1 Introduction

1.1 Sub-Saharan Africa Competition Policy in Perspective

Competition policy has over the years established a very wide footprint with some of its most nascent adopters being Sub-Saharan African (SSA) jurisdictions. However, the socio-economic and political characteristics of the SSA jurisdictions call for a different approach to competition policy. A consideration of Competition Policy in the SSA context invariably draws one's mind to three major themes: development, small market economies and regional integration.

This is against a backdrop of several other socio-economic and political factors that led to the adoption of competition policies in SSA. At the national level, SSA consists of small, highly concentrated economies at different levels of economic development. These clusters of small economies are often composed of regional economic champions such as Kenya, South Africa and Nigeria. One of the main similarities shared by a majority of the SSA countries is their colonial history, which played an integral part in shaping the socio-economic and political climate and policies that led to the adoption of competition law by these countries.

At the regional level, there are several regional integration blocks including the Common Market for Eastern and Southern Africa (COMESA), Southern African Development Community (SADC) and the East African Community (EAC) consisting of overlapping memberships in some instances.

Internationally, the globalization of economies has reshaped the global legal regulatory landscape, forcing nations to rethink some of the traditional notions of territoriality and consequentially fostering a greater convergence of legal norms.[1]

The reduction (and in some instances elimination)[2] of barriers to international trade has been accompanied in many countries by the adoption

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1 Bertrand Crettez, Bruno Deffains and Olivier Musy, 'On Legal Cooperation and the Dynamics of Legal Convergence' (2010) (Economix Working Paper 17), 2 <http://ideas.repec.org/p/drm/wpaper/2010-17.html> accessed 16 September 2019.

2 For instance in the case of Regional Economic Communities where trade tariffs between the member states are eliminated.

of competition laws to prevent private frontiers from being erected that hinder the efficiency of their markets and which would consequently make their national markets less attractive.[3]

The integral role of competition law as one of the components of this legal convergence trend is evident from its inclusion in the post-war period of the 1940s in the Havana Charter[4] for the formation of an International Trade Organization (ITO).[5] Though it was subsequently excluded from the 1947 General Agreement on Tariffs and Trade (GATT), its role in international trade has continued to gain increasing importance in the years since then.[6]

Outside of the World Trade Organization (WTO) context, one of the main avenues through which co-ordination of international competition law measures and co-operation is being achieved is the International Competition Network (ICN). The main attraction of the ICN is the fact that proposals, recommendations or measures arising from its activities are not binding on any countries. This coupled with the voluntary participation creates a forum through which a continuous and consistent effort towards international competition law regulation can be realized.[7]

From the perspective of transnational business, a main goal of competition law convergence is to cut down on transaction costs, that result from the hurdles faced in seeking to comply with the merger regulation provisions of the various and diverse national legal systems.[8] Multinational corporations (MNCs) play a central role as a driving force behind economic globalization.[9] The process of global restructuring through mergers and

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3 Eleanor M. Fox, 'Toward World Antitrust and Market Access' (1997) 91 Am. J. Int'l L.1, 1.

4 Havana Charter for an International Trade Organization (U.N. E/Conf. 2/78 (1948) reprinted in UN. Doc. ICITO/1/4 (1948) (Havana Charter).

5 Clifford A. Jones, 'Toward Global Competition Policy?; The Expanding Dialogue on Multilateralism' (2000) 23 World Competition, Issue 2, 95-100; see also David J. Gerber, Global Competition: *Law, Markets and Globalization* (Oxford University Press 2009) cap 2.

6 Ibid Jones (2000).

7 Mariana Bode and Oliver Budzinski, 'Competing Ways Towards International Antitrust: The WTO versus the ICN' (2005) New Developments in Antitrust (Nova No 3), 13-15.

8 Dani Rodrik, 'Globalization and growth - looking in the wrong places' (2004) 26(4) Journal of Policy Modelling, 513-517.

9 Shangquan Gao, 'Economic Globalization: Trends, Risks and Risk Prevention' ST/ESA/2000/CDP/1, 2 <http://www.un.org/en/development/desa/policy/cdp/cdp_background_papers/bp2000_1.pdf> accessed 22 August 2019.

acquisitions by which MNCs aim at accessing new markets and increasing efficiency should be facilitated by efficient and effective merger regulation systems.

A discussion on global competition law is not possible without looking into the United States (US) and the European Union (EU) which are the leading jurisdictions in terms of development, application and enforcement of competition law.[10] The EU-US cooperation mechanism on merger control plays a central role in any debate on international cooperation and convergence.[11]

Some of the dominant themes surrounding the adoption of competition law in SSA include the promotion of regional integration, economic development, incentivizing Foreign Direct Investment (FDI), or at times from recommendations of international institutions or as part of bilateral or multilateral trade agreement packages.[12]

Adoption of competition laws is seen as a catalyst for economic development in SSA unlike in the developed jurisdictions where it is predominantly a tool to regulate already developed markets.[13] SSA countries however face various challenges such as resource constraints (including lack of skilled human resource) and enforcement capacity which always leads to the question as to whether there is a need for tailor-made laws.[14]

Mergers and Acquisitions (M&As) continue to play an integral role in the economic development of Africa. Statistical data points to a surge in M&As in Africa, with the SSA region showing in 2014 an M&A activity level not seen since at least the mid-90s.[15] The benefits from the upsurge in M&A activity include increased FDI, infrastructure improvements, not

10 See generally Eleanor M. Fox, 'Antitrust and Regulatory Federalism: Race up, Down and Sideways' (2000) 75 N.Y.U. L. Rev. 1781, 1803.

11 Alexandr Svetlicinii, 'EU-US Merger Control Cooperation: A Model for the International Antitrust?' (2006) 11(3) Journal for Legal Theory and Practice of the Jurists Association of Serbia, 113-126 <http://ssrn.com/abstract=1325695> accessed 15 July 2019.

12 Dina I. Waked, 'Competition Law in the developing world: The why and how of adoption and its implications for international competition law' (2008) 1, Global Antitrust Review 69, 69; see generally Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michael S. Gal & David J. Gerber (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar 2012).

13 Waked (Ibid) 73.

14 Ibid 79.

15 Javier Blas and Andrew England, 'M&A activity hots up in Africa as investors bet on growth' *Financial Times* (2 December 2014) <http://www.ft.com/cms/s/0/47dee88a-795c-11e4-a57d-00144feabdc0.html#axzz3OhsEWIfR.> accessed 15 July 2019.

to mention the probability of human resource development and more opportunities for employment. Though the biggest deals are still driven by the natural resource base, there is an increased spending power of the middle class, an improving political climate and an increasing focus on infrastructure development raising optimism for greater economic diversification and sustained economic growth.[16] It is therefore logical that more SSA countries would seek to adopt merger regulation systems in order to have a better grasp on the increased M&A activity in their territories.

Most SSA competition laws are modelled on the provisions of the developed jurisdictions. The EU model has been adopted as the model of choice for many developing jurisdictions and SSA is no exception.[17] Both the European Union and the United States seek an enhancement of economic efficiency and consumer welfare.[18] However, whereas the US system increasingly places greater emphasis on efficiency the European Union tends to balance efficiency considerations with non-efficiency objectives that are critical to the integration of the European Community.[19] This is one of the reasons that make the EU system the model of choice for a number of SSA countries which are also members of Regional Economic Communities (RECs).[20] Developing countries however incorporate deviations which focus specifically on the development objective that is central to their competition laws. The incorporation of public interest in the substantive analysis is the core divergence.

The focus of this study will be on Eastern and Southern Africa (ESA). The ESA countries in focus are Zambia, Zimbabwe, Kenya, Mauritius, Botswana, Tanzania, Malawi, Seychelles and Namibia. The Common Market of Eastern and Southern Africa (COMESA) merger regulations are

16 Carolyn Cohn and Susan Fenton, 'Sub-Saharan Africa M&A deals, debt issuance surge in 2013' *Reuters* (London, 16 January 2014) <http://in.reuters.com/article/2014/01/16/africa-deals-idINL5N0KQ1FF20140116.> accessed 15 July 2019; *see also* Mthuli Ncube, 'Mergers and Acquisitions in Africa' (AFDB 2012) <http://www.afdb.org/en/blogs/afdb-championing-inclusive-growth-across-africa/post/mergers-and-acquisitions-in-africa-10163/.> accessed 15 July 2019.

17 Fox (n 10) 1799.

18 Eleanor M. Fox, 'US and EU Competition Law: A Comparison' in J. David Richardson and Edward M. Graham (eds), *Global Competition Policy* (Peterson Institute for International Economics 1997), 339.

19 Ibid. 353-354.

20 *See generally* Josef Drexl, 'Economic Integration and Competition Law in Developing Countries' in Josef Drexl, Mor Bakhoum, Eleanor M. Fox, Michael S. Gal & David J. Gerber (eds), *Competition Policy and Regional Integration in Developing Countries* (Edward Elgar 2012) 231-252.

also included. There are more countries in the SSA region that have adopted competition policies including merger provisions but are yet to undertake implementation. The countries in focus have however implemented their merger regulations with some having reasonable experience in enforcement. The analysis is also restricted to Anglophone countries. The inclusion of the COMESA merger regulation brings the regional perspective into the discussion. The fact that six out of the nine countries in focus are also members of COMESA will facilitate an analysis of the interaction between the regional and national merger regulation systems.[21] The availability of published information (decisions, reports, guidelines and regulations) on which to base the analysis has also largely instructed the choice of jurisdictions.

1.2 Policy Objectives of Merger Regulation

Merger regulation is virtually never adopted as a standalone set of rules. It is a vital component of a country's or region's competition policy. The policy objectives of merger regulation are therefore tied to the objectives behind the adoption of a competition policy. Competition policies are adopted to fit into various political and socio-economic settings, be it the need to control cartelist behaviour, to enhance consumer welfare, to protect public interests, to facilitate regional integration or to act as a catalyst for economic development especially for developing countries.

One of the core intentions behind competition law from a consumer welfare point of view is the allocation of economic resources in an efficient way through protection and promotion of competition in the market. From the total welfare perspective, an ideal situation involves a balance of not only the static (allocative and productive efficiency) but also dynamic efficiency.[22] Policy considerations are however very dynamic. They evolve to meet the needs of the pervasive political and socio-economic circumstances. Therefore, though an efficient distribution of economic resources

21 Zambia, Zimbabwe, Kenya, Mauritius, Malawi and Seychelles are part of COMESA.

22 OECD, 'The Objectives of Competition Law and Policy' CCNM/GF/COMP(2003)3, 9 <http://www.oecd.org/daf/competition/2486329.pdf> accessed 15 July 2019. The OECD conducted a survey of competition law objectives across various jurisdictions (including some Sub-Sahara Africa jurisdictions) and virtually all jurisdictions include this as primary or core objectives of their competition policy.

may be a main objective across the board, these specific political and socio-economic considerations have to be taken into account.

A good starting point in the understanding of the evolution of competition policy objectives would be to look at the reasons that led to the implementation of antitrust rules including the current goals in the United States, which is widely regarded as the birthplace of competition law implementation and enforcement and is still very influential in the global development of competition law.

Antitrust regulation was already on the international agenda from the onset of discussions on an international trade organization in the 1940s. Very few jurisdictions had competition policies in place. The policy objectives behind these initiatives for a multilateral antitrust regime, and how they relate to the increasingly converging competition policy standard, are therefore important for understanding the evolution of antitrust.

Another vital perspective as regards competition policy development that currently touches not only on Sub-Saharan Africa but also other developing and emerging markets is that of regional integration and the creation of regional economic communities. Regional integration is in most cases also accompanied by competition policies meant to safeguard the liberated internal markets. In order to understand the policy perspective of a regional community, the European Union is instructive from the point of view of a developed economic community, more so because it is the preferred integration model adopted by emerging and developing markets.

From the national perspective, the adoption of competition law by Sub-Saharan African jurisdictions can be considered from a trade, industrial and government policy context. Trade liberalization and privatization and the ensuing effect of opening up the markets to investment led to the adoption of facilitating policies including competition policy. However, the main objective reflected in most of the competition policies is that of economic development and the need to make the national markets more competitive.

An understanding of these various policy viewpoints would be invaluable in putting the developing and emerging jurisdiction perspectives in context. The objectives behind the policies adopted in Sub-Saharan Africa RECs such as COMESA and SADC as well as the various country perspectives, analysed within the matrix of the various international viewpoints, are vital for understanding the policy structure of the SSA merger regulation climate.

1.3 Research Objectives and Questions

The main objective of merger regulation is to ensure that the post-merger firm does not inhibit competition in the market, consequently ensuring that economic efficiency is maintained.[23] The proliferation of merger regulation systems in emerging markets has however been a point of concern owing to the ensuing counter-effect to economic efficiency.[24] In addition, questions have been raised regarding the ability of emerging markets to run an efficient merger regulation system in light of their resource and capacity constraints.[25]

The increasing number of merger regulation systems is raising the level of regulatory compliance costs for the concerned undertakings.[26] Add to that the inefficiency of some of the systems and the level of uncertainty goes up[27], possibly dissuading the undertakings from proceeding with their transactions. Some commentators posit that certain developing and emerging markets may be better off not adopting merger regulation systems owing to constraints in effectively operating the system.[28]

The globalization of business has also resulted in increased extraterritorial application of domestic laws.[29] This holds especially true for merger regulation. Owing to the absence of supranational competition law, the application by national jurisdictions of their competition laws to activities occurring outside of their borders where such activities have an effect on their national markets is a more or less accepted feature in international competition law.[30] There are however various factors that determine

23 Ibid.

24 Andre Fiebig, 'A Role for the WTO in International Merger Control' (1999-2000) 20 Nw. J. Int'l L. & Bus. 233, 234-237; Eleanor M. Fox, 'Antitrust and Regulatory Federalism: Race up, Down and Sideways' (2000) 75 N.Y.U. L.Rev. 1781, 1803.

25 Louise du Plessis, Lurie Judd and Amy van Buuren, 'Competition law in the developing world: A fish out of water?' (Competition Law, Economics and Policy Conference, October 2011), 4-6 <http://www.compcom.co.za/wp-content/uploads/2014/09/FINAL-PAPER-2011.pdf> accessed 15 July 2019.

26 Andre Fiebig, 'A Role for the WTO in International Merger Control' (1999-2000) 20 Nw. J. Int'l L. & Bus. 233, 234-237.

27 Du Plessis et al. (2011) 4-6.

28 Ibid.

29 See for instance IBA, 'Report of the Task Force on Extraterritorial Jurisdiction' (International Bar Association 2009), 45 <http://tinyurl.com/taskforce-etj-pdf.> accessed 15 July 2019.

30 Ibid.

whether and to what extent a country can exercise extraterritorial jurisdiction.

The exercise of extraterritorial jurisdiction by the United States and the European Union for instance would be much more straightforward compared to Sub-Saharan African jurisdictions. This is because the ability to exercise such jurisdiction, especially in terms of enforcement is linked to the economic strength and market presence of the particular jurisdiction.[31] Competition law is concerned with the regulation of markets. The greater the international weight a market has the easier it will be for that particular country to exercise its extraterritorial jurisdiction.[32]

The SSA jurisdictions would find it easy to exercise prescriptive jurisdiction extraterritorially, in terms of putting in place legislative measures, but they would virtually be unable to exercise any enforcement jurisdiction owing to their weaker economies. The question therefore is how the SSA countries can in such instances protect their domestic markets. Is there some form of leverage they can use to facilitate their exercise of extraterritorial jurisdiction? And what role does comity play in this regard?

Merger regulation needs to facilitate rather than hinder international business. Countries in Eastern and Southern Africa (ESA) need to adopt merger regulations that will facilitate both national and international business and which will at the same time effectively achieve their regulatory mandate.

Some of the relevant questions to ask are therefore: Where do the merger regulation regimes in ESA fall within the global convergence in merger regulation? What is the extraterritorial effect of the ESA merger laws? How do the substantive as well as the procedural merger regulation standards fit the context of ESA? Is there a need for redefined merger regulation systems for ESA? What is the appropriate merger regulation regime?

Factoring in the central role that economic development plays in the ESA competition policies the relevant questions include: Can a nexus be made between the adoption of competition law by the ESA jurisdictions and an increase in economic development? Can an increase in FDI and

31 See for instance Jeremy Grant and Damien J. Neven, 'The attempted merger between General Electric and Honeywell; A case of transatlantic conflict' (March 2005) <http://ec.europa.eu/dgs/competition/economist/honeywell.pdf> accessed 22 August 2019. This paper discusses the EU prohibition of a merger that had been cleared in the US.

32 IBA, 'Report of the Task Force on Extraterritorial Jurisdiction' (International Bar Association 2009), 63-64 <http://tinyurl.com/taskforce-etj-pdf.> accessed 15 July 2019.

M&A activity be attributed to the merger regulations? Do the merger regulations enhance or facilitate the ease of doing business?

1.4 Structure of the Thesis and Methodology

Although a broad convergence of merger regulation regimes may be highly beneficial especially from the perspective of international transactions, this work does not necessarily advocate for such an approach in respect of the ESA regimes. It rather explores what is suitable for ESA. The purpose of this study in this regard is to explore what can be done to optimize the already existing ESA merger regimes.

The thesis is divided into the following three parts:

Part 2 starts off with an overview of some key national and regional socio-economic and political characteristics of the ESA region in order to contextualise the discussion of competition policy considerations. From a broader perspective, it analyses some of the important developmental concerns of the ESA region and explores the link between adoption of competition policy and economic development.

Part 3 of the study discusses the international merger regulatory landscape. It starts off by discussing the efforts that had been put into creating a multilateral competition law regime and the subsequent move to foster legal convergence. This is followed by a comparative analysis of the substantive and procedural approaches to merger regulation, extraterritoriality and comity as well as institutional design.

The final part of the dissertation contains a summary of the conclusions and recommendations.

The methodology adopted is a comparative assessment of merger review in the European Union, the United States, South Africa, the United Kingdom and ESA as well as the recommendations, proposals and guidelines of the international institutions i.e. OECD, ICN, UN. The discussion of the substantive standard in South Africa and ESA pays special focus to public interest, which is a vital aspect of the substantive analysis in these jurisdictions. The purpose is to reveal whether or not the merger regulation approach in ESA is optimal and to what extent the approach can be optimised.