

**UNIVERSITY OF NAIROBI**

**SCHOOL OF LAW**

**MASTER OF LAWS (LL.M) THESIS**

**THE EFFICACY OF THE COMPETITION LAWS IN THE LIBERALIZATION OF  
TRADE IN KENYA: A STUDY OF THE TELECOMMUNICATION SECTOR**

**THESIS SUBMITTED IN FULFILMENT OF THE REQUIREMENTS FOR THE  
AWARD OF THE DEGREE OF MASTER OF LAWS (LL.M), UNIVERSITY OF  
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## **DEDICATION**

This paper is dedicated to the Almighty God for giving me strength and capacity to start and complete this thesis.

### **To my Parents, Julius Musyimi Kilinda and Rose Ndunge Musyimi:**

I thank you for your unconditional love and support throughout my life. Your sacrifices for my siblings and I have not been in vain. This achievement here is for you and I do hope that I have made you proud.

### **To my darling Husband, Rucuiya Kimani:**

You have been my one and only true love. Your immense love and support from when I started this journey has not only encouraged me to soldier on, but given me strength to finish what I started. Thank you for being my cheer leader and believing in me.

### **To my son, Taji Rucuiya:**

You are such a blessing and charming boy. You gave me a reason to work harder and better myself.

### **To my Supervisor:**

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Special Thanks to Rucuiya Kimani for assisting with proof reading the research project document. Special thanks also to Mr Conrad Nyukuri for his support as my employer and giving me an opportunity to enrol for the course and allowing me to time off to attend the LL.M course.

Finally, my thanks to my colleagues in the LL.M course class 2017/2018 with whom we have consulted and shared ideas as we pursue the course and doing the research project.

## **LIST OF ABBREVIATIONS AND ACRONYMS**

|        |  |
|--------|--|
| CA     | Communication Authority                              |
| CAK    | Competition Authority of Kenya                       |
| CAT    | Competition Appeals Tribunal                         |
| CBK    | Central Bank of Kenya                                |
| CCK    | Communications Commission of Kenya                   |
| CMA    | Capital Markets Authority                            |
| COMESA | Common Market for Eastern and Southern Africa        |
| FTC    | Federal Trade Commission                             |
| FCC    | Federal Communications Commission                    |
| ICASA  | Independent Communications Authority of South Africa |
| ICT    | Information Communication Technologies               |
| MMT    | Mobile Money Transfer                                |
| MNO    | Mobile Network Operators                             |
| MOA    | Memorandum of Agreement                              |
| MVNO   | Mobile Virtual Network Operator                      |
| PLC    | Public Limited Company                               |

|      |   |
|------|---|
| SIM  | Subscriber Identification Module        |
| STK  | SIM Application Toolkit                 |
| VPN  | Virtual Phone Network                   |
| US   | United States                           |
| USSD | Unstructured Supplementary Service Data |

## **LIST OF STATUTES**

The Constitution of Kenya, 2010

The Competition Act, 2010

The Capital Markets Act, 2012

The Kenya Information and Communication Act, 2009

The Kenya Information and Communication (Fair Competition and Equality Treatment) Regulations, 2010

The Competition Tribunal (Procedure Rules), 2017

The Capital Markets (Takeovers & Mergers) Regulations, 2002

The COMESA Competition Regulations, 2004

The Sherman Anti-Trust Act, 1890, Laws of United States of America

The Clayton Anti – Trust Act, 1914, Laws of United States of America

The Federal Trade Commissions Act, 1914, Laws of United States of America

The Telecommunications Act, 1996, Laws of United States of America

The Electronic Communications Act, 2005, Laws of South Africa

The Competition Act, 1998, Laws of South Africa

Promotion of Diversity and Competition on Digital Terrestrial Television Regulations

The Restrictive Trade Practices, Monopolies and Price Control Act, 1990 (Repealed)



## **ABSTRACT**

The central aim of this paper is to highlight the efficacy of Competition Laws in the regulation of the Telecommunication Sector in connection to promoting competition in Kenya. The paper highlights the institutional and legal framework of competition law in the Telecommunication Sector. Further, it points out the positive impact and challenges faced by both the legal and institutional frameworks regulation competition in this sector. Lastly, it provides the recommendations on how to promote competition in the Kenyan Telecommunication Sector.

The fact that the Telecommunication Sector is a cross regulated sector, there has been a challenge to effective competition in the Sector. The study espouses on the extent if any to which competition regulating institutions have hampered competition in the Telecommunication Sector and whether there is over regulation of competition in this sector. This research will seek to find a solution or at least offer guidance on how to deal with the thorny question as to whether the telecommunication sector should or should not be regulated and to what extent. In particular by considering the various regulatory approaches taken by various jurisdictions, the paper leaves the reader with the choice as to what approach Kenya should take in the sector.

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## INTRODUCTION

### **1.1. Background**

While political momentum assures political democracy, strong competition assures economic democracy. Competition is the process for optimizing efficiency and equity.<sup>1</sup>

Competition provides the freedom of choice for most consumers. It also gives a certain cultural richness by catering to the full range of consumer wants. To assure the sustenance of these benefits demands the existence of a competition regime.<sup>2</sup> Competition law controls practices such as anti-competitive agreements that have their object as restriction of competition.<sup>3</sup> Abuse of dominant position by monopolist or firms with substantial market power is regulated by Competition law.<sup>4</sup> Competition law supervises mergers to investigate those harmful to the market and approval is sought before the implementation of mergers.<sup>5</sup>

The liberalisation of trade has led to a massive expansion in the growth of world trade relative to world output.<sup>6</sup>

On the other hand, technology is ever advancing, and the impact of technology is felt in all aspects. Telecommunication therefore is never left behind in these technological advancements. It may be argued that with the advances in technology in the telecommunication sector, an entity that upholds technology is likely to be competitive than those left behind by the advancement. However, this is just one of the aspects of competition

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<sup>1</sup>Peter Muchoki Njoroge, *Enforcement of competition policy and law in Kenya Including case studies in the areas of mergers and Takeovers, prevention of possible future abuse of Dominance and collusion/price fixing*, <<http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/PeterNjoroge.pdf>>

<sup>2</sup>ibid

<sup>3</sup>Richard Whish & David Bailey, *Competition Law*, (2012) Oxford University Press, 7th edn,

<sup>4</sup>Ibid

<sup>5</sup>ibid

<sup>6</sup>Anthony P Thirlwall, "Trade Liberalisation and Economic growth: Theory and Evidence," (2000), *Economic Research Papers No 63*, The African Development Bank, 21

on this sector. Thus, the debate is ever whether the market forces such as technological advancement is what propel competition or whether regulation fuels competition.

To put this into perspective, whereas there is the school of thought that argues that regulating the telecommunication sector promotes competition in this market, there is also the school of thought that postulates that regulation is a barrier to competition and true competition in the telecommunication sector can only be determined by the market forces of demand and supply. This paper does not necessarily answer this question but rather problematises the same citing the school of thought that has influenced one school of thought over the other.

The interplay between competition regulation and trade liberalisation is that competition policy plays the role of ensuring free trade, free selection, free market access for enterprises. This is the key point mentioned in the relationship between competition policy and liberalization of trade and investment in the telecommunication sector.<sup>7</sup>

## **1.2. Statement of the Problem**

Competition is the process whereby two or more persons supply or acquire from the market the same or substitutable goods or services.<sup>8</sup> The Competition Act promotes fair trade competition and proper control of economic power.<sup>9</sup>

The emerging issue which this paper is concerned with is the application and the efficacy of competition laws with a specific interest in the Telecommunication sector. Whilst the object

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<sup>7</sup> Troung Quang Hoai Nam, *Competition Policy and Liberalisation of Trade and Investment*, accessible at <<https://isis.koha.my/cgi-bin/koha/opac-detail.pl?biblionumber=29411>>

<sup>8</sup>The Competition Act, 2010

<sup>9</sup>ibid

of the Competition Act and other related regulation is to enhance the welfare of the people of Kenya by promoting and protecting effective competition in markets, preventing unfair and misleading market conduct throughout Kenya, the application of the laws could by itself interfere with the liberal trade and the interplay of market forces thus inhibiting competition in the telecommunication sector.

Further the paper problematises the fact that the telecommunication sector is cross regulated by the Communication Authority and the Competition Authority *ipso facto* has been a challenge to effective competition. This research will seek to find a solution or at least offer guidance on how to deal with the thorny question as to whether the telecommunication sector should or should not be regulated and to what extent. In particular by considering the various regulatory approaches taken by various jurisdictions, the paper leaves the reader with the choice as to what approach Kenya should take in the telecommunication sector.

### **1.3. Justification of the Study**

This study is important in highlighting whether in the discharge of its mandate the Competition Authority is likely to interfere with the forces of the liberal market in the telecommunication sector.

This study therefore is timely and appropriate to enable us understand the legal framework of competition law in the telecommunication sector as it in statute and to highlight the loopholes in the statutes and the policy on competition law. This study is also necessary to espouse the extent (if any) to which competition regulating institutions have hampered competition in the

telecommunication and whether there is over regulation of the competition in the telecommunication sector being a cross regulated sector.

From this study, we will be able to understand if there is need for a shift in the regulation approach of this sector and a policy change in order to enable growth of the sector through competition.

#### **1.4. Statement of Objectives**

The general objective of the study is to understand the efficacy of the Act in liberalisation of trade in the Telecommunication Sector. The specific objectives of the study are as follows:

- a) To understand the underpinning institutional and legal framework for competition law in Kenya with keen interest in the telecommunication sector;
- b) To analyse the efficacy and the challenges of the legal and institutional framework of competition law in the telecommunication sector;
- c) To undertake a comparative analysis of the competition laws in other jurisdictions with the object of offering recommendations that would foster competition in the Kenyan telecommunication market; and
- d) To highlight the main findings that the study has unearthed and offer recommendations on how to foster competition in the Kenyan telecommunication sector taking into account the regulatory and liberal schools of thoughts.

## 1.5. Research Questions

This study will attempt to answer the following questions:

- a) What is the institutional and legal framework of competition laws in the telecommunication market in Kenya?
- b) What is the efficacy and the challenges of the legal and institutional framework of competition law in the telecommunication sector?
- c) What is the legal and institutional framework of competition law in the telecommunication sector in South Africa and United States of America?
- d) What are some of the main findings that this study has espoused and the recommendations that this paper offers in order to propel competition in the telecommunication sector?

## 1.6. Theoretical Framework

Competition is the relationship between a number of undertakings which sell goods or services of the same kind to an identifiable group of customers<sup>10</sup>. Competition focuses more on the activities and relationship between sellers but also on the buyers who also find themselves in contention in a particular product or geographical market.<sup>11</sup> Some of the advantages of competition in the market is that it plays a role in allocative efficiency. It

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<sup>10</sup>Joanna Goyder, Albertina, Albors Llovens, *Goyder's EC Competition Law*, (2009), Oxford University Press, 5th edn

<sup>11</sup>Ibid



ensures that manufacturers of products allocate resources more in the direction preferred by consumers.<sup>12</sup>

However, there are certain theories that have been discussed by scholars on competition law and its regulation. Whereas the chapter on theoretical framework will delve on the detailed theories and the criticism, this part focuses primarily on the classification of the theories that have influenced either over or under regulation of the Kenyan telecommunication market. These theories influence this study and inspire the findings herein.

### **1.6.1. The Liberal Market Theory**

The father of economics Adam Smith - a classical economist – opined of perfect competition equilibrium where free markets regulate themselves in the absence of intervention by the State. The markets are purely driven by the forces of demand and supply.<sup>13</sup> In his theory he argues that there would be effective competition if such competition is propelled by the forces of the market rather than being regulated by the State. Another Liberal market theorist is George Stigler who argues that regulation of competition through entry barriers and permits is meant to serve self-interest rather than the interest of the general public. As such he advocates for free market as postulated by Adams Smith.

The proponent of this theory argues that without or with very minimal regulation, the free market will force businesses to protect consumers, provide superior products or services, and

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<sup>12</sup>ibid

<sup>13</sup> Dickson P., *Evolutionary theories of competition and aftermarket antitrust law* *Antitrust Bulletin*; Spring 2007; Accessible at [http://www.antitrustinstitute.org/files/Evolutionary%20theories%20of%20competition%20and%20aftermarket%20antitru\\_081320081456.pdf](http://www.antitrustinstitute.org/files/Evolutionary%20theories%20of%20competition%20and%20aftermarket%20antitru_081320081456.pdf). >

create affordable prices for everyone.<sup>14</sup> They believe that the government is inefficient and creates nothing but a bureaucracy that increases the cost of doing business thus hindering competition. Recent scholars opine that technological advancement, innovation and improvement of products in itself is an incentive to foster competition without necessarily seeking the helping hand of the regulator.<sup>15</sup> It is also opined that competitive pressures will force the incumbent firm to lower their inefficiencies that was incurred in attempting to comply with regulation. The resulting cost decreases may be such that lower market prices will result.

However, Joskow argues that the market imperfections are the norm not the exception and as such the theory of a perfect market is nothing but ideal and as such cannot be relied upon solely as the basis of propounding for a free market.<sup>16</sup> He therefore states that State intervention is absolutely necessary to regulate the market. Factors such as informational asymmetry and unequal market power has also been said to be some of the reasons as to why regulation is absolutely necessary.<sup>17</sup>

This liberal theory influences this study as it is argued that regulation of market should not be used to curtail entry and operations in the market but rather liberalise and foster competition. This theory has also influenced states such as the United States of which a comparative study is undertaken in this regard and in particular some of the lessons learnt in the telecommunication market on the liberalisation of the market and whether the deregulation

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<sup>14</sup> <https://www.investopedia.com/articles/economics/08/free-market-regulation.asp>

<sup>15</sup> Johan den Hertog, *Review of Economic Theories of Regulation*, Discussion Paper Series 10-18 (2010), Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Utrecht University

<sup>16</sup> Joskow P.L, "Market Imperfections Versus Regulatory Imperfections", cesifo DICE Report 3/2010, 4

<sup>17</sup> Ibid

itself fosters or stifles competition. This theory will be useful in our findings to support the proposal that the telecommunication market should be regulated in a manner that does not curtail entry and exit into the market. It supports that cross regulation of the telecommunication sector may to some extent result in over regulation and therefore instead of promoting growth in the market it leads to stifling of its growth.

### **1.6.2. Public Interest Theory**

In his paper *Theories of Economic Regulation*, Richard Posner discusses the Public Interest Theory. This theory he argues that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices. This theory basically recognises that market forces of demand and supply do fail and as such it is unlikely that without state intervention there would be fair competition. The theory also recognises that natural monopoly may be abused and as such there can be no competition whatsoever unless the State regulates the market. The emphasis is on the interest of ultimately on how the product affects the consumer. Thus, it is assumed that if there is proper regulation of the market and ultimately effective competition, then the quality of the products is guaranteed.

Centrally, the theory holds that regulation is supplied in response to the demand of the public for the correction of inefficient or inequitable market practices.<sup>18</sup> Premised on this assumption, it is argued that the principal government intervention in the economy trade union protection, public utility and common carrier regulation, public power and reclamation programs, farm subsidies, occupational licensure, the minimum wage, even tariffs are responses of

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<sup>18</sup> Richard A. Posner, *Theories of Economic Regulation*, (1974) Working Paper No.41, Center For Economic Analysis of Human Behaviour and Social Institutions, National Bureau of Economic Research, 9

government to public demands for the rectification of palpable, inefficiencies and inequities in the operation of the free market.<sup>19</sup> Michael recognised two arguments commonly used to support regulation, namely that markets were prone to fail and that regulation was costless (zero transaction costs).<sup>20</sup>

The Public Interest Theory therefore in summary argues that regulation seeks the protection and benefit of the public at large. Some academics have defined the theory as a system of ideas, which proposes that when market fails, economic regulation should be imposed in order to maximise social welfare.<sup>21</sup> It presupposes that the existing market forces and the very nature of the market is very unfair and cannot self-regulate competition. The theory also recognises that due to the imperfection of the market, there is need to regulate the market for fairness.

The theory emphasises on public interest and public good as the basis for regulating the market. Joskow lists some of the market imperfections that regulations intend to curb such as market power, natural monopoly, externalities, information costs, information asymmetries, consumer/investor decision-making imperfections, bounded rationality and transaction costs generally.<sup>22</sup> In summary, the theory postulates that regulation is necessary for effective competition. The theory also assumes that government regulation is effective and can be implemented without great cost. So precisely, the transaction costs and information costs,

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<sup>19</sup> Ibid

<sup>20</sup> Michael Hantke-Domas “The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?” (2003) *European Journal of Law and Economics*, 165–194

<sup>21</sup> Michael Hantke-Domas “The Public Interest Theory of Regulation: Non-Existence or Misinterpretation?” (2003) Volume 15, Issue 2, *European Journal of Law and Economics*, Kluwer Academic Publishers, Netherlands 165–194

<sup>22</sup> Joskow P.L, “Market Imperfections Versus Regulatory Imperfections”, *cesifo DICE Report 3/2010*, 4

which underlie market failure, are assumed to be absent in the case of government regulation.<sup>23</sup>

Richard Posner opines that this theory has a number of shortcomings because the agencies tasked with regulating the economy are asked to do the impossible and it is not surprising that they fail to do so given that they lack the capacity to regulate an ever-mutating market.<sup>24</sup> Secondly, he admits that administrative failures are largely attributed to the ever growing and complex market. Again, the theory is also faulted for assuming that regulation is done at zero cost when in fact regulation is in itself expensive. For instance, in the Kenya competition in the telecommunication sector is regulated by two authorities with a fully-fledged staff and annual budgetary allocation. The cost of regulation is therefore expensive and only burdens consumers and hinders entry in the market and competition.

This theory has however influenced the regulatory approach to market economy and competition by a great extent has largely influenced the Kenyan approach to competition and in particular in the telecommunication sector. This is seen through the regulatory authority, regulations, rules, policy framework and the laws that are meant to promote competition. This theory highlights the extent to which regulation should be applied in the market, this supports our study in understanding to what extent if any should we allow regulation in the telecommunication sector. The extent of application of regulation determines if competition is enabled or not. It also checks on practices of the monopoly firms on matters competition.

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<sup>23</sup> Johan den Hertog, *Review of Economic Theories of Regulation*, Discussion Paper Series 10-18 (2010), Tjalling C. Koopmans Research Institute, Utrecht School of Economics, Utrecht University

<sup>24</sup> Richard A. Posner, *Theories of Economic Regulation*, (1974) Working Paper No.41, Center For Economic Analysis of Human Behaviour and Social Institutions, National Bureau of Economic Research , 9

### 1.6.3. Capture Market Theory

The theory suggests that economic regulation is not concerned with the public interest at all but is a process by which interest groups seek to promote their (private) interests. This has been propounded by Marxists that capitalists control the institutions of our society. Among those institutions is regulation thus regulation is merely to serve the individualistic and capitalist interest.<sup>25</sup>

According to Stigler “regulation is just a product, produced in a marketplace like any other product is. The main difference between regulation and other products is that the political process defines the structure of the market for regulation.” He first argues that the state’s strongest resource that not even the mightiest citizen has is the power of coercion that government can use in such a way as to help some individuals and industries at the expense of others. He adds that “by trying to influence how the state uses its coercive authority, businesses seek to “buy” one or more of government’s four main products: subsidies; control over competitive entry; regulation of product substitutes or complements; and the fixing of prices.”

This theory attempts to find a soft landing for the two opposite theories. According to its proponent - George Stigler, the public interest theory of regulation is fundamentally flawed as the purported regulators seek not to correct market failures by regulation and thereby promote the public interest, but rather to propel their self-interest.<sup>26</sup> Stigler did not just challenge this view—he turned it on its head. He contended that regulators come to represent the interests of

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<sup>25</sup> George J. Stigler, “The Theory of Economic Regulation” (1971), Vol. 2, No. 1 , The Bell Journal of Economics and Management Science, 3-2

<sup>26</sup> George J. Stigler, “The Theory of Economic Regulation” (1971), Vol. 2, No. 1 , *The Bell Journal of Economics and Management Science*, 3-2

the regulated industry, not the broader public, and that the concentrated interests of industry thus prevail over the diffuse interests of consumers in the design and implementation of regulations.<sup>27</sup>

The theory is that economic regulation is not concerned about the public interest at all but is a process by which interest groups seek to promote their (private) interests, and that this takes several distinct forms.<sup>28</sup> The theory has been considered from a Marxist's point of view.<sup>29</sup> A more interesting version of the "capture" theory derives from political science, who emphasize the importance of interest groups in the formation of public policy. According to this approach, the policy formulators are politicians who do have interests in the market and as such, they will only enact laws that further their interests.<sup>30</sup>

In studying the licencing of occupations and professions such as law and medicine, he argued that "licensing exists not to protect consumers but to limit the ability of potential entrants to practice the profession." In summary, the learned scholar argues that the primary goal of regulating market is not as a matter of public interest rather it is influenced by the need to protect the interest of individuals in that particular market. In a succinct manner: regulation is a barrier to entry into a market. Basically, the business controls and determines regulations.

The theory has however been criticised in several aspects. First that it is not entirely true that business centrally influences regulations. In fact, businesses often than not decry and oppose most regulations that are imposed on them as detrimental and barrier to effective competition.

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<sup>27</sup> George J. Stigler, "The Theory of Economic Regulation" (1971), Vol. 2, No. 1 , The *Bell Journal of Economics and Management Science*, 3-2

<sup>28</sup> Richard A. Posner, *Theories of Economic Regulation*, (1974) Working Paper No.41, Center for Economic Analysis of Human Behaviour and Social Institutions, National Bureau of Economic Research , 9

<sup>29</sup> *Ibid*

<sup>30</sup> *Ibid*

Finally, his theory has been argued to be contradictory as regulating certain professions is not for self-gain but rather to ensure quality in services offered and ultimately for the public.<sup>31</sup>

In this context the theory is more than valuable as it influences the process of formulating regulation and their impact in this sector. In particular, it may well be said that the regulation exists to further certain interests and not for the public good. If the theory's assumption is founded, then it means that the laws in place are enacted to regulate competition in this sector are not geared towards furthering the competition but to foster the interest of cartels and the interest groups in the Telecommunication Sector. This theory influences our research in the context of regulation. Our research is focused on whether application of competition law which informs the regulation of this industry promotes or hinders competition in the telecommunication sector. This theory therefore helps us understand whether this regulation and its application by the regulatory authority serves the interest of a few such as the monopolies, the government or the business class and not the general public. It will help us highlight whether the regulation promotes competition while serving the interests of a few or it actually hinders growth of the telecommunication sector, by ensuring that the monopolies that represent interests of the 'few' remain giants in the market and by extension bar entry of new entrants into the market.

## **1.7. Research Methodology**

The author undertook a doctrinal analysis of core, subsidiary and related legislation providing for the regulation of the Telecommunication market through a desk study. The legislation

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<sup>31</sup> Ibid



studied included the Constitution of Kenya 2010, the Competition Act, the Kenya Information and Communication Act 2009, and the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010. The Relevant government policy documents and parliamentary reports on the subject are also informative of this study.

In addition, the study relied on other secondary sources such as case reports, speech transcripts, textbooks, journal articles, periodicals, newspaper and magazine articles, market research insight papers, Annual reports from various institutions and other relevant articles and documents obtained physically from various libraries or the internet.

The study also undertook a comparative study to obtain insights on the various approaches being on the extreme ends of either an over regulated or under regulated market to inform this paper accordingly. The jurisdiction chosen for this particular comparative study was the US considering the institutional and legal framework of its telecommunication sector and competition. The US telecommunication sector is less regulated compared with other jurisdictions. The research also chooses South Africa as the second country for the comparative study. Here again the legal and institutional framework were considered first because South Africa share the same environment as Kenya and secondly because it has a nearly similar legal framework as that of Kenya.

## **1.8. Literature Review**

Telecommunication sector is a growing industry in the country and definitely scholarship has set in on the subject. Here are literary works on the subject:

*Odhiambo's Convergence of regulation and competition in Mobile Money,*<sup>32</sup>

The author recognises that telecommunication market needs a multisectoral approach in its regulation. She argues that regulatory oversight must not only guard against anticompetitive behaviours that may distort competition in the mobile, telephone and banking industry, but should not lag technological innovations. This, she postulates is to strike a balance between regulation and creating a space for innovation.

Odhiambo recognizes that the mobile banking has three regulators being the Central Bank, the Competition Authority and the Communication Authority thus there is likelihood of overlap and conflict between these institutions thus leading either to over regulation or under regulation of this sector. However, the scholar does not discuss whether by having a shared or common regulator in this sector stifles or nourishes competition in the sector. Whereas Odhiambo discusses competition and the role of the regulator in competition, her study is limited to money transfer (mobile banking). Further, the article does not address the concern of whether to prefer liberalization to regulation in enhancing competition within the market. The paper therefore intends to undertake an in-depth analysis on the subject.

*National Assembly's Report on the Inquiry into the legislative and Regulatory gaps affecting competition in the telecommunication sub-sector.*

In this report submitted to the Departmental Committee on Communication, Information and Innovation. The study revealed that there were reports particularly by Telkom and Airtel as

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<sup>32</sup> Odhiambo F. "Convergence Of Regulation And Competition In Telecommunication And Finance: A Proposed Regulatory Framework",  
<<https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/5534a1cfe4b078bae80cb7a5/1429512655227/Faith+Odhiambo+Convergence+of+regulation+and+competition+in+Mobile+Money.pdf>>

against Safaricom for unfair competition.<sup>33</sup> The Committee observed that there is need for the service providers to invest heavily in technological advancements.<sup>34</sup> At Chapter Eleven of the report, the committee having heard proposals from the regulator and the service providers on modes of improving competition and growth in the sector, made a number of recommendations. The committee observed that monopolisation of the market is likely to pose far reaching effect such as liquidation of companies, redundancy of employees and lack of innovation. It was recommended that the Central Bank of Kenya and the Communication Authority to develop standard money transfer and service rates regulations for the Telecommunication Sector. It is observed that most of the recommendations of the Committee were geared towards enacting more recommendations in the sector. This paper therefore, intends to consider the aspect of unregulated market and whether it will foster Competition in the sector.

*Mbati 's Strategies Employed by Airtel Africa in Enhancing Performance.*<sup>35</sup>

The paper discusses the legal and policy framework that regulates the Telecommunication Sector in the market. Mbati considers a number of business strategies including Merger & Acquisition strategy, outsourcing strategy among others in the Telecommunication Sector. The paper focuses more on the strategy rather than on the regulatory framework that influences the Kenyan telecommunication market.

The Paper focuses more on market strategy in enhancing competition at the expense of regulatory model and the efficacy of regulating the market. This paper therefore goes ahead to

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<sup>33</sup> National Assembly, Kenya *Report on the Inquiry into the legislative and Regulatory gaps affecting competition in the telecommunication sub-sector, 12<sup>th</sup> Parliament, 3<sup>rd</sup> Session, March, 2019* page 64-65

<sup>34</sup> Ibid, 65

<sup>35</sup> Mbati K. L., *Strategies Employed by Airtel Africa in Enhancing Performance, (2015)* (unpublished thesis) Master of Business Administration, University of Nairobi.

consider whether the existing legislations have enhanced competition in the telecommunication or whether the various market forces and the strategies discussed by Mbatia should fully regulate competition in the sector.

*Charles O. Dulo, Telecommunication Regulation in Kenya: A case for Generic Reforms due to Convergence in ICT*<sup>36</sup>

The learned author analyses the regulations governing the Telecommunication Sector and the Generic reforms that the Sector grapples with.

However, he argues that Communication Authority (then communication Commission of Kenya (“CCK”) like most Government bodies in Kenya is created pursuant to statutes. This makes them amenable to the State Corporations Act, which unfortunately gives the Executive immense powers over such bodies. He also discusses how this undermines the independence of the various regulatory bodies such as the CCK.<sup>37</sup>

He opines that whereas the executive power being that of policy formulation is simply theoretical and not practical. For instance, he gives a case of the purported cancelation of the 3rd mobile telephone licence that had been awarded to the Econet Wireless Kenya by the then Minister for Communication as being ultra vires and null and void ab initio. He therefore concludes that even though the law anticipates that these two entities should be independent, the Authority is never independent because of the Executive power influence.

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<sup>36</sup> Dissertation submitted to the University of Nairobi in partial fulfilment of the degree of Master of Laws, 2004/2005 (Under the Law, Science and Technology Programme), (2006)

<sup>37</sup> Charles O. Dulo, *Telecommunication Regulation in Kenya: A case for Generic Reforms due to Convergence in ICT (Information Communication Technologies)*, Ibid, 42

The scholar also strongly proposes that institutional and personnel independence of the regulator be enhanced through effective policy to avoid the regulator being “captured” by the executive and the cartels. He takes the approach of regulating the Sector more so that the unfair competition practices in the market are dealt with. In particular he decries that there is need to regulate internet services.<sup>38</sup>

*ICT Regulation Toolkit, Why Regulate?*<sup>39</sup>

This Article first posits that the introduction of competition in the marketplace does not per se mean regulation is unnecessary. Quite the contrary, the role of the regulator actually increases once governments authorize competition particularly during the early stages of transition from monopoly to effective competition. In order to transition into an effective competitive environment, regulators, it is argued, must establish a regulatory framework that can resolve disputes, address anticompetitive abuses, protect consumers and attain national goals such as universal access, industrial competitiveness or economic productivity and growth.

The article lists some of the issues that regulatory reform must address such as creating independent regulators for licensing, and for enacting up to date competition regulations; putting efforts in dealing with market exclusivities; allocating and managing scarce resources such as numbers and spectrum resources in a non-discriminatory way within the liberalized market; expanding and enhancing access to telecommunications and ICT networks and services, and importantly promoting and protecting consumer interests.

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<sup>38</sup> Ibid, 115-116

<sup>39</sup> <http://www.ictregulationtoolkit.org/toolkit/6.2>

It is also opined that in a fully competitive environment, regulation is equally necessary however the same should be limited to pave way for competition and growth. This is argued that it is necessary to continue regulating a competitive telecommunication market particularly given the dynamic role of the sector and the unsettled issues that new technologies may introduce into the regulatory environment. Moreover, in certain areas, regulators need to maintain a prominent role because market forces often fall short of creating the conditions necessary to satisfy public interest objectives such as universal access and service.<sup>40</sup>

Some of the benefits of limited regulation in a competitive telecommunication market that the paper espouses include economic growth and consumer benefits, increase in investments - for example Morocco is said to have attracted foreign investment in its telecommunication sector following the limited regulation of the economy in 1990s. Finally, it is also postulated that regulation will help lower prices for consumers.<sup>41</sup>

*The Analysis Mason's Report to the Competition Authority of Kenya on competition in the Telecommunication sector.*<sup>42</sup>

The CAK mandated the Analysis Mason to undertake a study on the competition in the Kenyan market and ways of enhancing competition in the market. The study revealed that Safaricom is a major market player in the industry. It was also observed that dominance was an issue of concern both for the regulator and consumers. Based on the presentation, the report did not clearly state that any firms were found to have clearly abused positions of dominance

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<sup>40</sup> Ibid

<sup>41</sup> Ibid, 6

<sup>42</sup> <https://www.analysismason.com/Research/Content/Country-reports/kenya-country-report-rdrk0/#23%20May%202019>

in the market. It made recommendations that the regulator should be permanently vigilant to check all market segments to ensure that consumers are not harmed by the behavior of firms that are dominant.<sup>43</sup> The report also suggested that Safaricom be split to enhance competition in the market. It was also established that Garissa, Turkana, Marsabit, Mandera, Samburu, Wajir and Isiolo were the counties who had the lowest level of internet access and telecommunication infrastructure.

However, the report failed to clarify the dominant market player and the impact of Safaricom's position in the market. Fundamentally, the failure to consider the option of free market with excessive emphasis on regulation. Further the proposal to split Safaricom is anti – competitive and a clear inclination towards regulation rather than a free market economy.

The Institute of Economic Affairs of Kenya also criticised the report for not being presented to the members of public and professionals so that they can comment on the same.<sup>44</sup> This is in breach of the fundamental constitutional principle of public participation. In particular, the committee was faulted for not offering a Summary report to enable preparation and for not giving the feedback to the public at the conclusion of the event.<sup>45</sup>

## **1.9. Limitations of the Study**

This study will confine itself to the analysis of the competition law application by institutions established under it only. It will aim to understand whether a balance between regulation of fair competition and the risk of interfering with a liberal market by these institutions exists.

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<sup>43</sup> Institute of Economic Affairs, *Memorandum Presented to the Communications Authority on the Study Findings on: Competition in the Telecommunications Sector in Kenya*, Held on Tuesday, 20th February, 2018 At The Stanley Hotel, Nairobi

<sup>44</sup> Institute of Economic Affairs, *Memorandum Presented to the Communications Authority on the Study Findings on: Competition in the Telecommunications Sector in Kenya*, Held on Tuesday, 20th February, 2018 At The Stanley Hotel, Nairobi

<sup>45</sup> Ibid.

There is the time and financial constraint and as such more effective methods of undertaking this research such as interviews and questionnaires cannot practically be utilised.

### **1.10. Hypothesis**

This research is premised on the author's hypotheses that:

- a) That the Competition Authority has executed its mandate properly in ensuring that there is true competition in the Telecommunication sector; and
- b) That over-regulation is likely to inhibit liberalisation of the market thus become ultimate barrier to competition and therefore a balance must be achieved.

### **1.11. Chapter Breakdown**

Chapter One introduces the subject of the study. It does provide the background to the study, problem statement, the justification of the study, research objectives, limitations to the study and methodology of research.

Chapter Two focuses on the theoretical and legal framework for competition laws in Kenya in the telecommunication sector. In particular, the chapter does discuss the theories and schools of thoughts that discuss the regulation of competition market. It also espouses the legislative, policy and institutional framework that regulate competition of the Kenyan telecommunication market.

Chapter Three provides an in-depth analysis of efficiency of the legal, policy and institutional framework of competition in Kenya. The Chapters examines the decisions by institutions



created under the Act and how they have affected competition in the telecommunication sector. This assessment is taken a step further by considering the impact of these determinations on competition in the Kenyan telecommunication market. The Chapter is concluded by considering the challenges faced by the regulators in the Telecommunication Sector.

Chapter Four undertakes a comparative approach by considering what other states have done in terms of their policy, legal and institutional framework to foster competition in the market. This is to offer some insights and recommendations that Kenya can pick in order to further competition in its Telecommunication Sector.

Chapter Five deals with the summary of findings, conclusions and recommendations on the application of competition law with an interest on how to balance regulation and liberalisation of the market for the good of effective competition.

## **CHAPTER TWO: LEGAL AND INSTITUTIONAL FRAMEWORK OF COMPETITION LAW IN THE KENYAN TELECOMMUNICATION SECTOR**

### **2.1. Introduction**

This Chapter is divided into two major parts. In Chapter One we discussed the theoretical framework of regulating competition in Kenya. This is to help the reader appreciate the underlying forces that influence and tailor the regulation.

The Chapter in part one considers the legal framework of regulation in Kenya. This is a discussion of the constitutional provision on competition, the legislation and attendant rules and guidelines issued by the various institutions in this sector. The Chapter then concludes by considering the various institutions that play a role in the regulation of competition in the telecommunication market. It begins with the regional institutions before delving into the local authorities.

## **2.2. Legal Framework**

### **2.2.1. COMESA Competition Regulations, 2004<sup>46</sup>**

The Kenyan Constitution, 2010 by dint of Article 2 allows for international law (including treaty ratified by Kenya) to form part of laws of Kenya. Kenya became a member of the COMESA by signing the COMESA Treaty on 21<sup>st</sup> December, 1998. Article 2 of the COMESA Competition Regulations, 2004( hereinafter “*COMESA Regulations*”) outline the purpose of the COMESA Regulations as “*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,*

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<sup>46</sup> Official Gazette of the Common Market for Eastern and Southern Africa (Comesa), Volume 17 No. 12, 20 November 2012

*and to protect consumers against offensive conduct by market actors.”* This is a clear indication of the public interest approach taken by the regulations.

Article 3 of the COMESA Regulations provides that *“the Regulations apply to all economic activities whether conducted by private or public persons within, or having an effect within, the Common Market, except for those activities as set forth under Article 4.”* This means that any mergers and acquisition of any telecommunication company across the border (within the common market) must align with these regulations.

Part 3 of the COMESA Regulations is on Prohibited restrictive business practices. These include any undertakings and concerted practices which may affect trade between Member States and have as their object or effect the prevention, restriction or distortion of competition within the common market. Article 17 and 18 defines a dominant position the market and the instances which may amount to abuse of the dominant position.

Part 4 deals with the mergers and acquisitions and the need to seek the authority of the COMESA Commission in certain defined merger transactions. Finally, part 5 deals with the consumer protection. The provisions of this international instrument are therefore applicable where a transaction such as one involving the acquisition of a telecommunication company within the regional block must be subjected to the COMESA Regulations.

### **2.2.2. The Constitution of Kenya 2010**

This is the supreme law of the land. Article 2 of the Constitution of Kenya allows International law such as the COMESA Regulations to form part of the competition laws of

Kenya. Article 10 provides for the national values and principles of governance that are to govern all state organs including the competition regulatory institutions in the Telecommunication Sector. This means that the laws, regulations and policies enacted on competition must comply with these principles such as public participation or risk being declared unconstitutional.

Article 27 prohibits discrimination so that competition laws and policies cannot be discriminatory against one party over the other in the market. Article 47 provides for the right to fair administrative action. The Article requires that every administrative body to ensure that their decisions are expeditious, efficient, lawful, reasonable and procedurally fair. Further it provides that every person (including telecommunication companies) have the right to seek judicial redress through a right of appeal or review of the decisions of the various regulatory institutions.

Article 46 is on consumer rights and provides that, “*Consumers have the right (a) to goods and services of reasonable quality; ... (c) to the protection of their health, safety, and economic interests.*” This is the basis upon which competition is often regulated on as a matter of public good and to protect the consumer of the goods and services. Article 23 provides that a person who alleges that any of the above mentioned rights have been infringed has the right to lodge a case in the High Court and seek the following reliefs: a declaration of rights; an injunction; a conservatory order; a declaration of invalidity of any law; and an order of judicial review.

### 2.2.3. The Competition Act, 2010

Before the enactment of the current Competition Act, 2010 competition in the Kenyan market was largely regulated by the Restrictive Trade Practices, Monopolies and Price Control Act, 1990 which was passed primarily to curb price fixing and monopolistic trading in the country.<sup>47</sup> This however had limited scope and did not consider the complex competition areas such as mergers and acquisitions. The main objectives of the Competition Act include among others to: “bring national competition law, policy and practice in line with best international practices; and promote the competitiveness of national undertakings in world markets.”<sup>48</sup>

Section 21 of the Competition Act provides for restrictive trade practices. Section 23 of the Act in defining dominance provides that: -

*“(1) For purposes of this section, “dominant undertaking” means an undertaking which: (a) produces, supplies, distributes or otherwise controls not less than one-half of the total goods of any description which are produced, supplied or distributed in Kenya or any substantial part thereof; or*

*(b) provides or otherwise controls not less than one-half of the services which are rendered in Kenya or any substantial part thereof.*

*(2) Notwithstanding subsection (1), an undertaking shall also be deemed to be dominant for the purposes of this Act where the undertaking—*

*(a) though not dominant, controls at least forty per cent but not more than fifty per cent of the market share unless it can show that it does not have market power; or*

*(b) controls less than forty per cent of the market share but has market power.”*

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<sup>47</sup> Preamble of the RTPA

<sup>48</sup> See Section 3, the Competition Act, 2010

Section 24 of the Competition Act lists some of the instances that may amount to abuse of dominant market to include: -

- (a) “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;*
- (b) limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;*
- (c) applying dissimilar conditions to equivalent transactions with other trading parties;*
- (d) making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts; and*
- (e) abuse of an intellectual property right.”*

#### **2.2.4. The Kenya Information and Communications Act, 2009**

“Telecommunication service” is defined as: -

*a service consisting of the conveyance by means of a telecommunication system of anything falling within subparagraphs (i) to (v) in the definition of “telecommunication system”;*  
*(ii) a service consisting of the installation, maintenance, adjustment, repair, alteration, moving, removal or replacement of apparatus which is or is to be connected to a telecommunication system; or (iii) a directory information service, being a service consisting of the provision by means of a telecommunication system of directory for the*

*purposes of facilitating the use of a service falling within subparagraph (i) above and provided by means of that system.”*

Section 3 of the Kenya Information and Communications Act (hereinafter referred to as KICA) establishes the Communications Authority of Kenya (hereinafter referred to as CA) with perpetuity and legal personality. Section 5A provides for independence of the Authority. There are also Rules and Regulations under this Act that govern telecommunication market as considered herein.

#### **2.2.5. Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010**

These regulations were enacted pursuant to section 84 of the KICA. The main purpose of these KICA Fair Competition Regulations is to provide a regulatory framework for the promotion of fair competition and equal treatment in the communications sector; and protect against the abuse of market power or other anticompetitive practices within the communications sector.<sup>49</sup> These regulations therefore play a pivotal and primary role in regulating competition in the telecommunication sector.

Subsection 2 of Section 3 elaborated some of the objectives that the KICA Fair Competition Regulations as to: -

*(a) provide for the standards and procedures to be applied by the Commission in determining whether particular conduct is anti-competitive;*

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<sup>49</sup> Section 3, KICA Regulations 2010

*(b) clarify the agreements, conduct or practices that the Commission shall consider to be anti- competitive, and prohibited under the Act; and*

*(c) provide for the standards and processes that the Commission shall apply when determining whether a telecommunication service provider is dominant in a given market.*

These regulations also outline the criterion that guides the CA in determining a competition market and also in determining a breach of the competition laws in the telecommunication sector.<sup>50</sup>

### **2.3. Analysis of the Legal Framework**

Review of the legal framework is that regulation under the various legislations serves various interests as outlined in the theories of regulation. For instance regulation under the Constitution of Kenya 2010 serves to protect the interests of the public as discussed in the public interest theory, whose emphasis is on the interest of ultimately on how the product affects the consumer. Thus, it is assumed that if there is proper regulation of the market and ultimately effective competition, then the quality of the products is guaranteed.

The Constitution in protecting the interest of public requires that consumer rights to quality goods are ensured; it requires that public participation on policy decisions and administrative actions is done; it requires that the public are not discriminated upon and that administrative bodies to ensure that their decisions are expeditious, efficient, lawful, reasonable and

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<sup>50</sup> Section 5 & 6 of the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010



procedurally fair. The Constitution in this case adopts the public interest theory in regulating competition matters.

The Competition Act also takes up the public interest approach by protecting other players in the telecommunication market against abuse of dominant position by the giant players. The minority players in the market form part of the public whose interests should equally be protected. This is seen in form of the criterion set in the act for determining acts that amount to abuse of dominant position and it also provide guidelines for mergers and acquisitions in this market that might not only reorganise the market share structure but also lead to use to dominant positions to shape the performance of the market through market prices.

The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations also lean on the public interest theory in protecting players in the telecommunication market from abuse of the competition laws.

## **2.4. Institutional Framework**

Kenya has a plethora of regulatory instruments that deal with competition in the Telecommunication sector as discussed below:

### **2.4.1. COMESA Competition Commission**

Article 6 of the COMESA regulation establishes the COMESA Competition Commission being a person enjoying international legal personality. The COMESA Commission has a

number of functions including, investigate anti-competitive practices of undertakings within the COMESA Common Market, and to mediate disputes between Member States. Further the COMESA Commission has the responsibility of regularly reviewing the competition policy and promote national competition laws and institutions, with the objective of harmonisation of those national laws with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market.<sup>51</sup>

#### **2.4.2. The Communication Authority**

Section 4 of the KICA Fair Competition Regulations, 2010 provides *verbatim* the role of the Communication Authority (“CA”) in competition thus: -

*“Mandate of the Authority over competition matters. (1) The Authority shall have the power to determine, pronounce upon, administer and enforce compliance of all its licensees with competition laws and regulations, that it relates to commercial activities in the communications sector.*

*(2) In so far as such matters fall concurrently under the jurisdiction of another statutory agency responsible for competition matters, the Authority shall cooperate with the said agency in matters related to fair competition.”*

Regulation 7 of the KICA Fair Competition Regulations empowers the CA to develop and publish , from time to time, in the Kenya Gazette, guidelines to be followed when determining whether a licensee in a dominant market position in a specific communications market with an elaborate criteria that is to guide the commission in issuing the guidelines.

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<sup>51</sup> Article 7 of the Official Gazette of the Common Market for Eastern and Southern Africa (Comesa), Volume 17 No. 12, 20 November 2012

The CA has powers to direct dominant service provider to cease a conduct in that market which has or may have the effect of substantially reducing competition in any communications market or to implement appropriate remedies.<sup>52</sup> This provision empowers the CA to fully regulate competition and ensure non abuse of dominance by players in the telecommunication sector.

Regulation 13 of the KICA Fair Competition Regulations provides that: -

*“The Commission (read as Authority) may, on its own motion or upon a complaint, investigate a licensee whom it has reason to believe has committed an act or omission, or is alleged to have committed an act or omission, or to have engaged in a practice, breaching the requirement for fair competition or equality of treatment.”*

Section 23 of KICA empowers CA to: -

- (a) protect the interests of all users of telecommunication services in Kenya with respect to the prices charged for and the quality and variety of such services;*
- (b) maintain and promote effective competition between persons engaged in commercial activities connected with telecommunication services in Kenya in order to ensure efficiency and economy in the provision of such services and to promote research and development in relation thereto.”*

### **2.4.3. Competition Authority of Kenya**

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<sup>52</sup> Regulation 9(5) of the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010

This is established under Section 7 of the Competition Act. Some of the functions of the Competition Authority of Kenya (“CAK”) include<sup>53</sup> to:

*“(a) promote and enforce compliance with the Act.....*

*(j) Investigating policies, procedures and programmes of regulatory authorities so as to assess their effects on competition and consumer welfare and publicize the results of such studies.....*

*(m) Liaising with regulatory bodies and other public bodies in all matters relating to competition and consumer welfare.”*

Section 12 creates the office of the Director General being the chief executive officer of the CAK. Under Sections 23 of the Competition Act, the CAK is mandated to determine issues on restrictive trade practices and dominance in the market. The Competition Act also empowers the CAK upon application by a party to exempt the application of the restrictive trade practices.

Section 31 gives the CAK enormous investigative powers into any alleged contravention of the restrictive trade practices and abuse of dominance under the Competition Act including uncompetitive practices.<sup>54</sup> This has seen the authority receive numerous complaints from various telecommunication players such as Airtel Kenya as against Safaricom PLC.<sup>55</sup>

Section 41 of the Competition Act is on mergers and acquisitions. Broadly it defines mergers as the purchase or lease of either shares, acquisition of an interest, or purchase of assets of the

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<sup>53</sup> Section 9 of the Competition Act.

<sup>54</sup> Section 31(1) of the Competition Act.

<sup>55</sup> *Airtel & Safaricom Abuse of Dominance Case 2013*, Airtel Kenya in this case (*Reported in the CAK Annual Report 2013/2014*)

other undertaking in question.<sup>56</sup> It also includes the acquisition of controlling interest in an undertaking. Section 42 of the Competition Act empowers the CAK to control mergers in Kenya. Pursuant to the said section, the CAK has developed a number of Guidelines on mergers such as the Merger Guidelines and the Merger Threshold Guidelines to regulate all mergers.<sup>57</sup> The effect of these provisions is that all mergers including that of telecommunication companies must require the approval of the CAK. A case in point is the proposed merger between Telkom Kenya and Airtel Kenya.<sup>58</sup> There is need for the CAK to be notified of each merger.

Section 36 of the Act empowers the Authority upon investigation that it may:

- (a) declare the conduct, which is the subject matter of the Authority's investigation, to constitute an infringement of the prohibitions contained in Section A, B or C of this Part;*
- (b) restrain the undertaking or undertakings from engaging in that conduct;*
- (c) direct any action to be taken by the undertaking or undertakings concerned to remedy or reverse the infringement or the effects thereof;*
- (d) impose a financial penalty of up to ten percent of the immediately preceding year's gross annual turnover in Kenya of the undertaking or undertakings in question; or*
- (e) grant any other appropriate relief.”*

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<sup>56</sup> Section 41(2)(a) of the Competition Act.

<sup>57</sup> <<https://www.cak.go.ke/index.php/statute-regulation#faqnoanchor>>

<sup>58</sup> Wafula P. Et al “Airtel and Telkom to merge in a bid to stem loss making streak” *The Standard* 8<sup>th</sup> April, 2018, Accessed at <<https://www.standardmedia.co.ke/article/2001276042/airtel-and-telkom-to-merge-in-a-bid-to-stem-loss-making-streak>>

The CAK may also opt for settlement pursuant to section 38 of the Act. If a party is dissatisfied with the decision of the authority, they can appeal to the Appeal Tribunal pursuant to Section 40 of the Competition Act.

#### **2.4.4. Competition Appeal Tribunal**

The Competition Appeals Tribunal (“CAT”) is established under Section 71 of the Competition Act and is regulated by the Competition Tribunal (Procedure) Rules, 2017 (“*CAT Rules*”). This Tribunal is of the same status as the Magistrate’s court pursuant to Article 169 of the Constitution of Kenya and its decision has the force of law and can be enforced as a court order. The Tribunal shall consist of a chairman and not less than two and not more than four other members.<sup>59</sup> Section 71(4) of the Competition Act provides for the quorum of the tribunal as three members inclusive of the chairman (being an advocate).

The CAT may either review or determine an appeal on the decision of the CAK or deal with any matter referred to it by the competent court of law.<sup>60</sup> The CAT rules provide for the form of an appeal being that of a memorandum of appeal and that the same should be served. The CAT may after considering the appeal direct the CAK to reconsider the case afresh.<sup>61</sup> The CAK has a right to appeal to the High Court against any decision of the CAT.<sup>62</sup> Rules 41 and 42 gives the CAT powers to generally give conservatory and injunctive orders to an appellant.

#### **2.4.5. Capital Market’s Authority**

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<sup>59</sup> Section 71, Competition Act.

<sup>60</sup> Rule 9, Competition Tribunal (Procedure) Rules, 2017

<sup>61</sup> Section 75 of the Competition Act

<sup>62</sup> SECTION 77 of the Competition Act.

Finally, competition in the telecommunication sector is to some extent though in a limited manner regulated by the Capital Markets authority (“CMA”). This authority is a creature of Section 5 of the Capital Markets Act. The objective of the CMA as per section 11 is to regulate the capital market. This means that a company that is trading in capital market must seek the approval of the CMA before undergoing a merger or some other form of restructuring pursuant to the Capital Markets (Takeovers and Mergers) Regulations, 2002.

## **2.5. Conclusion**

The Chapter has highlighted the legal and the institutional framework for competition in the Telecommunication sector. The Chapter has provided the elaborate local legislations enacted to deal with competition. In concluding with this part we delved into an analysis of how the theories of competition regulation have influenced the legal framework. Noting the number of institutions that regulates this sector, we cannot avoid the major challenge to this ever cross-border and an intertwined market of telecommunication. Thus, the push and pull between the several agencies who may usurp jurisdiction is inevitable.

The Chapter however reveals that Kenya has a number of regulations in place to address competition in the telecommunication sector. The subsequent chapter therefore undertakes a study as to whether this legal and institutional has promoted competition or whether it has failed to do so.

**CHAPTER THREE: THE EFFICACY OF REGULATING COMPETITION IN  
THE KENYAN TELECOMMUNICATION MARKET**

**3.1. Introduction**

This Chapter does a situational analysis to assess whether the various regulators effectively dispensed their functions under the various legal regimes in ensuring that competition is fostered in the market. The chapter first discusses some of the cases that have been handled by the various authorities and their finding and an assessment as to whether they stifled or



accelerated completion. The Chapter then proceeds to conclude as to the major challenges that come with regulating the Telecommunication market.

### **3.2. The efficacy of Competition Regulation**

The previous chapter highlighted some of the functions of the Competition Authority of Kenya (“CAK”) a regulator as established under section 7 of the Competition Act primarily to promote and enforce compliance with the Act<sup>63</sup> and importantly to foster fair competition in the market among other functions.<sup>64</sup> Indeed this is in line with the objective of the Competition Act being that of preserving and promoting the free market and for consumer welfare protection in regulated industries.<sup>65</sup>

One of the roles of the Communication Authority (CA) is that it is required to develop, promote and monitor fair competition among key market players in the ICT industry by ensuring that ICT users are protected from unfair business practice.<sup>66</sup> As elaborately discussed in the ensuing chapter of this dissertation, competition in the telecommunication sector takes a multi-regulatory approach with several stakeholders playing a role in it. The CA investigates complaints on abuse of market dominance and enacts guidelines and regulations to ensure that commodities such as waves are not used by the dominant market players at the prejudice of the weaker parties. This is to ensure that there is a competitive market.<sup>67</sup> The CAK primarily

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<sup>63</sup> The Competition Act 2010, section 9Ibid

<sup>64</sup> Ibid

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<sup>66</sup> <https://techweez.com/2017/03/16/communications-authority-kenya-ca-explains-competition-clause-telecommunications/> accessed on 4 June 2019 2.22pm

<sup>67</sup> <https://techweez.com/2017/03/16/communications-authority-kenya-ca-explains-competition-clause-telecommunications/> accessed on 4 June 2019 2.22pm

regulates mergers between various telecommunication companies. It also regulates the restrictive trade practices generally.

### **3.3. Steps taken by the Regulatory bodies in regulating Competition**

In the recent past, a number of cases have been lodged with either the CAK or CA on abuse of dominance and the anti-competitive practices. These authorities have in the past determined a number of cases in the telecommunication sector on matters competition. Some of these cases are discussed below:

#### **3.3.4. The Echotel Limited Acquisition of IwayAfrica Limited Case**

Echotel International Proprietary Limited had expressed the interest to acquire 80% of the issued share capital of IwayAfrica Kenya Limited, a company dealing in the provision of internet services.<sup>68</sup> The proposed transaction proceeded when the parties sought the approval of CAK to approve the merger deal within the meaning of Section 2 and pursuant to Section 41 of the Competition Act. The parties' combined turnover for the preceding year was over Sh1 billion. This meant that the transaction had met the set threshold pursuant to the Merger Threshold Guidelines thus justifying the need to notify the CAK.<sup>69</sup>

In the CAK's competition analysis for market products such as market provision for retail internet access services, the estimated market shares for the five main players in the provision of retail Internet access services in 2018 was: IwayKenya (1.2%); Echotel (0.6%); Safaricom

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<sup>68</sup> <https://www.cak.go.ke/index.php/latest-determinations> accessed on 10 June 2019 1.50pm

<sup>69</sup> *ibid*

(14%); Internet Solutions (13%); Liquid Telecom (25%); Telkom Kenya (28%); Simbanet (4%); and Others (14.2%). Post-merger, the merged entity would have a market share of 1.8% and was therefore unlikely to raise competition concerns since its market power is generally low. If anything is to go by, the merged entity would still face competition from other players controlling approximately 98.2% of the market power.<sup>70</sup>

Further, competition analysis on the market for provision of Virtual Private Network (“VPN”) services, the market shares for the five leading players in the provision of VPN services in 2018 were: iWay Kenya (0.02%); Echotel (0.2%); Safaricom (15%); Internet Solutions (20%); Liquid Telecom (32%); Telkom Kenya (20%); Simbanet (4%); and Others (8.78%). After the merger, the merged entity would have a market share of 0.22% and was unlikely to raise competition concerns since its share was generally low. Further, it was the CAK’s view that the merger was unlikely to lead to a substantial lessening for competition or prevent competition in the market for the provision of VPN services.<sup>71</sup>

Premised on the fact that the transaction was unlikely to raise negative competition or public interest concerns, the Authority approved the acquisition of 80% of the issued share capital of IwayAfrica Kenya Limited By Echotel International Proprietary Limited.<sup>72</sup> This is indeed a positive step taken by the CAK in regulating competition among the various internet service providers.

In reviewing abuse of dominance power in the Telecommunication Sector, the CA submitted to the Twelfth Parliament Departmental Committee on Communication, Information and

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<sup>70</sup> *ibid*

<sup>71</sup> *Ibid* note 57

<sup>72</sup> *ibid*

Innovation<sup>73</sup> that in access to telecommunications infrastructure, including cell towers, ducts, poles and fibre, the incidence of dominance in the wholesale market, from its reports, existed in the Tower market where Safaricom Limited is listed as dominant in a number of counties.

In this regard, CA proposed that Safaricom Limited be obliged to provide other Tier 1 operators access, on a non-discriminatory basis, to its sites in those counties over the next five years, without extinguishing appetite for further investments by the current and future investors in the sub-sector. CA further proposed that every licensee should be subjected to a minimum threshold investment requirement in the Towers market to ensure the sustainability of the industry whilst fostering competition. Unfortunately, despite the report by the CA on the need to neutralise dominance in the market controlled predominately by Safaricom, there has been no further action on the same.

### **3.3.5. Airtel & Safaricom Abuse of Dominance Cases**

Airtel Limited in this case (*reported in the CAK Annual Report 2013/2014*) lodged a complaint with the CAK accusing Safaricom Kenya of abusing its dominance in the market. This was following Safaricom's directives to its M-Pesa agents not to offer any money transfer services from any other provider. Safaricom had also threatened to terminate M-Pesa agency contract for an agent that had contravened the said directive. Airtel Limited also alleged that Safaricom was being anti-competitive thus requesting to have Safaricom open up its exclusive agency network, lower the cost of transactions and allow for interoperability of the platform.

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<sup>73</sup> Report on the inquiry on legislative and regulatory gaps affecting competition in the Telecommunication sector, 2019

The preliminary findings of the CAK upon investigating the case found that Safaricom had abused its dominant position by engaging in restrictive trade practices. The CAK invited Safaricom to lodge its defence. In response, Safaricom submitted a settlement proposal to the CAK pursuant to Section 38 of the Act terminating the hearing. Airtel dissatisfied with the decision filed a judicial review application challenging the termination of the hearing. The matter did not go to a full hearing as the parties agreed to an out of court settlement bringing the judicial review application to an end.

The Competition Act further classifies abuse of dominant position *inter alia* as directly or indirectly imposing unfair practices or selling prices, applying dissimilar conditions to equivalent transactions with other trading parties, limiting or restricting production, market outlets or access, investment, distribution or technical development through or other predator practices.<sup>74</sup>

In line with the above description of abuse of dominant position, Airtel Limited had filed a petition with the Authority accusing its rival Safaricom Limited of setting the cost of M-Pesa mobile cash transfers to Airtel Money Customers at double the price charged on Safaricom-to-Safaricom customers. Airtel Limited had argued that by categorizing non-Safaricom customers as unregistered users and imposing on them double the M-pesa charges applicable to its customers; Safaricom was abusing its position as Kenya's dominant provider of mobile phone-based money transfer services.<sup>75</sup>

Following its investigations into alleged infringement of Part III of the prohibitions set out in the Competition Act by Safaricom Limited and its Mobile Money transfer agents, the

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<sup>74</sup> <http://www.nairobibusinessmonthly.com/consumer-welfare-as-a-goal-of-competition-law/>

Accessed on 3 June 2019 at 4.27 pm Jane Wachira, Consumer welfare as a goal of competition law, 2017

<sup>75</sup> *ibid*

Authority entered into a settlement with Safaricom Limited in line with its powers under section 38 of the Act.<sup>76</sup>

The terms of the Settlement included; that all restrictive clauses in the agreements between Safaricom Limited and its Mobile Money Transfer Agents be expunged immediately, but in any event not later than 18th July 2014; that the Mobile Money Agents be at liberty to transact the Mobile Money Transfer Businesses of any other mobile money transfer service providers; that oversight by Safaricom Limited be thereafter limited to its business with the Agents and that each Mobile Money Service Provider be responsible for ensuring compliance with Central Bank of Kenya Regulations.<sup>77</sup>

In other instances, Safaricom was found to be abusing its dominant position in areas such as Discriminatory Pricing where Safaricom Limited has differentiated pricing for unregistered M-Pesa users compared to registered M-Pesa users. This discriminatory pricing strategy has been effective in compelling mobile subscribers many of whom are highly price-sensitive to choose Safaricom as their preferred operator.<sup>78</sup>

Price Discrimination is also evident in the prices of USSD services vary depending on the customer. In the case of different banks and other financial service providers, Safaricom clearly applies dissimilar conditions. For instance Commercial Bank of Africa, for which the M-Shwari product is accessible through STK, incurs no separate STK charge; KCB Bank, for which its KCB M-Pesa product is accessible through USSD, incurs no separate USSD charge; Equity Bank's Eazzy 247 product, which is accessible through USSD, incurs Ksh 4 charges per USSD session; Other banks accessible through USSD appear to incur prepay charges at

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<sup>76</sup> Competition Act, 2010

<sup>77</sup> Kenya Gazette Notice Vol.cxvino.118-page 2629, 3 October 2014

<sup>78</sup> Renaldo D'Souza, Susan Makena, Elizabeth Njenga, Justina Vuku, *Safaricom dominant fact or fiction* 2018

either Ksh 2 per session from June 2015 or Ksh 5 per session or more in the case of postpay (depending on the number of shops); and Non-MNO mobile money services providers (e.g., Mobikash and Tangaza) incur higher prepay charges than banks.<sup>79</sup>

Abuse of dominant position has been evident in the high tariff prices charged by Safaricom Limited on consumers. Its tariffs are significantly higher than its competitors in virtually all its service lines. Safaricom Limited has taken advantage of its market positioning, its network infrastructure, and coverage advantages, its distribution network to charge a premium tariff to its customers.<sup>80</sup>

Market restrictions or tied selling to include the sale of headsets at Safaricom retail outlets where would be twin SIM phones are configured to accept a single SIM card. This is a deliberate effort by the operator to ensure that phone buyers are restricted to using a single operator for all mobile services. With Safaricom enjoying a strong advantage in mobile money services particularly, subscribers would find it cumbersome to keep switching SIM cards to use other comparatively cheaper services provided by other operators is an abuse of dominant position by Safaricom.<sup>81</sup>

Preventing competitive conduct by competition where Safaricom resisted wallet-to-wallet interoperability with other mobile wallets when it was first proposed with the fear that this would erode the advantage it enjoys in mobile money services. Account to account interoperability was implemented in April 2018 but has had minimal effect on MPesa market

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<sup>79</sup> Macmillan Keck Attorneys & Solicitors, Acacia Economics *Draft Report Competition inquiry into USSD service provision in Kenya, 2016*

<sup>80</sup> Ibid note 65

<sup>81</sup> Ibid note 65

share since implementation.<sup>82</sup> The lack of interoperability between M-Pesa and other mobile wallets is a major factor in the competitive dynamic of the mobile money services market segment. The price and non-price barriers to transfers, which arise from the lack of interoperability between mobile wallets, drive and entrench network effects whereby the value of an MMT service depends on the number of consumers using that service. Where a provider becomes dominant, such network effects reinforce and protect its dominance.<sup>83</sup>

It remains highly opposed to the agent to agent operability where agents operate a single float accessible to users of the different mobile service operators. With a network of almost 160,000 agents, Safaricom believed that it would be unfair for other operators to use its existing agent network, one they have invested extensively in building as a key area of competitive advantage.<sup>84</sup>

The CAK and CA also play the role of commissioning inquiries, studies, and research into matters relating to competition and the protection of the interests of consumers. Such inquiry was the market inquiry into the pricing and conditions of USSD access offered by mobile network operators (MNOs) in Kenya. The objective of the market inquiry was to determine whether the provision of USSD services led to constraints on competition in financial services and related markets and identify other concerns relating to consumer protection.<sup>85</sup>

The inquiry suggested that Safaricom appeared to be engaging in conduct that constrains competition at several levels: First, Safaricom appeared to be raising the costs of bank and non-MNO mobile money services providers through unfairly high USSD charges and price

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<sup>82</sup> *ibid*

<sup>83</sup> *Ibid* note 66

<sup>84</sup> *ibid*

<sup>85</sup> *ibid* note 66



discrimination. By doing so, Safaricom impedes its financial services rivals' ability to compete with M-Pesa in the mobile money services market segment. This appears to be an unlawful abuse of dominance.<sup>86</sup>

Secondly, Safaricom's strategy for account-to-account interoperability embeds M-Pesa further refusing account-to-account interoperability with other mobile wallets while allowing it with bank accounts (albeit still on pricing terms that draw usage to M-Pesa) intensifies network effects that protect M-Pesa from the competition. The combined impact of these makes M-Pesa a 'must-have' product and, since it is only available on a Safaricom SIM card, Safaricom secures its position as a 'must-have' network. Together, these make M-Pesa impregnable to competition on the merits of the services themselves.<sup>87</sup>

Thirdly, M-Pesa's market power in the mobile money services market segment appears to be having an impact also in the adjacent mobile savings and loan market segment. Safaricom is able to offer advantages to lending products in which it has an interest, including interoperability of accounts without usage charges, co-branding and privileged access to Safaricom's customer data for these products. Safaricom appears to be limiting a key input to the mobile savings and loan market segment, possibly constraining competition in this market to a duopoly of banks whose revenues it shares. Indeed, Safaricom's stake in these ventures may amount in effect to a tendency towards monopoly in the mobile savings and loan market.<sup>88</sup>

The inquiry also established the level of dominance by different market players in different market segments such as retail mobile telecommunications services provided by MNOs and

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<sup>86</sup> Ibid note 66

<sup>87</sup> Ibid note 66

<sup>88</sup> ibid

MVNOs, the wholesale provision of USSD and STK access by MNOs and MVNOs to mobile financial services providers, retail money transfer and payment services and consumer savings and loans.<sup>89</sup>

Effective competition policy should in the substantive law set out the basic rules to be applied. It should adopt procedures for ascertaining the relevant facts in each case from which fair and properly reasoned conclusions can be drawn on the application of the substantive law to the case.<sup>90</sup>

A difficult balance has to be struck between the need of the Competition Authority of Kenya to have sufficient powers to ascertain these facts which may be elusive and the rights of the undertaking involved in the due process including access to the allegations made against them and a full right of response.<sup>91</sup>

### **3.4. Challenges faced by the regulators in the Telecommunication Sector**

An effective competition policy should also ensure maintenance and development of institutions capable of enforcing the substantive rules in a way which is both fair and effective.<sup>92</sup> Competition enforcement agencies in developing economies lack resources and skills to effectively implement competition law. In most cases, the agencies are understaffed, have no competent staff and are mismanaged.<sup>93</sup>

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<sup>89</sup> *ibid*

<sup>90</sup> *Ibid* n 14

<sup>91</sup> *Ibid* n 14

<sup>92</sup> *Ibid* n 14

<sup>93</sup> Andy C.M. Chen, *Justifications and Limitations for Adopting Divergent Competition Policy and Law in Emerging Economies*, 43 *Denv. J. Int'l L. & Pol'y* 379, 402 (2015)

The Competition Authority, for instance, may not have the expertise to deal with technological issues in determining competition cases from the telecommunication sector. If anything is to go by, the Communication Authority that is supposedly competent in dealing with telecommunication issues plays a limited role when it comes to competition and dominance regulation.

This has caused inefficiencies in swift and accurate identification of offences or management of competition in the market. Further, the incompetence of these regulatory entities has been attributed to many factors. For instance, civil service systems in most developing countries (such as Kenya) rely on a relatively frequent rotation of staff rather than on more stable assignments, which in turn creates the risk of inconsistent enforcement.<sup>94</sup>

Equally, it must be recognized that technology is a field that is constantly growing and advancing. This, therefore, means that occasionally the market players are ever a step ahead of the regulator. Consequently, the regulator may not be able to develop regulations to preemptively deal with the changing market. Rather most of these regulations are reactive and may not be useful given the pass of time.

The regulators are susceptible to political interference risking losing their independence in the execution of their mandate.<sup>95</sup> In safeguarding market competition there may be constant conflict that the demands the government to protect policy goals that are incompatible with

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<sup>94</sup>Ibid

<sup>95</sup>Ibid n 25

the fundamental principles of competition law, but that are required to be implemented based on political considerations.<sup>96</sup>

Under the Competition Act, any merger and takeover for whole or part of an undertaking requires the approval of the Authority regardless of the market share and whether the principal and target businesses are substantially similar.<sup>97</sup> There are no thresholds under the Act where the merger or acquisition between players of similar or different goods.<sup>98</sup> The Act also lacks thresholds in terms of market share above which the CAK may exercise its jurisdiction. This results in a situation whereby the Authority may be swamped with all manner of application and ultimately leading to inefficiencies in the disposal of the cases attributed to lack of human capacity to competently and effectively deal with the cases.<sup>99</sup>

In the pursuit to control unwarranted economic power, the CAK has a wide mandate to analyse the market and determine where concentrations of economic power exist whose negative effects outweigh efficiency advantages.<sup>100</sup> The Authority's powers span to making an order against those persons deemed to hold such unwarranted concentrations of power to dispose of their interest as the Authority deems fit.<sup>101</sup> Unfortunately, despite the enormous powers, the CAK is yet to exercise these powers.

Equally, a few cases have been reported in comparison to the manner in which the Competition Act has been contravened by the various market players. Even where these cases have been determined by the CAK their reporting is not effective and the public is not notified

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<sup>96</sup>Ibid n 25

<sup>97</sup><http://www.wap.ratio-magazine.com/inner.php?Id=4041> accessed on 10 October 2017

<sup>98</sup>Ibid n 25

<sup>99</sup>Ibid n 25

<sup>100</sup>Ibid n 25

<sup>101</sup>Ibid n 25

in an accessible manner of the regulator's decision. Few cases also get to the Competition Tribunal in the Telecommunication Sector. The Courts too have not made major judicial pronouncements on competition law cases as few are presented before judges. This, therefore, means a deficit of jurisprudence that is to guide the regulators in this market.

Further, even where there are recommendations to amend the law<sup>102</sup> there is often delay in the implementation aspect. Crucially, is the fact even in such a situation, the regulator, the state and the market players are ever insisting on drafting more and more regulations while turning a blind eye to free market and market forces regulatory approach in the sector. The reports of the Competition Tribunal are also not as available as those of other tribunals. A search with the Kenya Law Reports offers no assistance either.<sup>103</sup>

Finally, as highlighted from the onset of this paper, telecommunication as a market cuts across several spheres of law including the banking law, competition law, communication law and securities law (where applicable). As such, there is a likelihood of regulatory conflict as to who should fully regulate competition in this sector. Yet another risk is that of market over-regulation which may in itself stifle completion.

This puts a telecommunication company in a position where it will have to adhere to the CBK guidelines on mobile banking, completion guidelines on abuse of dominance and the Communication Authority directives on the use of waves. This may also possess the other challenge of under regulation as one regulator may fail to exercise its powers to regulate

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<sup>102</sup> See the recommendations in the National Assembly, Kenya *Report on the Inquiry into the legislative and Regulatory gaps affecting competition in the telecommunication sub-sector, 12<sup>th</sup> Parliament, 3<sup>rd</sup> Session, March, 2019*

<sup>103</sup> Kenya law reports <<http://kenyalaw.org/kl/index.php?id=9050>>

competition for fear of usurping another regulator's powers a step which may in itself fail to cure the market failures.

### **3.5. Conclusion**

The Chapter has taken a situational analysis approach by discussing the facts as they are on the ground. The efficacy of the various authorities and entities in ensuring effective competition has been discussed too in-depth. It is revealed that there is a lot to be done. There are a number of institutions at play with no clear and cut jurisdiction thus inefficient regulation of competition in the sector. Further the institutions are also not independent enough to discharge their mandate in upholding competition.

The Chapter has equally deliberated on some of the challenges that the Kenyan market and the regulators faces and the causes of these challenges in regulating competition in the telecom market. The paper has given the reader an understanding of the applicability and the impact of the competition regulations in the market.

## **CHAPTER FOUR: COMPARATIVE ANALYSIS**

### **4.1. Introduction**

The law polices and principles that govern competition law in the Kenyan telecommunication sector do not operate in vacuum. The same takes into account some of the best practices on the subject and modify the same to fit the local context. South Africa on one hand (by default of being colonised by the United Kingdom, followed the colonial path) thus it has a highly regulated telecommunication market. This is largely spiced by the pro- regulation economics theories. The United States on the other hand unlike most states, never had a nationalised telecommunication sector with early telecom companies such as AT&T being private entities free from state control. This history was principally influenced by the liberal market economic theories and has in turn influenced the colour of its regulations.

Accordingly, part one of this paper will consider United States as a model state on competition regulation in the telecommunication sector influenced by the liberal theory. This part will in detail discuss the legal and institutional framework of United States on the subject. The second part will discuss the regulatory and institutional framework of South Africa to capture the trends in regulating competition in the telecommunication sector in Africa.

In discussing these two states, the paper will endeavour to compare each aspect with the Kenyan legal position on the same. The chapter then concludes by a brief conclusion on the findings in the research.

## **4.2. United States**

### **4.2.1. The Regulatory framework of competition in the telecommunication sector**

#### **Sherman Anti-trust Act**

This is the oldest legislation enacted by the US for purposes of regulating competition. Thus Section 1 of the Sherman Act, (1890) provides that: *Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*”

Section 2 goes further and makes monopoly a felonious offence. However, over time the Courts have interpreted these provisions objectively so that they fit into the ever-growing technological advancement.

#### **Clayton Anti-trust Act, 1914**

This Act was enacted to supplement and strengthen the Sherman Act of 1890, a legislation that was felt to have failed in regulating effectively the massive corporations’ unfair competition in the market. Section 5 of the Act provides that “*unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*” The Act also in clear terms provides that no single entity may



acquire the other where the said acquisition is likely to substantially lessen competition or tend to create a monopoly. It also places such transactions under the jurisdiction of the Federal Trade Commission.

### **Federal Trade Commission Act**

This particular legislation established the Federal Trade Commissions<sup>104</sup> and Section 5 of this Act empowers it to prevent any person or other entity from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce. The Act was therefore enacted in the same year as the Clayton Antitrust Act to actualise and implement its aspirations by having an institution in place. The Act also considers cross-border transactions and the need for foreign assistance a critical element that is cognisance of the cross-border nature of the telecommunication.<sup>105</sup>

### **The Telecommunication Act, 1996**

The Telecommunications Act 1996 (“TA”) was introduced to ensure that the seven Baby Bells open their networks to competitors. The TA has the same objectives as the Communications Act 1934; that is, to increase competition and to reduce regulation.<sup>106</sup> This is a clear bias by the United States in their policy by preferring a liberal rather than a regulated market and if

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<sup>104</sup> Section 1, Federation Trade Commission Act.

<sup>105</sup> Section 6, Federation Trade Commission Act.

<sup>106</sup> Rhys Williams, *Telecommunications Regulation and Competition Law*, Franco-British Lawyers Society, accessed at: < <https://fblls.eu/wp-content/uploads/2013/03/2002-Telecommunications-Regulation-and-Competition-Law-by-Rhys-Williams-Partner-Simmons-Simmons.pdf>>

regulated, to the very minimum. This position is contrasted with that of Kenya and South Africa as we shall see shortly.

The Act broadly affects the telephone services, local and long-distance cable programming and other video services, broadcast services and services provided to schools.<sup>107</sup> The purpose of the Act is to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.<sup>108</sup>

This Act has been criticised for not fully dealing with legal balkanization and for the failure to limit the mega-mergers that were seen shortly after enacting the legislation thus killing competition.<sup>109</sup> However, in the long run, it has been argued that local telephone companies were prohibited by the Federal Communications Commission from offering cable television service. The same prohibition applied to local cable television systems being able to offer telephone service. Therefore, until the Telecommunications Act of 1996, regulation ensured that these industries could not go head-to-head against each other for customers.<sup>110</sup>

Section 103 of Act allows registered holding companies to diversify into telecommunications, information, and related services and products where the Securities and Exchange Commission determines that a registered holding company is providing telecommunications, information, and other related services through a single purpose subsidiary, designated an

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<sup>107</sup> <<https://www.fcc.gov/general/telecommunications-act-1996>>

<sup>108</sup> The short title, Telecommunication Act, 1996

<sup>109</sup> Hanlong Fu, David J. Atkin, & Yi Mou , “The Impact of the Telecommunications Act of 1996 in the Broadband Age”, (2011), *Nova Science Publishers*, 123

<sup>110</sup> <<https://www.brookings.edu/blog/techtank/2016/02/08/was-the-1996-telecommunications-act-successful-in-promoting-competition/>>

"exempt telecommunications company." This provision opened the market even for other entities that were ordinarily not in this market.

Section 102 (b) authorises the bell operating companies (Telecom) companies to expand their markets beyond their regions. This provision was a liberalising one.<sup>111</sup> The Act also allows any person licensed to operate a TV broadcast station also to offer such ancillary or supplementary services on designated frequencies as may be consistent with the public interest, convenience, and necessity.<sup>112</sup> This is meant to incite innovation in various field and has worked well so far in the US market.

#### **4.2.2. The Institutional Framework of Competition in the Telecommunication Sector**

##### **Federal Trade Commission ("FTC")**

This Commission is established pursuant to Section 1 of the Federal Trade Commission Act, 1914. Section 5(1) provides that "*Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.*" However, unlike Kenya where the Competition Authority can either act on its own motion or on application by an individual, the FTC may not act on its own motion and whenever it considers that it has reason to believe that a person or entity is competing unfairly and having taken into account the public interest, issue and serve upon such person a complaint stating its charges and have the matter heard by it within 30 days.<sup>113</sup>

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<sup>111</sup> Degnan Peter M., Scott A. McLaren & Michael T. Tennant, "Telecommunications Act of 1996: 704 of the Act and Protections Afforded the Telecommunications Provider in the Facilities Sitting Context, The," (1997), 3 *Michigan Telecomm. & Tech. L. Rev.* 1

<sup>112</sup> <<https://www.congress.gov/bill/104th-congress/senate-bill/652>>

<sup>113</sup> pursuant to Section 5(b), FTC Act

Section 5(c) empowers the FTC to review or set aside its orders. The Court of Appeals of the United States also have the power to either overturn or uphold the findings of the FTC. However, Section 5(e) of the Federal Trade Commission Act provides that “*No order of the Commission or judgement of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Act.*” This seems to be an interesting and rather confusing provision as the same is likely to raise conflicts between these two legislations.

Section 7 of the FTC Act also expressly provides that the Court may on application direct that a particular matter be heard by the FTC where it is just and reasonable to do so order. This is similar to the Kenyan context where the Court can and does always direct cases to the specialised tribunal. However, the same is not solidified in any statute.

The FTC reports on the determined cases and the matters pending before it and the same is downloadable from their website.<sup>114</sup>The FTC is also effective in determining its cases on matters telecommunication competitions. For instance, in the recent *Facebook Case, 2019*, the FTC fined Facebook a 5 billion U.S dollar fine. However, unlike in the Kenyan context where the order of the tribunal will be enforced just as the order of the Court provided that the same has been lodged as such, FTC’s decisions are only enforceable as a civil action in the district courts.

## **The Federal Communications Commission**

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<sup>114</sup> <https://www.ftc.gov/enforcement/cases-proceedings>

At the National level, the FCC regulates interstate and international communications by radio, television, wire, satellite, and cable in all 50 states, the District of Columbia and U.S. territories. An independent U.S. government agency overseen by Congress, the Commission is the federal agency responsible for implementing and enforcing America's communications law and regulation.<sup>115</sup> This institution is a creature of the Communication Act, 1934.

It does less in terms of competition law in the sector with a key interest in regulating telecommunication. The functions are similar to those of the Kenyan Communication Authority. However, through its policies, it has ensured the affordability and accessibility to communication devices and services thus fostering competition in the market. For instance, from June 2019 the FCC has enacted policies with a framework for faster and cheaper Internet access for consumers.

These policies are in line with the Telecommunication Act objectives and they intend to “replace unnecessary, heavy-handed regulations that were developed way back in 1934 with strong consumer protections, increased transparency, and common-sense rules that will promote investment and broadband deployment.”<sup>116</sup>

### **4.3. South Africa**

#### **4.3.1. The Regulatory framework for competition in the Telecommunication Sector**

##### **Electronic Communications Act, 2005**

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<sup>115</sup> <<https://www.fcc.gov/about/overview>>

<sup>116</sup> <<https://www.fcc.gov/restoring-internet-freedom>>

This Act in clear terms gives a specific mandate of investigating any anti-competitive conduct in the communication market to the Competition Commission. This is provided for under Section 67(9) of the Electronic Communication Act that provides that “*subject to the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry.*”

### **The Competition Act, 1998**

The Preamble of the Act in clear terms provides the main object of the Act as that of establishing the Competition Commission responsible for the investigation, control, and evaluation of restrictive practices, abuse of dominant position, and mergers; and for the establishment of a Competition Tribunal responsible to adjudicate such matters; and for the establishment of a Competition Appeal Court.<sup>117</sup>

Part A of the Act is elaborate on restrictive trade practices like the Kenyan Competition Act. However, unlike the Kenyan counter-part Act, this Act clearly categorises restrictive trade practices into vertical and horizontal practices.<sup>118</sup> The two types of trade-restrictive practices are prohibited by the Act in order to foster competition in all markets including the telecommunication field.<sup>119</sup>

Chapter 5 of the Act elaborately provides for the procedure that is to be followed when carrying out investigations. It also gives any Court the powers such as those of arrest, search, and

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<sup>117</sup> Short title, Competition Act, 1998, Laws of South Africa.

<sup>118</sup> Section 4 and 5 of the Competition Act, 1998, Laws of South Africa.

<sup>119</sup> Sections 6& 7 of the Competition ACT, 1998, Laws of South Africa.

seizure for purposes of enforcing this Act.<sup>120</sup> The Act also provides for the enactment of Rules that govern various proceedings before these three Authorities.

### **Promotion of Diversity and Competition on Digital Terrestrial Television Regulations**

These Regulations were enacted by the Independent Communications Authority of South Africa (ICASA) pursuant to section 30(2) (c) and (d) of the Electronic Communication Act, 2005. One of the purposes of the Regulations is to “*promote diversity and competition on the Digital Terrestrial Television platform.*” These Regulations are comparable to the Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations. Section 6 establishes a Digital Television Channel Authorisation Procedure while Section 3 creates a framework for promoting diversity and competition on digital terrestrial television. Section 8 of these Regulations empower the Complaints and Compliance Committee established by the ICASA under the ICASA Act to penalise a television broadcasting service for failure to comply with these competition promoting regulations.

### **The Competition Commission and ICASA MOA, 2002**

In 2002, Memorandum of Agreement was entered into between the Competition Commission and ICASA primarily to define and clarify the jurisdictional boundaries of the entities. Paragraph 1.1, for instance, sets out the “*manner in which the parties will interact with each*

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<sup>120</sup> See, Section 47, the Competition Act, laws of South Africa.

*other in respect of the investigation, evaluation, and analysis of mergers and acquisitions transactions and complaints involving telecommunications and broadcasting matters.*<sup>121</sup>”

Paragraph 2.1 of the MOA provides that in merger applications, the parties “*shall submit separate and concurrent applications to the Commission (in accordance with Competition Act) and to the Authority (in accordance with the Independent Broadcasting Authority Act, the Broadcasting Act, and the Telecommunications Act) for their respective consideration.*”<sup>122</sup>”

#### **4.3.2. The Institutional Framework for Competition in the Telecommunication Sector**

##### **Independent Communications Authority of South Africa (ICASA)**

This is a body established the Independent Communications Authority of South Africa Amendment Act, 2014. It must be remembered that the ICASA shares responsibility with the Competition Commission to facilitate competition in the telecommunication sector. This is pursuant to Section 3(1A) (a) and 82 of the Competition Act (as amended) that confers the two entities concurrent jurisdiction over competition matters where a sector is subject to regulation by another regulatory authority. This position is similar to the Kenyan case where the Competition Authority and the Communication Authority share responsibility in regulating the communication sector. Generally, there has been mutuality between these two regulators evident from a number of joint ventures done by the two entities.<sup>123</sup>

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<sup>121</sup> Government Gazette No. 23857. 20 September 2002. Memorandum of Agreement entered into between the Competition Commission and ICASA

<sup>122</sup> *ibid*

<sup>123</sup> <<https://www.icasa.org.za/news/2019/icasa-welcomes-the-provisional-findings-and-recommendations-by-the-competition-commission>>



The ICASA also issues reports annually updating consumers on the tariff pricing pursuant to Section of the Act that provides that “*promote the interest of consumers with regard to the price, quality and the variety of electronic communication services*” as it seeks to ensure that *there is retail price transparency.*<sup>124</sup>”

### **Competition Commission, the Tribunal & the Court**

The Competition Commission is established pursuant to section 19 of the Competition Act, 1998. Unlike Kenya where the merger is centrally a role of the Competition Authority, South African Competition Act categorises mergers into small and large mergers. Section 13 of the Competition Act provides that a party need not notify the commission of a merger if it is a small one unless the Commission so directs. Section 14A of the Competition Act, on the other hand, provides in mandatory terms that “*after receiving notice of a large merger, the Competition Commission (a) must refer the notice to the Competition Tribunal and to the Minister.*”

The Competition Tribunal is created under Section 26 of the Competition Act.

Pursuant to Section 18 of the Act, anyone dissatisfied with the decision of the Tribunal should lodge an appeal with the Competition Tribunal. The Competition Tribunal is also mandated to publish a notice of the decision made by it in the Gazette and further issue written reasons for its decision.<sup>125</sup>

Competition Appeal Court is established under Section 36 of the Act composed of at least three judges of the High Court. Section 17 provides that within 20 business days after notice

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<sup>124</sup> Object 2(n) of the Electronic Communication Act, 2005

<sup>125</sup> Section 16, Competition Act, 1998 Laws of South Africa.

of a decision by the Competition Tribunal being received by the Competition Court, it can set a date for the proceedings. It also has authority either to agree with the tribunal or overturn their decision altogether. This means that the Competition Commission plays a rather passive role in determining large mergers.

These provisions also show that contrary to the Kenyan position, three authorities are involved in determining competition issues of competition. The small mergers are dealt with by the Commission. Larger mergers are approved by the Tribunal and the specialized Appeal Court determines appeals from the Tribunal. In the Kenyan context, this is ordinarily done by the competition tribunal that exercises appellate jurisdiction over the competition authority. Further, there is no special court to deal with competition matters.

The issue of concurrent jurisdiction between ICASA and the Competition Commission has also been adjudicated before as seen in the following case:

### *Telkom Case*<sup>126</sup>

In this case, the Commission made a finding that a complaint regarding the abuse of dominance by Telkom (a South African Company) was an urgent matter that required urgent investigation by the Competition Tribunal. Telkom objected to the jurisdiction of the tribunal to hear competition matters in the telecommunication sector. On the second appeal to the Supreme Court of Appeal, it was held that the tribunal had the jurisdiction and thus could hear and determine the complaint. This case helped clarify the demarcation and the interplay between the two authorities while exercising its concurrent jurisdiction.

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<sup>126</sup> <[https://ispa.org.za/press\\_releases/ispa-welcomes-the-supreme-courts-decision-on-telkom/](https://ispa.org.za/press_releases/ispa-welcomes-the-supreme-courts-decision-on-telkom/)>

#### **4.4. Conclusion**

This chapter attempts, though not exhaustively, to discuss the various jurisdiction with emphasis on the comparative aspect with the Kenyan competition regime in the telecommunication sector. It also attempts to draw the lessons Kenya can borrow from these progressive jurisdictions and implement in the Kenyan telecommunication sector. A discussion of the regulatory framework of the United States reveals a liberal approach towards regulation that only regulates the telecom market for consumer protection and not competition. Whereas United States is not of the same economic and growth level of Kenya, the study of its telecommunication's regulation is necessary to espouse the steps and laws that it has in place despite being a liberal economy so as to influence Kenyan's steps as the growth of the telecommunication sector is obviously inevitable.

South Africa on its part takes the English approach that Kenya equally subscribes to- that by regulating the market, competition is encouraged. The challenge of cross-regulation caused by the multi-agency approach to the regulation of competition in this market is equally faced by South Africa. These major findings definitely inspire recommendations herein and lessons that Kenya can learn.

## **CHAPTER FIVE: TOWARDS A BALANCE BETWEEN REGULATION AND A LIBERAL MARKET**

### **5.1. Introduction**

The preceding Chapters have elaborately discussed the regulatory framework that exists in Kenya in the telecommunication competition. The Paper has also considered what other states have done as far as regulating competition in the telecommunication sector is concerned. One golden thread is running in this entire discourse: “should we or should we not regulate competition in the telecommunication market?”

The discourse has not, of course, addressed this pertinent question but has rather problematised the same and offered guidance as to which way to follow. Accordingly, this concluding chapter is divided into two major parts. First, the chapter gives a summary of the paper and the major findings therein. Obviously, a study as this one is a voyage that the scholar herein undertook into the literary waters and at the point of docking, a summary of facts found must then be elucidated. The Chapter then gives a number of recommendations that the Kenyan regulator can consider when addressing the subject of this discourse. The Chapter is then concluded by succinctly expressing the way forward on the question of regulation.

### **5.2. Summary of Findings**

## **Chapter One**

Chapter I of this paper was majorly an introductory, giving inter alia, the background of the study and the objects of the study. The chapter also highlighted the methodology applied in the study being the desktop approach of reviewing and considering scholarly documents and other research conducted in this respect. The objects of the study informed the research questions that this paper has answered in the previous chapters. The main objectives were to analyse the legal and institutional framework of the study and to assess the efficacy of these framework. Finally, a comparative analysis of the United States of America's and the South African legal and institutional framework also formed one of the objectives of the paper.

The literature review section of this Chapter also revealed that not so much study has been in done in Kenya addressing whether it is necessary to regulate the telecommunication sector and if so, whether competition is fostered. However, a number of valuable literacy papers did shed light on the subject. Where some scholars both locally and internationally argued for and against regulating the market. Some advocated for a common ground of limited regulation of growing markets.

The Chapter discussed the major theories divided into liberal and public interest and capture theories of economic regulation. The liberal theory advocates for free market – free from regulation- as the mature for economic growth and competition in any marketplace. This it relies on the market forces of supply and demand. The public theory on its part argues that regulation is necessary to protect the consumer and foster competition by correcting the market imperfections. The last theory of capture market theory postulates that regulations serve not the public but rather self- interest of policy and regulatory formulators.

## **Chapter Two**

Chapter II of the dissertation discusses first the legal framework of regulating competition in the telecommunication sector.

Part two of the Chapter unearths the institutional framework of competition in the telecommunication market. In particular, authorities such as the Communication Authority and the Competition Authority are the major player in the market. The Chapter also cautions of the likelihood of conflicts between these two regulators. The need to notify any merger to the Competition Authority has also been considered. The Chapter also digs up the *Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010* as the major regulations governing the subject. These regulations seem to be giving the powers of regulating competition to the Competition Authority of Kenya. It was also revealed that where a transaction is within or a cross the COMESA block, then the COMESA Competition Commission has to be notified for approval.

## **Chapter Three**

This Chapter undertook the situational analysis on the efficacy of the existing regulation in ensuring that there is competition in the telecommunication sector. In the first part we considered the positive steps taken by the regulator in promoting competition. For instance, in a number of complaints filed by Airtel Kenya with the Competition Authority on abuse of

dominance, it was our finding that accordingly Safaricom was cautioned against abusing its market power and orders given to that effect.

The Chapter has also considered the challenges that the regulators in the subject that is ever-camouflaging thus constantly leaving the regulator behind. The cross-regulatory approach to the subject and the unavailability of the determined complaints by the regulator are some of the challenges that the paper identifies. The other major challenges that the chapter brought to light included the need to promote capacity building of the regulators so that they can constantly be at par with the ever-mutating telecommunication market. There is need to promote the independence of the regulators so as not be “captured” by the curtails and self-interested market players.

#### **Chapter Four**

This Chapter discussed the legal and the institutional framework of South Africa and United States in the regulation of the competition in the telecommunication market. The study reveals that the South African system of regulating the subject is not so apart from that of Kenya. In particular, it has two regulators on the subject and that in fact the conflict as to who has jurisdiction on completion in the telecommunication sector has been tested, determined and clarified by the Supreme Court of Appeal. This is something that Kenya should consider so as to clear this grey area. The study also revealed that South Africa largely supports the public interest theory of regulation just like Kenya. It has so far worked well in enhancing competition in the South African growing telecom market.

The other jurisdiction that has also been compared with the Kenyan is the United States. This country has been inspired by the liberal and the capture market theorists on the need to under-regulate the market to foster competition. It also has one major regulator dealing with competition in the telecom market. It has specific regulations in place such as the Telecommunication Act, 1996, to encourage competition in the market. However, it must be remembered that their regulation is very limited with the freedom given to the market forces to determine the competition in the sector. In fact, the main objective of the Telecommunication Act is to “replace unnecessary, heavy-handed regulations that were developed way back in 1934 to promote investment. Indeed, this country has had major growth in the sector with companies competing with few market barriers.

### **Recommendations**

The paper in the preceding chapters did offer a number of recommendations that Kenya can take into account the existing regulatory framework in order to promote competition in the telecom market. The following are some of the recommendations that Kenya can buy:

First, it is strongly recommended that, just like South Africa where there are two regulatory authorities sharing jurisdiction, then there should be a clear judicial pronouncement on the same for purposes of clarifying such pertinent issues. This will also enable one single authority to work on developing the relevant policies to foster competition without the fear of usurping other entities jurisdiction. In the alternative, the Kenyan regulatory framework can also take the US approach by having just one regulator on the subject. Indeed, this study agrees and supports the recommendations of the National Assembly’s Departmental



Committee on Communication, Information and Innovation for the Kenya Information and Communication Act, 1998 to be amended giving the Competition Authority the sole mandate in regulating competition in all sectors including telecommunication.

However, pending the proposed amendments and with the current regulatory dispensation, it is recommended that taking into account the South African style, the Competition Authority and the Communication Authority need to sign a Memorandum of Understanding on the exercise of jurisdiction in regulating competition in the telecommunication market. Further, the Competition Tribunal's decision should be published and the same made easily accessible to the public.

It is also suggested that Kenya should have a specialised Court or division of the Court to deal with competition matters exhaustively and develop proper jurisprudence in the area. Further, there is need to have specific timelines for determining the complaints filed with the tribunal as justice delayed is justice denied.

With these limited regulatory barriers, the U.S market has been opened fully, the market players such as Google have been able to develop more innovative ideas in the telecommunication sector. This is an approach of under regulating the market unlike the South African and the Kenyan approach of over-regulation of the telecom market.

The Kenyan legislation should also be amended accordingly to cater for the trans-border transaction and the need for foreign assistance, a critical element that is cognizance of the cross-border nature of the telecommunication. The COMESA regulations are not sufficient as they only cover the limited regional block.

Importantly, it is strongly recommended that we have minimum regulation and where they exist in the first place the focus should be on consumer protection. It is evident that an over-regulated market is less likely to flourish in terms of competition and as such market forces should be allowed to some extent to determine the trajectory of competition this sector.

### **5.3. Conclusion**

The paper started an intellectual voyage of ascertaining to what extent telecommunication market should be regulated. Unfortunately, the paper has not answered this question with a succinct answer. Rather, it has problematised the issue and opted for a middle ground. Kenya has to choose either the US or the South African approach which is to regulate the sector to the maximum or allow for a liberal market. This should be done having considered all the relevant factors and the recommendations herein.

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