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THE VIABILITY OF COMPETITION LAW AS A TOOL OF ECONOMIC INCLUSION IN UGANDA.

Mwondha Dean Michael*

ABSTRACT

Competition law is an area of increasing importance in developing countries, the disruptions caused by the COVID-19 pandemic have only put more pressure on policy makers to identify and utilise legislative options that can enable the redistribution and allocation of resources without necessarily disrupting competition among businesses. The growth of economic activities in the East African region, particularly in Uganda, brings with it a range of opportunities, but at the same time presents a set of unique challenges to businesses in Uganda. The absence of a business regulatory framework on competition leaves the door open for abuse of dominance by larger firms and players in the economy. It becomes important to assess how best a comprehensive competition regulatory framework from a domesticated perspective can ensure business inclusion, by considering first the value of such laws in light of business practice and secondly, why such a law is necessary.

1.0 INTRODUCTION

Competition is central to the success of a market economy. It also plays a major role in the protection of consumer interests and fosters efficiency in resource allocation.[1] Competition entails a "struggle or contention for superiority among firms seeking to win customers."[2] From another perspective, it entails a process

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1 Uganda Law Reform Commission, 2004. 'A Study Report on Competition Law' LAW COM. PUB. NO. 6 of 2004, Kampala: Uganda Law Reform Commission

2 Whish, Richard, and David Bailey. 2011. Competition Law. London: Oxford University Press, p. 3

where firms constantly seek an advantage over their rivals and win more business territory by offering more attractive terms to customers by developing better products or through the use of much more effective marketing tactics.[3]

Competition policy on the other hand refers to government measures that directly affect the behaviour of enterprises and the structure of industry including polices that enhance competition in the domestic market.[4] The law on competition concerns itself with rules meant to protect the process of competition in order to maximise consumer welfare.[5] This can be understood in the context of some broad objectives espoused by Massimo Motta in his text "Competition Policy: Theory and Practice,"[6] such as the defence of smaller firms, promotion of market integration, facilitation of economic freedom, fighting inflation, fostering fairness and equity among others.[7] These will form part of the discourse later in this article as key priority points for the success of a viability of a proper competition framework in Uganda.

The legislative framework in Uganda on competition is still in its nascent stages. The closest semblance of attempts can be found in the National Competition and Consumer Protection Policy and the Uganda Communications Commission Act. The policy is structured around the implementation of specific sectoral strategies to promote efficiency, competitiveness and consumer welfare in a liberal economy.[8] The absence of comprehensive regulations on these strategies makes enforceability and realisation of the goals envisioned in the policy impossible hence defeating the underlying objective behind the policy. Being a policy, it is

3 *supra*, n.1, p. 17
4 *ibid*
5 *ibid*, p.1
6 Motta, Massimo. 2003. Competition Policy Theory and Practice, Cambridge University Press, p. 21
7 *ibid*, p.17
8 Lina M. Khan 2017, 'Amazon's Antitrust Paradox' Yale Law Journal, pp. 711-802, p.742

not binding but is merely a set of directive standards that parties may choose to follow or not.[9]

The Uganda Law Reform commission came up with prepositions of what a proper legislative regime on competition law would look like as early as 2006. The 2006 Report notes the absence of a law to deal with national and global competition issues. It rightly considered the relevance of competition law as a tool of preventing unfair competition that causes economic injury to businesses through deceptive or wrongful business practice.

Some objectives of the study revolved around ascertaining whether there was a need for the law in Uganda. The Commission in its survey considered a range of stakeholders ranging from policy makers, innovative sectors, performing arts societies, to state departments. The aim was to gather key data that would inform a decision to design and implement a law on competition. The report further recommended the implementation of a competition policy alongside a law. Having a policy would help identify practices and standards from an international perspective that were relevant to the needs of the Ugandan economy.

The necessity of having a competition policy was assessed along the lines of the intersecting and supportive principles peculiar to the creation of an effective law on competition.[10] For a law to be as comprehensive as intended, consideration was placed on the structure of trade, industrial relations, privatisation, regional, social and consumer protection policies among others.[11]

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9 Iryna, Yamkovyi, et al., 'Legal Policy: The Latest Dimensions of Development. Advances in Economics, Business and Management Research', 2020, p. 47. It is opined that the influence of policy on the legal system of a state is significantly amplified during social reform periods: democratization and humanization of public relations actively influences the formation of political consciousness and political culture of the population. This facet operates simply as an element of a political system that determines the effectiveness of the legal system but is not binding in and of themselves alone being devoid of legislative force.

10 See; Commission Report, p.7

11 *ibid*, p. 8

The Law Reform Commission draws several examples from the successes underpinning the success of competition law in England as a point of reference in its review process. The Commission also highlighted the contributions of regional integrations, specifically the European Union community, towards the development of competition law and policy in England.

The success of laws on competition, at least in Europe and common law jurisdictions, was informed by the application of the concepts of relevant product and geographic market which form part of the larger concept of market definition. Market definition is a tool to identify and define the boundaries of competition between firms.[12] Market definition relies on indicators such as relevant product and geographic market to spot actual competitors of particular businesses or undertakings that are capable of constraining those undertakings.

This approach as suggested by the European commission also provides a sound basis for the computation of market share in the assessment of dominance.[13] The question of whether this approach can live up to its name is put on inquiry in light of emerging technology and business trends in this paper.

The paper sets out a brief background of competition law highlighting its origin at common law and at the European regional level while evaluating its true purpose as a tool of fostering the inclusion of businesses by clamping down on unfair business practices that frustrated small businesses. It considers key concepts under the market definition approach relied on by the European Union in making and enforcing competition laws as a viable approach for Uganda while briefly considering the value it would present to the East African community as a whole.

Given the nascent nature of the Ugandan business environment, this paper focuses on the telecommunications, emerging technology and agricultural

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12 Official Journal of the European Communities, 1997, 'On the Definition of Relevant Market for the Purposes of Community Competition Law,' Commission Notice, European Commission, December 9, at para 2.

13 *ibid*.

produce sectors as relevant product items. It also considers geographical market structures of the selected items, and how a proper legal framework on competition can protect emerging players in those sectors as integration takes hold and as a relevant tool in fighting against unforeseen economic ramifications because of global pandemics like COVID-19. The paper also considers pivotal aspects of enforcement of competition law key to the implementation of laws in the area such as Competition Authorities.

This article seeks to iron out these themes with the main objective of ensuring that policy makers picture relevant considerations in making a law on a regional basis. From a third world context, it is also crucial to front the argument that competition law should be looked at from a perspective broader than simply promoting consumer welfare. Competition law can be used as a tool of promoting inclusion of persons in economic activities thus ensuring economic growth.

2.0 HISTORICAL BACKGROUND OF COMPETITION LAW AT COMMON LAW

Competition law and policy at common law originated partially from the doctrine of restraint of trade, which essentially provided courts the basis of reconciling freedom of trade with freedom of contract. The gist behind the doctrine was that "contractual limitations on parties' wider behaviour are prima facie void unless justified as reasonable."[14]

Restraints to trade are identified as per the judgment of Diplock LJ in *Petrofina (Great Britain) ltd v Martin,* in which he ruled that:

[14] The Evolution of Competition Law and Policy in the United Kingdom. Working Paper, London: Law Society Economy, p.4

> *"Where parties come to a consensus that one party will restrict his liability in the future to carry on trade with other persons not parties to the contract in such manner as he chooses."* [15]

The doctrine of restraint of trade as espoused by Diplock LJ is an underlying principle, but not the epitome of competition law and thus it's importance in this context was never overstated in the development of competition law in the United Kingdom.[16] The understatement of the significance of the restraint of trade doctrine is aimed at preventing a confusion and misconception of competition law as a variant of the doctrine, mainly because competition law is a much broader and complex field.

The first legislative effort was birthed in 1948 with the enactment of the Monopolies and Restrictive Practices (Inquiry & Control) Act. The Act was fronted by the Labour Government, and essentially represented a legislative attempt into monopolies and trade restrictive practices that existed at the time by a government that had partially contributed to the rise of monopoly through its nationalization schemes.

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15 [1966] Ch.146, 180, the case concerned a restrictive petrol purchase agreement between Petrofina and Mr. Martin. The later was required to sell strictly at the rates dictated by Petrofina. The dictates of Mr. Martins conduct by Petrofina also extended to the power of sale exercisable by Mr. Martin who was required to grant Petrofina the right of first refusal. The arrangement was to last 12 years from 6th April 1963 and during this period, Mr. Martin was unable to sale petrol at the prevailing rate as the rate dictated by Petrofina was unreasonably low. He was convinced by a rival company EASO and started selling their petrol during the same period in which he ought to have been selling Petrofina petrol exclusively. Mr. Martin decided to execute a second agreement in which he would sell his garage to EASO. Petrofina brought an action seeking an injunction against Mr. Martin who resisted the petition on account of it's being in restraint of trade. Court found that a contract in restraint of trade is one in which a party agrees with any other party to restrict his liberty in the future to carry on trade with other persons not party to the contract in such manner as he chooses.

16 "The British Monopolies Act of 1948: A Contrast with American Policy and Practice." The Yale Law Journal 59, no. 5 (1950): 899–927. <https://doi.org/10.2307/793218 >, p.902. The chances of winning in tort were limited because the doctrine that restraint must spring from malice rather than business motives made the doctrine an inadequate weapon against trade combinations. Also, see *Sorrell v. Smith*, [1925] A.C. 700, 712; The malice required was the "dis- interested malice" described by Judge Cardozo in *Nann v. Raimist*, 255 N.Y. 307, 319 174 N.E. 690, 695 (1931). The usefulness of the tort's rationale was further limited by the requirement of a conspiracy, i.e., two persons plotting together.

It was thus viewed by some scholars as an attempt to "create competition in the midst of monopoly" in addition to its being a procedural façade to further state control over a number of sectors in the economy.[17] The scope of the Act under section 2 targeted economic results rather than business methods focusing on supply, processing and exporting. The Act was also administratively inclined rather than a legal control tool. Its structure was hinged around the creation of bodies for instance the Monopolies and Restrictive Practices Commission (MRPC) that was empowered to investigate newly established monopolies on the basis of those three criteria.

In the years that followed, agitations for reform continually gained popularity, the need for a more "juridical regime," in order to foster a sense of legal certainty.[18] In 1956, The Restrictive Trade Practices Act was enacted. Headlining it was the promise to counter restrictive practices but at the same time leaving monopolies the preserve of the 1948 Act. Further legislative efforts were undertaken to account for loopholes in existing laws thus the Resale Prices Act of 1964. The Restrictive Trade Practices Act of 1968 and the Fair-Trading Act of 1973 were finally all consolidated in the Restrictive Trade Practices Act of 1976.[19]

After 1978 and 1979, pressure for reform grew once again, despite the successful reception of the 1973 Act. This culminated into the creation of the 1980 Competition Act. This particular legislation streamlined inquiries into anti-competitive behaviour. It emphasized the effects of particular behaviour rather than the structure of an industry or form of agreements.

The Act was structured to take into account developments that had taken hold in the European Community. Thus, it adopted provisions from the European Community law in order to reduce regulatory burdens on companies. This was attained through inclusion of Chapters 1 & 2, which provided for prohibitions

17 'The British Monopolies Act of 1948: A Contrast with American Policy and Practice.' Yale Law Journal, pp. 899-927 p. 899

18 *Supra,* n. 14, p.7

19 Preamble of the Restrictive Trade Practices Act, 1976

on anti-competitive agreements and abuse of dominance. With these modifications, common law competition law slowly edged to stability.

The Enterprise Act of 2002 resolved the crisis around merger regimes and management such as politicization of decision-making processes and inadequate thresholds of liability from the spectrum of competition law. The Act's objectives lay in the separation of political influence from the process of merger control, procedural reform to promote transparency, and the establishment of an objective competition-based standard of assessment for mergers.[20] To date, competition law continues to evolve and adapt.

Drawing from the European Union as an example, the rise of globalisation and integration of economies all over the world, and in the East African region specifically, will require players in the regulatory landscape to define a relevant product market and a relevant geographic market. This is in order to establish non-arbitrary laws on firms doing business in particular fields, or perhaps enact a responsive law on competition regionally.

A relevant product market will be key in identifying all products or services regarded as interchangeable or substitutable by a consumer based on key indicators such as price, characteristic or intended use. On the other hand, a relevant geographic area would identify the area in which the undertakings concerned operate in terms of demand and supply of services or products, while at the same time identifying whether the conditions of competition are homogenous relying on comparative data drawn from neighbouring areas.[21] How well these structures respond to threats like COVID-19 might be determined by how adaptable a law on competition will be moving forward.

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20 Graham, Cosmo, 2004, 'The Enterprise Act 2002 and Competition Law.' The Modern Law Review, pp. 273-288, p.281. The problematic public interest test in the Fair-Trading Act were replaced with a new test of substantial lessening of competition modelled on the European Merger Control Regulation which was premised on the dominance test, that assessed an entity's strength and ability to impede competition significantly by virtue of its dominance in a common market.

21 *ibid*, para 7-8

The concepts propounded by the European commission may relate to particular business practices and standards worth consideration under conventional competition law. However, they may not adequately accommodate the nature of activities, being either public (such as public emergencies to tackle health threats) that will not require the intervention of competition law, or threats economic in nature which are the conventional aspects of competition law. These shall tend to require more scrutiny under the lens of competition law and policy.

3.0 COMPETITION LAW IN THE UGANDAN CONTEXT

3.1 Legislative Attempts

Uganda has lagged behind in putting in place a comprehensive law on competition. The closest aspects of competition law couched in legislative language can be found in The Trademarks Act and The Communications (Fair Competition) Regulations of 2005,[22] which have since been repealed and replaced by the Uganda Communications (Competition) Regulations, 2019 herein referred to as (the Regulations),[23] pursuant to Section 93 of the Uganda Communications Act 2013 (the Act).[24] For the Trademarks Act, competition was not conceptualized in the context of economic harm caused by unfair business practices, rather it was treated as plain trademark infringement.[25]

However, it is notable that these laws are worded in limiting language and thus create the impression that they are limited in scope to only the communications sector. Regulation 2 of the Regulations explicitly limits the scope of these

22 Statutory Instrument 2005 No. 24

23 Statutory Instrument 2019 No. 93

24 Section 93(2) (e) of the Uganda Communications Act empowers the Minister after consultation with the Uganda Communications Commission and with approval of Parliament, by statutory instrument, to make regulations that relate to anti-competitive practices.

25 The ULRC noted that competition was understood in the context of misappropriation or unauthorized use of intangible assets not protected by trademark or copyright laws, false advertising, bait and switch selling tactics, unauthorized substitution of one brand of goods for another, use of confidential information by former employees to solicit customers, theft of trade secrets, breach of restrictive covenant, trade libel and false representation of products or services. See; Uganda Law Reform Commission 2004 "A study Report on Competition Law" para. 1.4

regulations only to operators licensed under the Act, and to any other person required to comply with Part IX of the Act; an operator being a person licensed to provide a communication or broad casting service.[26]

This part of the Act provides for a range of competition law related aspects, and expressly places an obligation on the commission to promote, develop and enforce fair competition and equal treatment among all operators in any business service relating to communication.[27] Under section 53, the Act further prohibits unfair competition tendencies. This, ideally, is conduct by operators acting independently or in consortium with others that restricts or distorts competition in relation to any business activity relating to communications services.

It includes conclusion of restrictive agreements, anticompetitive mergers and acquisitions in the communications sector.[28] The question of against whom this breach can be committed is adequately addressed by section 55, which allows any person to bring an action once aggrieved by an operator.

3.2 Judicial Decisions Premised on Competition Law Principles

The Commission has clarified its role in issues of competition[29] in *UCC-Ubuntu Towers Uganda Ltd v American Towers Corporation Ltd & Airtel Uganda Ltd*.[30] The matter arose out of the effect of particular clauses in the Master Tower sharing Agreement (MTSA), which the appellant alleged had breached rules of fair competition by American Tower Corporation Ltd as a successor to Eaton Towers Uganda Ltd and Airtel Uganda Ltd.

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26 Section 2, Uganda Communications Act

27 Section 52, *ibid*

28 Section 53(2) (a-c), *ibid*

29 The commission as established under Section 4 of the UCC Act is mandated to enforce the objectives of the Act these include receiving, investigating and arbitrating complaints relating to communications services and taking necessary action under Section 5(j) & (n).

30 In the Matter of the Uganda Communications Act, 2013 & In the Matter of a Complaint by *Ubuntu Towers Uganda Ltd v American Towers Corporation limited & Airtel Uganda Ltd* 2020. Decision of the commission.

The agreement was signed between Eaton and Airtel and granted a third party, American Tower Corporation Ltd (ATC) a right of first refusal (ROFR),[31] which the appellant argued was contrary to competition regulations because it caused distortions in as much as it lessened competition in the communications sector.

Five issues were raised for the Commission's determination. These were around the anti-competitiveness of the clauses, whether ATC's conduct amounted to dominance and abuse of dominance among others. The Commission commenced by citing section 5(1)(b), (j) & (n) of the UCC Act 2003. Section 5(1) (n) presents much more relevance because it mandates the commission to promote competition, protect operators from acts and practices of other operators that damage competition and to also facilitate the entry into markets.

The Commission in this decision relied on conventional principles of competition law in coming to a decision. These related to abuse of dominance by a firm, preferential treatment and the restrictive nature of trade agreements that provided exclusive rights and a competitive advantage to particular industry players. The Commission summarily found that the clauses were unfair and contrary insofar as they restricted the rights of other licensed tower operators from freely negotiating and or engaging with Airtel for possible business in the construction of new sites except with the consent of ATC. The ROFR clauses had a direct effect on entry into the tower market and carried with them an exclusionary effect.

Also considered was the level at which these restraints operated, given the fact that the players involved were in different industries thus the question of vertical restraints in competition law. Vertical restraints were held to be competition restrictions in agreements between firms or individuals at different levels of the production and distribution process as distinguished from horizontal restraints

[31] James Chen, 'Right of First Refusal', May 3 2022. The Right of First refusal is a contractual right giving its holder the option to transact with the other contracting party before others can. This right guarantees that its holder will not lose their right to an asset if others express interest in it.

that are found in agreements between firms at the same levels. This was a clear case of vertical restraints.

Reliance was placed on the European Commission Guidelines on Vertical Restraints 2010/C 13001 in determining whether the ROFR clauses were an attempt to "ring-fence and guarantee" for a particular party(s) financial benefit from the construction of new sites for Airtel over a period of 10 years. In addition, the Commission considered the question of dominance in the context of market share. It considered that ATC had a portfolio that translated into a market share of 87% in terms of relevant product and market. To this extent, it was apparent to the committee that ATC exhibited all features of an operator with significant market power in the tower market in Uganda.

While it is obvious that ATC had majority market share, the Commission does not stop at this point in determining whether or not ATC was carrying out practices in restraint of trade. By going beyond the value of Market share, the Commission appreciated the inaccuracy associated with relying on a sole indicator as a measure for violation of competition rather, it took on a holistic investigation into the conduct of ATC in assessing violations.

In deciding the question of preferential treatment, the Commission considered the effect of the ROFR clauses and found that the clauses made it possible for ATC to "cherry pick between different infrastructure build orders to the commercial disadvantage of new entrants… this significantly undermined the contestability of the tower market." This was found to constitute unfair competition.

It is important to note that this decision is not an exhaustive position on the status of competition law in Uganda, given the fact that it is sector-oriented and thus limits its scope of relevance to the entire body of competition law. Still, it is worth noting that it nevertheless renders some guidance on the progress towards the realization of a strong legislative framework on competition law in Uganda.

3.3 Impact of the Decision on Competition Law

One of the key characteristics of the decision is its source of law. The decision relies heavily on European Union and British legislative approaches, case law and principles of competition law. Considering these facets of the decision within a broader dimension, specifically the East African Community, presents a strong opportunity for law makers both locally and regionally, especially to be appraised of the absence of substantial legislation governing competition in the region.

While Kenya and Tanzania, have competition laws domestically,[32] the rest of the East African member states are still in the nascent stages of development with Rwanda, South Sudan, Congo and Uganda still at policy level. The East African Community with its East Africa Community Competition Act only presents a non-comprehensive version of competition law framework for the member states, which in itself makes it an ineffective tool of redress in matter of competition regionally.[33]

Having a regionally uniform, informed and stakeholder sensitive approach to competition law enables a tailored design of the law, based on specific products produced regionally with the main aim of combating anti-competitive behaviour at a policy and legislative level.[34] It also provides objective standards for the identification of breach and compliance, and presents the basis for the formation

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32 In 1989, Kenya realised the need to introduce competition law, and thus enacted the Competition Law and Restrictive Trade Practices, Monopolies and Price Control Act. The Act makes provision for the regulation of restrictive trade practices, collusive tendering, monopolies and concentrations of economic power and the control of mergers and takeovers. See also; 'Briefing Paper on Competition Law in Kenya,' A snapshot is available at <https://cuts-nairobi.org/pdf> accessed August 31 2022. In Congo, there is no competition legislation on mergers but the country has a draft Competition Bill that makes provision for the establishment of decision making bodies. Congo is a member of regional competition bodies such as the Central African Economic and Monetary Community (CEMAC) and the Organisation for the Harmonization of Business Law in Africa (OHADA). See 'ENS Africa Report on Doing Business in the Republic of the Congo,' available at <https://www.ensafrica.com> accessed August 31 2022.

33 The East African Community Competition Act, 2006. The Act in its long title is enacted to promote and protect fair competition in the community to provide for consumer welfare and to also establish the East African Community Competition Authority and for related matters

34 Michal Gal S. 2010. 'Regional Competition Law Agreements: An Important Step for Anti-Trust Enfrocement,' 2010, University of Toronto Law Journal pp. 239-261, p. 240. The role regional competition law agreements play in joint enforcement and advocacy is critical role in solving enforcement problems especially in developing jurisdictions.

of "objective exceptions" based on a member state's prevailing economic conditions. This to an extent eliminates politically motivated interventions in market forces, which might negatively influence and sanction anti-competitive behaviour.[35]

The dynamics that play out in third world countries present greater complexities in the enforcement and operation of competition law. Low levels of economic development alongside weak institutions and government bureaucracy still present serious challenges.[36] This makes it important to address competition law first, at a municipal or domestic level and then one can move on to the regional level.

4.0 The Winding Road to a Law That Fits the Ugandan Context

The glaring lack of a structured and comprehensive legal framework on competition law that identifies the different levels and modes of anti-competitive behaviour stands clear throughout the decision. A hint of competition laws and regulations under the Act and the Regulations here and there soon is swallowed up in a barrage of English principles and law that the judges resort to in an attempt to address the questions before them.

While the application of common law precedent appears to provide direct recourse under the doctrine of *stare decisis*, a danger of keeping the judiciary tied to a set of English construction of law and its application deprives the judicial officer and litigant of flexibility when presented with the need to

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35 Raju Parakkal,'Political Characteristics and Competition Law Enactment: A Cross Country Empirical Analysis,' The Antitrust Bulletin, pp. 609-629, p. 610 Competition laws are largely determined by economic factors rather than political ones however it is possible to make a case for the contribution of political characteristics such as the nature of the political system, the rule of law and political ideology of the ruling government to competition law. Enactment of competition laws is more likely to be done if the political system is more democratic and left-leaning and usually but unsurprisingly, countries with weak systems are more likely to enact competition laws. This leads to issues in it its application and enforcement especially where there is limited engagement with stakeholders at the drafting stages.

36 Gal, Michal. 2004. 'Competition, Competitiveness and Development: Lessons from Developing Countries,' United Nations Conference on Trade and Development, Geneva: UN, pp. 21-109, p. 21

contextualize such laws and facts.[37] This in turn creates a mechanical, as opposed to purposive approach, to competition law, which may prove disastrous on third world economies. It therefore becomes relevant for competition law and policy to take into account the size of their economies in creating a law and applying the already existent one.

European Union competition law is majorly characterized by three domains namely; the prohibition on horizontal and vertical agreements, prohibitions on the abuse of dominance and mergers,[38] and a set of controls that incorporate the EU prominent features alongside administrative controls and subsidy regulation.[39] Ultimately, decisions from courts in such jurisdictions can only do so much for Uganda, especially in the absence of a written law.

Thus, while the decision in *Ubuntu* and the Regulations largely reflect an appreciation of the two EU concepts, they also display a deficit in the fields of cartel regulation, emerging technology and agriculture. For a country like Uganda that greatly relies on agriculture, it becomes important to have fair business practices to foster economic growth and inclusion at all levels of the production chain. While equitable distribution of economic benefits through an effective law on competition and policy might tend to prove themselves illusory at the start, in the end they might be attainable.

4.1 What Aspects Should the Law of Uganda Entail?

In the era of strong 'decolonialized' sentiments amidst globalization, it becomes important for paradigms of decolonization to evolve as well. A mere transplant of Westernized or European application and understandings of competition law or

37 Benjamin Cardozo, 'The Nature of the Judicial Process,' 1921 Yale University Press, p.15

38 *supra*, n. 6, p. 29

39 Ashurst. 2021. 'Overview of UK Competition Law', <https://www.ashurst.com> See for exapmle Articles 81 on Horizontal and vertical agreements in the Treaty of the European Communities and in the Merger regulations along side The United Kindom Competition Act Article 101 that prohibites vertical agreements. Accessed July 21, 2022

the law generally might not favour or even work well in the typical African setting.[40]

4.1.1 A Domesticated Approach

Thus, the law must take into account a range of factors such as the peculiarities of business models in the East African region, the nature of products produced in the region, regional exports, political climates in the region, dialogue, customs and traditions, and human rights considerations. A holistic and broader approach to competition law in Uganda will play a crucial role in its effectiveness and success.

One factor in the progressive development of competition law in England was a home-grown and domestically sensitive approach to business tactics which had sparked the need for regulation. The legislature responded to the needs of the society as they occurred.

Unlike the European Union that has managed to attain full integration at several levels, the same cannot be said about East Africa and the East African Community. It will become crucial for policy makers at a domestic and regional level to identify classes of the relevant product market and the geographical market in which they interface. Are there issues of collusive price fixing in a certain geographical area? Are there exemptions to the relevant product market or relevant geographic market? Answers to these questions will determine a clear scope of adoption and application of competition law both at a domestic and regional level.

4.1.2 Responsiveness

A proper law on competition must not appear to be general in nature; it must be specific in its objectives, regarding conduct that would for instance pass the threshold of anti-competitiveness across a scale of indicators. The law must be

40 Sally Engle Merry, 'Law and Colonialism,' Journal of the Law and Society Association, 1991, pp. 889-922, p. 891

able to identify and respond to business arrangements or structures. Take an example of cartels within players in the domestic industry. Cartels can be understood as agreements among competitors fixing prices, allocating markets or rigging tenders.[41] Cartels come in two folds and are described broadly as:

> *"Hard core cartel, that engages in price fixing, output restraints, market division, customer allocation and bid rigging which may be expected to reduce or eliminate competition and secondly, cartels which may not harm competition significantly, may be pro-competitive, or have beneficial effects outweighing any anti-competitive effects."*[42]

Identification of tendencies such as price-fixing, market sharing, bid rigging or agreements to limit production or supply play a vital role in achieving this goal.[43] However, evidence of express cartel arrangements might not even be visible; thus, the law must take into account concepts such as circumstantial evidence.[44]

It is a complex concept and must be understood at more than one level. A blanket application of cartel restrictions on cartel behaviour could have some negative

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41 'Prosecuting Cartels Without Direct Evidence of Agreement.' OECD June 2007, June, available at <https://www.oecd.org/competition/cartels/>, accessed July 26 2022
A cartel can be defined as agreements between firms that would otherwise be in competition with each other that aim to fix prices, reduce output or allocate markets or that involve the submission of collusive tenders. See: World Trade Organisation, 'Provisions on Hard Core Cartels: Background Note by the Secretariat', ("Background Note"), WT/WGTCP/W/191, dated 20 June 2002, at section 3.

42 Dr. Jonathan T Fried, 2002, 'Cartels and Competition Law in the Americas: Hard Core and Export Cartels," available at: <http://www.oas.org> pp. 2-3 accessed July 26 2022
See also Competition Bureau (Canada), 'Options for the Internationalization of Competition Policy: Defining Canadian Interests,' p. 13. available at <http://strategis.ic.gc.ca/SSG/ct01519e.html>

43 Seruwagi, Jane, Martine Kaggwa, and Kiiza Africa. 2015, 'The State of Play of Competition Policy and Law Reform; The case of Uganda.' This piece highlights the lack of regulation of the transport service regarding fixing of travel fares. This has led to cartel like operations in the bus sector for instance where fares are determined without any consultation or intervention of government thus ultimately affecting customers. This was evident at the start of the COVID-19 pandemic curbing measures in Uganda.
See; The Independent. 2021. 'Transport fares hiked, students stranded,' <https://www.independent.co.ug> accessed August 30 2022

44 *supra*, n. 38. p.7 The OECD policy brief notes that it might be difficult for a country just starting to enforce its competition law to obtain direct evidence of cartel agreement as a result of lack of a strong competition culture which weakens anti cartel programs. Thus, generation of direct evidence becomes almost impossible.

effects on growing economies such as Uganda. Cartels play a role in stabilization of prices at levels that take into account average total costs and thus encourage investment both in the short and long run thus leading to productivity growth.[45]

On the other hand, they present significant hurdles for developing countries as well, in terms of increasing the costs of living.[46] The prospective regulation of cartels in Uganda can be approached from a sectoral perspective in an economy both domestically and regionally. Regulation should take into account the power, fuel and other household product sectors where the pinch of cartel tendencies is felt.

4.1.3 Adaptable

As the world evolves, so does the nature of products and market. The evolution of technology, for example, cannot be ignored. Data as become a highly marketable commodity and this requires competition laws to adjust accordingly to regulate unfair trade practices in digital spaces.[47]

The regulation of telecommunications sector in the context of competition law in Uganda is just a glimpse of how far competition law can be utilized. These are considerations that must be taken into account while developing a robust law on competition in Uganda and regionally. A fundamental starting point would be identifying a suitable defining scope of what constitutes a product, for the purpose of identifying a relevant product market. Should it include a service?

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45 Izabela Luiza, 'Cartels: A Good or a Bad Strategy, 2015,' pp. 30-38, p. 32

46 OECD, 'New Initiatives, Old Problems: A Report on Implementing the Hard Core Cartel Recommendation and Improving Co-operation,' DAFFE/CLP (2000) 3/Rev. 1, 23 March 2000, at p. 2 and WTO, Report (2000) of the Working Group on the Interaction between Trade and Competition Policy (2000 Report), WT/WGTCP/4, 30 November 2000, at Section 39.

47 'OECD Handbook on Competition Policy in the Digital Age.' 2021, OECD, accessed July 23, 2022, <https://www.oecd.org>, p.19. The report also highlights the necessity for authorities to acquire experts in digital markets to try and ensure that knowledge remains up to date in this space in order to render effective and relevant policies on digital competition in the market. The report also notes that "Competition law plays an essential role in ensuring dynamic competition as digital markets mature, in particular in stopping and deterring anti-competitive behaviour or mergers that would harm such dynamic competition.

It should ideally be able to entail the inclusion of digital products and or services, so as to adequately capture a range of players not for the purpose of prosecution, but having a well-regulated competition landscape that can adapt to emerging technological products in the context of assessing what would constitute anti-competitive agreements, abuse of dominant market position and so on.[48]

Digital platforms have been conveniently described as "natural to a digital economy based on internet highways as brick-and-mortar businesses are to an analogue economy based on air and seaports, railways and roads."[49] The risks posed by an under or unregulated digital economy in terms of competition is that unlike conventional tangible business models, players in the digital industry have:

> *"…structurally different consequences as monopolies… as digital platforms become dominant, they exhibit stronger networking effects on both sides of the market, thereby enabling them to become monopolists for example in search, and monopsonists in e-commerce. They move away from product and service pricing models and towards data-based models, selling the data or using it to charge advertisers for targeted audiences."*[50]

It is important for competition regulation to consider looking beyond the size of the players and consider the nature of businesses in the digital market, given the fact that as a result of COVID-19, there is increasingly a shift from conservative business models to over-the-top delivery of services, which encompasses a range of sectors from health, e-commerce, transport, insurance, banking, fintech, government services among others.[51]

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48 The survey titled Regulatory environment for platforms, liability of intermediaries, data and cloud computing and collaborative economy available at <https://ec.europa.eu>. The European Commission defined an online platform as an undertaking operating in two (or multi)sided markets, which uses the internet to enable interactions between two or more distinct but interdependent groups of users so as to generate value for at least one of the groups.

49 Asia-Pacific Economic Cooperation (APEC) Competition Policy and Law Group, Competition Law and Regulation in Digital Markets Policy, 35 Heng Mui Keng Terrace: APEC, 2022, pp.4-5

50 *ibid,* p. 13

51 'Competition Issues in the Digital Economy.' United Nations Conference on Trade and Development. Geneva 2019: United Nations. 1-15.

Lawmakers will have to consider new methods of regulating morphed anti-competitive behaviours for instance considering who holds more market share in terms of advertising spaces, access to consumer data; these concepts have proven to be vital for market control and power in the digitized economy. Take an example of service providers in Uganda such as SafeBoda and Jumia. Jumia operates an online platform and app services housing over five thousand unique sellers as of 2020,[52] SafeBoda on the other hand, a transportation and courier services app holds more than 80% market share in the business.[53]

These have been able to thrive on providing low-cost alternatives to services ordinarily accessible without their mediation. However, such pricing has not only been a driving force in attracting consumers, but has also led to indirect acquisition tendencies where many stand-alone operators have involuntarily opted to join these tech giants.

Addressing these tendencies becomes difficult. It becomes nearly impossible to identify the appropriate tools for analysing anticompetitive practices using conventional tools such as market share especially where it is not as obvious or direct. The need to also ensure regulation while still encouraging innovation and investment in the digital economy. Collection and analysis of relevant data in digital economies can be extremely challenging especially where an economy has extremely large global players acting domestically as well.[54]

All these must be taken into account while designing an all-inclusive competition policy and law.

It should be noted that economies of scale and data-driven network effects and control of data create high barriers to entry. Take the example of Google, Google can use the search data of users to improve its search engine algorithms while new players do not have such an advantage and hence start-ups soon face competitive pressure and may end up being acquired by dominant platforms.

52 Julius Businge, 'Jumia's 8 years in Uganda,' June 15 2020, avilable at; <https://www.independent.co.ug#> accessed July 26 2022

53 Damilare Dosunmu, 'After Dominating Bike-Hailing in Ibadan for 2 years, Can SafeBoda Keep Its Lead?' March 4. available at; <https://techcabal> accessed July 26 2022 published March 4th 2022.

54 *supra*, n. 51, p. 14

When looking at the question of enforcement by the courts, it is important to consider it in the context of private or public enforcement. Should, for example, an ordinary private taxi driver or boda-boda rider bring an action against Uber or SafeBoda for say, abuse of dominance? Alternatively, should this be left to a public-spirited litigant to proceed by way of public interest litigation under Article 50 of the constitution as a violation of economic rights?[55] Giving competition law a face of human rights does not go far in protecting players in both digital and tangible economies redress. Thus the need for a strengthened and highly detailed mode of enforcement by a private individual or public body.

As these enterprises continue to expand, unregulated in third world economies, the effects of anti-competitive tendencies shall become much more evidently clear.[56] Cartel arrangements, price bidding, predatory mergers and acquisitions of smaller and start up enterprises shall continually run through third world economies. Under the false belief that under-regulation of these practices to some extent may steer economic development, such economies may refrain from regulating such activities given the tax benefits that may be attained by allowing expansionist practices.

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55 Article 50 of the 1995 Constitution of Uganda provides for the enforcement of rights and freedoms by courts. Under clause (1), any person who claims that a fundamental or other right or freedom guaranteed under the constitution has been infringed or threatened is entitled to apply to a competent court for redress which may also include compensation.

56 Alexander Kububa, 'Anti-Competitive Practices and their Adverse Effects on Consumer Welfare: The Zimbabwean Experience.' 2008. In The Effects of anti-competitive business practices on developing countries and their developement prospects, by Hassan Qaqaya and George Lipmile, 73-129 New York: United Nations. at page x, it is noted International Competition has seen a period of intensification now that interdependence of national economies has increased to a point where all economies are exposed to the influence of events and policies originating in other parts of the globe, for the Zimbabwe case, it is noted that Competition Law plays a vital role in curbing anti-competitive practices. p. 79.

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5.0 CONCLUSION

The success of a competition law in Uganda will largely depend on the legal draftsman's ability to situate the structure of the law around the structure of competition policy in Uganda and the East African community. Understanding the political and geo-political factors, along with socio-economic factors such as land use and ownership systems will play a critical role in creating a dynamic flexible and amenable law at the domestic and regional level.

The East African community, while still in its developing stages, the transition to a regionally responsive policy and law on competition will play a major role of ensuring equitable resource distribution and economic inclusion of a range of players in the regional economy ultimately stimulating economic growth within the region. This will create more room for innovation and encourage participation and diversity within economies by curbing unhealthy monopolistic business strategies. These benefits are ultimately transmitted to the ordinary buyer who gains from a much more diverse and broad range of options in a market, from service delivery to varieties in product options.

Competition law, if properly used, presents itself as a formidable tool for economic liberation, inclusion and stimulation for third world countries.

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