1.2	1.2	1.2	1.3	1.3	1.3	1.3	1.3
Ethiopia	19.2	19.2	19.2	19.2	19.1	18.9	18.8	19.0	18.7	18.5	18.4	18.2	18.1	18.8
Kenya	8.6	8.7	8.7	8.7	8.7	8.7	8.7	8.9	8.9	8.9	8.9	9.0	9.0	9.4
Libya	1.4	1.4	1.4	1.4	1.4	1.4	1.4	1.3	1.4	1.3	1.3	1.3	1.3	1.4
Madagascar	4.7	4.7	4.7	4.7	4.7	4.8	4.8	4.9	4.9	4.9	4.9	4.9	4.9	4.9
Malawi	3.5	3.5	3.5	3.5	3.5	3.5	3.6	3.6	3.6	3.6	3.7	3.7	3.7	3.7
Mauritius	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3
Rwanda	2.3	2.3	2.2	2.2	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.3	2.2
Seychelles	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Sudan	9.0	9.0	9.0	9.0	9.1	9.1	9.1	7.4	7.7	7.7	7.8	7.8	7.8	7.4
Swaziland	0.3	0.3	0.3	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.2
Uganda	7.3	7.4	7.4	7.5	7.6	7.6	7.7	7.9	7.9	8.0	8.1	8.1	8.1	8.1
Zambia	3.1	3.1	3.1	3.1	3.1	3.1	3.2	3.2	3.2	3.3	3.3	3.3	3.3	3.0
Zimbabwe	3.1	3.0	3.0	2.9	2.9	2.8	2.8	2.8	2.9	2.9	2.9	2.9	2.9	2.7
COMESA	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Source: International Monetary Fund, World Economic Outlook Database

Tariff rate, MFN, weighted mean, all products (%)

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Burundi		21.1	17.5	14.6	13.4	17.9	19.5	15.5	13.7	12.3	12.4	8.9	8.95
DRC			11.3	11.6	11.1	12.0	11.0				10.2		
Comoros					4.9		6.4	6.4	6.5	6.7	8.2	7.7	
Djibouti		26.3	27.7			17.3		17.7	17.7		17.6		
Egypt, Arab Re	10.6	10.0	10.0	8.9	8.9	8.9	11.7	9.6	9.7	11.1	10.6	10.5	11.44
Eritrea			5.8										
Ethiopia			12.0		10.1	10.4	10.3	10.5	10.0			12.2	
Kenya	10.3	7.6	7.0	8.2	8.2	10.2	8.7	8.0	13.1	10.6	9.8	7.7	12.36
Libya			0.0										
Madagascar	1.7	6.5	10.3	9.8	9.6	8.7	7.7	7.6	7.3	7.3	7.0		8.43
Mauritius	12.5	5.4	1.9	2.4	2.6	1.2	1.2	1.2	0.9	0.8	0.8	0.8	0.90
Malawi			20.7		8.0	9.6	8.8	8.6	7.6	7.4	9.7	7.9	8.23
Rwanda		19.1	18.1		17.4	13.9	16.3	13.8	13.9	13.7	12.6	13.0	12.82
Sudan			13.9		11.1	18.5	16.7	15.1					
Swaziland	10.6	9.8	9.5	8.3	7.1	12.2	6.7	11.1	6.3	9.0	8.7	5.2	8.49
Seychelles		31.1	30.7	28.3								4.2	5.84
Uganda	6.3	12.5	10.4	11.0	11.1	12.1	11.9	10.5	11.0	10.5	7.8	8.2	7.58
Zambia	9.8	10.5	10.2	9.1	9.3	8.7	7.8	8.5	8.4	8.6			9.00
Zimbabwe				12.7			16.7	13.4	14.6			11.9	10.62

Source: TRAINS database (UNCTAD)

Total Exports as % age of COMESA GDP													
	2004	**2005**	**2006**	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
Burundi	0.0	0.0	0.1	0.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Comoros	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Congo DR	0.5	0.5	0.4	0.5	0.7	0.5	0.9	1.0	0.9	1.0	0.9	0.7	0.6
Djibouti	0.0	0.0	0.0	0.0	0.0	0.1	0.2	0.3	0.0	0.1	0.2	0.0	0.1
Egypt	3.5	4.0	5.0	4.2	5.6	4.9	4.8	5.5	4.4	4.3	4.0	3.0	3.0
Eritrea	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.1	0.0	0.1	0.1	0.0
Ethiopia	0.2	0.3	0.3	0.3	0.3	0.2	0.4	0.5	0.3	0.4	0.6	0.3	0.3
Kenya	1.3	1.4	1.1	1.3	1.2	1.1	1.1	1.2	1.1	1.1	0.9	0.7	0.8
Libya	8.3	10.3	10.6	9.1	10.9	6.2	8.0	3.0	7.9	5.7	1.3	1.2	1.1
Madagascar	0.5	0.3	0.3	0.3	0.2	0.2	0.2	0.3	0.2	0.3	0.3	0.2	0.3
Malawi	0.3	0.2	0.2	0.2	0.2	0.3	0.2	0.3	0.2	0.2	0.3	0.1	0.1
Mauritius	0.9	0.8	0.7	0.5	0.4	0.4	0.4	0.4	0.3	0.4	0.4	0.3	0.4
Rwanda	0.0	0.1	0.0	0.0	0.1	0.0	0.0	0.1	0.1	0.1	0.1	0.1	0.1
Seychelles	0.1	0.1	0.1	0.1	0.1	0.1	0.0	0.2	0.1	0.1	0.1	0.1	0.1
Sudan	1.0	1.3	1.8	0.3	2.0	1.9	2.1	1.6	0.5	0.9	0.6	0.5	0.5
Swaziland	0.8	0.5	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.3	0.2	0.2
Uganda	0.3	0.3	0.3	0.3	0.4	0.4	0.3	0.5	0.4	0.4	0.5	0.4	0.4
Zambia	0.7	0.7	1.2	1.2	1.1	0.9	1.3	1.6	1.5	1.6	1.3	1.0	0.9
Zimbabwe	0.8	0.4	0.4	0.9	0.4	0.5	0.6	0.6	0.6	0.6	0.6	0.5	0.4
COMESA	**19.2**	**21.1**	**23.0**	**19.7**	**24.0**	**17.9**	**20.9**	**17.4**	**18.9**	**17.4**	**12.4**	**9.4**	**9.3**

Source: COMSAT database, IMF for GDP figures

Imports as % age of COMESA GDP

	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Burundi	0.1	0.1	0.1	0.2	0.1	0.1	0.1	0.2	0.1	0.1	0.1	0.1	0.1
Comoros	0.1	0.1	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.1	0.0
Congo DR	0.6	0.6	0.7	0.7	0.8	0.6	0.8	1.0	1.0	1.1	1.1	0.8	0.7
Djibouti	0.3	0.6	0.3	0.4	0.3	0.1	0.3	0.3	0.5	0.2	0.4	0.5	0.4
Egypt	5.3	7.5	7.1	7.0	11.2	9.4	9.6	10.6	9.7	9.2	10.8	9.6	9.4
Eritrea	0.1	0.1	0.1	0.0	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.1	0.0
Ethiopia	0.6	1.5	1.6	1.5	1.8	1.7	1.7	1.6	1.8	1.7	2.4	2.4	2.3
Kenya	2.0	2.2	2.3	2.7	2.7	2.4	2.2	2.7	2.5	2.5	2.7	2.0	1.9
Libya	3.4	3.0	2.7	2.9	3.6	3.9	3.9	1.4	3.5	4.0	2.6	1.6	1.3
Madagascar	0.8	0.6	0.5	0.6	0.4	0.5	0.4	0.5	0.4	0.5	0.5	0.3	0.4
Malawi	0.3	0.4	0.4	0.4	0.5	0.4	0.4	0.4	0.4	0.4	0.4	0.3	0.3
Mauritius	1.2	1.2	1.0	1.0	1.0	0.8	0.8	0.9	0.8	0.8	0.8	0.6	0.6
Rwanda	0.1	0.2	0.2	0.2	0.2	0.3	0.2	0.2	0.2	0.3	0.3	0.2	0.2
Seychelles	0.2	0.2	0.2	0.2	0.2	0.2	0.2	0.3	0.2	0.1	0.1	0.1	0.2
Sudan	1.7	2.6	2.8	2.2	3.1	1.8	2.2	1.7	0.9	1.0	1.0	1.3	1.4
Swaziland	0.7	0.6	0.3	0.3	0.3	0.2	0.3	0.3	0.2	0.2	0.2	0.2	0.2
Uganda	0.8	0.8	0.8	0.9	0.9	0.9	0.8	0.9	0.9	0.9	1.0	0.8	0.7
Zambia	1.0	1.0	1.0	1.0	1.1	0.8	0.9	1.3	1.3	1.5	1.3	1.2	1.0
Zimbabwe	0.8	0.3	0.5	0.9	0.6	0.7	0.9	1.5	1.0	1.2	0.9	0.8	0.7
COMESA	**19.9**	**23.6**	**22.7**	**23.0**	**29.0**	**24.9**	**25.7**	**26.0**	**25.6**	**25.9**	**26.6**	**23.2**	**21.8**

Source: COMSAT database, IMF for GDP figures

Intra-COMESA Trade, 2016, Values in US$ millions and % Shares

Rank	Exporter	Value	% Share	Importer	Value	% Share
1	Egypt	1,757.40	21.9	Zambia	1,510.40	18.8
2	Kenya	1,516.40	18.9	Congo DR	1,021.90	12.7
3	Congo DR	904.6	11.3	Sudan	874.9	10.9
4	Zambia	873.8	10.9	Kenya	685.5	8.5
5	Sudan	814.9	10.1	Egypt	643.8	8
6	Uganda	801.5	10	Libya	616.1	7.7
7	Rwanda	354.5	4.4	Uganda	580.6	7.2
8	Mauritius	229.9	2.9	Zimbabwe	364	4.5
9	Swaziland	156.5	1.9	Rwanda	361.9	4.5
10	Malawi	153.6	1.9	Ethiopia	316.3	3.9
11	Ethiopia	124.6	1.6	Malawi	280.2	3.5
12	Libya	91.9	1.1	Mauritius	201	2.5
13	Zimbabwe	89	1.1	Madagascar	174.7	2.2
14	Madagascar	77.4	1	Djibouti	135.9	1.7
15	Burundi	44	0.5	Eritrea	96.9	1.2
16	Djibouti	18.1	0.2	Burundi	82	1
17	Seychelles	11.1	0.1	Seychelles	48.3	0.6
18	Comoros	7.4	0.1	Swaziland	13.6	0.2
19	Eritrea	3	0	Comoros	10.5	0.1
	Total	**8,029.70**	**100**	**Total**	**8,018.40**	**100**

Source: COMSTAT database