

**The Diffusion of Competition Law in Africa:
Theoretical Perspectives on the Policy Transfer Process**

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PhD

DECLARATION

I, Azza Anwar Ahmed Raslan, confirm that the work presented in this thesis is my own. Where information has been derived from other sources, I confirm that this has been indicated in the thesis.

ABSTRACT

This thesis uses policy diffusion theories as the theoretical framework for the study of the proliferation of competition laws in Africa. By forming synergies with the diffusion literature, the thesis identifies the main transfer agents and presents a typology of competition law based on its objectives.

Since the 1990s, Africa has witnessed an exponential increase in the number of jurisdictions adopting competition law. In addition to facing fundamental obstacles such as weak rule of law and institutions, competition law adoption and enforcement in Africa have to balance a number of different, and sometimes conflicting, policies. The pursuit of economic growth through integration into the world economy has led to convergence with an “economic welfare based model” of competition law. At the same time, the desire to meet social obligations, such as the protection of disadvantaged groups and developmental needs, has led to the incorporation of broader policy objectives in competition law, thereby introducing divergence from the said model. One area where this divergence features prominently is merger control, where plurality of objectives (economic welfare and non-economic welfare) are considered and weighed against each other. This increases the complexity of conducting cross-border mergers and creates tension between the different legal systems.

The original contribution of this thesis is in bringing together two sets of literature, namely diffusion, and competition law. It provides a statistical and systematic analysis of competition law transfer to Africa, which is also absent from the literature. It empirically traces the transfer process and policy objectives of these laws, focusing on South Africa as the leading jurisdiction in this respect. It looks into how the South African model has influenced other laws in Africa, and the challenges arising from this. Its aim is to engage academia in a critical examination of this model, assist policymakers in making informed policy choices, and benefit practitioners in understanding how merger analysis functions in this regard.

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LIST OF ABBREVIATIONS

BITs	Bilateral Investment Treaties
CAC	Competition Appeal Court of South Africa
CAK	Competition Authority of Kenya
CEMAC	Economic Community of Central African States
COMESA	Common Market for Eastern and Southern Africa
CFIUS	The Committee on Foreign Investment in the United States
DG Comp	The European Competition Commission
DOJ	The United States Department of Justice
EAC	East Africa Community
ECOWAS	Economic Community Of West African States
ed/eds	Editor/editors
EU	The European Union
FDI	Foreign Direct Investment
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
ICN	The International Competition Network
i.e.	For example / that is
IMF	International Monetary Fund
IOs	International Organizations
JFTC	Japan Fair Trade Commission
KFTC	Korea Fair Competition Commission
KOICA	Korea International Cooperation Agency
LDC	Least Developed Countries
NaCC	Namibia Competition Commission
NCA s	National competition authorities
OECD	The Organization of Economic Cooperation and Development
PICs	Public Interest Considerations

RTAs	Regional Trade Agreements
SA	South Africa
SACC	South Africa Competition Commission
SACU	Southern African Custom Union
SACT	South Africa Competition Tribunal
SADC	Southern African Development Community
SAPs	Structural Adjustment Programmes
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom
UNCTAD	The United Nations Conference on Trade and Development
UN Set	United Nations Set for the Control of Restrictive Business Practices
US	The United States of America
USAID	The United States Agency for International Development
US Agency for International Development	US Agency for International Development
WBG	World Bank Group, including five organizations, namely the International Bank for Reconstruction and Development (IBRD), the International Finance Corporation (IFC), the Multilateral Guarantee Agency (MIGA), and the International Centre for the Settlement of Investment Disputes (ICSID)
WAEMU/UEMOA	West African Economic and Monetary Union
WTO	World Trade Organization

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CHAPTER 1 INTRODUCTION

1.1 Background: Competition Law, a Global Phenomenon

One can look back to the past few decades and claim victory for competition law advocates. Over 130 countries, most of which are developing countries, have adopted competition law.¹ This law is an element of competition policy and is in essence a set of rules which maintain and promote market competition, and its theoretical basis emphasizes the importance of markets.² With growing trade liberalization, regionalization, and globalization, the number of competition law regimes has further increased, and so it is important to understand the reasons behind this exponential growth and the objectives of these countries in adopting competition laws.

In this thesis, we propose to study the phenomenon using concepts borrowed from political science, namely policy diffusion, and transfer. These concepts provide a broader narrative to classic transplant theory allowing us to look at different patterns of diffusion that may individually or collectively influence the adoption process, and emphasize the work of the agents and networks involved in the transfer process. Finally, they allow us to assess the impact the diffusion process has on the adopted substantive and procedural rules and their development, beyond the narrow focus of convergence.

1.1.1 Competition law: a hybrid of law and economics and a sub-particle of competition policy

Competition law is a hybrid of law and economics as well as an element of competition policy.³ Hoekman and Holmes define national competition law as “the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position (including attempts to create a dominant position through mergers).”⁴ Competition policy encompasses “the set of measures and instruments used by governments that determine the conditions of competition that reign on their markets.”⁵

¹Deputy Secretary-General of UNCTAD Petko Draganov, 13th Annual Conference of the International Competition Network (ICN) - Opening Session (2014).

²A PAUL & WILLIAM D SAMUELSON, *NORDHAUS ECONOMICS* (The McGraw-Hill company press. 1998).

³R SHYAM KHEMANI & MARK A DUTZ, *THE INSTRUMENTS OF COMPETITION POLICY AND THEIR RELEVANCE FOR ECONOMIC DEVELOPMENT* (World Bank. 1996).

⁴Bernard Hoekman & Peter Holmes, *Competition policy, developing countries and the WTO*, 22 *THE WORLD ECONOMY* (1999), p. 876.

⁵*Id.*

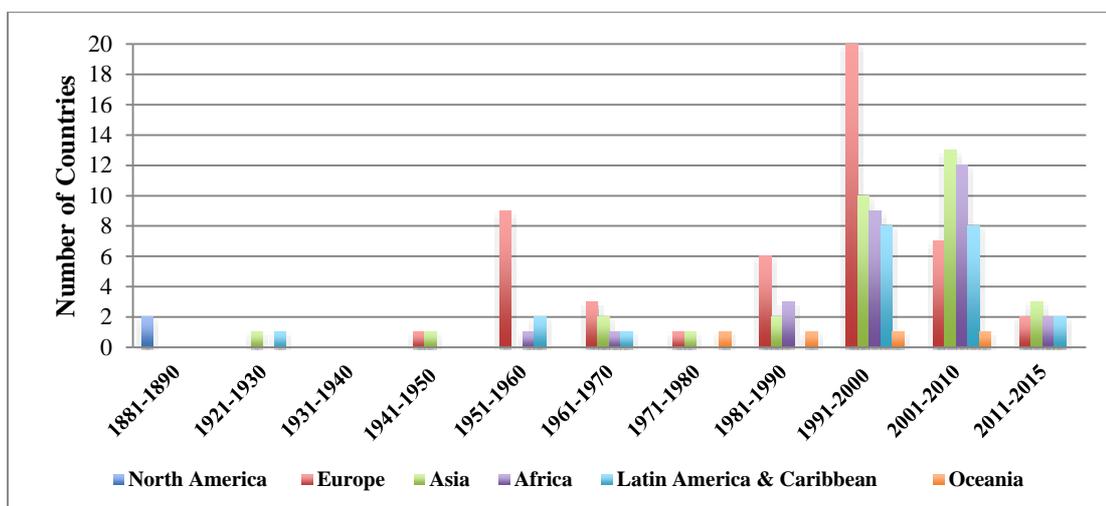


Figure 1 Proliferation of Competition Law by Region

Source: Compilation by author based on the review of national competition laws and relevant publications of NCAs and IOs

In this thesis, we track the proliferation of competition law since its inception. As of 2015, there are 138 jurisdictions, which have adopted competition law (**ANNEX I** National Competition Law (by region / period of adoption)).⁶ About two thirds of these laws were adopted between 1991 and 2010. Europe dominated the results in the first decade, but Asia and Africa, with almost equal number of countries, dominated the second decade. Many incentives have influenced the adoption of competition law. Under neo-classical economics, free markets maximize social welfare. However, in some instances market failures could occur, resulting in production and allocation inefficiencies. To face these risks, the tool of competition law can be used. Most countries adopted a free market economy as a change of policy following their commitment under various international trade agreements, most notably the WTO. Also, structural reform was a pre-requisite to access the finance offered by international finance institutions. In this context, competition law plays an important role in the transition from state to market economies. Dealing with state monopolies and privatization requires a complementary institutional infrastructure that is able to ensure a healthy competitive environment. With more attention being given by governments and the international community to broader socio-economic development, competition law is viewed as a useful tool to face such problems.⁷ This may in practice expand competition law to a wider domain beyond its current efficiency paradigm.

⁶ Data is included in Annex I. The last series reflects adoption numbers of only five years from 2011 to 2015. Data for the years 1890 – 1920 (no activity) was removed from the graph for illustration purposes. However the same is included in Annex I.

⁷ See for example Note by the Secretariat, Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth (WTO 1998) and ELEANOR M FOX & ABEL M MATEUS, ECONOMIC DEVELOPMENT: THE CRITICAL ROLE OF COMPETITION LAW AND POLICY (Edward Elgar. 2011).

Competition (antitrust) law is a dynamic concept that has evolved over time, and is reshaped based on each country's needs. It has been used to achieve different objectives in different countries (and in some cases, the same country) over the years. For this reason, it has become essential to look at the adoption process, the objectives, and the enforcement of competition to understand the outcome of its diffusion.

1.1.2 Introducing the concepts: policy diffusion, transfer and convergence⁸

Comparative law literature has engaged with the concept of the diffusion of laws through the study of legal transplants.⁹ Diffusion is a broad concept focused on how innovations spread over time. In this context, an innovation could be an idea, practice, or object perceived as new by the adopter. The concept of diffusion is featured in many other disciplines, the most relevant being social science literature. However, Twining notes a disconnection between the legal literature on transplants and the social science literature on diffusion: "Modern sociological accounts of diffusion and modern legal discussions on reception and transplants are a rather clear example of two bodies of literature seemingly addressing similar phenomena but which largely ignore each other."¹⁰ Twining then concludes that:

"(l)egal and social scientific studies of diffusion grew out of shared beginnings in cultural anthropology, but they have largely lost with each other. *Leading accounts of 'reception' or 'transplantation' law make scarcely any reference to social science literature on diffusion, which in turn has largely ignored law.*" [emphasis added]¹¹

He then criticized what he called the "naïve module" of transfer under legal transplant theories, where transplantation, as indicated by the formal adoption of legal rules or institutions without much alteration to fill gaps or replace existing local laws, occurs through a one-way transfer in a bipolar relationship between an advanced (parent) country to a less developed one; the criteria of success is whether the imported law has "stayed in place".¹²

⁸ In the outset, a special word of caution seems appropriate. We will discuss the literature of diffusion from the angle of competition law proliferation. The writer acknowledges the fact that she is not a trained political scientist but will exert utmost effort to explain the different concepts. See in general for a review of the literature on diffusion. Beth A Simmons, *et al.*, *The global diffusion of public policies: Social construction, coercion, competition or learning?*, 33 ANNUAL REVIEW OF SOCIOLOGY (2007), BETH A SIMMONS, *et al.*, *THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY* (Cambridge University Press. 2008) and Martino Maggetti & Fabrizio Gilardi, *Problems (and solutions) in the measurement of policy diffusion mechanisms*, 36 JOURNAL OF PUBLIC POLICY (2016).

⁹ Holger Spamann, *Contemporary Legal Transplants: Legal Families and the Diffusion of (Corporate) Law*, BYU L. REV. (2009) p. 3.

¹⁰ William Twining, *Social science and diffusion of law*, 32 JOURNAL OF LAW AND SOCIETY (2005), p. 203.

¹¹ *Id.*

¹² William Twining, *Diffusion of law: a global perspective*, 36 THE JOURNAL OF LEGAL PLURALISM AND UNOFFICIAL LAW (2004), p. 14.

Twining further illustrates some transfer processes which are not addressed by legal transplant, and yet which are present in the literature on diffusion of law, as shown below.

Table 1: Diffusion of laws – A Standard case and some variants

	Standard Case	Some Variants
a. Source –destination	Bipolar: single exporter to single importer	Single exporter to multiple destinations. Single importer from multiple sources. Multiple sources to multiple destinations etc.
b. Levels	Municipal legal system –municipal legal system	Cross-level transfers. Horizontal transfers at other levels (e.g. regional, sub-state, non-state transnational)
c. Pathways	Direct one-way transfer	Complex paths. Reciprocal influence. Re-export
d. Formal / informal	Formal enactment or adoption	Informal, semi-formal or mixed
e. Objects	Legal rules and concepts; Institutions	Any legal phenomenon or idea, including ideology, theories, personnel, mentality, methods, structures, practices (official, private practitioners, educational etc.), literary genres, documentary forms, symbols, rituals etc.
f. Agency	Government – government	Commercial and other non- governmental organizations. Armies. Individuals and groups: e.g. colonists, merchants, missionaries, slaves, refugees, believers etc. who “brings their law with them”. Writers, teachers, activists, lobbyists etc.
g. Timing	One or more specific reception dates	Continuing, typically lengthy process
h. Power and prestige	Parent civil or common law >> less developed	Reciprocal interaction
i. Change in object	Unchanged Minor adjustments	“No transportation without transformation”
j. Relation to pre-existing law	Blank slate Fill vacuum, gaps Replace entirely	Struggle, resistance Layering. Assimilation Surface law
k. Technical / ideological /cultural	Technical	Ideology, culture, technology
l. Impact	“It works”	Performance measures Empirical research Monitoring. Enforcement

Source: Twining (2005)

Political science literature defines diffusion as a “process whereby policy choices in one unit are influenced by policy choices in other units.”¹³ In that sense, the diffusion of policies is a product of interdependence.¹⁴ Similar to diffusion, policy transfer is also concerned with the process, emphasizing, however, the “conscious, external knowledge of a policy” as the basis of developing domestic policies.¹⁵ Both concepts overlap to a great extent, but some view the latter as a subset of the former.¹⁶ Different degrees of transfer were identified as: a) copying an existing policy, (or copy-pasting a model as some used in competition literature); b) emulating a policy, i.e. copying it while making some adjustments; c) hybridization, which stands for the coupling of two policies; d) synthesization, which means mixing three or more policies together; and, e) inspiration, which means using an existing policy as an inspiration for the creation of another.¹⁷

Jurisdictions consider the implementation environment when deciding whether to borrow policy innovations from other jurisdictions.¹⁸ Policy diffusion is thus a two-fold concept incorporating the formal adoption of an act and the implementation of the said act. The latter aspect is understood to mean, in relation to competition law and policy, “the stages after the decisional point of adoption” including...the frequency of its use, its scope, the quality of competition assessment, its role in the specific polity, its institutionalization and permanence within a specific organizational structure, enduring through elections and changes in government” i.e. the “depth of adoption”.¹⁹

Convergence is defined as “the tendency of societies to grow more alike, to develop similarities in structures, processes, and performances.”²⁰ It is thus understood to focus on a particular outcome; conforming to a specific policy as the “golden rule”. On the other hand, policy transfer may lead to a variety of outcomes and lead to convergence or divergence.²¹ It may result in: firstly, an “uninformed transfer”, where the borrowing country may have had

¹³ Erin Graham, *et al.*, *The diffusion of policy diffusion research*, UNPUBLISHED, THE OHIO STATE UNIVERSITY AND THE UNIVERSITY OF MICHIGAN (2008), p.3.

¹⁴ Fabrizio Gilardi, *Methods for the analysis of policy interdependence*, in *COMPARATIVE POLICY STUDIES* (2014).

¹⁵ ADAM J NEWMARK, *AN INTEGRATED APPROACH TO POLICY TRANSFER AND DIFFUSION* § 19 (2002), p. 2.

¹⁶ Maggetti & Gilardi, *JOURNAL OF PUBLIC POLICY*, (2016), p. 90. The two terminologies will be used interchangeably throughout the thesis.

¹⁷ David Dolowitz & David Marsh, *Who learns what from whom: a review of the policy transfer literature*, 44 *POLITICAL STUDIES* (1996), p. 351.

¹⁸ Sanya Carley, *et al.*, *Capacity, guidance, and the implementation of the American recovery and reinvestment act*, 75 *PUBLIC ADMINISTRATION REVIEW* (2015) (discussing learning as a diffusion mechanism found that implementation concerns are an underexplored but potentially important influence on policy adoption decisions in the states). Charles R Shipan & Craig Volden, *Policy diffusion: Seven lessons for scholars and practitioners*, 72 *PUBLIC ADMINISTRATION REVIEW* (2012) (criticizing policy diffusion research, except for few studies, for focusing on the adoption stage and not extending the research to implementation).

¹⁹ Ioannis Lianos, *et al.*, *Cross-national diffusion in Europe*, in *HANDBOOK OF REGULATORY IMPACT ASSESSMENT* (Claire A. Dunlop & Claudio M. Radaelli eds., 2016).

²⁰ Colin J Bennett, *What is policy convergence and what causes it?*, 21 *BRITISH JOURNAL OF POLITICAL SCIENCE* (1991). For an overview of the policy convergence literature, see *id.* and Stephan Heichel, *et al.*, *Is there convergence in convergence research? An overview of empirical studies on policy convergence*, 12 *JOURNAL OF EUROPEAN PUBLIC POLICY* (2005).

²¹ Diane Stone, *Learning lessons and transferring policy across time, space and disciplines*, 19 *POLITICS* (1999), p. 6.

insufficient information about the policy/institution and how it operates in the country from which it is transferred; secondly, an “incomplete transfer”, where crucial elements of what made the policy or institutional structure a success in the originating country cannot be transferred; and/or, thirdly, an “inappropriate transfer”, where insufficient attention is given to the differences between the economic, social, political, and ideological contexts in the transferring and the borrowing country.²² This ultimately affects the implementation of the law and the convergence (or divergence) on the subject of diffusion.

We find that adopting this framework of analysis would be particularly informative for the following reasons:

1.1.2.1 Adoption (diffusion) patterns

Diffusion examines the adoption patterns and the process of the policy/law transfer triggered by a broad range of causal factors over time.²³ This enables us to investigate a number of diffusion patterns of competition law, going beyond intuitive assumptions of coercion in the context of developing countries. Diffusion literature provides a typology of patterns through which policies are transferred. These can take the form of learning, emulation, or socialization or be due to externalities (coercion, contractualization or competition).²⁴ The theory acknowledges that states exist in a dynamic environment and there may be a number of motives affecting their decision to adopt a new law. Understanding the adoption process of a given law is important, as it will affect its configuration and enforcement in the host country,²⁵ and how the law may develop in the future.²⁶ Further, diffusion provides an interesting set of factors, which address how fast (or slow) a policy is adopted. We can apply the five factors Roger identified as affecting the rate of diffusion. These are relative advantage, compatibility, complexity, observability, and trialability.²⁷ This kind of examination may help us understand why competition law has diffused (at a slow or fast rate) in any given country. Also, this helps us to explain why certain aspects of competition law are, or may be, adopted more easily than others.

²² David P Dolowitz & David Marsh, *Learning from abroad: The role of policy transfer in contemporary policy-making*, 13 GOVERNANCE (2000), p.17.

²³ Christoph Knill, *Introduction: Cross-national policy convergence: concepts, approaches and explanatory factors*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY (2005), p. 3.

²⁴ Simmons, *et al.*, ANNUAL REVIEW OF SOCIOLOGY, (2007).

²⁵ Daniel Berkowitz, *et al.*, *Economic development, legality, and the transplant effect*, 47 EUROPEAN ECONOMIC REVIEW (2003), p. 168.

²⁶ SIMMONS, *et al.*, *The global diffusion of markets and democracy*, 2008, p. 47.

²⁷ These factors are discussed in more detail in the next chapter. They may also include knowledge required to use the innovation, risk, task performance, support and the possibility of reinvention. See, TRISHA GREENHALGH, *et al.*, *DIFFUSION OF INNOVATIONS IN HEALTH SERVICE ORGANISATIONS: A SYSTEMATIC LITERATURE REVIEW* (John Wiley & Sons. 2008), p. 595.

1.1.2.2 Identifying agents and networks of transfer

The concept of legal transplant is not concerned with the agents involved in the transfer process, although it may, in some of its forms, acknowledge the role played by bureaucratic elites in transplanting a foreign law into the host country (Watson). Hence, it is less informative about the other agents' role in producing legal change.²⁸ In this sense, it was noted that legal transplants address the "macro" aspect of legal change but not the "micro" aspect relating to the process of change.²⁹ This is of great importance given the various states, IOs, and networks working in the field of competition law and policy. Researchers have discussed the agents driving the transplantation process, especially that of various IOs involved in the process. These discussions were mostly done in a comparative fashion (i.e. which organization does what better). To date, there has not been an in-depth discussion of the agents and networks involved in competition law transfer and their impact on policy choices.³⁰

1.1.2.3 Diffusion multipliers?

Identifying diffusion patterns and transfer agents would inform us about how one or more agents impact policy adoption patterns, i.e. how adoption by one country may affect the decision to adopt the policy/law in another country (diffusion multipliers). In this way, we can identify the most influential adopters,³¹ and in turn guide the technical assistance efforts of IOs by focusing their work and co-operation with regional diffusion multipliers for maximum impact.

1.1.2.4 Understanding how convergence works beyond the core-periphery convergence model

Examining convergence as a form of informal harmonization allows us to track consensus over competition law issues.³² These may cover the convergence of competition law at procedural, substantive, and normative levels.³³ Although research is not lacking on this particular matter, it has been noted that studying core-to-periphery convergence, i.e. from the

²⁸ Michele Graziadei, *Legal transplants and the frontiers of legal knowledge*, 10 THEORETICAL INQUIRIES IN LAW (2009), 700

²⁹ *Id.* at p. 725.

³⁰ We will discuss these studies in depth in chapter two.

³¹ Others called it "tipping point" or "threshold" "when a decision of one or few counties to join a group of policy pioneers precipitates a rush to emulate". MARK EVANS, *NEW DIRECTIONS IN THE STUDY OF POLICY TRANSFER* (2009), p.36.

³² Thomas K Cheng, *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, 12 CHICAGO JOURNAL OF INTERNATIONAL LAW (2012), p. 435.

³³ *Id.* at p. 481 (arguing that special characteristics of developing countries will have a limited impact on normative and procedural convergence however its impact on substantive convergence is immense. For the latter, he mentions poverty elevation and inclusive growth as goals that may impact enforcement). This research challenges the first assumption regarding normative substance of the law and shows that, in relations to surveyed countries there is also normative divergence.

established jurisdictions to the emerging jurisdictions, as a theoretical phenomenon dominates competition law scholarship.³⁴

Further, it has been noted that both diffusion and policy transfer literature should “move away from an “excessive preoccupation with Western countries” by looking at developing countries and other regions such as Africa, Asia and the Middle East.³⁵ This multidisciplinary research will serve our direct goal of examining competition law proliferation in Africa, as well as expand knowledge of diffusion and transfer research in other parts of the world. In this study, we focus on Africa, examining both periphery-to-core convergence and periphery-to-periphery convergence.

1.1.2.5 Informing the work of IOs

Legal transplants focus on whether the adoption of a foreign law is possible. Socio-economic and cultural aspects are a hindrance to the transfer process, leaving no room to discuss actual patterns of transfer or agents that drive the transfer. Studying the proliferation of competition law under the diffusion framework will move us away from the bipolar view of legal transplant (an advanced “parent” country and a less developed country). All the above should help in measuring the impact of the work of the various state and non-state agents, which in turn would assist them in tailoring their programmes for the future.

Diffusion literature on the above concepts is vast and intertwined across disciplines. Our aim is to use the diffusion, transfer, and convergence concepts to study the spread of competition law. The thesis will only focus on capturing the main distinctive features of the three concepts relevant to our discussion: policy diffusion, transfer, and convergence. Taking this broad approach to examine the phenomenon should provide a better theoretical framework than the narrow focus of legal transplants.

1.1.3 Competition diffusion in Africa

For the empirical part of the thesis, we will study the transfer process of competition law in Africa. The continent has witnessed an exponential increase in jurisdictions adopting competition law since the 1990s.³⁶ As of 2015, 28 jurisdictions have adopted competition law, 23 of which are currently implementing their laws. Competition law adoption and enforcement in Africa face some fundamental obstacles and need to account for a number of

³⁴ *Id.* at p. 446.

³⁵ David Marsh & Jason C Sharman, *Policy diffusion and policy transfer*, 30 POLICY STUDIES (2009), p.33 and p. 43.

³⁶ As of 2015, twenty-eight African countries adopted competition laws, four of which are North African countries and twenty-four countries in Sub-Saharan Africa. We were not able to verify whether Cape Verde and Congo-Brazzaville have adopted a competition law or not. We understand that Benin adopted a Public Procurement law (Loi n° 2009-02 DU 07).

different (sometimes conflicting) policies. African countries deal, to varying degree, with issues that obstruct their path to development, including political instability, poor institutional capacities and the rule of law, corruption, unemployment, poverty and inequality. The pursuit of economic growth emphasises their need to integrate into the world economy to realise economic development, leading to a general tendency to converge with the “economics based model” of the US antitrust and/or EU competition law. On the other hand, the social need to protect the most vulnerable populations and broad developmental goals are recognized policy objectives in these countries, leading to the incorporation of broader policy objectives in their competition laws, and thereby introducing a divergence from the “economics welfare based model” currently advocated as the basis for convergence. One area of competition law where the divergence is prominently featured is merger control, where mixed policy objectives (economic and non-economic) are taken into account and balanced against each other. This may have implications that extend beyond national borders, increasing the complexity of conducting cross-border mergers, which are themselves, an important feature in international trade; this opens the door to the possibility of conflict between the different legal systems.

Except for particular studies on individual countries or regional organizations in Africa, to date there has been no in depth analysis of the development of competition law in the continent.³⁷ One reason for this is that some of these countries are still at an early stage of formulating or introducing competition law, and for those that have existing competition regimes there might not be enough enforcement as yet. However, in cases where there is some competition law enforcement, researchers are faced with difficulties in collecting and verifying data.

So far, diffusion studies have focused on the development of competition law in the US and Europe, and have largely ignored other regions, leaving gaps in the literature on other jurisdictions and hence the need to study the African region closely. In any case, this emphasizes the need to look carefully at the region. Looking at Africa provides a good opportunity to examine the diffusion of competition in a sub-set of developing countries in an innovative and systematic way.

³⁷ MICHAL S GAL, *et al.*, THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW (Edward Elgar Publishing, 2015), Fox Eleanor M Fox, *Competition, development and regional integration: In search of a competition law fit for developing countries*, in COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES (Josef Drexler, *et al.* eds., 2012) and SIMON ROBERTS, COMPETITION POLICY, COMPETITIVE RIVALRY AND A DEVELOPMENTAL STATE IN SOUTH AFRICA (HSRC Press, 2010).

1.2 Scope and Research Methodology

This research project looks at the worldwide proliferation of competition law in order to understand the patterns (process), actors (agents) and outcomes (convergence/divergence) behind the phenomenon using empirical evidence from Africa in general, and enforcement activities of South Africa (SA) and select sub-Saharan African countries in particular.

The questions we address here concern *how* competition law is transferred, *who* the agents of this transfer are, and *what* is being transferred. The empirical part of the thesis addresses the question of diffusion patterns in Africa and whether there is any relation between the *patterns* of diffusion and the *outcome* of diffusion. In this part the objectives of competition laws are adopted as a proxy to measure convergence/divergence, although we recognize that this proxy may not provide conclusive evidence.

After identifying jurisdictions with broader policy objectives which go beyond the economic efficiency-based objectives, we look at jurisdictions that consider PICs in their merger control and how these broader policies have been implemented. For this purpose, the thesis focuses on South African merger control as the leading jurisdiction in this regard, and tests the hypothesis that it is the diffusion multiplier of this approach. We then compare the law and practice of other relevant countries in our sample to that of SA to test for variations in this model.

Primary sources for this thesis are international, regional and bilateral agreements, treaties, statutes, legal instruments and policy documents of the US and the EU, as the two primary transferred models of economic efficiency-based competition law and select African jurisdictions. This is supplemented by discussion and analysis in the literature on the topics of diffusion and transfer literature, international relations theories on the one hand and on the other existing literature on comparative competition law and policy.

The thesis uses descriptive statistical analysis to track the proliferation of competition law worldwide across time (Chapter 2), study the objectives of competition laws (Chapter 4), examine the diffusion of national and regional competition law in Africa (Chapter 5), and highlight various aspects of merger control regimes in select African countries (Chapter 6). To understand the outcome of the statistical analysis, a qualitative analysis of agents and networks of diffusion is presented (Chapter 3). A few semi-structured interviews (either in person or via electronic exchanges) were conducted with competition policy experts at the FTC, DG Comp, and the COMESA, as well as other practitioners and scholars in relevant

fields.³⁸ As for the analysis of competition law in SA, the research also benefited from the interview with, and follow-up comments of, a member of the SACT.

1.3 Contribution to Scholarship and Limitations

The thesis innovatively brings two sets of literature together, that of diffusion and competition law. It further contributes to the existing literature on competition by undertaking a statistical and systematic analysis of competition law in Africa. Further, it presents an empirical study of non-economics based objectives of competition laws in Africa, especially the enforcement of public interest considerations (PICs) in select jurisdictions. Moreover, it also contributes to the diffusion literature by examining the policy transfer within Africa, namely between SA and other sub-Saharan African countries.

It is important to note the obstacles faced in this research, in particular the scarcity of information on different aspects of competition enforcement activities in most of the countries under review. Except for very few, the decisions of competition authorities and/or courts are not made available online. In this regard, one must commend SA for making such resources available to the public and to anyone interested in the field. A language barrier faces almost anyone who decides to conduct research on African jurisdictions, as every country adopts a mixture of official languages. In many countries, former colonial languages are still considered one of the official languages of the country, and these may be English, French, Portuguese, or Spanish, while each country may also adopt other languages reflecting their own national identity such as Arabic, Swahili, and Zulu. Although the adoption of a colonial language as one of the official languages of the country gives access to foreign researchers to understand official texts, in order to be able to look across Africa one must command more than one of these languages.

1.4 Structure of the Thesis

The thesis is divided into two main parts consisting of seven chapters. The first part provides a discussion of the theories relevant to the transfer of competition law and the second part provides the application of these theories in Africa regarding two aspects: patterns of diffusion (Chapter Five) diffusion outcomes (Chapters Four and Six).

³⁸ Mr. Nicholas Franczyk Counsel for International Technical Assistance at the FTC, Mr. Holger Dieckmann at the International Relations Unit of the DG Comp., Mr. Tim Green at the Department of International Development (DFID), Ms. Sophia Jeffrey at the USAID Africa Bureau, a member of the COMESA Competition Authority, a member of the Competition Authority of Botswana, a member of the Egyptian Competition Authority, Dr. Fabrizio Gilardi, Professor of Public Policy in the Department of Political Science, University of Zurich and Professor Deborah Brautigam Director of the China – Africa Research Initiative at John Hopkins University (SAIS).

PART I:

Chapters 2-4 provide the theoretical perspectives on competition law diffusion and transfer and attempt to answer the “how”, “who”, and “what” questions.

Chapter 2 provides the theoretical framework and introduces the diffusion, transfer, and convergence concepts to study the proliferation of competition law. The second part of the chapter tracks the diffusion process of competition law and discusses how the attributes of competition law may also affect its adoption rate.

Chapter 3 addresses the agents involved in the diffusion process. We look at the agents of the transfer of competition law and show their diversity and the networks formed by and around these agents. The chapter focuses on the role of international and regional organizations on the one hand and competition authorities as trans-governmental networks on the other. When looking at competition authorities under this light, one finds established trans-governmental horizontal networks where regular exchange of information and knowledge takes place. These, in turn, become catalysts for change in their respective countries, especially through an expanding advocacy function, where they are able to influence the policies, laws, and practices of other sectors in the government, as well as the market.

Chapter 4 discusses the subject of diffusion and the challenges in reconciling a multidimensional development process with single objective economic welfare based competition law model. The chapter uses the objectives of the law as an indication of its normative core and looks at the impact of the diffusion process on the same. For that we propose a typology of objectives according to which we will map competition laws in Africa: economic welfare and non-economic welfare objectives. We argue that establishing a direct link between competition and development (a non-economic welfare objective) will either lead to an inadequate law that could not address such a process, or a much broader law, which may not conform to international best practice.

PART II:

Chapters 5 and 6 provide the empirical part of the thesis, focusing on the diffusion of competition law in African countries, as well as presenting our conclusion.

Chapter 5 looks at the diffusion patterns of national competition laws in Africa: voluntary vs.

involuntary diffusion (by proceeding to a mapping exercise). It also discusses African regional trade blocks as active agents of the diffusion of competition law, and in particular considers the different types of RTAs in Africa. What role do these RTAs play in competition law diffusion, transfer, and development? The problem of overlapping memberships and obstacles to future development is also discussed at length.

Chapter 6 focuses on the multiple objectives of the competition law model adopted in a number of jurisdictions in sub-Saharan Africa, led by SA. This model, by its inclusion of PICs, represents a divergence from the standard model of competition laws (US/ EU) that have moved away from the inclusion of broad objectives to deferring these matters to other laws and / or bodies. The chapter looks at the extent to which public interest has been weighed under South African's merger control. We will answer the question of how these societal and developmental objectives were interpreted and enforced by the relevant competition authorities, especially the SACT. The second part will look at the same question for other selected countries in sub-Saharan Africa. This will be followed by a discussion of the enforcement of PICs and the "priority problem" that underlines the existence of more than a single value or right, as the unique challenges and approaches under this model.

Chapter 7 presents our final remarks and possible areas for future research.

PART I

CHAPTER 2 LEGAL TRANSPLANTS AND DIFFUSION THEORIES: A BROADER NARRATIVE TO THE STUDY OF THE TRANSFER OF COMPETITION LAW

2.1 Introduction

The number of countries adopting competition law has increased exponentially, especially during the 1990s. In the literature, this proliferation of competition law has been examined through the lens of legal transplant theories.³⁹ The concept of legal transplants, a branch of comparative law,⁴⁰ focuses on whether legal transplants can be adapted to their new environment. In this regard, two main views dominate the debate. On the one hand, some consider law to be a product of its own environment which cannot be uprooted and cultivated successfully elsewhere. We refer to this view as the culturalist approach. On the other hand, others consider law to be a transferable set of norms.⁴¹ We refer to this view as the functionalist approach.⁴²

This debate has resulted in empirically testing for the success or failure of legal transplants to demonstrate the soundness of either approach.⁴³ However, assessing the outcome of the transplantation process is not a simple task.⁴⁴ One possible outcome is full convergence both in form and substance, in addition to implementation in the adopting system being in full accordance with the original.⁴⁵ Some are sceptical about the possibility of achieving such convergence and have put forward a range of other possible transfer outcomes, including

³⁹ Tay-Cheng Ma, *Legal transplant, legal origin, and antitrust effectiveness*, 9 JOURNAL OF COMPETITION LAW AND ECONOMICS (2013); Michal S Gal, *Cut and Paste of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, The, 9 EUR. JL REFORM (2007); Michal S Gal & Eleanor M Fox, *Drafting competition law for developing jurisdictions: learning from experience*, in ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW (Michal S Gal, et al. eds., 2014), and Heba Shahein, *Designing Competition Laws in New Jurisdictions: Three Models to Follow*, in NEW COMPETITION JURISDICTIONS; SHAPING POLICIES AND BUILDING INSTITUTIONS (Richard Whish & Christopher Townley eds., 2012).

⁴⁰ ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW (Edinburgh, Scottish Academic Press. 1974), p. 6.

⁴¹ “[S]uccessful legal borrowing could be made from a very different legal system, even from one at a much higher level of development and of a different political complexion.” Alan Watson, *Legal transplants and law reform*, 92 LAW QUARTERLY REVIEW (1976). One concept of functionalism is instrumentalism “where institutions are viewed as tools, introduced by decision makers in order to resolve certain problems or achieve certain goals” and in practice lead to “one size fits all”. *THE FUNCTIONALISM OF LEGAL ORIGINS, et al., DOES LAW MATTER? ON LAW AND ECONOMIC GROWTH* (Intersentia. 2011).

⁴² Although Watson criticized functionalism his approach was considered to be based on the functionality of a law being the driving force behind its adoption by other countries. Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law*, 80 MICH. L. REV. (1981).

⁴³ ALAN WATSON, LEGAL TRANSPLANTS AND EUROPEAN PRIVATE LAW § 4 (Metro Maastricht. 2000). It is worth noting that Watson was a critic of functionalism nonetheless, some found that his position is nothing but “a mirror image of the functionalism he attacks”. See Richard L. Abel, *Law as Lag: Inertia as a Social Theory of Law, Survey of Books Relating to the Law*, Vol. 80 MICHIGAN LAW REVIEW (1982), p. 790.

⁴⁴ Some rejected using success (assimilation) or failure (rejection) as a measure to assess the outcome of the transplant emphasising that success and failure come in different forms and degrees. See Graziadei, *THEORETICAL INQUIRIES IN LAW*, (2009), at 733.

⁴⁵ Margit Cohn, *Legal transplant chronicles: the evolution of unreasonableness and proportionality review of the administration in the United Kingdom*, 58 AMERICAN JOURNAL OF COMPARATIVE LAW (2010), p. 592.

simple “fine-tuning,” which entails introducing minor changes to the transplant, to the “downright rejection” of the transplant.⁴⁶

Using legal transplant theories as the theoretical basis on which to understand the transfer of competition law and policy across jurisdictions has its limitations, as these theories fail to explain various aspects of the transfer process. Rather, they look to the outcome of the transplant process by testing for similarities and differences in legal texts. This leads to a narrowing of the focus of the study of comparative competition law and policy to look for convergence as a sign of the success of the transplant, and divergence as a sign of its failure. There is also an absence of any systematic discussion about the agents and/or networks that drive the transfer process and their impact on policy choices. We propose here to widen the scope of our examination by using policy diffusion theory to explain the adoption (in the formal sense) and implementation of competition laws (whether conforming to the origin or not). Policy diffusion allows us to investigate the reasons behind the global transfer of the competition, agents and networks involved in the transfer and assess the impact of the diffusion on implementation.

This chapter is divided into five parts. In the second part, we discuss the legal transplant literature and how it applies to competition law. In part three, we discuss how diffusion, transfer and convergence theories may provide an important narrative, and what they may add to the existing theoretical framework for the study of the multiplication of competition law regimes. In part four, we consider the diffusion of competition law. The chapter ends with part five representing our conclusions.

2.2 Competition Law and Legal Transplant Theories

2.2.1 Legal transplant theories

Legal transplants emerge from the study of comparative law. The concept of “transplant” is understood to mean “the moving of a rule or a system of law from one country to another, or from one people to another”.⁴⁷ In that sense, countries may be divided into two categories: “origins” representing countries which have developed their formal legal order internally and, “transplants,” representing countries that received their formal legal order externally.⁴⁸ There is a great deal of debate regarding the transplantation of legal norms and their success. On the one hand, some scholars argue that legal norms are closely related to their socio-political,

⁴⁶ *Id.* at p. 592.

⁴⁷ WATSON, *Legal transplants: An approach to comparative law*, 1974, p.21. Some used the term "circulation". See Edward M Wise, *Transplant of Legal Patterns*, 38 AM. J. COMP. L. SUPP. (1990).

⁴⁸ Berkowitz, *et al.*, EUROPEAN ECONOMIC REVIEW, (2003), p.1.

economic and cultural origins, so rendering the success of their transplantation rather difficult.⁴⁹ On the other hand, other scholars have argued the opposite, claiming that legal norms are autonomous ideas which may be adopted in any given setting. This characteristic is what drives legal development. Between these contradicting ideas, there is a spectrum of views and research addressing the question of legal transplants.⁵⁰ The 1970s witnessed a debate on legal transplants in the works of Kahn-Freund and Alan Watson. Kahn-Freund noted how lawmakers at the time looked abroad for new ideas and techniques.⁵¹ He attributed the reasons behind legal transplants to be one of the following three: a) to harmonize laws internationally, b) to give effect to a shared belief in social change in both one's own society and the foreign country, and c) to bring social change as expressed by a foreign law.⁵² Kahn-Freund did not question transplantation *per se* but cautioned that legal transplants face many limitations. He agreed with Montesquieu's main argument, that the spirit of the law is closely related to its environment, but argues that we should reconsider the order of these environmental elements. In his view, the relative significance of the political elements now trumps geographical, economic, social, and cultural elements.⁵³ The question of legal transplants in Kahn-Freund's mind is encapsulated in the following quotation:

[A]nyone contemplating the use of foreign legislation for law making in his country must ask himself: how far does this rule or institution owe its existence or its continued existence to a distribution of power in the foreign country which we do not share. How far would it be accepted and how far rejected by the organised groups which, in the political sense, are part of our constitution?

⁴⁹ Pierre Legrand, *Impossibility of Legal Transplants*, *The*, 4 MAASTRICHT J. EUR. & COMP. L. (1997). The core of this view stems out of the work of Montesquieu dating back to the seventeenth century. "[L]aws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another." Montesquieu found climate, region, religion and population as fundamental factors determining government structures, which in turn affect the formation of the law. ANNE M COHLER, *et al.*, MONTESQUIEU: THE SPIRIT OF THE LAWS (Cambridge University Press. 1989) and JOHN ALAN BAUM, MONTESQUIEU AND SOCIAL THEORY (Elsevier. 2013).

⁵⁰ William Ewald, *Comparative jurisprudence (II): the logic of legal transplants*, 43 THE AMERICAN JOURNAL OF COMPARATIVE LAW (1995), Ugo Mattei, *Efficiency in legal transplants: An essay in comparative law and economics*, 14 INTERNATIONAL REVIEW OF LAW AND ECONOMICS (1994) and Daniel Berkowitz Berkowitz, *et al.*, EUROPEAN ECONOMIC REVIEW, (2003).

⁵¹ Otto Kahn-Freund, *On uses and misuses of comparative law*, 37 THE MODERN LAW REVIEW (1974).

⁵² "Foreign legal systems may be considered first, with the object of preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce. *Id.* at p 2.

⁵³ *Id.* at p. 8-12. By political differentiation, Kahn-Freud meant the difference between communist and the non-communist, on the one hand and that between dictatorships and democracies, the types of democracy (presidential and the parliamentary type) and the "organized interests in the making and in the maintenance of legal institutions."

He broadly defined organised groups to include not only those representing big business, trade unions and consumer organisations, but also those representing cultural, religious and charitable interests.⁵⁴

Watson's theory, on the other hand, is based on the notion that law develops mainly through borrowing due to fortuitous contact.⁵⁵ He illustrates this point by tracing the transplantation of the Roman contract system in Europe and elsewhere, to demonstrate that law, being a transferable idea, can be detached from its social, economic, political, and cultural origins and cultivated elsewhere.⁵⁶ Before Watson, in *Matters of Legislation (Time and Place)*, Bentham also addressed legal transplants,⁵⁷ and contradicted Montesquieu in finding that utilitarian laws are of universal application "so that the best laws for China would also be the best laws for Peru."⁵⁸ Bentham, however, adds an important aspect when applying utilitarian laws, by raising an important distinction that is not always carefully considered in legal transplant literature. This is the difference between the formal adoption of a law and the actual implementation of the same, where the latter will require taking local circumstances into consideration when applying the law.⁵⁹

The debate over the success of legal transplants continued with Legrand, who took a strong stance opposing Watson's legal transplants theory. He argued that a transplant does not take place since its "meaning simply does not lend itself to transplantation."⁶⁰ Being at a crossroads, they take on new meanings and rationales from their new host country, and this local meaning makes it *ipso facto* a different legal norm.⁶¹ Some found legal transplants to be "irritants" that would have an unpredictable effect in the host country.⁶² Grossfeld was sceptical about universal laws that may be imported and transplanted in another country,⁶³ and discussed the limitations language imposes on the law of a country. He cautioned against

⁵⁴ A more recent research seems to stand by this assertion. Abel M Mateus, *Competition and Development: What Competition Law Regime?*, in *COMPETITION LAW AND DEVELOPMENT* (Daniel Sokol, et al. eds., 2013).

⁵⁵ WATSON, *Legal transplants: An approach to comparative law*. 1974. Also see Watson, *LAW QUARTERLY REVIEW*, (1976), WATSON, *Legal transplants and European private law*. 2000; ALAN WATSON, *SOCIETY AND LEGAL CHANGE 2ND ED* (Temple University Press. 2010) and Watson's own summary of his views in RUDOLF B SCHLESINGER, *COMPARATIVE LAW: CASES, TEXT, MATERIALS* (Foundation Pr. 1998).

⁵⁶ Watson, *LAW QUARTERLY REVIEW*, (1976), at p. 79.

⁵⁷ JEREMY BENTHAM, *ESSAY ON THE INFLUENCE OF TIME AND PLACE IN MATTERS OF LEGISLATION* (Stevenson & Company, Printers. 1843).

⁵⁸ Andrew Huxley, *Jeremy Bentham on Legal Transplants*, 2 *J. COMP. L.* (2007), p.4.

⁵⁹ BENTHAM. 1843, p.172. Bentham made the following remark when addressing the applicability of English laws to Bengal. "The rest of the world can present no difficulty to a lawgiver, who having been bred up with English notions, shall have learnt how to accommodate his laws to the circumstances of Bengal."

⁶⁰ Legrand, *MAASTRICHT J. EUR. & COMP. L.*, (1997) See Alan Watson's reply to Legrand thesis in WATSON, *Legal transplants and European private law*. 2000. For a discussion on the development of comparative legal study see P. LEGRAND & R. MUNDAY, *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* (Cambridge University Press. 2011).

⁶¹ *Legrand, MAASTRICHT J. EUR. & COMP. L.*, (1997).

⁶² Gunther Teubner, *Legal irritants: good faith in British law or how unifying law ends up in new divergencies*, 61 *THE MODERN LAW REVIEW* (1998).

⁶³ BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* (Oxford University Press, USA. 1990).

a literal translation of legal texts, and also noted the role religion plays in constructing legal systems. In his view, transplantation is not impossible but must be attempted after contemplation of the socio-political and cultural aspects of the imported law.⁶⁴ Others looked to how successful legal transplants have been, and the relevant factors which may be attributed to their success (or failure).⁶⁵

Legal transplants gained momentum with the liberalization wave of the 1990s. The concept attracted a great deal of interest when international finance institutions introduced their “rule of law” reform initiatives.⁶⁶ The idea is to advance reform through the deployment of legal transplants. In this sense, the “rule of law” reforms seem to adopt Watson’s perspective, i.e. the functionality of the imported legal norm.⁶⁷

2.2.2 Competition law as a legal transplant

Legal transplants were used as the theoretical framework for the adoption of competition law by developing countries and transitional economies. Applying the above to competition law means that for the “Watsons”, competition law transplantation hinges on its worthiness as a legal rule. The first stage of the research focused on addressing the merits of adopting competition law. The case for competition law has been skilfully articulated and supported by empirical research.⁶⁸ Competition law maximizes efficiencies, realizes consumer welfare, promotes innovation, deters corruption, and attracts FDI.⁶⁹ It has also particularly been linked to economic growth and development.⁷⁰ In this sense, the spread of competition law might be attributed to it being conceived as a “desirable and worthwhile economic policy.”⁷¹ Others have argued that there is no value in adopting competition law in developing countries, given

⁶⁴ *Id.* at p.45.

⁶⁵ Jack A Hiller, *Language, Law and Sports and Culture: The Transferability or Non-Transferability of Words, Lifestyles, and Attitudes through Law*, 12 VAL. UL REV. (1977); Ewald, *THE AMERICAN JOURNAL OF COMPARATIVE LAW*, (1995), GROSSFELD. 1990, Edward M. Wise, *AM. J. COMP. L. SUPP.*, (1990), Katharina Pistor, *The standardization of law and its effect on developing economies*, 50 *THE AMERICAN JOURNAL OF COMPARATIVE LAW* (2002), and Loukas A Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations*, *THE INTERNATIONAL LAWYER* (2000).

⁶⁶ DUNCAN KENNEDY, *THREE GLOBALIZATIONS OF LAW AND LEGAL THOUGHT* (2005).

⁶⁷ This issue will be discussed at length in Chapter 4.

⁶⁸ Deputy Secretary General OECD Seiichi Kondo *Global Forum on Competition* (2003), p.2.

⁶⁹ See for example OECD, *OECD. Promoting Pro-Poor Growth 2. Implementing Competition Policy in Developing Countries*. (2006), Secretariat. 1998 and MARK ANDREW DUTZ & AYDIN HAYRI, *DOES MORE INTENSE COMPETITION LEAD TO HIGHER GROWTH?* § 2249 (World Bank Publications. 2000).

⁷⁰ William E Kovacic, *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*, 77 *CHI.-KENT L. REV.* (2001) and DUTZ & HAYRI. 2000.

⁷¹ John Preston, *Investment climate reform, competition policy and economic development: some country experiences*, UK DEPARTMENT FOR INTERNATIONAL DEVELOPMENT (1993).

the stark difference in socio-political and economic situation in these countries and the lack of institutional capacity.⁷²

The debate then shifted to the content of the transplant. Fox explains that the real challenge that developing countries face when adopting competition law is “to understand when foreign law is appropriate law and when it is not.”⁷³ Fox and Gal further reminded new adopters that: “designing competition law requires the determination of whether the benefits of a transplanted law (or parts thereof) outweigh its limitations.”⁷⁴ This view did not remain uncontested as some found that an optimal competition law based on a century of practice and enforcement and on economic principles –not societal or cultural ones –will enhance competition and economic welfare to the benefit of consumers in any given country. In this sense, “[C]ompetition laws of all nations should be identical.”⁷⁵

A few studies have discussed adoption patterns by focusing on the copying⁷⁶ and emulation of policies, but without engaging with the aspect of diffusion.⁷⁷ In this context, the harmonization project of the EU was of particular interest. This is in line with the historic progression of competition law across Eastern Europe, where accession to the Union and harmonization of the laws of Eastern European countries with that of the EU were to the forefront. There has also been interest in other regional integration projects with a competition law component in other parts of the world, such as NAFTA, ASEAN, and various regional agreements in Africa.⁷⁸ However, while these attempts did not provide a complete typology for the patterns of adoption of competition law, they would eventually engage in a discussion of the outcome of such a transfer.

Beyond the initial transplantation phase, the two main issues which seemed to dominate the discussions were the challenges of convergence and enforcement. With the growing number of adopters, many studies highlighted the need to harmonize competition law to mitigate conflicts that may arise between countries due to either the inability to address transnational anticompetitive activities or the conflicting application of their competition law.⁷⁹ This was

⁷² Armando E Rodriguez & Mark D Williams, *Effectiveness of Proposed Antitrust Programs for Developing Countries*, *The*, 19 NCJ INT'L L. & COM. REG. (1993) and Paul E Godek, *Chicago-School Approach to Antitrust for Developing Economies*, *A*, 43 ANTITRUST BULL. (1998).

⁷³ Eleanor M Fox, *Economic development, poverty and antitrust: the other path*, 13 SW. JL & TRADE AM. (2006), p. 20.

⁷⁴ Gal & Fox. 2014 p. 304.

⁷⁵ George Priest, *Competition Law in Developing Nations: The Absolutist View*, in *COMPETITION LAW AND DEVELOPMENT* (2013) p. 79.

⁷⁶ Gal & Fox. 2014.

⁷⁷ Shahein. 2012.

⁷⁸ Oliver Solano & Andreas Sennekamp. *Competition Provisions in Regional Trade Agreements*. pt. 6 (2006) and Lucian Cernat, *Eager to ink, but ready to act? RTA proliferation and international cooperation on competition policy*, in *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS* (Philippe Brusick, *et al.* eds., 2005).

⁷⁹ Andrew T Guzman, *Introduction-International Regulatory Harmonization*, 3 CHI. J. INT'L L. (2002), Ondrej Blazo, *Harmonization of Competition Law in Globalized Economy and European Law*, AVAILABLE AT SSRN 1720819 (2010), and

usually done in a comparative fashion focusing on the US antitrust law and the EU competition law (for example the Microsoft case). In recent years, the number of comparative studies covering strategic countries such as China, India, SA and Brazil have risen.⁸⁰

The literature has also discussed at length the factors affecting the success or “effectiveness” of the newly adopted competition law in developing countries. For the “culturalists,” competition law cannot be successfully transplanted without adaptation to the host country. The latter view has influenced the work of competition law literature on developing countries.⁸¹ The majority of scholars addressing this issue have emphasized that developing countries have special attributes that should be taken into consideration in the process. Research has therefore addressed the “ecology” of transplanting competition law into developing countries, i.e. the prerequisites that would guarantee a successful transplantation resulting in enforcement.⁸² Issues such as the level of economic development, democracy, corruption, and vested interests were highlighted as reasons limiting its effectiveness.⁸³ Most of the discussion has centred on how the institutional characteristics of these countries may undermine the effective enforcement of the transplanted law.⁸⁴ Many contributions have been made to assist the newly established competition authorities, another form of transplant in their own right, in promoting their independence, gaining credibility, allocating their resources better, and prioritizing their work.⁸⁵

A number of researchers have been interested in the agents of diffusion, in particular transnational competition law networks, and IOs such as the WTO, OECD, UNCTAD and ICN. At some point when the issue of a global competition law was still alive and well, there was a debate about which of the existing organizations would provide the best enforcement of such a global law. The discussions mainly addressed convergence efforts, the similarities and differences between their convergence activities, such as suggestions for a model competition

Stefan Schmitz, *How Dare They-European Merger Control and the European Commission's Blocking of the General Electric/Honeywell Merger*, 23 U. PA. J. INT'L ECON. L. (2002).

⁸⁰ MARK WILLIAMS, *COMPETITION POLICY AND LAW IN CHINA, HONG KONG AND TAIWAN* (Cambridge University Press, 2005), Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, 4 JOURNAL OF COMPETITION LAW AND ECONOMICS (2008); Trudi Hartzberg, *Competition policy and practice in South Africa: Promoting competition for development*, 26 NW. J. INT'L L. & BUS. (2005) and Dallal Stevens, *Framing competition law within an emerging economy: the case of Brazil*, 40 ANTITRUST BULL. (1995).

⁸¹ See for example Tamar Indig & Michal S Gal, *Lifting the veil: rethinking the classification of developing economies for competition law and policy*, THE ECONOMIC CHARACTERISTICS OF DEVELOPING JURISDICTIONS: THEIR IMPLICATIONS FOR COMPETITION LAW (2015), FOX & MATEUS, 2011, Eleanor Fox, *In search of a competition law fit for developing countries*, LAW AND ECONOMICS RESEARCH PAPER SERIES (2011).

⁸² FOX, LAW AND ECONOMICS RESEARCH PAPER SERIES, (2011); Michal S Gal, *The ecology of antitrust: preconditions for competition law enforcement in developing countries*, COMPETITION, COMPETITIVENESS AND DEVELOPMENT (2004).

⁸³ Mateus, 2013.

⁸⁴ See Kovacic, CHI.-KENT L. REV., (2001), Ma, JOURNAL OF COMPETITION LAW AND ECONOMICS, (2013) and Gal, COMPETITION, COMPETITIVENESS AND DEVELOPMENT, (2004).

⁸⁵ See for example Eleanor M Fox & Michael J Trebilcock, *The Design of Competition Law Institutions and the Global Convergence of Process Norms: The GAL Competition Project*, (2012) and Andreas Stephan, *Prioritizing Cartel Enforcement in Developing World Competition Agencies*, in COMPETITION LAW AND DEVELOPMENT (2013), p 137.

law, best practice, recommendations and guidelines, and more generally the role of soft law in the process of policy transfer.⁸⁶

Accordingly, discussions regarding competition law as a legal transplant have addressed whether transplantation is possible, and what the functional value of adopting competition law might be, i.e. whether it provides a better alternative to current policies and if so under which conditions. The majority of research adopts a culturalist view when it comes to its success in developing countries, namely that the context determines whether competition law will succeed in a developing country. Most of the work then provides empirical studies describing successes or failures, and any possible recommendations we can derive from these cases. Reading through this rich body of scholarship, one finds that it does not fully address the adoption patterns of, or agents for, the transplantation. Taking a multidisciplinary approach, using theories of policy diffusion, transfer, and convergence would shed light on the transfer process and widen the scope of the discussion. In particular, if the diffusion process (which is a process based on interdependency) of competition law is understood, it may enable us to comprehend why competition law (or any particular aspect of the law whether substantive, procedural or institutional rule) has diffused in some countries more than others and possibly predict the diffusion of the law (or a particular aspect) based on defined parameters and provided all things being equal.

2.3 Competition Diffusion, Transfer and Convergence

In this part, we explain the theories of policy diffusion, transfer, and convergence, their application to competition law, and possible benefits.

2.3.1 Understanding policy diffusion, transfer, and convergence

Diffusion is a broad concept of how innovations spread over time. It is featured in many disciplines such as political science, sociology, and economics.⁸⁷ An innovation could be an idea, practice, or object perceived as new by the adopter.⁸⁸ Policy diffusion is understood to mean “any pattern of successive adoptions of a policy innovation.”⁸⁹ Most of the early work on policy diffusion was conducted in relation to policy diffusion across American states.⁹⁰ It

⁸⁶ CASSEY LEE, MODEL COMPETITION LAWS: THE WORLD BANK-OECD AND UNCTAD APPROACHES COMPARED (Centre on Regulation and Competition. 2005); Hugh Hollman & William E Kovacic, *The International Competition Network: Its Past, Current, and Future Role*, 20 MINNESOTA JOURNAL OF INTERNATIONAL LAW (2011).

⁸⁷ EVERETT M ROGERS, *DIFFUSION OF INNOVATIONS* (Simon and Schuster. 2010).

⁸⁸ An idea is still considered an innovation even if it exists elsewhere and other entities have already adopted it. *Id.* at p. 12.

⁸⁹ Simmons, *et al.*, ANNUAL REVIEW OF SOCIOLOGY, (2007) p. 220.

⁹⁰ See for example ROBERT L CRAIN, *et al.*, THE POLITICS OF COMMUNITY CONFLICT: THE FLUORIDATION DECISION (Bobbs-Merrill Company. 1969), Pamela S Tolbert & Lynne G Zucker, *Institutional sources of change in the formal structure of organizations: The diffusion of civil service reform, 1880-1935*, ADMINISTRATIVE SCIENCE QUARTERLY (1983); David Knoke,

was subsequently extended to the international domain. On the international level, policy diffusion was found to be the consequence of interdependence.⁹¹ Policy diffusion occurs when government policy decisions in a given country are systematically conditioned by prior policy choices made in other countries sometimes mediated by the behaviour of IOs or even private actors or organizations.⁹² In this sense, diffusion is concerned with “the process that leads to the pattern of adoption, not the fact that at the end of the period all (or many) countries have adopted the policy.”⁹³ Policy transfer, a related concept to diffusion, is defined as the “processes by which knowledge about policies, administrative arrangements, institutions and ideas in one political system (past or present) is used in the development of policies, administrative arrangements, institutions and ideas in another political system.”⁹⁴ Similar to diffusion, policy transfer is also concerned with the process. However, emphasis is put on knowledge as the basis of the policy transfer.⁹⁵ Policy transfer may occur on a national, regional, or international level(s) and across time (past to present).⁹⁶ This is very similar to Watson’s concept of the functionality of legal transplants. However, policy transfer expands on the method of how such transfer occurs and its content.

The act of converging denotes moving towards uniformity.⁹⁷ Convergence is defined as “the tendency of societies to grow more alike, to develop similarities in structures, processes, and performances.”⁹⁸ Policy transfer may lead to convergence or divergence.⁹⁹ In comparison, Dolowitz and Marsh identified three scenarios where a policy transfer is unsuccessful: in case the transferee did not have sufficient information of how the transferred rule operates (uninformed transfer), the transferee failed to capture the elements of success of the transferred rule (incomplete transfer) and failure to account for the differences between the

The spread of municipal reform: Temporal, spatial, and social dynamics, AMERICAN JOURNAL OF SOCIOLOGY (1982) and Charles R Shipan & Craig Volden, *The mechanisms of policy diffusion*, 52 AMERICAN JOURNAL OF POLITICAL SCIENCE (2008)

⁹¹ See Gilardi, 2014, and Fabrizio Gilardi, *Transnational diffusion: Norms, ideas, and policies*, 2 HANDBOOK OF INTERNATIONAL RELATIONS (2012) p.472.

⁹² Beth A Simmons, *et al.*, *Introduction: The international diffusion of liberalism*, 60 INTERNATIONAL ORGANIZATION (2006), p.787. Gilardi describes transnational diffusion to mean “decisions in one country depend not only on domestic factors and international pressures, but also on decisions made in other countries”. Gilardi, HANDBOOK OF INTERNATIONAL RELATIONS, (2012), p.31

⁹³ Beth A Simmons & Zachary Elkins, *The globalization of liberalization: Policy diffusion in the international political economy*, 98 AMERICAN POLITICAL SCIENCE REVIEW (2004).

⁹⁴ Dolowitz & Marsh, *GOVERNANCE*, (2000), p.9.

⁹⁵ NEWMARK. 2002.

⁹⁶ Evens examined all the possible pathways of transfer. Mark Evans & Jonathan Davies, *Understanding policy transfer: A Multi-level, multi-disciplinary perspective*, 77 PUBLIC ADMINISTRATION (1999), p. 24. For a critic of the theory see Ian Weinberg, *The problem of the convergence of industrial societies: A critical look at the state of a theory*, 11 COMPARATIVE STUDIES IN SOCIETY AND HISTORY (1969).

⁹⁷ “Convergence”, Merriam-Webster Online Dictionary. 2016. Available at <http://www.merriam-webster.com/dictionary/convergence>. Last visited 1 September 2016.

⁹⁸ See Bennett, BRITISH JOURNAL OF POLITICAL SCIENCE, (1991). Bennett identified four causes of policy convergence namely: emulation, harmonization, elite networks and penetration (coercion).

⁹⁹ Diane Stone, *Learning lessons, policy transfer and the international diffusion of policy ideas*, UNIVERSITY OF WARWICK. CENTRE FOR THE STUDY OF GLOBALISATION AND REGIONALISATION (No.69/) (2001).

economic, social, political and cultural characteristics of the transferee (inappropriate transfer).¹⁰⁰

A full analysis of policy diffusion, transfer, and convergence concepts is not the aim of this thesis. The literature on all the above is vast and intertwined across the disciplines of public policy, international relations, and sociology. The aim here is to use diffusion, transfer, and convergence concepts to study the spread of competition law. Hence, we will only focus on capturing the main distinctive features of the three concepts relevant to our discussion.

With its focus on the process rather than the effect, diffusion can be distinguished from convergence, although it may seem similar to policy transfer. The focus of policy transfer is “understanding the process by which policies and practices move from exporter to importer jurisdictions” focusing on “agents of policy transfer and the processes of decision making in the importer jurisdictions.”¹⁰¹ Policy transfer emphasizes the role of the ‘agents’ in the transfer process¹⁰² by addressing the role they play, whether in government, IOs, or policy networks.¹⁰³ Knill and Christoph explain that when examining the concept of convergence the dependent variable is similarity/change between countries, but with regard to policy transfer it is the transfer content and transfer process (including agents of transfer), and in diffusion the dependent variable is the adoption pattern.¹⁰⁴

Table 2: Policy convergence, transfer, and diffusion

	Policy convergence	Policy transfer	Policy diffusion
Analytical focus	Effects	Process	Process
Empirical focus	Policy characteristics	Policy characteristics	Policy characteristics
Dependent variable	Similarity/change	Transfer content Transfer process	Adoption pattern

Source: Knill, Christoph 2005, p. 768

¹⁰⁰ Dolowitz & Marsh, GOVERNANCE, (2000), p.9.

¹⁰¹ Stone, UNIVERSITY OF WARWICK. CENTRE FOR THE STUDY OF GLOBALISATION AND REGIONALISATION (No.69/), (2001).

¹⁰² Elected officials, professionals, policy entrepreneurs, administrators, bureaucrats, political parties, think tanks, pressure groups, academics, international organizations, and experts are discussed in length in the diffusion and policy transfer literatures alike. See DAVID P DOLOWITZ, LEARNING FROM AMERICA: POLICY TRANSFER AND THE DEVELOPMENT OF THE BRITISH WORKFARE STATE (ISBS. 1998), and Stone, POLITICS, (1999).

¹⁰³ RICHARD ROSE, LESSON-DRAWING IN PUBLIC POLICY: A GUIDE TO LEARNING ACROSS TIME AND SPACE § 91 (Cambridge Univ Press. 1993), and Diane Stone, *Transfer agents and global networks in the ‘transnationalization’ of policy*, 11 JOURNAL OF EUROPEAN PUBLIC POLICY (2004).

¹⁰⁴ Knill, JOURNAL OF EUROPEAN PUBLIC POLICY, (2005), p. 5. March and Sharman explain, policy transfer focuses on process-tracing and diffusion focuses on pattern-finding emphasizing the need to examine both for a full examination of the case at hand. Marsh & Sharman, POLICY STUDIES, (2009), p.31.

It is important to draw attention to the fine lines between the different concepts. Nevertheless, this endeavour is not overly significant for our purposes. We will utilize this wide variety of theories to shed light on other less studied aspects of the transfer process of competition law.

Accordingly, the objects of diffusion or transfer can be policies, institutions, ideologies, attitudes, or even negative lessons.¹⁰⁵ Policy transfers could be a voluntary transfer such as lesson drawing,¹⁰⁶ or occur because of direct or indirect coercion. Former imperialists forcing their own laws on another country under their control is an example of direct coercion.¹⁰⁷ Indirect coercion may take the form of a negotiated transfer, such as in the case of SAPs imposed by international financial institutions on developing countries (conditionality).¹⁰⁸ For our discussion, we will focus on diffusion patterns, the agents of policy transfer, and the content and outcome of the transfer.

2.4 Diffusion Patterns and Competition Law¹⁰⁹

We will now discuss the competition transfer phenomenon from the diffusion theory perspective to identify how the diffusion of competition law occurs.

2.4.1 Policy diffusion patterns and rate of diffusion

Four main alternative policy diffusion patterns were identified.¹¹⁰ These are: coercion, competition, learning, and emulation (social construction).¹¹¹

2.4.1.1 Coercion

There is no agreement on what constitutes coercion in legal theory. Some define coercion as the direct use of force.¹¹² It is not always possible to differentiate between a coerced act and a non-coerced act, in that it is unclear which actions (or lack thereof) by the coercer should be considered as coercion. Nozick does not agree with the latter view of coercion, stating that it

¹⁰⁵ David P Dolowitz & David Marsh, *Policy transfer: a framework for comparative analysis*, in BEYOND THE NEW PUBLIC MANAGEMENT: CHANGING IDEAS AND PRACTICES IN GOVERNANCE (Martin Minogue, et al. eds., 1998).

¹⁰⁶ ROSE, 1993.

¹⁰⁷ Evans & Davies, PUBLIC ADMINISTRATION, (1999) p. 11.

¹⁰⁸ Vreeland argued that because countries need the IMF loans they accept conditions because they have no other choice. James Vreeland JAMES RAYMOND VREELAND, THE IMF AND ECONOMIC DEVELOPMENT (Cambridge University Press, 2003).

¹⁰⁹ When we refer to the diffusion of 'competition law' we generally mean competition law in the broad sense including norms, institutions and procedures.

¹¹⁰ Simmons, et al., INTERNATIONAL ORGANIZATION, (2006), p. 2. Gilardi disagrees with adding coercion as a policy diffusion mechanism. Gilardi, HANDBOOK OF INTERNATIONAL RELATIONS, (2012).

¹¹¹ Simmons, et al., ANNUAL REVIEW OF SOCIOLOGY, (2007). Some have argued that all these patterns can in fact all be subsumed within a single theoretical framework. See Brau Dietmar Braun & Fabrizio Gilardi, *Taking 'Galton's problem' seriously towards a theory of policy diffusion*, 18 JOURNAL OF THEORETICAL POLITICS (2006). Witold J Henisz, et al., INTERNATIONAL COERCION, EMULATION, AND POLICY DIFFUSION: MARKET-ORIENTED INFRASTRUCTURE REFORMS, 1977-1999 § 2004 (Academy of Management 2004), p.13 (arguing that based on neo-institutional analysis in sociology, two basic mechanisms that underlie policy diffusion across countries: coercion and emulation).

¹¹² Grant Lamond, *Coercion and the Nature of Law*, 7 LEGAL THEORY (2001).

does not include the use of force and is not determined based on the actions of the coercer but rather the reaction of the coercee. In his view, coercion is a result of the coercee's acquiescence to a "proposal" of a conditional threat/offer made by the coercer which influences the former's incentives to act (or not act).¹¹³ This, however, expands the bounds of "coercion" to possibly include any factors that influence the cost-benefit analysis, which can only be determined through testing causality, such as whether the coercee's action would have occurred but for the action of the coercer. Wertheimer provides an additional requirement to classify an offer as coercive. The coercer must make it clear that the coercee will be negatively affected in a manner that leaves no choice for the coercee but to acquiesce. Also, in this regard, it is not always easy to understand the bargaining position and dependency of each party. Based on the above, we can conclude that, in essence, coercion denotes the existence of an asymmetrical balance of power between two interdependent parties, where one has to acquiesce to the "proposals" of the other or they will be in a worse position than before.¹¹⁴

Coercion as a diffusion pattern is understood to mean a situation where a state promotes its rules using its material power (military or economic).¹¹⁵ For example, the transfer of democracy to Japan and Germany through US military occupation was considered a form of direct coercion.¹¹⁶ The threat of negative sanctions providing sufficient incentives for countries to voluntarily transplant exogenous rules was considered a form of indirect coercion.¹¹⁷ Studying the diffusion of liberalism, it was found that powerful countries are able, by manipulating opportunities and constraints encountered by target countries, to influence the probability of these countries by adopting the policy they prefer. Such influence may be either directly exerted or through the international and non-governmental organizations they influence.¹¹⁸

Conditionality (as a form of coercion) has also been discussed as policy diffusion pattern in the EU, where accession was subject to accepting a wide range of institutional and policy reforms.¹¹⁹ The study of the work of IOs like the IMF provides empirical evidence of indirect

¹¹³ *Id.*

¹¹⁴ ALAN WERTHEIMER, COERCION (Wiley Online Library, 1987).

¹¹⁵ Some define coercion as the direct or indirect use of power resulting in "a compulsion to conform". See Stone, POLITICS, (1999), p. 309.

¹¹⁶ Joshua Muravchik, *Exporting Democracy: Fulfilling America's Destiny* AMERICAN ENTERPRISE INSTITUTE PRESS (1991).

¹¹⁷ Others argued that a "top-down" policy diffusion approach on governments is more likely in times of financial crises or military defeat. Stone, POLITICS, (1999).

¹¹⁸ Simmons, *et al.*, INTERNATIONAL ORGANIZATION, (2006), p. 790.

¹¹⁹ Frank Schimmelfennig & Ulrich Sedelmeier, *Governance by conditionality: EU rule transfer to the candidate countries of Central and Eastern Europe*, 11 JOURNAL OF EUROPEAN PUBLIC POLICY (2004).

compulsion (conditionality) over developing countries.¹²⁰ Nonetheless, some argue that national governments may utilize the external pressures of international financial institutions to push through reforms they favour but which are unpopular at the domestic level.¹²¹

Another form of diffusion that is also relevant here is contractualization. It occurs “when diffusion results from some form of symmetric bargaining between states, or ‘soft’ international organization influence.”¹²² It is not always easy to distinguish between contractualization and coercion.¹²³ Some, however, consider contractualization a separate diffusion mechanism if there is a quid pro quo beyond the elimination of harm or the threat thereof to be a contractual arrangement rather than an occurrence of coercion.¹²⁴

2.4.1.2 Competition

Gilardi defines policy competition “as the process whereby policy makers anticipate or react to the behaviour of other countries in order to attract or retain economic resources.”¹²⁵ Competition here may be horizontal or vertical.¹²⁶ Horizontal competition may occur between states in a federal system such as the US, between member states of a regional body such as the EU, or between states in the international community.¹²⁷ Vertical competition may occur between different regulatory authorities.¹²⁸

The study of this pattern focuses on competition as the catalyst for the diffusion across governments. Competition over favourable tax structures for businesses and environmental law are often cited in that regard. The former may result in a ‘race to the bottom’ while the

¹²⁰ It was argued that access to finance from international institutions was contingent on accepting reform packages. See Peter Larmour, *Conditionality, coercion and other forms of Power: international financial institutions in the Pacific*, 22 PUBLIC ADMINISTRATION & DEVELOPMENT (2002).

¹²¹ Fabrizio Gilardi, *et al.*, *Regulation in the age of globalization: the diffusion of regulatory agencies across Europe and Latin America*, (2006) p. 14.

¹²² Lianos, *et al.* 2016, p.288.

¹²³ “Contracting parties do not necessarily negotiate as equals and their contractual agreement does not necessarily result in a balanced outcome. The boundary between coercion and contractualization is not clear, particularly where a country’s leaders feel compelled to enter into a treaty to avoid economic harm.” Jean-Frédéric Morin & Edward Richard Gold, *An Integrated Model of Legal Transplantation: The Diffusion of Intellectual Property Law in Developing Countries*, 58 INTERNATIONAL STUDIES QUARTERLY (2014) p. 5.

¹²⁴ *Id.* at p. 5.

¹²⁵ Gilardi, *et al.*, (2006) p. 15. Note that there is the concept of regulatory competition, which is associated with welfare economics and the production of local public goods. This model however was based on movement of individuals and resources within a federal state with various competing local governments. See Simon Deakin, *Legal Diversity and Regulatory Competition: Which Model for Europe?*, 12 EUROPEAN LAW JOURNAL (2006).and Charles M Tiebout, *A pure theory of local expenditures*, THE JOURNAL OF POLITICAL ECONOMY (1956). Regulatory competition is associated with welfare economics and the production of local public goods. This model however was based on movement of individuals and resources within a federal state with various competing local governments.

¹²⁶ See Joel P Trachtman, *International regulatory competition, externalization, and jurisdiction*, 34 HARV. INT’L. LJ (1993), p. 2-3.

¹²⁷ *Id.*

¹²⁸ *Id.*

latter may result in a race to the top.¹²⁹ A study of the policy diffusion pattern for entry into BITs found that countries join BITs if their direct competitors for capital have done so.¹³⁰ Also, examining the diffusion of financial openness, Simmons and Elkins found that it has been diffused among similarly situated countries competing for capital.¹³¹

Another tool which may emphasize the competition aspect is the various surveys and indicators ranking countries for their economic and fiscal performance. Countries now compete for higher ranking in reports capturing the investment climate, business conditions, IPR enforcement, and credit worthiness. Studies comparing and contrasting given legal aspects across countries possibly presents them with an incentive to compete to either maintain their rank or outrank others.

Together coercion, contractualization and competition are sometimes referred to as “externalities.” They indicate an influence from external actors on the cost-benefit analysis of domestic actors who influence their decision to adopt or abandon a policy.

2.4.1.3 Learning

Diffusion through learning is defined as “the process whereby policy makers use the experience of other countries to estimate the likely consequences of policy change.”¹³² Political scientists, economists and sociologists have studied this type of diffusion pattern.¹³³ Economists’ starting point was a presumption of rationality. The assumption is that policy makers “make optimal use of available information-weighting learning in terms of objective similarities among cases (countries) extracting the right signal from the mass of noise.”¹³⁴ This is known as ‘Bayesian learning.’¹³⁵ This presumption has been challenged since the rationality of policy makers is limited by their capacity to assemble and evaluate the relevant evidence of the efficacy of a policy approach.¹³⁶ To overcome these shortcomings, Simmon explains that “policymakers may use cognitive shortcuts in which attention is drawn to highly successful countries or to highly successful outcomes, rather than assessing all available

¹²⁹ David Vogel, *Trading up and governing across: transnational governance and environmental protection*, 4 JOURNAL OF EUROPEAN PUBLIC POLICY (1997) and Xun Cao, *Networks as channels of policy diffusion: Explaining worldwide changes in capital taxation, 1998–2006*, 54 INTERNATIONAL STUDIES QUARTERLY (2010).

¹³⁰ Zachary Elkins, *et al.*, *Competing for capital: The diffusion of bilateral investment treaties, 1960–2000*, 60 INTERNATIONAL ORGANIZATION (2006).

¹³¹ Simmons & Elkins, AMERICAN POLITICAL SCIENCE REVIEW, (2004).

¹³² Simmons, *et al.*, INTERNATIONAL ORGANIZATION, (2006) p. 797. See also Jack S Levy, *Learning and foreign policy: sweeping a conceptual minefield*, 48 INTERNATIONAL ORGANIZATION (1994), p.311.

¹³³ Simmons, *et al.*, INTERNATIONAL ORGANIZATION, (2006), p. 795. Claire A Dunlop & Claudio M Radaelli, *Systematising policy learning: From monolith to dimensions*, 61 POLITICAL STUDIES (2013) and Paola Coletti & Claudio M Radaelli, *Economic rationales, learning, and regulatory policy instruments*, 91 PUBLIC ADMINISTRATION (2013).

¹³⁴ Simmons, *et al.*, INTERNATIONAL ORGANIZATION, (2006), p. 797.

¹³⁵ Fabrizio Gilardi, *Four ways we can improve policy diffusion research*, 16 STATE POLITICS & POLICY QUARTERLY (2016) p. 18-19 and Elkins Elkins, *et al.*, INTERNATIONAL ORGANIZATION, (2006).

¹³⁶ Simmons, *et al.*, ANNUAL REVIEW OF SOCIOLOGY, (2007).

information as the Bayesian approach demands”, through a process labelled “channelled learning.” This channelled learning is carried out by and through social actors. Many studies have been conducted to test the social learning hypothesis. Empirical research has shown, for example, that developing countries learn from the effectiveness of others’ trade liberalization policies and structure their own policies as a result.¹³⁷

Sociologists focus on the social aspect of learning and regard this type of policy transfer as “a social and collective process founded on exchange between groups.”¹³⁸ This is called socialisation and is understood to mean diffusion which results from “interaction“ among networks of experts and/or administrative elites that develop shared understandings and beliefs due to their continuous interaction.¹³⁹

Linos questions “diffusion through technocracy” in democratic societies.¹⁴⁰ Studying the adoption of health, family and employment laws, Linos argues that international models developed in familiar (rich) countries or by certain IOs are used as a point of reference not just by politicians to support policy adoption but also in order to influence voters’ choices.¹⁴¹ This is a study featuring democratic societies of developed countries, which may apply in varying degrees to developing countries. Nevertheless, with communication technology and access to information, adoption by ‘high-status actors’ and recommendations of IOs could still impact the public perceptions in less democratic countries (whether positively or negatively).

In any case, learning may yield positive or negative results as “information learned from a neighbour can either enhance or diminish the chances of a polity’s adopting a law.”¹⁴²

2.4.1.4 Emulation

Emulation is defined as “the process whereby policies diffuse because of their normative and socially constructed properties instead of their objective characteristics”.¹⁴³ Emulation may occur in case of uncertainty and the inability to decide on the various policy alternatives, so

¹³⁷ *Id.*

¹³⁸ Stone, UNIVERSITY OF WARWICK. CENTRE FOR THE STUDY OF GLOBALISATION AND REGIONALISATION (NO.69/), (2001), p. 9.

¹³⁹ CLAUDIA HOFMANN, LEARNING IN MODERN INTERNATIONAL SOCIETY (Springer. 2008).

¹⁴⁰ KATERINA LINOS, THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES (Oxford University Press. 2013).

¹⁴¹ Lianos refers to this as the “voter information model” of diffusion. Ioannis Lianos, *Global Governance of Antitrust and the Need for a BRICS Joint Research Platform in Competition Law and Policy*, CLES RESEARCH PAPER SERIES NO. 5/2016 (2016). Available at Available at SSRN: <http://ssrn.com/abstract=>. Last visited 1 September 2016.

¹⁴² Christopher Z Mooney, *Modeling regional effects on state policy diffusion*, 54 POLITICAL RESEARCH QUARTERLY (2001), p. 105.

¹⁴³ WALTER CARLSNAES, *et al.*, HANDBOOK OF INTERNATIONAL RELATIONS (Sage. 2002), p 466.

they seek legitimacy by emulating the behaviour or practices of other actors.¹⁴⁴ Emulation has been found to be the prevalent diffusion pattern for a number of policies such as macro-economic and market oriented reforms.¹⁴⁵ Emulation is different from learning in that the latter entails a process of examination and evaluation of the alternative policies of other countries while the former emphasizes the identity of prior adopters.¹⁴⁶

It is important not to treat these patterns of diffusion as mutually exclusive.¹⁴⁷ This is not easy to achieve especially since diffusion studies are mostly specific in scope, addressing a given policy among identified states or countries at a certain point in time.¹⁴⁸ Some of these outcomes may be useful across other studies. For example, Meseguer found that learning and emulation may overlap,¹⁴⁹ while other research found that competition matters more among early policy adopters; coercion matters more among late adopters and learning becomes more important over time.¹⁵⁰

2.4.2 Diffusion patterns of competition law

Analysing the proliferation of competition law through the lens of policy diffusion theories has not been done before, at least not in a systematic way.¹⁵¹ Research emphasizes the role of coercion in the adoption of competition law especially in developing countries. Post WWII, coercion at the adoption phase was self-evident in the case of Japan and Germany.¹⁵² However, it may take a more subtle form, as in the case of “conditionality”. Gal notes that often the passing of a competition law has been treated as one of the cornerstones of the liberalization and pro-market reforms that have swept many developing countries.¹⁵³ Others also noted that competition policy was a requirement among a long list of reforms and structural changes devised by Western countries and IOs for countries to achieve “economic development and prosperity.”¹⁵⁴ In most cases, the adoption of competition law was a result

¹⁴⁴ Henisz, *et al.* 2004, p 16.

¹⁴⁵ Covadonga Meseguer, *Policy learning, policy diffusion, and the making of a new order*, 598 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE (2005) and Bruce Kogut & J Muir Macpherson, *The decision to privatize: economists and the construction of ideas and policies*, THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY (2008).

¹⁴⁶ LINOS. 2013 p. 2.

¹⁴⁷ Marsh & Sharman, POLICY STUDIES, (2009) p. 36. They make the point that it is difficult to empirically test and draw the line between these different patterns.

¹⁴⁸ Research efforts have been dedicated to review these studies and construct a more holistic view on policy diffusion. See for NEWMARK. 2002 and Gilardi, STATE POLITICS & POLICY QUARTERLY, (2016).

¹⁴⁹ Meseguer, THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, (2005).

¹⁵⁰ See discussion of Mooney, POLITICAL RESEARCH QUARTERLY, (2001), p.33.

¹⁵¹ As a first step to the systematic study of competition law and diffusion, CLES organized a conference titled The Global Diffusion of Competition Law and Policy - An Exploratory Workshop, June 2015, St Petersburg. See also Lianos, CLES RESEARCH PAPER SERIES NO. 5/2016 (2016).

¹⁵² Gerber notes the “deepest intellectual roots and strongest political support” for competition law attributing these roots to the ordoliberal school. DAVID GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION (Oxford University Press. 2010), p.167.

¹⁵³ Gal, COMPETITION, COMPETITIVENESS AND DEVELOPMENT, (2004).

¹⁵⁴ “[W]hen international institutions (UN, IMF, The World Bank, OECD) evaluate the conditions countries should meet in the road towards economic development and prosperity, the formulation and implementation of an effective competition policy (CP)

of pressure from outside agencies (bilateral, multilateral, advisers, etc.) rather than an internal policy reform¹⁵⁵ through a ‘top down’ approach.¹⁵⁶ Diawara attributes the convergence over the goals of competition law between developed and developing countries to a “cut and paste” strategy and the diktat of international financial institutions like the WB and the IMF, hence the finding that competition law making in developing countries is an external process.¹⁵⁷ Waked notes that motives for adopting competition law may vary; however, most of the developing countries either adopted competition rules in response to recommendations of international institutions or because of various obliging treaties they signed, such as the WTO and the EU, and notes the association of the “promises of development” in adopting these recommendations.¹⁵⁸ The consensus of the international community on a given issue “was found to be a source of ‘indirect coercion’ especially when a common solution to that problem has been introduced in a number of nations, then nations not adopting this definition or solution will face increasing pressure to join the international community by implementing similar programmes or policies.”¹⁵⁹ Projects such as the NYU project on global administrative law examined the institutions of competition law in a number of countries and found an emerging ‘sympathy of systems’ in which global process norms, along with substantive norms, play a critical role.¹⁶⁰ These types of studies compare a given aspect of competition law across countries and put them *tête-à-tête*, which in turn shows indirectly who is behaving outside of the acceptable norms.

Simmons, Dobbin and Garrett identified the factors to be taken into consideration in their empirical investigation of conditionality.¹⁶¹ They emphasised the importance of being precise about exactly how the outcome under investigation is linked to power asymmetries. That entails identifying coercive actors and a causal link between their actions such as formal

appears always as one of the major requirements." Marcos Francisco Marcos, *Do Developing Countries Need Competition Law and Policy?*, AVAILABLE AT SSRN 930562 (2006). For a discussion of diffusion of financial liberalization policies see Simmons & Elkins, *AMERICAN POLITICAL SCIENCE REVIEW*, (2004) (suggesting two ways that foreign economic policy choices are diffused: choices by a country's peers can alter either a) the “payoffs” associated with a given policy choice or the b) information set upon which decisions are based, they find that financial openness has been diffused across similarly situated countries competing for capital). Stephen J Kobrin, *et al.*, Reason, imitation or coercion? The liberalization of FDI policy in developing countries 1992-2001 (2005) (finding the liberalization of FDI restrictions has been diffused across countries competing for capital, as well as countries in shared regional and income networks).

¹⁵⁵ Rijit Sengupta & Cornelius Dube, Competition policy enforcement experiences from developing countries and implications for investment (OECD Global Forum on International Investment VII ‘Best Practices in Promoting Investment for Development 2008), p. 4.

¹⁵⁶ Mor Bakhom, *Reflections on the Goals of Competition Law in Developing Countries*, in *THE GOALS OF COMPETITION LAW* (Daniel Zimmer ed. 2012), p. 318.

¹⁵⁷ Karounga Diawara, *A Social Approach to The Goals Of Competition Law in THE GOALS OF COMPETITION LAW* (Daniel Zimmer ed. 2012), p 442.

¹⁵⁸ Dina I Waked, *Competition Law in the developing world: The why and how of adoption and its implications for international competition law*, 1 *GLOBAL ANTITRUST LAW REVIEW* (2008), p.69.

¹⁵⁹ Dolowitz & Marsh, *POLITICAL STUDIES*, (1996), p. 7.

¹⁶⁰ ELEANOR M FOX & MICHAEL J TREBILCOCK, *THE DESIGN OF COMPETITION LAW INSTITUTIONS: GLOBAL NORMS, LOCAL CHOICES* (Oxford University Press. 2012).

¹⁶¹ SIMMONS, *et al.*, *The global diffusion of markets and democracy*. 2008.

conditionality or persuasive opportunities and the outcome (adoption). This is usually present, for example, when a country is at moment of vulnerability, such as when it is about to join the WTO, EU or BITs. However, to empirically test the coercion factor is not always easy as many issues may arise in the process. The politicians who took the decision in the first place may not be there anymore or, even if they are, they may be unreachable. Also, the answer may vary. If you direct this question to a politician s/he might not be candid about being pressured by foreign countries or organizations to enact national laws. Or, on the contrary, they may not admit whether the pressure of the international community was simply a pretext to push for more change internally.

In a study of the diffusion of intellectual property rights (IPRs) in a comparative fashion to competition (antitrust) law in the developing world, Sell notes the difficulty in differentiating between learning and ‘being taught a lesson’.¹⁶² She concluded that the starting point for adopting liberal economic policies such as IPRs and competition (antitrust law) is common: the financial crisis of the 1980s.¹⁶³ The crisis drove many countries, mostly developing ones, to look for an alternative economic policy. Her starting point is in line with the above i.e. that developing countries were under “pressure” when they adopted competition (antitrust) law and policy. Nonetheless, she then qualified her stand and found that a “coercive external strategy,” mostly led by the US, was the driving force behind the push for adopting IPRs in developing countries while competition (antitrust) law adoption was a product of the “redefined interest” of developing countries driven by emulation and learning.¹⁶⁴ She does, however, acknowledge general external pressure for adopting market-oriented reforms by the IMF and the WB,¹⁶⁵ where the adoption of antitrust policy was a “choice within constraints.”¹⁶⁶ She argues that the distinction in policy diffusion patterns was due to the nature of the policies themselves.¹⁶⁷ Antitrust promotes efficiency gains in the developing countries, but on the other hand IPR gains are attributed to the foreign owner of the property rights. Developing countries have weak incentives (such as attracting FDI) to adopt IPRs as opposed to the gains of free riding,¹⁶⁸ while an antitrust policy is introduced as part of the democratization and reform process with “populist aspects for protecting consumers, promoting small and medium size business and recasting government business relations

¹⁶² Susan K Sell, *Intellectual property protection and antitrust in the developing world: Crisis, coercion, and choice*, 49 INTERNATIONAL ORGANIZATION (1995), p.316.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at p. 333-334

¹⁶⁷ Simmons, *et al.*, ANNUAL REVIEW OF SOCIOLOGY, (2007).

¹⁶⁸ Sell, INTERNATIONAL ORGANIZATION, (1995), p. 319.

giving incentives to reformist to promote antitrust policy.”¹⁶⁹ Also, the nature of the two laws may influence the choice of a different diffusion pattern. The implementation of IPRs is usually done through the existing court system and the tools it uses (property rights) are familiar to judges, who are generally well trained in defining the boundaries of property rights. Although competition law may require economic analysis and sophisticated balancing (perhaps not in the case of *per se* rules for certain restrictive business practices), it usually requires the establishment of an implementing body, most notably in the form of a specialized administrative authority and possibly the need for specialized courts. This requires a more important institutional investment and thus may involve more domestic actors in the process of policy transfer than that in the context of IPRs. Consequently, these domestic actors may exercise influence in the pattern of diffusion as well as the enforcement.

Emulation as a pattern of policy adoption conforms to Watson’s view of law as a transferable idea for its good merits regardless of its origin. It resembles the ‘copy-paste’ model of another country’s competition law (for example, the EU for Israel¹⁷⁰ and Turkey¹⁷¹). In that sense, emulation entails that there is a leading policy, which is considered a model to be followed. This is very prominent in competition (antitrust) law, with the US and the EU being the two main contenders for the title. Another form of emulation is what some have termed “symbolic imitation.”¹⁷² This is when decision makers choose policies in order to show that they are acting in a proper and adequate manner.¹⁷³ Wilks and Bartle argue that “the original decisions to delegate, and the design of the [competition] agencies, were motivated by a need to reassure and to appear to act...[competition] agencies had a strong symbolic element and had a ‘constitutional’ significance.”¹⁷⁴

With trade liberalization taking centre stage, there is great competition between countries, especially developing ones, to attract foreign investment. As mentioned earlier, many ranking tools have been introduced to measure various aspects of a country’s openness to investments. The most relevant to competition law is the World Competitiveness Report prepared by the World Economic Forum, which includes an indicator for the effectiveness of an anti-

¹⁶⁹ *Id.* at p. 320.

¹⁷⁰ Gal, EUR. J.L REFORM, (2007).

¹⁷¹ Shahein. 2012.

¹⁷² Braun & Gilardi, JOURNAL OF THEORETICAL POLITICS, (2006) p. 312.

¹⁷³ *Id.*

¹⁷⁴ They also find that the role of these agencies has expanded as "has passed, however, the agencies have become more activist and have contributed to policy through a demonstration effect, showing what can be done; as a source of technical expertise; and as an available agency of implementation to be enhanced or adapted by subsequent governments." See Stephen Wilks & Ian Bartle, *The unanticipated consequences of creating independent competition agencies*, 25 WEST EUROPEAN POLITICS (2002), p.148.

monopoly policy to measure the intensity of local competition.¹⁷⁵ Competition is not only relevant for developing countries. There is an element of competition between the US and EU competition regimes to become the premier supplier of competition law. Competition here is not only in relation to norms, but may extend to substantive rules, institutions, and procedures.¹⁷⁶

Learning might come at a later stage and in relation to particular issues such as institutional design, regulations, and enforcement mechanisms. It could happen through knowledge of the activities of others or actual interaction during ad hoc technical assistance, seminars, workshops and training, whether in the physical or virtual world. With communication available via social systems and other advances in technology, learning is becoming an influential policy diffusion pattern. Lessons are not only drawn across the Atlantic but around the world and on both horizontal and vertical levels. There is an on-going US/EU dialogue to exchange views on various competition issues and debate policy choices.¹⁷⁷ The Sudanese competition policy on public procurement law is an example of how the learning process is becoming much more complicated and intertwined. In drafting the law, the Sudanese General Directorate for Public Procurement cited different countries and organizations as sources of inspiration, including Egypt, Saudi Arabia, Tanzania and Uganda, as well as input from the WB and the COMESA.¹⁷⁸ In Malawi's case, to overcome the absence of guidelines, the Competition and Fair Trading Act makes reference to EU Competition Law, the ICN Guidelines, SADC Guidelines, COMESA Competition Regulations and other common law jurisdictions with a considerable body of precedent on the application of competition law.¹⁷⁹ In drafting its competition law, Thailand borrowed from South Korea, which, in turn, was influenced by the competition laws of Japan and Germany, both of who had competition laws influenced by the US model.¹⁸⁰

Diffusion provides a wide palate of patterns to choose from for explaining how competition law, institutions, and procedures continue to cross borders. It also allows for a customized

¹⁷⁵ Michael Krakowski, *Competition policy Works: The effect of Competition Policy on the intensity of Competition-An International cross-country comparison*, (2005).

¹⁷⁶ Jacint Jordana, et al., *The global diffusion of regulatory agencies: channels of transfer and stages of diffusion*, COMPARATIVE POLITICAL STUDIES (2011), p. 109. They traced the process of diffusion via multiple sources of institutional transfer: sectoral, national, intergovernmental and supranational and assert that institutional transfer via cross-national and cross-sectoral networks made regulatory agencies a 'global' best practice. Their research showed that the decision to establish competition authorities was to an extent influenced by the number of agencies created in the same sector in other countries.

¹⁷⁷ Damien Geradin, *Limiting the Scope of Article 82 of the EC Treaty: What can the EU Learn from the US Supreme Court's Judgment in Trinko in the wake of Microsoft, IMS, and Deutsche Telekom*, COMMON MARKET LAW REVIEW, DECEMBER (2005).

¹⁷⁸ Intergovernmental Group of Experts on Competition Law and Policy, Roundtable on "Competition Policy and Public Procurement" Written contribution by Sudan (2012).

¹⁷⁹ Charlotte Wezi Malonda. *Global Competition Review: Malawi*. (2014).

¹⁸⁰ DJ Gerber, *JO Haley: Antitrust in Germany and Japan, the First Fifty Years, 1947-1998*, AMERICAN JOURNAL OF COMPARATIVE LAW (2004).

narrative as different patterns of diffusion may operate for each of them. Diffusion of the law may be indicated by the act of adoption, i.e. the enactment of the law. This, as we have seen, may arguably be triggered in some cases by coercion. Adopting coercion as a pretext for the adoption of competition law neglects many aspects that may equally (or more so) affect the adoption process.¹⁸¹ We have yet to see such an in-depth analysis when addressing the diffusion of competition law in developing countries.

When adopting market-oriented reforms, countries are looking for a framework to promote growth and strengthen their stand *vis a vis* international companies, and for a mechanism to preserve SMEs. They also wish to assist in insuring historically disposed groups have greater access to markets and to the ability to acquire knowledge, and to be seen as a significant jurisdiction able to integrate into the larger international community. Competition law provides them with a model which they would be more likely to adopt so as not to be exposed to the ills of capitalism in their transition to a market economy. Competition law says it is not *laissez faire* without boundaries, and the State is still present yet in a different capacity as a referee. To be clear, we are not challenging coercion as a diffusion pattern of competition law in developing countries. We are simply pointing out that it is not the only one. Offering other explanations (whether independently or as a supplement) to coercion will help us address more precisely the adoption pattern for each country. We will also be able to identify “diffusion multipliers,” that is the countries which, if they adopt a certain policy, others are more likely to follow.

2.4.3 The rate of diffusion and the nature of competition law

Discussing the rate of diffusion of innovations, Roger explained the innovation-diffusion relation as “an uncertainty reduction process”¹⁸² with a number of variables affecting its rate.¹⁸³ In relation to the attributes of a policy innovation, Roger identified five elements which affect the rate of diffusion. These are relative advantage, compatibility, complexity, observability, and trialability.¹⁸⁴

¹⁸¹ For example, diffusion of institutions in Europe was found to be due to symbolic imitation. Wilks & Bartle, *WEST EUROPEAN POLITICS*, (2002), p.148.

¹⁸² ROGERS. 2010, p. 232.

¹⁸³ These included the types of decision behind adopting an innovation (optional, collective or authority), the communication channels through which an innovation is discussed, nature of the social system and the degree of interconnection and the effects of promotion efforts by the agents of change. *Id.* at p. 222. We will discuss networks and agents in the next chapter.

¹⁸⁴ Todd Makse & Craig Volden, *The role of policy attributes in the diffusion of innovations*, 73 *THE JOURNAL OF POLITICS* (2011), p. 224. See, Trisha GREENHALGH, *et al.* 2008 p. 595 (discussing potential for reinvention, fuzzy boundaries, knowledge required to use the innovation, risk, task performance and support as other possible factors of innovation to be taken into consideration).

- relative advantage refers to the “degree to which an innovation is perceived as being better than the idea it supersedes.... [it is] a ratio of expected benefits and costs of adoption”;
- compatibility is “the degree to which an innovation is perceived as consistent with the existing values, past experiences, and needs of potential adopters”;
- complexity is “the degree to which an innovation is perceived as relatively difficult to understand and use”;
- observability is “the degree to which results of an innovation are visible to others; and
- trialability is “the degree to which an innovation may be experimented with on a limited basis.”¹⁸⁵

Makes and Volden examined the effect that the nature of the diffused policies has on the diffusion process and found, as expected, that complex policies spread more slowly, whereas compatible policies spread more quickly.¹⁸⁶

Taking into consideration the attributes of the diffused subject matter, in our case competition law, and their effect on the rate of diffusion, we note that competition law is a sub-section of competition policy, which includes other ‘micro industrial policies’ such as tariff and non-tariff policies, FDI, government intervention, and economic regulation.¹⁸⁷ As Fox noted, competition law is a dynamic concept that evolves over time and is altered and reshaped based on a country’s circumstances.¹⁸⁸ Competition (antitrust) law in the US changed from being a “law against power in the marketplace” to “marketplace pluralism and empowerment for the underdog” and finally to “a tool for efficiency.”¹⁸⁹ Under the umbrella of the EU, competition law evolved from a tool for market integration, control of abuses of economic power, and levelling the playing field for business actors across the member states of the Community, to a tool to enhance efficiency. The ‘economics’ aspect of the law was based on industrial organization theories. The development of competition (antitrust) law especially in the US context is influenced by a stream of economic theories, most notably those of the

¹⁸⁵ GREENHALGH, *et al.* 2008.

¹⁸⁶ *Id.* They also found that learning as a diffusion mechanism is more likely for “observable policies” but not for “complex” ones.

¹⁸⁷ KHEMANI & DUTZ. 1996. Very few countries have comprehensive competition policy statements such as Australia, Botswana, Malawi, Mexico, Hong Kong.

¹⁸⁸ FOX & TREBILCOCK, *The design of competition law institutions: global norms, local choices.* 2012.

¹⁸⁹ *Id.* This topic will be discussed in more details in chapter 4.

Chicago school,¹⁹⁰ and there is still a degree of divergence between the US and Europe in that regard. In the US, there is greater faith in the ability of markets to self-correct, compared to Europe where there is greater faith in the efficacy of government regulation and intervention, specifically competition law.¹⁹¹ In any case, both systems have moved (and in the case of the EU are still moving) towards an approach where the focus of competition law enforcement is on economic-based theories of efficiency.

In practice, how institutions, in particular courts, deal with these theories may give a different narrative. For example, Clougherty, collected information on enforcement trends by competition authorities in 32 jurisdictions from 1992 to 2007, where he found no evidence that the role of economics is ascendant relative to the role of law for the said period, with a slight increase in the role of economics in less experienced antitrust jurisdictions.¹⁹² A roundtable discussion at the OECD regarding presenting economic evidence to the court found that “agencies and courts display varying degrees of sophistication when dealing with economic analyses,” reporting that “some courts have experienced difficulties with basic economic assumptions and theories.”¹⁹³ Another question is how relevant these theories are to developing countries. Some research contended that these economic theories could still be relevant beyond the sphere of the more advanced countries.¹⁹⁴ The question is rather how they can be relevant for other less advanced countries.

With more attention being given by governments and the international community to inequality, wealth distribution, and poverty reduction, competition law is often cited as a tool to address these problems.¹⁹⁵ The link between competition and development has been put forward by a number of scholars and IOs.¹⁹⁶ This may in practice extend competition law to a wider domain beyond the efficiency paradigm.

¹⁹⁰ See Richard A Posner, *The Chicago School of antitrust analysis*, 127 UNIVERSITY OF PENNSYLVANIA LAW REVIEW (1979) (arguing that the distinction between the Chicago school and Harvard school has greatly diminished and that attempting to theorize antitrust under either of these schools is futile).

¹⁹¹ Cheng, CHICAGO JOURNAL OF INTERNATIONAL LAW, (2012).

¹⁹² Joseph A Clougherty, *Competition Policy Trends and Economic Growth: Cross-National Empirical Evidence*, 17 INTERNATIONAL JOURNAL OF THE ECONOMICS OF BUSINESS (2010).

¹⁹³ OECD, Presenting Complex Economic Theories to Judges 2008 DAF/COMP(2008)31. Available at <http://www.oecd.org/daf/competition/abuse/41776770.pdf>. Last visited 1 September 2016.

¹⁹⁴ Nathaniel H Leff, *Industrial organization and entrepreneurship in the developing countries: The economic groups*, 26 ECONOMIC DEVELOPMENT AND CULTURAL CHANGE (1978).

¹⁹⁵ See for example Ajit Singh, *12. Competition and competition policy in emerging markets: international and developmental dimensions*, GROWTH AND ECONOMIC DEVELOPMENT: ESSAYS IN HONOUR OF AP THIRLWALL (2007), Eleanor M Fox, *Economic Development, Poverty, and Antitrust: The Other Path*, 13 SOUTHWESTERN JOURNAL OF LAW AND TRADE IN THE AMERICAS (2007) OECD. 2006, Tania Priscilla; Nyman Begazo Gomez, Sara. Competition and poverty. (2016) and The World Bank Group. Breaking down barriers : unlocking Africa's potential through vigorous competition policy. (2016). The CLES organized a roundtable on the relation between competition law and inequality (if any), June 2016 in London. UK.

¹⁹⁶ See for example Fox, SW. JL & TRADE AM., (2006), Yuichiro Uchida & Paul Cook, *The effects of competition on technological and trade competitiveness*, 45 THE QUARTERLY REVIEW OF ECONOMICS AND FINANCE (2005).

Competition law has been affected by the global shift to a market economy, i.e. competition law has been adopted as part of a free market economy by developing countries. This accelerated the rate of competition law diffusion. The “relative advantage,” “trialability,” and “observability” of the economics behind competition law are documented in an abundance of research and the work of academics and scholars,¹⁹⁷ while stories on the harm of international cartels and cross-border mergers have not gone unnoticed. The “complexity” of the economics behind the law and “compatibility” with the prevailing culture are also factors which affect the rate of diffusion, especially beyond the initial adoption stage. The complexity of economic analysis regarding some aspects of the law or the institutional set-up may slow the diffusion. For example, the complexity of the merger analysis has been cited as being among the reasons for not including merger control under Egyptian competition law.¹⁹⁸ For the latter, the characteristics of developing countries and the hurdles facing competition law enforcement have been a subject of discussion.¹⁹⁹ In some countries, competition law is embedded in their political economy (such as the US).²⁰⁰ Gerber explains that the Sherman Act was a product of the “populist political pressure” over the abusive practices of the trusts, where the Act was actually a consolidation of the restraints of trade and monopolization doctrines under the Common law, elevating them to federal law with severe penalties.²⁰¹ For others, competition law as a norm needed cultivation to become the prevailing norm. Harmony vs. competition was a challenge in adopting laws against cartels in some parts of Asia.²⁰² While in Hong Kong, the government argued that merger control is considered to be inconsistent with their free market model, and accordingly it was not part of their cross-sector competition law.²⁰³ Gal gives the example of Russia where the Russian Antimonopoly Ministry, the predecessor of the Federal Antimonopoly Service of Russia was established. She explains that due to the difference between antitrust principles and the embedded ones, enforcement would not have been possible without having a strong person, a minister and an active member of government, heading the antitrust authority at the time.²⁰⁴ Cheng notes that the administrative nature of competition law enforcement is a catalyst in the success of

¹⁹⁷ See DUTZ & HAYRI. 2000, Competition Commission of India, Impact of Cartels on the Poor: Competition Law, Poverty Reduction and India, Intergovernmental Group of Experts on Competition Law and Policy, July 2013, http://unctad.org/meetings/en/Presentation/IGE2013_PREImp_INDIA_en.pdf. 26 and Kovacic, CHI-KENT L. REV., (2001).

¹⁹⁸ Parliament Session No. 21, 2/1/2005, (available on file with author, in Arabic).

¹⁹⁹ OECD Cross-Border Merger Control: Challenges for Developing and Emerging Economies, DAF/COMP/GF(2011)13 (2011). Available at <http://www.oecd.org/daf/competition/mergers/50114086.pdf>. Last visited 1 September 2016.

²⁰⁰ GERBER. 2010, p. 124. This brings us to an important question. “What comes first? Do you need to have the right political economy present to introduce competition law or will competition law create the right political economy?”. Michal S Gal, *Reality Bites (or Bits): The Political Economy of Antitrust Enforcement*, JURIS PUBLISHING (2002).

²⁰¹ GERBER. 2010 at 123.

²⁰² SUCH AS CHINA GIVEN NEO-CONFUCIUS IDEALS OF SOCIAL HARMONY AND THE PATERNALISTIC ROLE OF THE STATE. SEE Williams. 2005, p.125-126.

²⁰³ Thomas K Cheng, *A Tale of Two Competition Law Regimes-The Telecom-Sector Competition Regulation in Hong Kong and Singapore*, 30 WORLD COMPETITION: LAW AND ECONOMICS REVIEW (2007).

²⁰⁴ Gal, JURIS PUBLISHING, (2002).

convergence.²⁰⁵ These types of concern raise compatibility issues. The link between law and economics has influenced the rate of competition law diffusion. Through case studies, competition law was able to demonstrate its benefits. Nonetheless, the compatibility and complexity of this hybrid law remains a predicament in the subsequent post adoption phase.

2.4.4 Mapping diffusion of competition law

Rogers defines the rate of adoption as “the relative speed with which an innovation is adopted by members of a social system”.²⁰⁶ Hence, the first step to track the diffusion of competition law is to map the adoption sequence of the law across time. We first have to identify the parameters for this ambitious quest. The purpose of this exercise is to provide a broad view of the diffusion of competition law (in the formal sense) across the world at given intervals of time to help in mapping the diffusion process.

First, in relation to the timeline, we adopted an arbitrary measure of a decade (ten years) and its increments, starting with the first model of competition legislation identified as of 1889 to 2015. The second parameter to identify was the triggering event, i.e. the first evidence of competition diffusion in a country. Competition law is a hybrid of law and economics and an element of competition policy. Competition policy encompasses “the set of measures and instruments used by governments that determine the “conditions of competition” that reign on their markets. Antitrust or competition law is a component of competition policy.²⁰⁷ Other components can include actions to privatize state-owned enterprises, deregulate activities, cut firm-specific subsidy programmes, and reduce the extent of policies that discriminate against foreign products or producers. A key distinction between competition law and competition policy is that the latter pertains to both private and government actions, whereas antitrust rules pertain to the behaviour of private entities.²⁰⁸

Competition policy is a broader concept than competition law with many other aspects, which fall outside the scope of this research. It is also important to differentiate competition law from other relevant laws such as unfair competition and consumer protection. We narrowed the research to “laws on the books” since diffusion emphasises the process and not just the outcome. This too has not been easy. The fragmented introduction of laws that deal with competition in the market makes it difficult to track the adoption process. For example, the UK introduced laws that addressed the restraint of trade in 1948, which were subsequently

²⁰⁵ Cheng, CHICAGO JOURNAL OF INTERNATIONAL LAW, (2012), p. 433.

²⁰⁶ ROGERS. 2010 p. 221.

²⁰⁷ Hoekman & Holmes, THE WORLD ECONOMY, (1999).

²⁰⁸ KHEMANI & DUTZ. 1996.

amended in 1953 and supplemented by the Restrictive Trade Practices Act of 1956 and the Resale Prices Act of 1964.²⁰⁹ The same issue arises in relation to various countries such as Argentina and Brazil.²¹⁰ In 1970, Pakistan adopted a law on monopolies and restrictive trade practices and established the Monopolies Control Authority.²¹¹

Another issue that should be mentioned is the gradual introduction of competition law, especially merger control regime. It was not until 1914 that the US enacted a special law governing mergers.²¹² In the EU, it has been noted, for example, that some countries had introduced merger control before the EU did in 1989, including the UK, Ireland, Germany, France, Greece and Portugal.²¹³ Other countries introduced merger control after the EU merger control of 1989 was adopted (which came into effect in 1990), such as Spain, Italy, Belgium, Austria and Sweden. We find that more recently some countries have been reluctant to adopt a fully-fledged merger control regime when first introducing competition law, such as Malaysia (2010),²¹⁴ India (2007),²¹⁵ Egypt (2005), and specific sectors such as Hong Kong (telecommunications in 2013). Other laws have included a merger control regime from the onset, as in China (2008), Botswana (2009), and the UAE (2013). Although most of the adopters of competition law follow the open market paradigm, others such as China and Vietnam have adopted competition laws as well.²¹⁶

Hence, we have identified the adoption of modern competition legislation, which seeks to protect free market competition from agreements between firms that restrict competition, or the abuse of a dominant position.²¹⁷ It is usually comprised of three parts: restrictive business practices, abuse of dominance/monopolization, and merger control. However, as we have

²⁰⁹ The Monopolies and Restrictive Practices (Inquiry and Control) Act of 1948. As Scott explains, this development was motivated by the Labour Government desire in the aftermath of the WWII to orient corporate power towards serving "general social interests" where "full employment would most likely be achieved under a competitive economy, discouraging anti-competitive behaviour was considered likely to contribute to the fulfilment of this objective". Andrew Scott, *The evolution of competition law and policy in the United Kingdom*, (2009), p. 6. See also Helen Mercer Tony Freyer, *Constructing a Competitive Order: The Hidden History of British Anti-Trust Policies*. By Helen Mercer- New York: Cambridge University Press, 69 BUSINESS HISTORY REVIEW (1995). Mercer finds that the slow adoption and relaxed enforcement was mainly attributed to dominant power of big businesses.

²¹⁰ MARCO BOTTA, MERGER CONTROL REGIMES IN EMERGING ECONOMIES: A CASE STUDY ON BRAZIL AND ARGENTINA § 46 (Kluwer Law International. 2011), p.30 - 33.

²¹¹ That was crippled by the prevailing circumstances at the time UNCTAD UNCTAD. VOLUNTARY PEER REVIEW OF COMPETITION LAW AND POLICY : PAKISTAN. (2013 / 4).

²¹² While merger control in the United States began under the Sherman Antitrust Act, since its passage in 1914, mainly the Clayton Act has governed merger review after 15 years. Kathryn Fugina, *Merger Control Review in the United States and the European Union: Working Towards Conflict Resolution*, 26 NW. J. INT'L L. & BUS. (2005). For example, Argentina introduced competition law in 1980 without merger control provisions which was later added to the law in 1999. Malaysia introduced a competition law in 2010 but to date does not have a merger control regime.

²¹³ *Id.* at p. 249.

²¹⁴ MARK WILLIAMS, THE POLITICAL ECONOMY OF COMPETITION LAW IN ASIA (Edward Elgar Publishing. 2013), p.243.

²¹⁵ The Competition Act was adopted in 2002 and subsequently amended in 2007. It contained merger control provisions. Bhattacharjea, JOURNAL OF COMPETITION LAW AND ECONOMICS, (2008).

²¹⁶ Countries such as China and Vietnam were included nevertheless.

²¹⁷ Following the definition of Hoekman & Holmes, THE WORLD ECONOMY, (1999).

seen, their introduction may have been gradual and fragmented, and in such a case the adoption of the law is usually followed by a number of amendments and supplemental acts.

This exercise alone will not advise us on the implementation of the law but will give an accurate picture of the progression of adoption of competition law across the world. It would however be possible to use the same technique to identify and track the diffusion of more specific aspects of the law, such as shifts in substantive norms like the treatment of vertical restraints, enforcement techniques like leniency programmes, and adopting criminal sanctions and institutional models administrative vs. judicial model, inter alia. This will also help to identify the leaders of a given policy/model and predict how changes in these countries may have a waterfall effect on others.

The first two competition laws originated in Canada and the US in 1889 and 1890, each respectively. Under Roger's terms, these would be considered innovators.²¹⁸ It was however noted that some countries have contemplated issues pertaining to competition in the market before or in parallel with the US. For example, France had some fragmented laws dealing with different aspects of competition as early as 1791.²¹⁹ Some traced the idea of having a general law of competition back to Austria in the 1890s, where a proposal for such a law was put forward, but to no avail.²²⁰ Germany adopted an anti-cartel law in 1923.²²¹ Despite not surviving beyond the 1930s, it influenced other European countries such as Sweden and Norway at the time.²²² Antitrust/competition law spread outside of the Americas in the UK, Germany and Japan.²²³ As Gerber notes, despite the US being acknowledged as the "father of antitrust law", it had limited influence over development of competition in Europe post WWII, the EU competition model is distinct from that of the US and takes the form of administrative control model.²²⁴

For these reasons, we find that the developers of EU competition law are also innovators in their own right. In the next two decades (1950-1970), in addition to over ten European countries, more early adopters joined the list in South America, Asia and Africa. In the following two decades (1970-1990) the number of new joiners remained low (shy of fifteen) and the group was mostly made up of European countries. Most notably, Australia followed

²¹⁸ When studying diffusion of innovation, Rogers introduced his bell shaped curve, dividing innovation adopters into five main groups: innovators, early adopters, early majority, late majority and laggards. ROGERS. 2010.

²¹⁹ OECD. France -The Role of Competition Policy in Regulatory Reform. (2003).

²²⁰ DAVID J GERBER, LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS (oxford university Press. 1998). See also Gerber, AMERICAN JOURNAL OF COMPARATIVE LAW, (2004).

²²¹ ANESTIS S PAPADOPOULOS, THE INTERNATIONAL DIMENSION OF EU COMPETITION LAW AND POLICY (Cambridge University Press. 2010), p. 12.

²²² Gerber, AMERICAN JOURNAL OF COMPARATIVE LAW, (2004), at p. 3.

²²³ *Id.* Gerber notes that there were eclipsed by the great depression.

²²⁴ GERBER. 1998.

by New Zealand adopted a competition law at the time. In Africa, Kenya and Algeria became the next two countries to adopt a competition law. The real surge in the rate of adoption of competition law came in the next two decades. Over two thirds of the competition laws of the world were adopted in the two decades between 1991 and 2010. The new joiners were mostly countries from Central and Eastern Europe and the Western Balkans, i.e. former Soviet Union states. Also, in these last two decades competition law started to gain more ground in Asia, Central and South America, and Africa.

2.5 Conclusion

We have discussed in this chapter the theoretical framework for the worldwide proliferation of competition law. Many have articulated the subject from the view of legal transplant studies. In essence, the legal transplant literature comprises two main but competing concepts in the field of comparative law. They address whether transplantation is possible and elements affecting its success or failure. However, they do not provide a holistic framework which covers all the aspects of the transfer process. Further, the work that has addressed convergence so far focuses on a single model of centre-periphery convergence, which remains incomplete. For these reasons, we used an alternative framework based on a synthesis of diffusion, transfer, and convergence theories. In this chapter, we tackled the first component of this framework: the diffusion patterns of competition law or the “how” issue.

Observing the spread of competition law across many different countries indicates the existence of a strong international diffusion process. Through the lens of policy diffusion, we allow ourselves to draw a fuller picture in order to complement the existing literature. Bound up at birth with a painful and unpopular economic reform programme, competition law shares the stigma that accompanied the implementation of these programmes: coercion.²²⁵ While coercion has been influential in initiating the transplantation process, it fades over time and other diffusion patterns such as competition, learning, and emulation may become more pronounced, especially in relation to other aspects of the law such as procedures and institutional set-up.

Diffusion may be the tool to gain an in-depth understanding of the adoption process of competition law and its various normative, substantive, and institutional dimensions. There are advantages to being late adopters, most noticeably the ability to learn and emulate more

²²⁵ ICN Working Group on Capacity Building and Competition Policy Implementation, *Building credible competition authorities in developing and transition economies* (2003), p.28 (discussing the reasons for adopting competition law, the report made this statement in reference to SAPs and the challenges it poses for competition enforcement). Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc364.pdf>. Last visited 1 September 2016.

successful peers. However, late adopters miss out on the discussions about the foundation of these policies, which makes the adoption process more onerous and in some cases detached from their specific realities. It further raises legitimacy concerns over the adoption of foreign concepts and norms especially if it fails to account for relevant domestic policies and objectives. This concern is amplified with the current rise of populism and distrust towards governments that may use this as leverage to reject competition. Issues of compatibility and complexity may affect the diffusion process. In striving to make these policies more relevant to their own context, developing countries may re-orient them to suit their needs. Diffusion in itself does not guarantee convergence as it may lead to normatively attractive, unattractive, or ambiguous results.²²⁶ This is equally true for competition law.

This leads us to explore an important aspect of the diffusion process: the agents driving the transfer process and the subject of the transfer, in other words, the “who” and the “what” which we will address in the next chapters.

²²⁶ RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (Oxford University Press, 2013).

CHAPTER 3 AGENTS AND NETWORKS OF COMPETITION LAW DIFFUSION

3.1 Introduction

Answering the question ‘Who learns what from whom’, Dolowitz and Marsh identified six types of policy transfer agents.²²⁷ These maybe divided into two categories: (a) state actors, including elected officials, political parties, bureaucrats and civil servants; and (b) non-state actors, including multinational institutions, pressure groups, and policy entrepreneurs/experts.²²⁸ These different agents of transfer do not act independently of each other. Research has concluded that in any specific transfer case, more than one category of actors is likely to be involved.²²⁹

These external and internal agents function through an intricate web of networks, which in turn diffuse the policy.²³⁰ Such networks may function as information, enforcement, and/or harmonization networks and can be found on the vertical level (supranational organization with autonomous powers) or horizontal level (networks of national officials exercising little or no autonomous powers). This is in line with the notion that learning via regional or global networks helps promote ‘international policy culture’.²³¹

It has been argued that the state, if not the only actor in the international order, is still the most significant actor although it has disaggregating into its “component institutions”.²³² Hence, the role that NCAs and trans-governmental bodies play in that regard is increasingly important and requires further scrutiny.

Learning, as a diffusion method, may occur via transnational epistemic communities,²³³ which are defined as “knowledge-based experts, operating with shared paradigm within

²²⁷ Dolowitz & Marsh, POLITICAL STUDIES, (1996).

²²⁸ *Id.* According to international (IR) relations theories, actors on the IR scene are either state or non-state actors. There is no set definition for states however they usually possess the following features; a territorial base; a stable population residing within its borders, a government recognized by its population; and recognized diplomatically by other States. While non-state actors are defined as “organized political actor not directly connected to the State but pursuing aims that affect vital state interests. They may include sub-state actors such as trade unions, intergovernmental organizations such as the NATO and transnational bodies such as IOs, NGOs and multinational companies. Wendy Pearlman & Kathleen Gallagher Cunningham, *Nonstate actors, fragmentation, and conflict processes*, 56 JOURNAL OF CONFLICT RESOLUTION (2012).

²²⁹ BOB DEACON & MORGAN KILLICK, SOCIALLY RESPONSIBLE GLOBALIZATION: A CHALLENGE FOR THE EUROPEAN UNION (Ministry of Social Affairs and Health. 1999).

²³⁰ “Networks represent a soft, informal and gradual mode for the international diffusion and dissemination of ideas and policy paradigms. Within such networks, knowledge institutions provide important information and analytic resources and they can be utilised for the spreading of ideas and reforms through the network as well as beyond.” Dolowitz & Marsh, POLITICAL STUDIES, (1996), p. 15.

²³¹ DEACON & KILLICK. 1999.

²³² ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (Princeton University Press. 2009).

²³³ Peter M Haas, *Introduction: epistemic communities and international policy coordination*, 46 INTERNATIONAL ORGANIZATION (1992), p. 4.

transnational or domestic networks who influence policy by shaping political leaders' knowledge of cause-effect relations and definitions of the national interest".²³⁴ This is particularly true in relation to competition being a highly technical law.

This chapter is divided into four parts. In the second part, we will address the agents and networks of competition law transfer with emphasis on NCAs, trans-governmental organizations, and epistemic communities and how they interact with each other. The third part addresses the networks founded and/or inhabited by these agents. The fourth part discusses the purpose of these agents and networks as platforms to foster convergence. The chapter ends with concluding remarks drawn from earlier discussions.

3.2 Agents and Networks of Competition Law Diffusion

Adopting a macro- and meso-level analysis of the agents and networks involved in competition law diffusion can help us understand the robust exchange where competition law norms, institutions and procedures are developed, discussed, and transferred. For our purposes, macro-level units of analysis are multinational competition organizations and networks while meso-level units of analysis are sub-national actors, mainly NCAs. A micro-level analysis regarding individuals or a subset of society (such as local policy elites) falls outside the scope of this chapter.²³⁵ However, we will briefly address epistemic communities of competition law given the prominent role they play in competition law transfer.

Our discussion will cover several bodies that are active in this regard, such as the WTO, WBG, UNCTAD, OECD, and ICN, as well as various NCAs of the World. We will base our discussion on the purpose and scope of work of these agents and available information on their activities. We will then try to shed some light on the interaction between the state and non-state actors and networks of competition diffusion using International Relations (IR) theories.

3.2.1 NCAs and competition law diffusion

A number of NCAs have played an important role in the transfer of competition law and policies and thus have become agents of diffusion. The U.S. DoJ and the FTC are two prominent examples. Both agencies engage in technical assistance and capacity building

²³⁴ Levy, INTERNATIONAL ORGANIZATION, (1994), p. 281.

²³⁵ For an example of micro level analysis of agents in select countries in Latin America see Andres Palacios Lleras, Competition Law in Latin America: Markets, Politics & Expertise (2016, UCL).

activities focusing on young competition agencies.²³⁶ They run various programmes to achieve their goals, including exchange programmes where mid-to-senior level staff from non-U.S. competition agencies are invited to the offices of the relevant divisions for short visits and staff are sent out to work with competition agencies outside the U.S.²³⁷ These activities are occasionally funded by the USAID, usually targeting their peers at the state level, i.e. the staff of competition authorities and possibly members of the judiciary. Countries that have benefited from these activities “range from some of the least developed countries of sub-Saharan Africa to the robust economies of Mexico”.²³⁸ This is in addition to their participation in relevant IOs where they engage in soft law formation of competition law (discussed below). The DG Comp also engages at the bilateral level in a wide range of cooperation activities with over 80 competition authorities of third countries/trade blocks. These countries include Algeria, Argentina, Australia, Chile, China, Egypt, India, Peru, Trinidad and Tobago, and Zambia, and trade blocs such as the Andean Community and the COMESA. The activities range from information sharing and exchange on competition issues, to capacity building.²³⁹

The US and the EU are not alone in diffusing competition law and policies. In Asia, Japan has taken the lead in providing technical assistance for various countries, in particular from East Asian developing economies.²⁴⁰ The JFTC provided training courses, short-term seminars and sent competition policy experts to countries such as China, Indonesia, Thailand, Vietnam, and Malaysia.²⁴¹ Korea’s successful rise to the ranks of developed countries made it an ideal candidate to “actively join in spreading a right competition culture in the world.”²⁴² Korea, through the KFTC and the KOICA, runs a joint programme offering customized assistance to

²³⁶ “[T]he Division promotes international competition policy cooperation and convergence by maintaining strong bilateral relationships with enforcement agencies in other jurisdictions and through participation in international organizations such as the Competition Committee of the OECD and the [ICN]. The Antitrust Division’s international initiatives aim to bring greater cooperation and convergence to international antitrust enforcement in the years ahead by facilitating international discussion of important issues, building bilateral and multilateral relationships, and learning how best to coordinate investigations and remedies.” DOJ, *International Program*(2016), available at <https://www.justice.gov/atr/international-program-4>.” One of the goals of the FTC’s technical assistance program is to promote the implementation of those consensus principles [sound, economically-grounded legal principles and transparent and fair procedures that support pro-competitive outcomes] by developing competition agencies.” Timothy H. Hughes, *et al.*, *International Competition Technical Assistance: The Federal Trade Commission’s Experience and Challenges for the Future*, in ANTITRUST IN EMERGING AND DEVELOPING COUNTRIES: FEATURING AFRICA, BRAZIL, CHINA, INDIA, MEXICO... (Eleanor M. Fox, *et al.* eds., 2016), p.192-3.

²³⁷ Hughes, *et al.* 2016, p. 199 and DOJ. 2016.

²³⁸ Hughes, *et al.* 2016, p.196 and see for example OECD, *Calendar of International Capacity Building Events*(2012), available at http://www.oecd.org/daf/competition/Calendar%20of%20Global%20Capacity%20Building%20Events_2012v2.pdf. Last visited 1 September 2016.

²³⁹ European Commission, *Bilateral relations on competition issues*(2015), available at <http://ec.europa.eu/competition/international/bilateral/>. Last visited 1 September 2016.

²⁴⁰ Deputy Director Keiichi IWASE, International Affairs Division at JFTC, Technical assistance offered and contributed by the Japan Fair Trade Commission (2005).

²⁴¹ *Id.*

²⁴² “What’s more, developing countries want to benchmark Korea rather than directly learn from advanced players because Korea has gone through similar historical and economic developments with what they are experiencing now” KFTC, *Suggestions for Effective Technical Assistance* (2005)

each recipient country based on its condition and needs.²⁴³ In collaboration with the OECD, it hosts a Regional Competition Centre (RCC) to meet the regional demand for competition law training. Before becoming a mentor of competition law, the KFTC benefitted from the experience of skilled competition authorities of the US, Germany, Australia, Canada, and Japan.²⁴⁴ Australia and New Zealand play a similar role with the ASEAN member states. In Africa, there is a long history of co-operation between the FTC and the EU on the one hand and the South African competition authorities on the other.²⁴⁵ The South African Competition Commission, now considered the leading competition authority in Africa, interacts with and provides training to many African countries especially SADC member countries.²⁴⁶ The Egyptian Competition Authority exchanges expertise with countries (mostly North) Africa and the Middle East such as Jordan, Tunisia, Morocco Kuwait, Oman and Sudan.²⁴⁷ Countries such as Indonesia, Brazil, Zambia, Serbia, Colombia and Peru, which are willing to take on a leadership role and have the necessary economic clout and competition infrastructure, have been identified as regional leaders by UNCTAD and are used to multiply the impact of policy diffusion.²⁴⁸

3.2.2 IGOs as agents and networks of diffusion

Transnational transfer of policy and practice does not always occur in a simple bilateral exchange between sovereigns but can be complemented by transnational transfer networks.²⁴⁹ IGOs continue to play a major role in the diffusion of competition law, especially in developing countries. IGOs act as the conduit and the agent of policy transfer where competition law is being developed and discussed. We will discuss below in more detail the contributions of the most relevant ones to competition law diffusion.

a) The WBG: an agent of persuasion and knowledge

The impact of the WBG on competition law diffusion especially in relation to developing countries has been mentioned in competition literature as one of the drivers behind the adoption of the law.²⁵⁰ In this regard, it is the coercive powers of these international financial institutions (via conditionality) that have driven many developing countries to adopt

²⁴³ *Id.*

²⁴⁴ *Id.* at p. 61.

²⁴⁵ Competition Commission South Africa & Competition Tribunal South Africa. Ten years of enforcement by the South African competition authorities, Unleashing Rivalry 1999 – 2009. (2009).

²⁴⁶ *Id.*

²⁴⁷ ECA, *Press Releases available at* <http://www.eca.org.eg/ECA/News/List.aspx>.

²⁴⁸ UNCTAD, *Mandate and key functions, Providing technical assistance to developing countries, available at* <http://unctad.org/en/Pages/DITC/CompetitionLaw/ccpb-Mandate.aspx>. Last visited 1 September 2016.

²⁴⁹ Stone, *JOURNAL OF EUROPEAN PUBLIC POLICY*, (2004).

²⁵⁰ We will discuss this association in later chapters when we explore the subject of diffusion and will test the coercion hypothesis in African countries.

competition regulations. The WBG provides two types of financing: investment loans and development policy loans. Investment loans have a long-term focus (five to ten years), and finance goods, works and services in support of economic and social development projects in a broad range of sectors. Development policy loans provide quick external financing to support government policy and institutional reforms. The conditionality approach is associated with Development Policy Lending, through which the WBG makes its resources available if the borrower: (a) maintains an adequate macroeconomic framework, (b) implements its overall programme in a manner satisfactory to the WBG, and (c) complies with the policy and institutional actions that are deemed critical for the implementation and expected results of the supported programme.²⁵¹

Thus, under a coercion hypothesis, to access finance the borrower has to commit to introducing competition regulation within a given timeframe. This, however, was not a consistent requirement under all such agreements, as the stipulation seemed to vary from one country to another. This goes back to the sequencing strategy adopted by the WBG where competition regulations have not always been a priority. According to Niam, historically, there were two sets of reforms: first generation and second-generation reforms.²⁵² The first generation reforms were macroeconomic to reduce inflation and restore growth. These entailed changing the macroeconomic rules, reducing the size and scope of the State, and dismantling institutions of protectionism and statism. Second generation reforms tackle issues of maintaining macroeconomic stability, realizing international competitiveness, and improving social conditions. This includes, among other things, upgrading the regulatory capacity, such as competition law.

Realizing the failure or limited success of the conditionality approach, the WBG policy and practice on conditionality was reviewed in 2004. Hence, there was a change in orientation of the financing offered towards ending extreme poverty and sharing prosperity, as two important dimensions to the financing activities of the WBG. Among the issues raised were borrowers' commitment to the reform programme, which was not found to be consistent or satisfactory in all cases. It is now an express criterion to approve any development-lending

²⁵¹ Reforms were mandated under Rehabilitation Loans, Structural Adjustment Loans / Credit (SAL/ SAC), or currently Policy Development Loan agreements such as Poverty Reduction Structural Adjustment Credit (PASAC) for low income countries. WBG, *Operational Manual, Development Policy Financing* (2014), available at <https://policies.worldbank.org/sites/ppf3/PPFDocuments/Forms/DispPage.aspx?docid=2673&ver=current>. Last visited 1 September 2016.

²⁵² Moises Naim, *Fads and fashion in economic reforms: Washington Consensus or Washington Confusion?*, 21 THIRD WORLD QUARTERLY (2000).

project.²⁵³ Further, the WBG offers advisory and technical assistance to member countries on various topics, including competition. Also, in 2013 the WBG initiated a Competition Policy Advocacy Contest. The Bank explained that the aim of the contest is “to showcase the positive results for consumers, businesses, and overall economic growth generated by forward leaning policies aimed at thwarting anti-competitive behaviours” which will effectively “provide a global platform for sharing lessons learned in competition policy advocacy and recognizing the efforts of individual agencies”.²⁵⁴ Though such activities are not to be considered direct policy transfer, they recognize the creative advocacy programmes in such countries and create an incentive (even if an honorary one) for NCAs to compete in implementing and showcasing their advocacy activities.

Whether the WBG compels its borrowers to adopt or reform competition law or it simply provides them with the knowledge and technical know-how to aid them in reaching their development needs is open to further scrutiny and may vary from one country to another. These speculations (in addition to poor performance in many cases) made the WBG more focused on borrower’s ownership of the adjustments proposed.²⁵⁵ In any case, the WBG has been an important driver of the adoption as well as development of competition law in many developing countries.

b) The WTO: The unfulfilled prophecy

The first attempt made under the WTO in relation to adopting a global competition law dates back to 1996 when a Working Group was created to study the relationship between trade and competition policies.²⁵⁶ At the Doha Ministerial Conference in 2001, the use of competition policy as a means for enhancing international trade and development was recognized.²⁵⁷ As the debate progressed, there was an obvious divide on adopting a multilateral agreement on international competition policy. Some developed countries led by the EU and Japan argued for it (advocating speedy negotiations of competition policy, which essentially would guarantee them market access) while developing countries led by India and Brazil opposed it (on the premise that they did not have the required infrastructure for the implementation of

²⁵³ “The Bank considers the strength of the program proposed for support and the Member Country’s commitment to, and ownership of, the program against its track record.” WBG. Development Policy Operations a framework To Assess Country Readiness For Making Productive Use Of Development Policy Operations. (2006).

²⁵⁴ WBG, *Competition Advocacy Contest* (2013), available at <http://www.worldbank.org/en/topic/competitiveness/brief/investment-climate>. Last visited 1 September 2016.

²⁵⁵ David; Dollar & Lant Pritchett. *Assessing Aid: What Works, What Doesn’t, and Why*, World Bank policy research report. (1998)

²⁵⁶ Hoekman & Holmes, *THE WORLD ECONOMY*, (1999).

²⁵⁷ A Marsden, *Competition Policy for the WTO*, COMPETITION LAWINSIGHT (2003).

such policy).²⁵⁸ Washington too was not on board for this universal approach to competition law for its own reasons. Reaching a deadlock, the whole issue was dropped from the WTO agenda. Nonetheless, the WTO still contains some provisions, which are relevant to competition law²⁵⁹ in addition to a few precedents brought to the WTO dispute resolution forum, which raised competition law issues.²⁶⁰ However, without political will, the call for unified rules on competition is unlikely to be revived anytime soon.

c) The UNCTAD: The development forum

The UNCTAD embraces 194 member states and its purpose is to promote a development-friendly integration of developing countries into the world economy.²⁶¹ Among those topics in which UNCTAD is active are competition and consumer policies. The UNCTAD serves as a research and think tank which dismantles data and performs policy analysis of competition and consumer policies. It is more importantly a provider of technical assistance to developing countries on such matters.

The most notable contribution of UNCTAD on the subject is its bold attempt to bring its diverse members to agree on a set of rules governing restrictive business practices, the UN Set.²⁶² The Set contains a variety of concessions and compromises with minimum standards of antitrust enforcement obligations.²⁶³ The UNCTAD also made available a Model Law on competition. It is arguable, however, whether it gained international acceptance to be treated as a point of reference. It is nevertheless the reference point used in the UNCTAD peer review programme. The UNCTAD provides research on competition law matters especially from the point of view of developing countries. It runs two technical assistance initiatives in Latin America and Africa, COMPAL and AFRICCOM.

²⁵⁸ Ignacio Garcia Bercero & Stefan D Amarasinha, *Moving the trade and competition debate forward*, 4 JOURNAL OF INTERNATIONAL ECONOMIC LAW (2001) and Chad Damro, *The new trade politics and EU competition policy: shopping for convergence and co-operation*, 13 JOURNAL OF EUROPEAN PUBLIC POLICY (2006). This was not the first attempt to contemplate a global competition law project. Similar effort had been done in the 1920s at the League of Nations led by France and under the Havana Charter of the ITO led by the United States. See a recount of these efforts in Philip Marsden, 'Jaw-jaw' not 'law-law' – from treaties to meetings: the increasing informality and effectiveness of international cooperation, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW (Ariel Ezrachi ed. 2012) p. 24-54.

²⁵⁹ Marsden, COMPETITION LAWINSIGHT, (2003).

²⁶⁰ Eleanor M Fox, *the WTO's first antitrust case–Mexican Telecom: a sleeping victory for trade and competition*, 9 JOURNAL OF INTERNATIONAL ECONOMIC LAW (2006).

²⁶¹ Robert S Walters, *UNCTAD: Intervener Between Poor and Rich States*, 7 J. WORLD TRADE L. (1973).

²⁶² The Set addresses a wide range of restrictive business practices by multinationals; however, it is not legally binding and has therefore not been helpful to developing countries. See GERBER, 2010, p.235.

²⁶³ Hoekman & Holmes, THE WORLD ECONOMY, (1999). The goal behind the set was a contentious issue. For developing countries, the goal was to enhance economic development through regulating the activities of transnational corporations while the goal for developed countries was using the Set as a means of maintaining and promoting market competition.

The UNCTAD engages different participants within the government of its member states and other stakeholders. Under the Set, the Intergovernmental Group of Experts (IGE) on Competition Law and Policy should meet on an annual basis to discuss and exchange views hoping to “enhance convergence through dialogue”.²⁶⁴ The IGA has no judicial or binding powers. The Set also requires that a Review Conference is held every five years to assess the validity of the Set. The review conference is held at the Ministerial level, while heads of national competition authorities are expected to attend in addition to selected civil society and private sector representatives. In 2010, the UNCTAD launched a platform for joint research activities engaging research institutions, universities, competition authorities, business, and civil society (RPP).

Being the product of developing countries’ discontent with the world economic order²⁶⁵ limits the ability of UNCTAD to function as the main agent of competition law diffusion. The uniqueness of UNCTAD will, however, remain in its ability to bring the development dimension into competition law and thus act as a trusted mentor for developing countries.²⁶⁶

d) The OECD: The premier league

The OECD is another IGO made up of thirty-five, mostly high-income States, where policy convergence is discussed and agreed based on the development course of these countries, in our case “modern competition law as promoted by OECD competition work”.²⁶⁷ The OECD engages in competition law advocacy through a specialized committee on Competition Law and Policy, which include NCAs of OECD countries as well as their counterparty from non-OECD countries as observers some members have argued for allowing countries whose competition law systems are not at par with OECD due to the size of their markets and impact on the global economy “that they can not be left out” specifically Brazil, China, India, Indonesia, Russia and SA.²⁶⁸ To qualify as an observer, a country is required to fulfil a certain criteria; adopt OECD recommendations, undergo a peer review exercise, contribute to competition committee roundtables, actively participate in outreach events and disseminate the OECD’s recommendations and best practices to other authorities.²⁶⁹ Invitations are limited

²⁶⁴ UNCTAD, *Intergovernmental Group of Experts on Competition Law and Policy*, available at <http://unctad.org/en/Pages/DITC/CompetitionLaw/Intergovernmental-Group-of-Experts-on-Competition-Law-and-Policy.aspx>

²⁶⁵ Sidney Dell, *The origins of UNCTAD*, UNCTAD AND THE NORTH-SOUTH DIALOGUE (1985), p. 4.

²⁶⁶ “UNCTAD reaches an audience of developing countries that do not participate in the OECD or ICN events.” Hollman & Kovacic, MINNESOTA JOURNAL OF INTERNATIONAL LAW, (2011), p. 297.

²⁶⁷ OECD. Proactive Strategy Vis-à-Vis Non Members. (2005) p.2.

²⁶⁸ *Id.* at p.5.

²⁶⁹ *Id.* at p.2.

to a two-year period and renewal can only be “earned by performance”.²⁷⁰ Accordingly, OECD by design depends on diffusion to reach the 150 plus other countries of the world. It in fact adopts a “diffusion multiplier” test to allow influential jurisdictions into the organization to first diffuse its own policies through learning, socialization and emulation onto them where they, as diffusion multipliers, would in turn diffuse the OECD policies to others (current observers to the Competition Committee are Brazil Indonesia, Lithuania, Romania, Russian Federation, SA, Chinese Taipei and non-observer enhanced engagement countries are China, India).²⁷¹ The OECD outreach activities, such as Competition Committee then spreads its agreed standards and rules through its annual forums (Global Forum on Competition and the Latin American Competition Forum) and their regional training centres in Hungary and Korea, by engaging larger audience (other non-member states) in an “in-depth ‘OECD-style’ dialogue with an increased number of economies with which OECD members have a strong interest”. This strategy may ensure the effectiveness of OECD as a global diffusion mechanism for “premier league” competition law, rather than just a club of advanced and developed countries. With more countries aspiring to join the club, the role of the OECD in policy diffusion might be on the rise.

e) Enters the ICN

In parallel to the unfolding events at the WTO, the US was looking for a less binding alternative to a multilateral agreement on competition law through voluntary diffusion mechanisms. In their report on competition convergence to the US Attorney General and Assistant Attorney General for Antitrust, the International Competition Policy Advisory Committee (ICPAC) recommended creating, as part of a global competition initiative, a forum focusing solely on competition law, open to all NCAs to participate on equal footing, on voluntary basis with no formal structure and non-binding capacity.²⁷² In 2001, the ICN was established. Over a decade, ICN members grew from its initial 14 NCAs to 127 NCAs from 111 jurisdictions.²⁷³ China has not yet joined the ICN but to date it has opted to remain a spectator, which undermines the reach of the ICN. Though voluntary and non-binding in nature the ICN explicit main goal is convergence.²⁷⁴ The activities of the ICN revolve around

²⁷⁰ *Id.*

²⁷¹ On-Line Guide to OECD Intergovernmental Activity, *On-Line Guide to OECD Intergovernmental Activity*(2009), available at <http://webnet.oecd.org/OECDGROUPS/Bodies/ShowBodyView.aspx?BodyID=7102&BodyPID=9336&Lang=en&Book=False>. Last visited 1 September 2016.

²⁷² The International Competition Policy Advisory Committee (ICPAC) To The Attorney General And Assistant Attorney General For Antitrust. Final Report. (2000).

²⁷³ ICN, Summary of ICN Work Products 2012-2013 (2013)

²⁷⁴“By convergence we mean the broad acceptance of standards concerning the substantive doctrine and analytical methods of competition law, the procedures for applying substantive commands, and the methods for administering a competition agency. Administration encompasses the techniques a competition agency uses to organize its operations, set priorities, and evaluate its effectiveness.” Hollman & Kovacic, MINNESOTA JOURNAL OF INTERNATIONAL LAW, (2011) p. 278.

formulating standards, practical guides and toolkits and holding training and workshops for member. Despite being an open forum, these activities are means to diffuse policies that gained consensus by the policy innovators, as reflected in OECD work, with the advanced competition law countries defining the agenda of the ICN and leading others in various seminars and working groups. This is also reflected in the choice of topics selected by the working groups which focus on substantive provisions, enforcement and advocacy geared towards limiting State role as per the discipline of competition law principles that rarely addresses controversial issues such as competition law and the public interest or competition law and industrial policy.

Diffusion through learning, socialization and emulation is the core of the ICN's activities. In an ICN survey of the impact of its work on its members it reported that 94% of competition agencies surveyed distribute them inside the agency, 77% use ICN materials for reference purposes, 46% for staff training and 40% for outreach.²⁷⁵ Fox finds that ICN work has been quite influential in the areas of merger process, cartel enforcement and the mutual understanding of laws, policies, and cultures. Fox however notes that despite being an open forum allowing for and encouraging participation, *de facto* the ICN agenda is set and the norms principally forged by the developed world.²⁷⁶ Kovacic et al explained a three-stage process of international standardization of competition law under the umbrella of the ICN which starts with individual jurisdictions going through a trial and error phase until the (with the help of ICN and such forums) identify "superior practices" to which they voluntarily opt for.²⁷⁷ It is not clear to what extent young competition authorities of developing countries are able to engage in individual experimentation rather than "voluntarily" adopting ready-made "superior practices" tried and recommended by experienced, resource endowed authorities.

The ICN experience seems to have inspired its members to establish similar organizations on the regional level possibly to align their common interests and discuss topic that are not addressed under the ICN. The African Competition Forum (ACF) was a product of lengthy discussions, which took place at the African Stakeholder Workshop (ASW) in 2010.²⁷⁸ The ACF is to be "African driven" and is tasked with dissemination of knowledge and experience, facilitating learning between competition agencies, initiating and collaborating on specific studies on competition problems faced in/across member countries, and designing and

²⁷⁵ ICN. ICN Factsheet and Key Messages (2009).

²⁷⁶ Eleanor M Fox, *Linked-in: antitrust and the virtues of a virtual network*, THE INTERNATIONAL LAWYER (2009) p. 152.

²⁷⁷ Hollman & Kovacic, MINNESOTA JOURNAL OF INTERNATIONAL LAW, (2011).

²⁷⁸ Mor Bakhoun, *A Dual Language in Modern Competition Law? Efficiency Approach versus Development Approach and Implications for Developing Countries*, 34 WORLD COMPETITION (2011), p.18.

delivering training programmes tailored to African needs and problems.²⁷⁹ For this, the ACF should be unique in its approach and give priority to issues impacting poverty and economic development in African countries and not just competition law and policy. This indicates that some may not have found a home at the ICN and are looking for alternatives to address the continent's needs. It also means that new networks of alliances may be formed which in the future would impact the ability to reach consensus in such forums.²⁸⁰

3.2.3 Epistemic communities as agents of diffusion

Research in lesson-drawing as a method of policy diffusion has indicated that learning may occur via transnational epistemic communities.²⁸¹ Haas explains that epistemic communities are leagues of experts in a given field of science that are capable of influencing policies through the knowledge they possess.²⁸² Members of an epistemic community do not have to be in absolute agreement over their beliefs as they may discuss, debate and develop them. It is their superiority as leading experts in their field that gives their views a weight which affects the decision making process.²⁸³ They are “carriers of scientific knowledge into politics”.²⁸⁴ This is particularly true in relation to competition being a highly technical law.

There is a wide collection of non-state institutions and individuals involved in competition diffusion. These include NGOs, think tanks, professionals and academic experts. Attempting to map their contributions in the diffusion of competition law is an ambitious quest, which we do not set out to do in this chapter. Add to this the fact that competition law, part law and part economics, draws on a wide range of contributors from both disciplines. For example, in a document titled “What think tanks are thinking” prepared by the European Parliamentary Research Service regarding, on the one hand, Google and, on the other hand, Gazprom abuse of dominance cases, lists commentaries and analysis of these cases from over ten different think tanks in the fields of competition, trade, public policy and economics.

There is little information about competition law NGOs working in developing countries. One particular NGO stands out: the Consumer Unity and Trust Society International (CUTS). CUTS is an Indian, Pan-African non-governmental think-tank that undertakes research,

²⁷⁹ Thula Kaira, *The Possibility of Establishing an Africa Competition Forum* (2010).

²⁸⁰ The BRICS countries are considering introducing a “Joint Research Platform” to function as a knowledge base of their specific models of competition law and to provide a venue to formulate an alternative narratives to the current mainstream competition model of the neoclassical price theory based model. See Lianos, CLES RESEARCH PAPER SERIES NO. 5/2016 (2016), p. 25.

²⁸¹ Rose Richard Rose, *What is lesson-drawing?*, 11 JOURNAL OF PUBLIC POLICY (1991).

²⁸² Haas, INTERNATIONAL ORGANIZATION, (1992).

²⁸³ *Id.*

²⁸⁴ Ernst Haas, *Conversations with History* (Institute of International Studies Harry Kreisler, UC Berkeley ed., 2000).

advocacy work and networking on a wide range of issues including competition in India in general and globally. In addition to its headquarters in India, CUTS has three centres operating out of Africa: in Ghana, Lusaka and Nairobi and another centre based in Geneva. CUTS established an institution dedicated competition and regulation, the Institute for Regulation and Competition (CIRC) which provides learning programmes and material in addition to various publications based on the experiences of developing countries.²⁸⁵ CUTS's in depth research projects especially on developing countries guides the discussions on the topic.

Turning our attention to academia, in the 1950s-60s there was a debate between two antitrust schools, the Harvard School and the Chicago school; however, they both agreed on using economic analysis in competition enforcement. The Chicago school impacted competition law development arguing that the primary goal of the law is economic efficiency.²⁸⁶ In more recent times, we can distinguish two main streams of thought that influence the trends in competition academia especially in relation to developing countries. The first stream reflects the views of those who advocate a more realistic approach to competition law, emphasizing the differences in economic development, institutions, culture, and social norms in developing countries. They draw their conclusions by looking at these various factors, which affect the adoption and enforcement of the law. It has gone further to suggest using competition law to deal with inequality issues and poverty reduction and not just economic efficiencies.²⁸⁷ However, strong believers in the economic analysis of the law negate the need for a customization process of competition law to developing countries. We will refer to the former as the “rationalists” and the latter as the “absolutists”.²⁸⁸ As an absolutist, Priest argues that, in a sense, all countries of the world are developing ones. He explains the absolutist views of competition law to mean a set of principles, which, if appropriately implemented, will maximize consumer welfare, enhance economic growth and aid low-income earners in any given society. Following this view, the ‘harmonization’ of competition law should not be based on compromise but rather conformity to “optimal competition law”.²⁸⁹ Any departure from “optimal competition law” should be closely scrutinized as such claims have been

²⁸⁵CUTS. Projects at a Glance. (2016).

²⁸⁶ Robert H Bork, *THE ANTITRUST PARADOX: :A POLICY AT WAR WITH ITSELF* , (1978). This will be discussed in more depth in the next chapter.

²⁸⁷ Fox, SW. JL & TRADE AM., (2006), Abel Mateus and Azza Raslan Ioanis Lianos, *Is There a Tension Between Development Economics and Competition?* , in *COMPETITION LAW AND DEVELOPMENT* (Thomas K. Cheng D. Daniel Sokol, and Ioannis Lianos ed. 2013);GAL, *et al.* 2015.

²⁸⁸George L. Priest, *Competition Law in Developing Nations: The Absolutist View*, in *COMPETITION LAW AND DEVELOPMENT* (D. Daniel Sokol, *et al.* eds., 2013).

²⁸⁹ *Id.* at p. 30.

“commonly presumed but not adequately explained”.²⁹⁰ On the other hand, the rationalists would argue that competition law should be designed to speak to the socio-political and economic situation and level of development of a country. Whether as a rationalist or an absolutist, there is still a more influential role for academia to play in competition law development.

All the IGOs discussed above interact (in varying degrees) with other non-state actors who, in turn, through their contributions, engage in policy diffusion activities.

3.3 Competition Agents and Polycentric Diffusion of Competition

3.3.1 Interaction between states and non-state agents of diffusion

In a given area, stakeholders may find that cooperation on common rules is beneficial; however, there is no agreement as to how exactly the rules should be designed. In such situations, since cooperating is still more beneficial than not cooperating, networks, whether formal or informal, are useful in addressing these differences. This describes the state of play for competition law. We have seen how IGOs have been very active in forming networks engaging with other agents in the process. In this context, what is the impact on the relation between states and non-State actors and the convergence process?

We consult the work of international relations theories to help us address this question. There are many competing theories of international relations, which make it difficult to neatly group them.²⁹¹ Our interest here is how these theories view IGOs and the role they play in policy formation. Many theories identify the state as their key ontological object such as realism, neorealism, liberalism and neo-liberalism theories, i.e. as state-centric theories,²⁹² despite having very different views of states’ motives in the international system.²⁹³ For the realists, IOs are like empty shells where states control their decisions based on their power and interests to achieve national security.²⁹⁴ Neorealists, however, find that other actors below the level of the states may function to serve state’s interest but with limited independent effects

²⁹⁰ *Id.*

²⁹¹ Stephen M Walt, *International relations: one world, many theories*, FOREIGN POLICY (1998), p.52.

²⁹² Alexander Wendt, *The state as person in international theory*, 30 REVIEW OF INTERNATIONAL STUDIES (2004), at p. 183. As Mearsheimer explains “Realists maintain that institutions are basically a reflection of the distribution of power in the world. They are based on the self-interested calculations of the great powers, and they have no independent effect on state behaviour.” Walt, FOREIGN POLICY, (1998) p. 7.

²⁹³ Robert Jervis, *Realism, neoliberalism, and cooperation: understanding the debate*, 24 INTERNATIONAL SECURITY (1999), p. 20.

²⁹⁴ John H Herz, *Political realism revisited*, 25 INTERNATIONAL STUDIES QUARTERLY (1981), p. 32.

since they are created, shaped and kept alive by states.²⁹⁵ Liberals found that international actors, especially multinational co-operations, were “gradually encroaching on the power of states.”²⁹⁶ Neo-liberalists in political science also do not see IOs as autonomous bodies but they may provide structural constraints on state behaviour.²⁹⁷

The globalization of world markets, the rise of transnational networks and nongovernmental organizations, and the rapid spread of global communications technology were found to be undermining the power of states and shifting attention away from military security toward economics and social welfare.²⁹⁸ Institutionalisms argue that “institutions can alter state preferences and therefore change state behaviour” which serves international cooperation.²⁹⁹ Neoliberal institutionalism takes a more modest approach and agrees with realists on the State being the main player in international relations; however, they acknowledge that IOs also play a vital role on the international stage.³⁰⁰ Nielson and Tierney build on neoliberal institutionalism and argue that in situations like environmental lending policy, the WB behaviour was closer to a principal-agent (P-A) model of international organization in which groups of member governments empowered their IO agents with real decision-making authority.³⁰¹ They note the shortcomings of the P-A model where member countries must solve principal collective-action problems multilaterally before motivating their agents.³⁰² They also, however, make the point that with more diversity in states’ preferences, the less likely it is that states will agree on a common policy and delegate to IOs.³⁰³

Rather than the self-interest of nation-states that realists see as a motivating factor, functionalists also challenge the state-centric view and focus on the common interests and needs shared by states (but also by non-state actors) triggered by the erosion of state sovereignty and the increasing weight of knowledge and hence of scientists and experts in the process of policy-making.³⁰⁴ Functional IOs formulate policy and become increasingly

²⁹⁵ Jervis, *INTERNATIONAL SECURITY*, (1999).

²⁹⁶ Although some liberals entertained with the idea that new transnational actors, especially the multinational corporation, were gradually encroaching on the power of states, liberalism generally saw states as the central players in international affairs. John J Mearsheimer, *The false promise of international institutions*, 19 *INTERNATIONAL SECURITY* (1994) p. 32.

²⁹⁷ DAVID ALLEN BALDWIN, *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE* (Columbia University Press, 1993).

²⁹⁸ Kenneth N Waltz, *Structural realism after the Cold War*, 25 *INTERNATIONAL SECURITY* (2000) p. 40. See also Walt, *FOREIGN POLICY*, (1998), and Waltz, *INTERNATIONAL SECURITY*, (2000).

²⁹⁹ Waltz, *INTERNATIONAL SECURITY*, (2000).

³⁰⁰ IAN CLARK, *GLOBALIZATION AND INTERNATIONAL RELATIONS THEORY* (Oxford University Press, 1999), p. 125. It has been noted that “for better or for worse institutional theory is a half-sibling of neo-realism”. See SUSAN STRANGE, *THE RETREAT OF THE STATE: THE DIFFUSION OF POWER IN THE WORLD ECONOMY* (Cambridge university press, 1996).

³⁰¹ Mearsheimer, *INTERNATIONAL SECURITY*, (1994).

³⁰² BALDWIN, 1993.

³⁰³ ROBERT OWEN KEOHANE & JOSEPH S NYE, *POWER AND INTERDEPENDENCE: WORLD POLITICS IN TRANSITION* (Little, Brown Boston, 1977), p. 23.

³⁰⁴ Peter Wolf, *International Organization and Attitude Change: A Re-examination of the Functionalist Approach*, 27 *INTERNATIONAL ORGANIZATION* (1973).

responsible for implementation.³⁰⁵ The most prominent example of functionalism to date is the EU.³⁰⁶ Further, Social Constructivist trend in IRs focuses on individual elites and sees IOs as non-state autonomous actors in the international system where “IOs can become autonomous sites of authority because their bureaucracies possess legitimate authority and control over expertise”.³⁰⁷

Looking at IOs working in the field of competition law, we find that from a state-centric theories’ perspective, an organization is a reflection of powerful states and is used by them to achieve their goals. However, this was unattainable due to states’ competing interests, which is mainly probably because of the fact that the US, the oldest antitrust system in the world and one of the most influential countries, has chosen to pursue their agenda in a bilateral setting. Developing countries were also reluctant to cooperate. This approach would lead us to conclude that there is no superior authority over national competition law matters and the somewhat limited impact that IOs have. Nevertheless, this does not explain why national competition laws continue to converge on specific issues.³⁰⁸

On the other hand, from the institutionalist theories’ perspective, institutions are vehicles created to reduce transaction costs between states to reach consensus on contentious issues. In this sense, however, the number of organizations working on reaching consensus on competition law issues cannot be justified. This is due to “*fundamentally incompatible preferences*” *i.e.* divergence in preferences.³⁰⁹ There is a choice to be made as to the preference to co-operate and if so to what extent. States have been reluctant to extend the scope of the relevant IOs to cover competition law. The failure of the harmonization plans under the WTO is an example. If and when they did, such IOs lack rule-making powers. The situation has slowly evolved ever since to reflect the degree and areas where states have found it beneficial to co-operate (cartels and merger control for example). Some organizations may have some degree of independence in setting their agenda and the role of experts has been amplified over the years.³¹⁰ Nonetheless, the policy trajectory is still dominated by the divergence in preferences of the different member states.

³⁰⁵ ERNST B HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES, 1950-1957 (Stanford University Press. 1958) and McCORMICK JOHN, THE EUROPEAN UNION: POLITICS AND POLICIES (Westview Press, Colorado. 1999)

³⁰⁶ CHRIS BROWN & KIRSTEN AINLEY, UNDERSTANDING INTERNATIONAL RELATIONS (Palgrave Macmillan. 2009).

³⁰⁷ Kenneth W Abbott & Duncan Snidal, *Why states act through formal international organizations*, 42 JOURNAL OF CONFLICT RESOLUTION (1998), p. 5.

³⁰⁸ For example, Ezrachi notes the formation of soft law on merger control by the OECD and ICN. BROWN & AINLEY, 2009, p.322.

³⁰⁹ As Verdier notes "major economic powers were deadlocked by fundamentally incompatible preferences, international antitrust cooperation was intrinsically unattainable." Pierre-Hugues Verdier, *Transnational regulatory networks and their limits*, 34 YALE JOURNAL OF INTERNATIONAL LAW (2009), p.159.

³¹⁰ For example, the agenda is set by the secretariat at the UNCTAD or an elected steering group at the ICN.

The number of organizations working in the field of competition law convergence also indicates that there are fundamentally incompatible preferences over the choice of the appropriate vehicle. Developed countries are not comfortable with using the UNCTAD as a convergence platform. The UNCTAD, though in structure a product of neoliberal institutionalism, has been found by developed states to be influenced by dependency theories and equality claims by developing countries, which ran contrary to the liberal policies.³¹¹ This for years have affected the UNCTAD and caused developed states to distance themselves from the forum.³¹² While the OECD by design has limited membership and targeted reach, its work is complemented by the ICN, created as a specialized transnational network providing a venue for non-binding exchange of knowledge and information between competition authorities, experts and other relevant stakeholders in hope of reaching convergence.³¹³ The mechanisms used are diffusion via learning, socialization and emulation by cultivating shared norms and experiences amongst competition law specialists.

From a diffusion perspective, the ICN is a network where intergovernmental agencies (NCAs) and experts from the epistemic community of competition law come together. The network facilitates knowledge exchange and adopts a bottom up approach to reach consensus through a collective decision making mechanism. As noted by Verdier, transnational regulatory networks face distribution consideration problems, which occur when states prefer different outcomes affecting the rule creation process. Also, at a later stage, enforcement problems may occur when states find that it is in their best interest to deviate from the agreed rule.³¹⁴ Both sets of problems are not mutually exclusive. It can be argued that so far the ICN's work is focused on agreeing on the rules. Hence, it mainly faces the problems associated with different distributive considerations of its members.

Co-operation and harmonization on the regional level tells a different story. Many states created regional organizations to address competition issues relevant to the common market created by the treaty or agreement (like ANDEAN and COMESA), while in other instances such organizations would override national ones (like CARICOM and WAEMU). In any case, to date, the situation is that international co-operation regarding competition law issues, though advanced over the years, still remains to a large extent an internal policy matter where

³¹¹ For a discussion of the relation between competition and development economics see Ioanis Lianos. 2013.

³¹² JEAN KACHIGA, *GLOBAL LIBERALISM AND ITS CASUALTIES* (University Press of America. 2008).

³¹³ "The ICN, OECD, and UNCTAD appear to have increased convergence around competition law norms and practices, and they have capacity to make further progress in the future. Of the three, the ICN may prove to be the most effective convergence vehicle." See Hollman & Kovacic, *MINNESOTA JOURNAL OF INTERNATIONAL LAW*, (2011) , p. 283.

³¹⁴ *Id.*

states are reluctant to undermine their sovereign powers. However, the epistemic communities of competition law play a fundamental role in shaping consensus on the subject through their interaction with and participation in trans-governmental competition networks.

3.3.2 Polycentric diffusion of competition law

After failed attempts at adopting a global competition law, the issue has been pursued through various agents and networks of individuals and institutions.³¹⁵ Slaughter argues that we are witnessing a rise in the direct interaction of the different institutions that perform the basic functions of governments –legislation, adjudication, implementation –both with each other domestically and also with their foreign and supranational counterparts.³¹⁶ Intergovernmental networks have been defined by Nye and Keohane as sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments.³¹⁷ Nye and Keohane, however, linked these networks to the works of IOs as the driving force behind them, while Slaughter did not see such a link as always being present. Networks may form between the constituents of the government horizontally, i.e. among national government officials in their respective areas.³¹⁸ Trans-governmental networks may exist within an international organization, under the umbrella of an agreement negotiated by heads of state or between national regulators that develop outside any formal framework “spontaneous trans-governmental networks”.³¹⁹ A network may take the form of:

- a) An information network, providing a venue for the discussion and exchange of ideas, and the building of a “collective memory”. In such networks, reputation is particularly important as power flows not from coercion but from the ability to exercise influence through knowledge and persuasion;
- b) An enforcement network, where talk leads to action in the form of direct aid in enforcing specific regulations, training and technical assistance by developed countries to developing countries; or

³¹⁵ As Fox noted, the failed attempts of internationalizing competition law gave networking a more important role in a globalized world. Fox, *THE INTERNATIONAL LAWYER*, (2009).

³¹⁶SLAUGHTER. 2009, p. 23. We do not share the view of Slaughter regarding the disaggregated state however we find her typology of intergovernmental networks relevant to our discussion.

³¹⁷ROBERT OWEN KEOHANE & JOSEPH S NYE, *TRANSNATIONAL RELATIONS AND WORLD POLITICS* (Harvard University Press. 1972). Defined in Slaughter as “pattern[s] of regular and purposive relations among like government units working across the borders that divide countries from one another and that demarcate the ‘domestic’ from the ‘international’ sphere. SLAUGHTER. 2009, p. 14

³¹⁸ SLAUGHTER. 2009, p. 19

³¹⁹ *Id.*

- c) A harmonization network, where parties engage in complicated technical negotiations aimed at harmonization.

Another form of network that exists, though less likely than horizontal networks, is a vertical network whereby the government officials of states come together and delegate their authority (or aspects thereof) to a higher supranational entity that exists above the state.³²⁰ IOs are an example of formal networks, whether horizontal or vertical, which depend on the representation of each state and their autonomy. A single organization which provides an example of both a horizontal and vertical network is the WTO. The WTO ministerial conference is a horizontal network, while the WTO dispute resolution is a vertical network.

Looking at the field of competition networks, one finds that no global vertical network exists in relation to competition law.³²¹ However, a number of regional vertical networks exist in the form of regional integration agreements such as the EU, CARICOM and the WAEMU. As to the horizontal level, interaction between competition law regulators is robust. Research has been conducted on US-EU merger review cooperation and found it to be primarily trans-governmental, providing an example of “trans-governmentalism, which arises within a framework agreed upon by heads of state”.³²² Some of the organizations where these networks operate function on more than a single horizontal/vertical level, such as the OECD. The OECD is a collection of government networks (horizontal network) facilitated by a supranational secretariat and a governing council (vertical network) with only informational power.³²³ The UNCTAD, although it follows the orthodox model of organizations which requires ministerial representation, is also an established network for regulators (Intergovernmental Group of Experts (IGE)). The ICN is a standalone network just between regulators. The web gets more complicated with direct interaction between the various competition authorities of the world. Also, the content of these interactions is not unified. When Raustiala examined trans-governmental networks and their impact on the existing international infrastructure of liberal internationalism, he found that competition regulators are interacting extensively with no single competition law – whether that of the US, EU or Japan – being predominantly global.³²⁴

³²⁰ SLAUGHTER. 2009, at p. 45-46.

³²¹ As discussed earlier in this chapter, there is a limited framework of global enforcement of competition under the WTO.

³²² Christopher A Whytock, *A Rational Design Theory of Transgovernmentalism: The Case of EU-US Merger Review Cooperation*, 23 BOSTON UNIVERSITY INTERNATIONAL LAW JOURNAL (2005).

³²³ SLAUGHTER. 2009, p. 136.

³²⁴ Kal Raustiala, *The architecture of international cooperation: Transgovernmental networks and the future of international law*, 43 VIRGINIA JOURNAL OF INTERNATIONAL LAW (2002).

To demonstrate the complexity of the matter, take country [X] for example. It is a developing country with a recently adopted competition law and a young competition authority. Similar to many other countries, in the early 1990s, country [X] entered into a SAP with the WB. Under said programme, country [X] aspired to enhance private sector performance and enacted a competition law with the help of WB experts. Country [X] is a member of the WTO. Hence, it is prohibited from doing what national law prohibits its private actors from doing (impairing trade and competition).³²⁵

It joined a regional integration agreement with some of its neighbouring countries. Under the agreement, regional competition regulation was adopted, and a regional competition authority and a court system to adjudicate any conflicts arising from said agreement were set up. It is also a member of UNCTAD. Therefore, its ministerial delegation votes on the revisions of the Set every five years and its NCA attends the annual meetings of the IGE. In addition, it is also a beneficiary of a regional technical assistance programme set up by UNCTAD, similar to the COMPAL and AFRICOMP, where officials of the national competition authority interact with their counterparts in neighbouring countries, and the UNCTAD specialized staff and an advisory group of experts.

Country [X] is not an OECD member, however; its competition authority attends the OECD Competition Committee meetings as a non-member observer. Also, its NCA is a member in the ICN where it engages in the virtual activities of its practice groups and attends the annual meetings. Further, the NCA of country [X] has formed with its counterparts a regional competition network following the ICN model where they get to exchange expertise and provide training assistance to each other. It also receives direct technical training from the DoJ/FTC and a one (or more) EU member states' NCAs. Co-operation is not only limited to the NCA, occasionally, as training sessions may be held with members of the judiciary where they get to meet and discuss competition law with their counterparts in other countries. Year round, the [X]'s NCA is invited, along with other NCAs, selected members of the judiciary, private practice and academia from all over the world, to attend a number of conferences on competition (antitrust) law and policy issues by esteemed universities, think-tanks and bar associations which maybe organized and financed in cooperation with an international organization and/or aid agency or one or more donor country.³²⁶

³²⁵ FOX & TREBILCOCK, *The design of competition law institutions: global norms, local choices*. 2012.

³²⁶ Take Zimbabwe for example, "valuable assistance was given by the Zambia Competition Commission, the Monopolies and Prices Commission of Kenya and the Competition Commission of South Africa. Other competition authorities that assisted included the Federal Trade Commission and the Anti-Trust Division of the U.S. Justice Department, the Australian Competition and Consumer Commission (ACCC), the Office of Fair Trading of the United Kingdom, and the Bundeskartellamt of Germany.

All these networks and organizations interact and intersect with each other while country [X], the developing country with a newly adopted competition law, is striving to find a model that would satisfy its development needs. Whether all these networks and activities will lead to convergence and what exactly this benchmark model of convergence will be, i.e. converge to what, is another matter yet to be determined.

3.4 Conclusion

Policy transfer theories enable us to have a better understanding of the role of agents of diffusion and allow us to capture the tremendous efforts and influence of the networks formed by and around these agents. Looking at state actors, resource endowed competition law agencies of mature economies play a significant role directly through bilateral relations with other countries and indirectly through their participation in the work of IGOs, especially the OECD, UNCTAD and the ICN.

On the non-State level, our study of competition law networks sheds light on the efforts less talked about by other actors such as NGOs, think tanks, academics, private practice and business community. The epistemic communities formed in this field are divided between supporters of a customized – development-oriented – competition law for developing countries and supporters of a universally ‘optimal competition law’. The work of these networks drives the discussions within the various IGOs. With few exceptions, the participants of these networks however are predominantly Western. This does not seem to be due to conscious exclusion but rather due to the scarcity of agents in developing countries who may join these networks.

With competition law coming of age in many other countries, the diffusion of competition law will not (or at least not for long) be dominated by a core-periphery model, i.e. emanating from the centre, being the US/EU competition (antitrust) regimes to the periphery. The emerging donors are gaining importance in development assistance and may challenge the norms and standards of traditional donors.³²⁷ The relevant networks will also see contributors from these countries that may shift this discourse.

Notable organisations that gave technical assistance included the United States Agency for International Development (USAID), the World Bank, and the United Nations Conference for Trade and Development (UNCTAD).” See Presentation by Mr Alexander J Kububa, Director and Chief Executive Officer of the Competition and Tariff Commission of Zimbabwe at Third Annual Competition Commission, Competition Tribunal And Mandela Institute Conference On Competition Law, Economics And Policy In South Africa -Pretoria, South Africa: 3 – 4 September 2009, p.1.

³²⁷ In this study, the focus was on Brazil. Alcides Costa Vaz & Cristina Yumie Aoki Inoue, *Emerging donors in international development assistance: the Brazil case*, RELATÓRIO DE PESQUISA, PARTERSHIP & BUSINESS DEVELOPMENT DIVISION (PBDD), INTERNATIONAL DEVELOPMENT RESEARCH CENTRE (IDRC) (2007).

We have seen how a number of diffusion patterns may have influenced the proliferation of competition law. We have also discussed the main agents leading the diffusion process. We have yet to discuss what influences the content of the policies being diffused. In the next chapter, we will discuss the underlying norms of competition law to address what the subject of diffusion is.

CHAPTER 4 THE SUBJECT OF DIFFUSION: COMPETITION LAW OBJECTIVES IN AFRICA

4.1 Introduction

Competition law, an element of competition policy, is a hybrid of law and economics. It is not a static subject, but one which has evolved over the years in accordance with the particular circumstances of the policy innovators, mainly the US and the EU (origin countries). The intellectual underpinnings of the US antitrust and/or EU competition law, which has also been reflected in the work of a number of agents and networks, to a great extent dominates the diffusion process. It influences soft law instruments (such as best practices) and is treated as the threshold for convergence.

Studying the subject of competition diffusion entails not only mapping the formal adoption of the law (Chapter 2), but also to look at whether, and to what extent, its norms, rules and institutions were transformed. Analysing the objectives of the law would be, in particular, informative about the normative core that guides enforcement activities in the recipient country. Tracking the evolution of competition (antitrust) laws in the US, one finds that its underlying objective has evolved over time.³²⁸ Following the “Chicago school revolution”, its main objective became neoclassical price theory economic efficiency.³²⁹ The EU competition law, on the other hand, had a plurality of objectives which were initially aimed at enhancing market integration through the control of the abuse of economic power, and levelling the playing field for business actors across the member states of the Union.³³⁰ In recent history, it followed its cross-Atlantic peers in embracing economic efficiency as the main objective of the law, albeit with some differences.³³¹

³²⁸ Eleanor M Fox & Lawrence A Sullivan, *Antitrust--Retrospective and Prospective: Where Are We Coming from--Where Are We Going*, 62 NYUL REV. (1987).

³²⁹ Bork, HARVARD LAW REVIEW, (1979) (arguing that it is consumer surplus that should be the goal of antitrust). For a counter view see Jonathan B Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 FORDHAM LAW REVIEW 2175(2013), p.2182 where it was noted that "It was noted that "Antitrust's Chicago school revolution discarded talk of social and political goals and reframed antitrust to focus solely on economic concerns." On this topic, see in general William E Kovacic, *The modern evolution of US competition policy enforcement norms*, 71 ANTITRUST LAW JOURNAL (2003) (providing an alternative narrative of modern US antitrust enforcement norms developed from the 1960 to 2000 rejecting the metamorphosis narrative and attributing the change to improvements to “the state of economic learning”). Strucke traces the development of antitrust goals (objectives) by reviewing the Sherman Act’s legislative history and finds that the Supreme Court has noted Congress’s noneconomic concerns about the concentration of wealth and power in the hands of a few” [reference omitted]. Maurice E Stucke, *Reconsidering antitrust's goals*, 53 BCL REV. (2012), p. 560.

³³⁰ RICHARD WHISH, *COMPETITION LAW* (Butterworths 4th ed. 2001).

³³¹ Ioannis Lianos, *Some reflections on the question of the goals of EU competition law*, in HANDBOOK ON EUROPEAN COMPETITION LAW SUBSTANTIVE ASPECTS (Ioannis Lianos & Damien Geradin eds., 2013).

An important objective for the adoption of competition laws in the developing world is the positive relation these laws have with development, as underlined in the work of various IOs.³³² From an adopter's perspective, competition law needs to be acclimated with a number of social and developmental goals and policies addressing industrial development, poverty reduction and inequality, to name a few. Accordingly, based on these objectives, there is a spectrum of competition law models, where, on the one end, we find a single objective that is economics-based (sometimes referred to as efficiency-based,³³³ core,³³⁴ or neoclassical-price theory objectives³³⁵), and competition laws with a plurality of objectives (sometimes referred to as non-efficiency based,³³⁶ multiple objectives³³⁷). There is great debate over whether competition law should include non-economics based objectives. These intellectual currents directly affect the subject of diffusion and subsequently enforcement.

The chapter is divided into six parts. In the second part, we discuss a typology for competition law objectives, then we apply it the competition laws as adopted by different jurisdictions in Africa. In the third part, we look at the relation between competition and development. We investigate the relation between competition law under legal reform programmes and development as a sought-after objective. In the fourth part, we explore how this may impact convergence. The chapter ends with part five, representing the conclusion.

4.2 A typology of Competition Law Objectives

4.2.1 Singularity and plurality of competition law objectives

4.2.1.1 The policy innovators

The objective of antitrust law has developed over the years. In the first phases antitrust was adopted to address concentration in the market as being “inconsistent with [US] form of government” focusing on combating power in the marketplace and protecting pluralism in the market especially small businesses.³³⁸ Later on, using economics, emphasis shifted to the ills of economic concentration on the assumption that it leads to market power and lower economic performance which became known as the Harvard structure-conduct-performance

³³² “More competitive markets and competition policy reforms deliver benefits for the poorest 40 per cent of the population and have a positive distributional effect.” Begazo Gomez. 2016 and OECD, Promoting Pro-Poor Growth 2. Implementing Competition Policy in Developing Countries. 2006.

³³³ David W Barnes, *Nonefficiency Goals in the Antitrust Law of Mergers*, 30 WILLIAM AND MARY LAW REVIEW (1989).

³³⁴ OECD, *The Objectives of Competition Law and Policy* (Note by the Secretariat ed., 2003).

³³⁵ Lianos, CLES RESEARCH PAPER SERIES NO. 5/2016 (2016). Also Barnes described it earlier as “narrow or neoclassical view of objectives”. Barnes, WILLIAM AND MARY LAW REVIEW, (1989), p.797.

³³⁶ Barnes, WILLIAM AND MARY LAW REVIEW, (1989).

³³⁷ OECD. 2003.

³³⁸ US Attorney General, Bills and Debates in Congress Relating to Trusts (March 21, 1902).

paradigm.³³⁹ Bork argues that what Congress cared about is actually increasing the efficiency of the economy or more precisely “consumer welfare”.³⁴⁰ This follows the Chicago school where the single objective of antitrust laws should be to promote “economic welfare” which Posner explains is the economist’s concept of efficiency.³⁴¹ Some scholars disagree with this narrow view and argue that objectives of antitrust law go beyond just promoting allocative efficiency to “ensuring fairness, protecting the competitive process, controlling wealth transfers, limiting the accumulation of private economic power, and preserving the freedom of individuals and enterprises to engage in economic activity.”³⁴² In its submission to the OECD in 2003, the FTC explains that after more than 100 years of practical experience and improved economic learning, there is strong consensus in the US on the objectives of antitrust laws, which are the promotion of economic efficiency and maximization of consumer welfare.³⁴³ Schools of thought may have debated the meaning of economic efficiency and consumer welfare. However, they agree on adopting “an economic efficiency orientation that emphasizes reliance on economic theory in the formulation of antitrust rules and on rejecting the consideration of non-efficiency-based objectives in antitrust”.³⁴⁴ This is not to say that other policy considerations deemed worthy of protection do not affect antitrust enforcement, as they are applied through other instruments disconnected from antitrust enforcement.³⁴⁵

On the other hand, the objectives of EU competition regulations were a subject of debate. Under the TFEU, competition is a tool for market integration, control of abuses of economic power and levelling the playing field for business actors across the member states of the Community.³⁴⁶ It has in recent years developed to adopt an economic approach and to emphasis enhancing efficiencies.³⁴⁷ In this regard it adopts a consumer welfare standard.³⁴⁸ In

³³⁹ Herbert J Hovenkamp, *The Harvard and Chicago Schools and the dominant firm*, U IOWA LEGAL STUDIES RESEARCH PAPER (2010) and Spencer Weber Waller, *Market talk: competition policy in America*, 22 LAW & SOCIAL INQUIRY (1997).

³⁴⁰ Bork, HARVARD LAW REVIEW, (1979). See also PHILLIP AREEDA & DONALD TURNER, ANTITRUST LAW (1978) and William E Kovacic, *Antitrust Paradox Revisited: Robert Bork and the Transformation of Modern Antitrust Policy*, The, 36 WAYNE L. REV. (1989).

³⁴¹ RICHARD A. POSNER, ANTITRUST LAW (University of Chicago Press 2nd ed. 2001), p.24.

³⁴² See discussion in Waller, LAW & SOCIAL INQUIRY, (1997), p 437.

³⁴³ United States, *The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency* (2003), p. 5; Posner, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, (1979) (arguing that the distinction between the Chicago school and Harvard school has greatly diminished and that attempting to theorize antitrust under either of these schools is futile).

³⁴⁴ John B Kirkwood & Robert Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME LAW REVIEW (2008).

³⁴⁵ This will be discussed in more depth in chapter 6.

³⁴⁶ Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01. See also RICHARD WHISH & DAVID BAILEY, COMPETITION LAW (Oxford University Press 7th ed. 2012).

³⁴⁷ Christopher Townley, *Which Goals Count in Article 101 TFEU?: public policy and its discontents*, EUROPEAN COMPETITION LAW REVIEW (2011).

³⁴⁸ “EU competition law seems, however, to emphasize more consumer surplus than producer surplus, and goes as far as accepting that wealth transfers from final consumers to producers might be a matter of concern for competition law enforcement...EU competition law may not adopt an economic efficiency-based approach (Kaldor-Hicks) and that issues of distribution play an important role in EU competition law. Lianos. 2013, p. 8. See also Case C-209/10 Post Danmark A/S v Konkurrencerådet [2012] [22].

the EU Commissions' own words "*The objective of Article 81 [currently Article 101] is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.*"³⁴⁹ More recently, the emphasis solely on consumer welfare seems to have weakened.³⁵⁰ In its judgment in the GlaxoSmithKline case, the ECJ explained that "*Article [101] aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such. Consequently, for a finding that an agreement has an anti-competitive object, it is not necessary that final consumers be deprived of the advantages of effective competition in terms of supply or price.*"³⁵¹ Under the Working Paper of the Report on Competition Policy 2011, EU competition policy aims to achieve three main objectives: "(i) protecting competition on the market as a means of enhancing consumer welfare, ii) supporting growth, jobs and the competitiveness of the EU economy, and iii) fostering a competition culture."³⁵² In the post Denmark judgment, it was evident that the courts still accept consumer welfare as an objective of competition law but not the only one.³⁵³ Many scholars argued about the plurality of objectives (goals) under the EU competition law.³⁵⁴ Blair and Sokol argue that in the US the divide is between total welfare and consumer welfare, while in Europe, the divide is between adopting competition objectives that are based exclusively upon industrial organization economics and the mixed objectives of industrial organization economics and non-economic political goals.³⁵⁵ EU competition law is one of a

³⁴⁹ Commission (EU), Notice: Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C 101/97. See also Österreichische Postsparkasse AG Case "the ultimate purpose of the rules that seek to ensure that competition is not distorted in the internal market is to increase the well-being of consumers."

³⁵⁰ Under the 2011 Guidelines on cooperation agreements stating that the objectives (of both IPR and competition laws) are "promoting innovation and enhancing consumer welfare." See Commission (EU), Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1 at [269]. However, under the Merger Guidelines consumer welfare is still the declared objective. See European Community, EU Competition Law: Rules Applicable To Merger Control 184 (2010).

³⁵¹ See Case T-168/01 GlaxoSmithKline Services Unlimited v Commission of the European Communities [2006] ECR II-02969. See also T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit on Article 101 of the TFEU "like the other competition rules of the Treaty, is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such." Case C-8/08, 2009 E.C.R. I-4529 at 38. In relation to Article 102 of the TFEU see Konkurrenter v. TeliaSonera Sverige ABCase C-52/09, 2011 E.C.R. I-00527, p. 22. "[n]ot only to practices which may cause damage to consumers directly, but also to those which are detrimental to them through their impact on competition."

³⁵² Commission Staff Working Paper Accompanying the Report on Competition Policy 2011, (2012).

³⁵³ Case C-209/10 Post Danmark A/S v Konkurrenterådet [2012].

³⁵⁴ Lianos. 2013, Laura Parret, *The multiple personalities of EU competition law: time for a comprehensive debate on its objectives*, THE GOALS OF COMPETITION LAW (2012) and Townley, EUROPEAN COMPETITION LAW REVIEW, (2011).

³⁵⁵ "From its inception, there were numerous goals of the Sherman Act. As noneconomic goals of antitrust have been removed from the U.S. discussion as a result of the ascendancy of the Chicago School, the ideological fight over promotion of economic goals versus other goals has given way to a debate about different economic conceptualizations of welfare effects that approximate the more "populist" notions of competition within an economics framework. In this current populist formulation, it is consumer welfare that would be maximized at the expense of producer-and- consumer welfare." Roger D Blair & D Daniel Sokol, *Welfare Standards in US and EU Antitrust Enforcement*, 81 FORDHAM LAW REVIEW (2012), p. 2509.

number of competing goals under the treaty and these are bound together by the single market imperative. [reference omitted] .³⁵⁶

4.2.1.2 Competition networks

Looking at the WBG-OECD competition law model published in 1999, we find “maintaining and enhancing competition in order to enhance consumer welfare” is the declared the objective of the law.³⁵⁷ In contrast, the UNCTAD Model law on competition (last revision 2010) provides a variety of approaches adopted by a wide range of countries of all sorts from which to pick and choose. The Model Law however acknowledges that each State may wish to include other specific objectives under the law, such as the protection and promotion of social welfare and in particular the interests of consumers.³⁵⁸ It emphasises economic development, as the final objective while competition is an intermediate one.³⁵⁹

In a study of the objectives of unilateral conduct laws, the ICN found that in thirty-three jurisdictions ten different objectives were identified, with all but one member agency identifying more than one objective as relevant to their unilateral conduct regimes.³⁶⁰ In a more recent study, the ICN conducted a survey on consumer welfare under the competition laws of 57 jurisdictions. The majority of respondents indicated that it is the underlying enforcement goal of competition, while 39% indicated that it is the primary goal for enforcement, 50% indicated that it was one of many, and 11% found it a possible outcome.³⁶¹ However, a consensus on the meaning of consumer welfare seems to have been absent among the respondents.³⁶²

Our purpose here is not to analyse and contrast the objectives of the different laws but rather to explore the objectives of the policy innovators at the time of the transformation. There is a

³⁵⁶ *Id.* at p. 2510.

³⁵⁷ “The primary purpose of competition law is to improve economic efficiency so that consumers enjoy lower prices, increased choice, and improved product quality...A more specific goal of competition law is to prevent economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors.” See OECD & WBG, A FRAMEWORK FOR THE DESIGN AND IMPLEMENTATION OF COMPETITION LAW AND POLIC (1999), p. 141.

³⁵⁸ UNCTAD. Model Law on Competition. (2010).

³⁵⁹ *Id.* at p.3.

³⁶⁰ ICN. Report On The Objectives Of Unilateral Conduct Laws, Assessment Of Dominance/Substantial Market Power, And State- Created Monopolies (2007).

³⁶¹ “[o]f thirty-three jurisdictions, the main antitrust objectives were the promotion of competition, economic efficiency, and increasing consumer welfare. Included within these terms were other goals such as guaranteeing “equal conditions for all enterprises in the market.” [reference omitted]. Stucke, BCL REV., (2012), p. 11.

³⁶² “Only seven of the fifty-seven authorities agreed with the provided definition of consumer welfare.136 Most (thirty-eight of the fifty-seven) antitrust authorities had “no explicit definition” of consumer welfare.” [reference omitted] *id.* at p.12.

consensus that economics-based objectives are the main objective of competition law.³⁶³ There may still be some debate on which type of efficiencies to consider (consumer welfare, total and/or dynamic efficiencies). However, there is no consensus on a singular approach to competition law objectives. In the next part, we will discuss the typology for these objectives.

4.2.2 Economic welfare-based objectives and non-economic welfare objectives

Classifying the different objectives under competition laws is not an easy task. The OECD proposed a simple categorization of objectives into core objectives, public interest objectives and, the in-between, “grey zone” objectives. The OECD considered promoting and protecting the competitive process and attaining greater economic efficiency as core objectives.³⁶⁴ Competition laws incorporate public interest objectives, which means any factors that “extend well beyond...generally accepted ‘core’ competition policy objectives, are at the other end of the spectrum. In the middle we find the “grey zone”, which includes objectives to protect fair competition, ensure an equitable opportunity to compete for small and medium-sized enterprises and prevent undue concentration of economic power.³⁶⁵

Looking at merger control regulations, Barnes identified two broad types of objectives. The first are efficiency-based objectives: allocative efficiency (consumer welfare), productive efficiency, economic efficiency (total welfare), and dynamic efficiency. The second are non-efficiency based objectives: the protection of small businesses, achieving international competitiveness, eradicating poverty, and promoting fairness, equity and justice.³⁶⁶ Waked follows Barnes’s typology of efficiency and non-efficiency objectives and applies it to fifty developing countries. She reports a finding of twelve different principle objectives: protecting consumer interests, public interest, competition, economic efficiency, eliminating restrictive business practices (RBPs), economic freedom, protecting small businesses, progress and development, fairness and equity, consumer choice, competitive prices, and competition in international markets.³⁶⁷

³⁶³ The OECD finds wide consensus over the protection of competition as the most appropriate means of ensuring the efficient allocation of resources as the basic objective of competition policy. OECD. *Competition Policy and Efficiency Claims in Horizontal Agreements* (1996), p.5.

³⁶⁴ OECD. 2003, p3.

³⁶⁵ *Id.* at p. 4.

³⁶⁶ Barnes, WILLIAM AND MARY LAW REVIEW, (1989). See also Dina I Waked, *Antitrust Goals in Developing Countries: Policy Alternatives and Normative Choices*, 38 SEATTLE UNIVERSITY LAW REVIEW (2015).

³⁶⁷ The ICN survey identified a number of objectives: ensuring an effective competitive process; promoting consumer welfare; maximizing efficiency; ensuring economic freedom; ensuring a level playing field for small and medium size enterprises; promoting fairness and equality; promoting consumer choice; achieving market integration; facilitating privatization and market liberalization; and promoting competitiveness in international markets. ICN, *Report On The Objectives Of Unilateral Conduct Laws, Assessment Of Dominance/Substantial Market Power, and State- Created Monopolies*, 2007, p.89. Waked consolidated

Accordingly, two types of competition objectives can be identified: economic welfare-based objectives, as understood under the US antitrust to promote free markets and curb state intervention, and only including economic efficiencies; consumer, total, and dynamic welfare as objectives and non-economic welfare objectives, including any other objective that is not based on economics but rather on other socio-political considerations. These may be further divided into industrial policy objectives,³⁶⁸ such as the protection of SMEs and international competitiveness (national champions), which correspond to the “grey zone” objectives identified by the OECD, and public interest/benefit objectives.

4.3 Competition Law objectives of African Competition Law Regimes

In this part, we look closely at the objectives of the competition laws in select jurisdictions in Africa.

4.3.1 Mapping the objectives

We surveyed the competition laws of nineteen jurisdictions in Africa that have established NCAs.³⁶⁹ For West Africa, we included the WAEMU competition law, since it applies on the national level.³⁷⁰ To be able to identify the objectives of each law, we look at the express objective (if any) as well as implied objectives based on substantive rules of the legal text or policy statements made by the relevant NCAs (**ANNEX IV Economic Welfare objectives and Non Economic Welfare Objectives in Competition Laws in Africa**). The aim here is to test for the singularity vs. plurality of objectives under these laws and to distinguish the most common objectives among the different jurisdictions, as a starting point in identifying jurisdictions and areas of enforcement that warrant further research.

some of these objectives and added some others to fit countries subject of review. Waked, SEATTLE UNIVERSITY LAW REVIEW, (2015).

³⁶⁸ We use White description of industrial policy as “concerted focus, consist effort on the part of the government to encourage and promote a specific industry or sector with an array of policy tools.” white Lawrence J White, *Antitrust policy and industrial policy: a view from the US*, NYU LAW AND ECONOMICS RESEARCH PAPER (2008), p.4.

³⁶⁹ These are Algeria, Botswana, Cameroon, Egypt, Gambia, Kenya, Malawi, Mauritius, Morocco, Namibia, Seychelles, Swaziland, South Africa, Tanzania, Tunisia, Zambia and Zimbabwe. These countries are clustered on sub-regional basis. In North Africa we surveyed Algeria, Egypt, Morocco and Tunisia, in West Africa Gambia and WAEMU in east Africa Kenya, Malawi, Mauritius, Seychelles, Tanzania, Zambia and Zimbabwe, in central Africa Cameroon and in southern Africa Botswana, Namibia, South Africa and Swaziland. These countries are clustered on sub-regional basis. Recent report by the WBG found that the number of jurisdictions with competition laws has almost tripled in 15 years to 32 jurisdictions; 25 jurisdictions have operational competition authorities (including two regional communities). Group, 2016, p10.

³⁷⁰ As member of WEAMU, we did not review the laws of Burkina Faso, Cote d'Ivoire, Mali, Senegal, and Togo although we understand they have established NCAs. We note that Nigeria has an active merger control regime in place, which we will include in chapter 6.

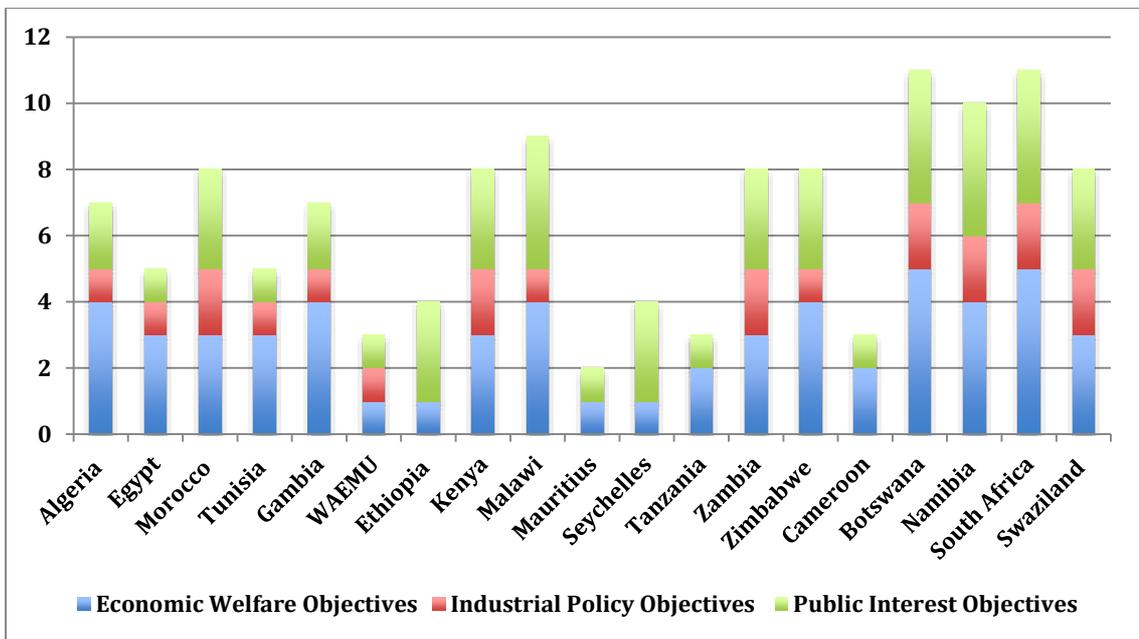


Figure 2 Plurality of objectives under competition laws in select jurisdictions in Africa: Economic welfare and non-economic welfare (divided into industrial policy objectives and public interest objectives)

Source: Based on review by the author of the express objective (if any) as well as substantive rules, policy statements made by the relevant NCAs and IOs publications

The competition laws of African countries vary in many ways, but they all display a plurality of objectives that go beyond economic welfare objectives. The spectrum of objectives varies from adding a carve-out for SMEs, finding an equitable solution for disadvantaged segments of the society, meeting development goals to protecting the environment.

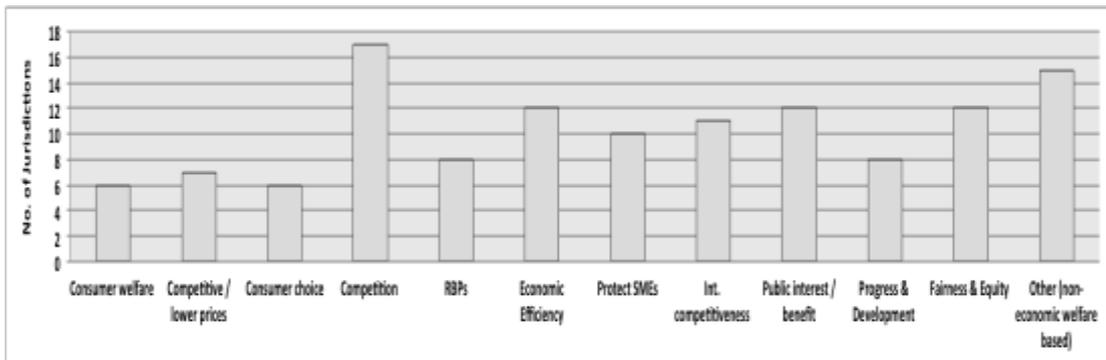


Figure 3 Types of economic welfare and non-economic welfare objectives under competition laws in select jurisdictions in Africa

Source: Based on review by the author of the express objective (if any) as well as objectives based on review of substantive rules or policy statements made by the relevant NCAs

In some instances these objectives were subsequently added in an amendment to the core competition objectives of the law or through the enactment of other laws that impacted the

enforcement of competition law. We will discuss below the types of objectives found under the competition laws of these jurisdictions.

4.3.1.1 Types of economic welfare objectives

The most mentioned economic objective of competition law is related to the competition process itself.³⁷¹ In Algeria, the law aims to set the conditions for the competitive process,³⁷² while in Egypt and Morocco it aims to protect competition and prohibit monopolistic practices.³⁷³ It is the sole economic objective of the competition laws of Mauritius, Ethiopia and the Seychelles.³⁷⁴ This objective is also related to eliminating restrictive business practices (RBPs),³⁷⁵ which some count as a standalone objective, and which may have been warranted in the beginning of the diffusion of competition law. However, we find that this is not warranted here since eliminating RBPs is featured under the substantive rules of all jurisdictions.

Economic efficiency is an express objective of the competition laws of eleven countries and the sole economic welfare objective under the WAEMU.³⁷⁶ Said objective is not always expressly stated, in some instances it may be in relation to substantive provisions of the law such as in the case of exemptions. For example, under the Egyptian Competition Law, economic efficiency is expressly stated under its exemptions framework.³⁷⁷

Consumer welfare is a recognized objective under the laws of six countries.³⁷⁸ For example, the Swaziland Competition Act was adopted to encourage competition in the economy by controlling anticompetitive trade practices, mergers and acquisitions, combating unfair trade practices, and protecting consumer welfare.³⁷⁹ In Kenya, there is a dedicated section for

³⁷¹ Algeria, Egypt, Morocco, Gambia, Ethiopia, Kenya, Malawi, Mauritius, Seychelles, Tanzania, Zambia, Zimbabwe, Cameroon Namibia, Botswana, South Africa and Swaziland.

³⁷² Article 1 of Ordinance No. 03 – 03 of 2003, as amended.

³⁷³ Article 1 of Egyptian Competition Law and Preamble of Moroccan Competition Law No. 104-12 of 2014.

³⁷⁴ The aim of the Mauritian competition act is to make better provisions for the regulation of competition. Preamble Competition Act of 2007. See also Article 3 of the Ethiopian Proclamation No. 813/2013 and the Preambles of Competition Act No. 4 of 2007 of Seychelles' Fair Competition Act 2009.

³⁷⁵ Algeria, Egypt, Tunisia, Gambia, Malawi, Zimbabwe, South Africa and Swaziland. For relevant data see Annex IV.

³⁷⁶ Algeria, Egypt, Morocco, Tunisia, Kenya, Malawi, Tanzania, Cameroon, Botswana, Namibia and South Africa and WAEMU. UNCTAD. Voluntary Peer Review of Competition Policy: West Africa Economic and Monetary Union, Benin and Senegal (2007).

³⁷⁷ Article 6 of the Competition Law No. 3 of 2005.

³⁷⁸ We included in this group any country that expressly adopted consumer welfare as an objective nonetheless it should be noted that there is no agreed definition of the term. Algeria, Morocco, Tunisia, Kenya, Botswana and Swaziland. "In Kenya competition law sometimes seeks to maximise producer and consumer surplus, not just consumer surplus alone...The legislation of Swaziland and also that of ...Kenya require a broad definition of consumer welfare." See ICN, Competition Enforcement and Consumer Welfare: Setting the Agenda (2011), pp. 13 – 29. It should be noted that Mauritius has taken consumer welfare as a factor in assessing remedies. ICN, Report On The Objectives Of Unilateral Conduct Laws, Assessment Of Dominance/Substantial Market Power, And State- Created Monopolies 2007, p. 41.

³⁷⁹ Preamble Competition Act 2007.

consumer welfare (Part VI).³⁸⁰ However, on closer examination this section seems to correspond to typical consumer protection issues. It is worth noting that some countries have adopted a broad concept of consumer welfare by including consumer choices³⁸¹ and competitive/lower prices.³⁸² Consumer choice and prices in the Gambia is considered a “public benefit” that may impact merger analysis.³⁸³ SA expressly mentions consumer choice as an objective of its competition act yet it was not explained or reflected in any substantive provision.³⁸⁴ In Zambia, an authorization may be granted for such conduct by the commission if the conduct results in, among others, maintaining greater choice of goods and services for consumers.³⁸⁵

In the Maghreb countries, price liberalization is also a declared aim with some exceptions for necessities such as food, public utilities, petrol, and medicines.³⁸⁶ This may be understandable given that these acts were initially adopted in the early 1990s, emphasising trade liberalization, price deregulation and other market structural reforms. However, it seems that relevant provisions under these acts now function as means to use price controls under a given set of rules to address price increases.

It is important to note the different economic welfare objectives adopted since these may, in some cases, be in conflict with each other (consumer and total welfare).³⁸⁷

4.3.1.2 Types of non-economic welfare objectives

a. “Grey zone” objectives – Protecting SMEs and international competitiveness

Over half of the countries under review stipulate international competitiveness/export promotion as an objective of their competition law.³⁸⁸ This objective mostly functions in the same manner as the objectives to protect SMEs, incorporated under substantive provisions of merger control and/or authorizations (exemptions). Under the Tunisian competition law, a

³⁸⁰ Also the ultimate purpose of the Competition Act is “to enhance the welfare of the people of Kenya”. See Article 3 of the Competition Act No. 12 of 2010.

³⁸¹ Gambia, Zambia, Zimbabwe, Botswana, Namibia and South Africa.

³⁸² Gambia, Malawi, Zambia, Zimbabwe, Botswana, Namibia and South Africa. Malawi lists only prices not choices.

³⁸³ Article 35 Competition Act No.4 of 2007.

³⁸⁴ Preamble Competition Act no. 89 of 1998.

³⁸⁵ Article 19 of the Competition and Consumer Protection Act 2010.

³⁸⁶ Algeria Article 4 of Article 1 of 03 – 03 and Law no. 10 -05 of 2010, Morocco Article 2 Law no. 104-12 of 2014 and Tunisia Article 3 of Law No. 2015-36.

³⁸⁷ It is important to note here that (except for our discussion in the next chapter of merger control) the objectives discussed are based on review of the text of the law to identify areas that warrant further research. For this purpose, we assume that countries follow in their implementation the text of the law and that therefore what is included as an objective in the text of the law is important. However, in practice, this assumption may be reversed as implementation of the law may lead to hierarchy between these objectives or simply some may be ignored.

³⁸⁸ Tunisia, Morocco, WAEMU, Kenya, Malawi, Zambia, Zimbabwe, Botswana, Namibia, South Africa and Swaziland.

merger review should be performed, taking into consideration its impact on the international competitiveness of national undertakings.³⁸⁹ In Kenya, Namibia and SA, it is also an express objective of the law, while in Botswana it is grounds for clearing a merger, granting an exemption, or assessing abuse of dominance.

The promotion or protection of SMEs takes the form of an exemption from the application of the law or as a defence for committing anti-competitive acts. Also, in the case of mergers and acquisitions, being an SME may affect the outcome of the review. Ten countries adopt provisions to protect SMEs under their competition laws.³⁹⁰ For example, under the Moroccan Free Pricing and Competition Act, SMEs (especially small farmers) are exempted from the application of the provisions pertaining to anti-competitive restraints and abuse of dominance.³⁹¹ In the Gambia, entities below a specific threshold (*de minimis*) are also exempted from the application of the law.³⁹² In the remaining countries in this category, namely Kenya, Zambia, Botswana, Namibia, SA, and Swaziland, the protection of SMEs can be considered under merger control and/or is the basis for an authorization.

b. Public interest objectives

i. Public interest/benefit

Twelve countries in our sample adopted objectives to safeguard a public interest or benefit under their competition laws.³⁹³ These are usually found in the substantive provisions of the law pertaining to merger review and/or granting authorizations. In some cases, these benefits or interests are mentioned without further definition or explanation. Other laws may adopt exhaustive lists (like SA) or give examples to explain what they may include (like Kenya). Since we will address merger in more depth later, we will focus here on jurisdictions that include PIC solely under their exemption/authorization system.

Egypt's competition law includes broad exemption for public utilities run by the state or exemptions for the same, which are run by private parties to realize public interest.³⁹⁴ Article 9(1) of the law provides an exemption from the application of the law to utilities run directly

³⁸⁹ Article 12 of Law no. 36 of 2015.

³⁹⁰ Algeria, Morocco, Gambia, Kenya, Zambia, Botswana, Namibia, South Africa and Swaziland. Egypt in practice may consider it as a factor in the course of its enforcement. More details on this in the next section.

³⁹¹ Article 9 of Law no. 104-12 of 2014.

³⁹² Section 5(2) and Schedule 2 of Competition Act no. 4 of 2007. An enterprise with an annual turnover in The Gambia not exceeding two hundred and fifty thousand dalasis based on the enterprise's accounts for the immediately pre-ceding financial year is exempted from the application of the law.

³⁹³ Algeria, Egypt, Morocco, Gambia, Kenya, Malawi, Seychelles, Zambia, Zimbabwe, Botswana, Namibia and South Africa.

³⁹⁴ Article 9 of the Egyptian Competition Law.

or indirectly by the government. Additionally, Article 9(2) of the law gives the ECA the power to exempt from any of the prohibited acts under the law those public utilities managed by companies subject to private law, where this is in the public interest or for attaining benefits to consumers that exceed the effects of restricting the freedom of competition. There is no definition or clarification to what would constitute a public utility or a public interest in this regard. Recently, an efficiency exemption was introduced to horizontal agreements. The ECA may exempt an agreement from the prohibition if such an agreement sought to realize economic efficiencies which benefit consumers in a manner that supersedes its negative impact on competition. The law further provided a definition for economic efficiency as reducing the average variable cost of production, enhancing the quality of the product, increasing production or distribution, or the production or distribution of new products, or the acceleration of the same.

In the Seychelles, the Fair Competition Act of 2009 includes an authorization mechanism based on undefined PICs.³⁹⁵ The act provides for the possibility to apply for an authorization for any anti-competitive practice under the Act. The criterion for granting an authorization is whether the agreement or practice is likely to promote the public benefit and is reasonable in the circumstances.

ii. Fairness and equity objectives

A number of countries include fairness and equity objectives under their competition laws.³⁹⁶ Fairness may be included as an overall objective of the law and/or may also be reflected in substantive provisions relating to anti-competitive practices.³⁹⁷ Other than a stated objective, Swaziland³⁹⁸ and Ethiopia³⁹⁹ include a special section on unfair trade under their competition act.⁴⁰⁰

We find the equity objective present in provisions relating to “historically disadvantaged citizens”. This in particular results from calls to deal with the legacy left by the colonial

³⁹⁵ Article 28 of Fair Competition Act of 2009.

³⁹⁶ Tunisia, Morocco, Seychelles, WAEMU and Ethiopia include fairness as an objective. Botswana, SA, Namibia, Zambia, Zimbabwe, Swaziland and Kenya include both objectives. Further, anti-hoarding provisions were present in some laws such as Morocco and Ethiopia. For more on hoarding see Keith Sharfman, *Law and Economics of Hoarding, The*, 19 LOY. CONSUMER L. REV. (2006).

³⁹⁷ Zambia and Botswana are examples of the former, while South Africa, Namibia, Kenya, Zimbabwe, and the Seychelles are example of the latter.

³⁹⁸ Article 33 of competition Act of 2007.

³⁹⁹ Proclamation no. 813 of 2013 articles 33, 5 (2) (c) and 8.

⁴⁰⁰ Kenya also has a provision addressing “Unconscionable conduct” which includes using “unfair tactics” against consumers. Article 56 (1) (d) under consumer welfare.

powers and, in the case of SA, by the apartheid system. The adoption of such objectives may be in the form of a broad statement addressing the socio-economic needs of the country or as part of a substantive provision addressing a particular (anti-competitive) conduct. The South African Competition Act of 1998 embraces a wide range of economic and non-economic objectives.⁴⁰¹ As explained by the Constitutional Court of South Africa, other than promoting and maintaining competition, some of the objectives of the Act are directed at addressing the inequalities and imbalances, which were created by the apartheid order. The Act seeks to promote a greater spread of business ownership so as to increase access to it by historically disadvantaged people. It sets for itself the task of promoting employment so that the social and economic welfare of South Africans may be improved. It further seeks to provide consumers with competitive prices for goods and services. It prohibits trade practices which undermine a competitive economy.⁴⁰² To achieve this, it prescribes a list of multiple goals of economic welfare objectives, like promoting economic efficiency, consumer welfare, technology, and other non-economic welfare objectives like employment. It seeks to diversify ownership to include “historically disadvantaged individuals,” international competitiveness and development. These objectives are given effect under the premise of a five year exemption or most likely during a merger review process.

iii. Development and progress

Development is among the express objectives of the competition laws of about half of the jurisdictions under review.⁴⁰³ It may be mentioned as an objective of the law or as a factor of analysis under a substantive rule. In Malawi, the commission may authorize any act, agreement or understanding which is not per se prohibited by the law if, on balance, the commission considers it “advantageous to Malawi”.⁴⁰⁴ Further, it may allow an anti-competitive merger if it would result in “acceleration in the rate of economic development”.⁴⁰⁵ In Cameroon, the Competition Law No. 98/013 aims to define the conditions for the exercise of competition in the market.⁴⁰⁶ However, a merger which is likely to seriously undermine competition may be permitted if the merger is shown to improve or will improve the performance of the national economy in a way that outweighs the negative effects of the merger on market competition, and that the improvement to the national

⁴⁰¹ Section 2 of the Competition Act 89 of 1998.

⁴⁰² See Competition Commission of South Africa v Senwes Ltd, CCT 61/11, (2012) (addressing the powers of the SACT under the Act 89).

⁴⁰³ Cameroon, Gambia, Ethiopia, Malawi, Botswana, Namibia, South Africa and Swaziland. This does not include provisions on “technical and economic progress” as understood under efficiency analysis.

⁴⁰⁴ Article 44 of Competition and Fair Trading Act 1998.

⁴⁰⁵ Article 34 of Competition and Fair Trading Act 1998.

⁴⁰⁶ Article 1 of Competition Law No. 98/013 of 1998.

economy would not be achieved without the merger or acquisition.⁴⁰⁷ Under Namibian competition law, the “development of the Namibian economy” is an objective of the law as well as “advancing the social and economic welfare,” while economic progress is an objective for granting exemptions.⁴⁰⁸

One variant of this objective is linking competition to the development agenda adopted by governments, which may possibly give it more definition but yet is still inconclusive. In the Gambia, mergers are subject to the SLC test.⁴⁰⁹ If the SLC test is positive, the commission needs then to consider whether any offsetting public benefits are present and, if so, to what extent the benefits should be taken into account in determining the remedial action (if any) to be taken. Such “public benefit” includes enhancing the effectiveness of the government’s programme for the development of the economy.⁴¹⁰ In Botswana, abuse of dominance is prohibited and assessed, taking into consideration a number of elements, including among others, advancing the strategic or national interest of the country in relation to a particular economic activity, providing social benefits which outweigh the effects on competition or in any other way enhance the effectiveness of the government’s programmes for the development of the economy of Botswana, including the programmes of industrial development and privatisation.⁴¹¹

iv. Other objectives

Many other non-economic welfare objectives were included in the laws of the countries subject to review. Employment and concerns over job losses have been a prime factor to consider in the merger review process in seven countries.⁴¹² Consumer protection is also in some jurisdictions, especially in countries where there is no separation between competition and consumer protection enforcement.⁴¹³ However, under the Mauritius Competition Act of 2003, product safety is one of the factors to consider as an offsetting public benefits.

Tanzania is the only country to adopt environment protection as an objective of competition law. The Tanzanian competition act aims to increase efficiency, encourage competition, promote innovation and protect consumers, for the benefit of the people of Tanzania as a

⁴⁰⁷ Article 17 of Competition Law No. 98/013 of 1998.

⁴⁰⁸ Competition Act No. 2 of 2003 and Articles 3 and 28.3 (d), each respectively.

⁴⁰⁹ Article 32 Competition Act 4 of 2007.

⁴¹⁰ The vision was criticised for relying on neoliberal policies. See Abdoulaye SM Saine, “*Vision 2020*” *The Gambia's Neoliberal Strategy for Social and Economic Development: A Critique*, 21 THE WESTERN JOURNAL OF BLACK STUDIES (1997).

⁴¹¹ Article 30 of Competition Act 2009.

⁴¹² Botswana, Kenya, Malawi, Namibia, SA, Zambia and Zimbabwe. This will be discussed in details in the next chapter.

⁴¹³ The Gambia Competition and Consumer Protection Commission and Seychelles Fair Trading Commission apply both the competition act and consumer protection act.

whole.⁴¹⁴ Time limited exemptions are granted under the law for agreements and mergers that may harm competition if they can be offset by certain prescribed “benefits”.⁴¹⁵ These benefits include, among others, protection of the environment.

4.3.1.3 Externalities – Interaction with the political landscape

We found that in a few cases, changes in circumstances or the adoption of other laws have directly affected the enforcement of competition law. In both Egypt and Tunisia there was a recent popular uprising, which resulted in a regime change. In both instances there were allegations of corruption, abuse of power and anticompetitive practices by entities close to the ruling party/family.⁴¹⁶ Afterwards, laws were adopted to implement various socio-political objectives, which may impact on their competition law. After the Tunisian revolution in 2011, research showed that the ousted president Ben Ali and Trabelsi (the first lady) families accounted for about 50% of the businesses in Tunisia.⁴¹⁷ A member of the Tunisian Competition Council stated that thereafter the Council has seen a hike in the number of cases filled.⁴¹⁸ Also, a proposal has been put forward to amend the law to allow a special circuit at the council to dispose of the right to hear appeals. The drive behind these amendments was attributed to the desire to attract FDI and access international funds.⁴¹⁹ A recent WBG loan was extended to Tunisia to assist in delivering a more competitive business environment, a strengthened financial sector, more inclusive and accountable social services, and more transparent public governance.⁴²⁰ The proposed reform also includes promoting SMEs as well as a review of the existing competition law and institutional framework.⁴²¹

Based on the declared policy goals for adopting competition law in Egypt, the law and its institutional framework had major birth defects. The law fell short in addressing issues of concern like anti-competitive mergers and acquisitions or exploitative practices. Though it created an institutional structure to enforce the law, it undermined its independence and impartiality (at least to the general public). The formation of the board of directors, and the

⁴¹⁴ Section 3 Fair Competition Act of 2003.

⁴¹⁵ Section 12 Fair Competition Act of 2003.

⁴¹⁶ Ian Chovichina, *et al.* Inequality, Uprisings, and Conflict in the Arab World. (2015).

⁴¹⁷ Contribution from Tunisia, Competition and Poverty Reduction (2013), p. 3. “Laws meant to encourage competition and investment were circumvented, and ultimately rents extraction by the few closest to the political power undermined the economy’s ability to take off and bring prosperity and good jobs to all. Inequality and unequal access to opportunities gave rise to resentment among the population.” WBG. The Unfinished Revolution, Bringing Opportunity, Good Jobs And Greater Wealth To All Tunisians. (2014), p.6.

⁴¹⁸ M. Mahdy, *Competition in Tunisia Witnessed a Great Deal of Improvement After the Revolution, According to a Source from the Competition Council* AL MASDAR NEWS PAPER, 08/11/2011. 2011,

⁴¹⁹ World Bank. Tunisia - Interim strategy note for the period FY13-14. No. 67692(2012), p.21.

⁴²⁰ *Id.*

⁴²¹ A new law was adopted in September 2015, Law No. 36 of 15 Reorganization of the Competition and Price.

capacity to refer cases to the prosecutor or settle them are the most prominent issues to cite in this regard. Under the new constitution, a new economic order was adopted based on sustainable development and social justice so as to raise the real growth rate of the national economy and the standard of living, increase job opportunities, reduce unemployment, and eliminate poverty. More importantly, it constitutionalized the prohibition of monopolistic practices and protection of the rights of workers and consumers. The state is obliged to “pay special attention” to small, medium and micro enterprises in all fields.

This new order resulted in a number of amendments to the competition law, which the ECA has been calling for.⁴²² On whether the change in policy will impact the work of the ECA, Dr. El-Garf, Chairperson of the ECA, explained that [the ECA] too would adopt 'social justice' as a policy goal. She explained that this means the focusing on the development of SMEs.⁴²³ The amendments adopted emphasised the independence of the ECA and the effectiveness of the Law. These include granting the ECA board the power to refer cases to the public prosecutor or settle them, introducing a full leniency programme in line with international best practices.⁴²⁴ Despite not seeing any special provisions in the amendments that addressed SMEs, the government has separately enacted a new law favouring domestic products and is in the process of enacting a law promoting SMEs. However, as part of its advocacy programme, the ECA launched an awareness programme dedicated to SMEs in Egypt to ensure they are able to utilize competition laws. In a more recent price fixing case against the four main distributors of pharmaceuticals in Egypt, which had engaged in a cartel to fix prices and restrict distribution, the ECA found that the companies did indeed infringe the law by agreeing to reduce credit/facility periods and discounts for small and medium-sized pharmacies.⁴²⁵ The ECA found that this collusion adversely affected small and medium-sized pharmacies by reducing their profit margins. It also restricted their ability to provide medicines in the quantities and variety needed, and caused them to lose customers. Ultimately, this conduct harmed end consumers, because it reduced the availability of medicines in remoter areas.⁴²⁶ The ECA made it a point to emphasise the damage done to these SMEs despite the fact that it was a *per se* violation of competition law. In addition,

⁴²² Up until recently (2014), it was the Prime Minister who may refer cases to the public prosecutor or settle them. The practice developed so that the PM delegates these powers to the Chairperson of the ECA (sometimes via the Minister of Industry and Trade). The ECA may issue administrative decisions to decide on whether a violation of the Law has taken place and order the cession of and/or remedy the violation immediately or within a given period as determined by the ECA. Article 20 of the Law.

⁴²³ Interview with Dr. Mona El Garf, Chairperson of the ECA on September 3, 2013.

⁴²⁴ Article 21 of the Law no. 3 of 2005.

⁴²⁵ ECA, 'Universal Access to Medicine Cannot be Compromised' ECA refers 4 pharmaceutical distribution companies to prosecutor general (2015).

⁴²⁶ Shaimaa Al-Aees, *ECA refers 4 pharmaceutical distribution companies to prosecutor general*, DAILY NEWS EGYPT, 1 December 2015, 2015, available at <http://www.dailynewsegyp.com/2015/12/01/eca-refers-4-pharmaceutical-distribution-companies-to-prosecutor-general/>. Last visited 1 September 2016.

pursuant to a number of mergers in the health sector, the Ministry of Health established a joint merger review committee with, among others, the ECA to review merger among drug companies which would *de facto* extend the ECA powers in relation to mergers beyond its narrow scope under the competition law in said sector.⁴²⁷ The introduction of said committee was on the basis of protecting public interest.

In Algeria, the act emphasizes freedom of prices except for strategic goods determined by the state, after consultations with the Competition Council. In addition, interim measures may be adopted by the government to face price increases or the government may set prices in the case of market disruption, disaster, and natural monopolies, or if there is persistent difficulty in the supply in a given market or geographical area. Such interim measures should only be adopted for a limited time (six months) after consulting with the Competition Council. In a subsequent amendment, the law allowed such measures to be renewed. This mechanism has been utilized in the wake of the financial crisis and the wave of discontent that swept across the region. In 2010, the whole article was remodelled to allow the government to set price ceilings on all consumer goods and services as part of a campaign to curb inflation.⁴²⁸ The then minister of trade, Mustapha Benbada, explained that the amendment of the act provides a legal framework that will create competitiveness and guarantee transparency and fairness in business transactions, adding that the aim is “to protect our economy and the purchasing power of citizens.”

Also, in Zimbabwe, the enactment of the Indigenisation Regulations impacted on the enforcement of competition law. The Zimbabwe Competition Act No. 7 of 1996 (as amended) encompasses a number of objectives deduced from reading through the various articles of the act. The act provides for the core objectives of promoting competition, reducing entry barriers, preventing restrictive practices, regulating mergers, and preventing and controlling monopolies. In addition, it prohibits certain unfair trade practices and tariff matters. Under the act, the criteria for determining whether to allow or sanction/block an act is whether it is or will be contrary to the public interest.⁴²⁹ The general criteria tick all the boxes of core competition objectives: promoting competition, consumer interest, new technologies, cost reduction, and market entry.⁴³⁰ However, in subsequent articles the act provides specific criteria for determining the concept of public interest for each of these

⁴²⁷ Ministry of Health and Population Decree no. 239 of 2016.

⁴²⁸ See Article 4 of law no10-06. See also Hamid Ould Ahmed, *Algeria Submits Price Controls Law to Parliament*, REUTERS, 30 June 2010, 2010, <http://af.reuters.com/article/topNews/idAFJ0E65T0WP20100630>. Last visited 1 September 2016.

⁴²⁹ The act in Article 32 sets the criteria for public interest in general for allowing restrictive practice, merger or monopoly situation.

⁴³⁰ Article 32 of Competition Act No. 7 of 1996.

categories. A merger is considered to be contrary to public policy if it fails to pass the standard SLC test; this occurs when a merger has lessened substantially or is likely to lessen substantially the degree of competition in Zimbabwe or any substantial part of Zimbabwe, or has resulted or is likely to result in a monopoly situation which is or will be contrary to the public interest. Although not a provision under the act, the commission must however also give effect to the Indigenisation Act.⁴³¹ Under the Indigenisation Act “at least 51 per cent of the shares of every public company and any other business should be owned by indigenous Zimbabweans”.⁴³² Hence, once the authority concludes that a merger substantially lessens competition, it determines whether there is any technological efficiency or other pro-competitive gains which would offset the lessening of competition. The merger control regime includes a PIC test, which in practice has included the impact on employment, SMEs, and the empowerment of indigenous people.⁴³³ However, giving effect to the indigenisation requirements expands the PIC test to equity claims.

These findings affirm that the diffusion of US and EU models of economics-based objectives did not occur without significant changes and compromises. All competition law regimes under review in Africa opted for a plurality of objectives featuring a wide range of non-economic welfare objectives, whether as an express objective or a factor reflected in the substantive provisions of the law. The societal and developmental challenges they face make it a necessity for them to take into account growth and development as objectives of competition law. Incorporating “development” as an objective of competition law is markedly different from the classic objectives of the diffused models of the US and EU. With the growing emphasis on the association of competition law with development, theories that shape and guide these two realms need to be explored, which we will present in the next section.

4.4 Reflections on Development as an Objective of Competition Law

Competition ‘economics’ finds its origins in industrial organization theories, a sub-discipline of neoclassical price theory. Despite the existence of various ‘schools’ and intellectual

⁴³¹ Part 2 of the Indigenization and Empowerment Act 14/2007. All mergers notified to the commission for examination must meet indigenisation requirements for approval empowering indigenous people who were disadvantaged before independence in 1980.

⁴³² Part 2, (1)(a) of the Indigenization and Empowerment Act 14/2007. Available at <http://www.nayoyouth.org/docs/Zimbabwe's%20Indigenisation%20and%20Empowerment-Act.pdf>. Last visited 1 September 2016.

⁴³³ See Coca-Cola/ Cadbury-Schweppes merger, Rothmans of Pall Mall/ British American Tobacco merger and Total Zimbabwe/Mobil Oil merger discussed in Alexander J Kububa, Issues In Market Dominance: Merger Control In Zimbabwe (2004). Unfortunately the author was not able to find more recent merger cases in publically available resources.

traditions, neoclassical price theory emphasizes the importance of markets and is classified as micro-economics.⁴³⁴ In contrast, development economics emerged as a distinct field of economics in the post-World War II period and has historically been associated with macroeconomics. There is a wealth of research on these two fields of economics and their underlying theories, classical and neoclassical economics known as “mainstream” or “orthodox economics,”⁴³⁵ Marxism and neo-Marxism, as well as development economics.⁴³⁶ Our emphasis here will be on understanding what development means and how its inclusion as a sought after goal may impact competition.

4.4.1 The concept of “development”

The term “development” has a variety of meanings, depending on the context it is used in.⁴³⁷ The concept of development has been linked to economic growth, and this is usually the subject of economic development studies.⁴³⁸ It has been noted that the full thrust of the industrial revolution in Britain in the eighteenth century and the rise of capitalism marked the beginning of the “systematic and intellectual interest” in economic development.⁴³⁹ Accordingly, our starting point will be economic development, being the most dominant factor in measuring development and how the concept evolved over time.

⁴³⁴ As such, competition economics focuses on specific product markets, not economies, the latter depending on a broader series of variables, such as the rate of wages paid, the demand and supply for all goods, the supply of money in society, rather than the interplay of supply and demand in a certain product market. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* (McGraw-Hill Irwin 19th ed. 2010).

⁴³⁵ Orthodox economics here denotes mainstream economics i.e. neoclassical economics. It has been argued that the use of the term “neoclassical economics” should be abandoned. It is either used to mean neoclassical economics specifically or to denote modern economics in contrast to heterodox economics. See David Colander, *The death of neoclassical economics*, 22 *JOURNAL OF THE HISTORY OF ECONOMIC THOUGHT* (2000), at p. 130.

⁴³⁶ For a discussion of the relation between competition and development economics see Ioanis Lianos. 2013.

⁴³⁷ Development has also been linked to other legal disciplines such as enforcement of contract law. The position regarding the relation between development and contract law has not been settled. On the one hand, some view strong formal contract law and enforcement thereof as an essential element for economic development. DOUGLASS C NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (Cambridge university press. 1990). On the other hand, another view is that economic development is achievable through informal contracting mechanisms. For a discussion of these two views see Michael Trebilcock & Jing Leng, *The role of formal contract law and enforcement in economic development*, *VIRGINIA LAW REVIEW* (2006).

⁴³⁸ This is usually measured by a country’s economic growth. The World Bank glossary defines economic development as “Qualitative change and restructuring in a country’s economy in connection with technological and social progress. The main indicator of economic development is increasing GNP per capita (or GDP per capita), reflecting an increase in the economic productivity and average material wellbeing of a country’s population. Economic development is closely linked with economic growth.” This approach is however criticized, as it is not inclusive of other important aspects of development. Hence, other methods were introduced. This will be discussed below in more details. It should be noted that growth is different from development On the difference between growth and development see for example M.D. MORRIS, *MEASURING THE CONDITION OF THE WORLD’S POOR* (PERGAMONS PRESS. 1979) and PAUL STREETEN, *DEVELOPMENT PERSPECTIVES* (SPRINGER. 1981). Economic growth is, however, one aspect of the process of economic development. See FIDELIS FIDELIS EZEALA-HARRISON, *ECONOMIC DEVELOPMENT: THEORY AND POLICY APPLICATIONS* (GREENWOOD PUBLISHING GROUP. 1996), p.3.

⁴³⁹ JAMES M CYPHER & JAMES L DIETZ, *THE PROCESS OF ECONOMIC DEVELOPMENT* (ROUTLEDGE. 2008), p. 109.

The pursuit of development as a socially desirable goal is relatively recent in origin and has had a positive relation to the rise of capitalism.⁴⁴⁰ Save for a few exceptions, the concept began to make its way in the nineteenth century, sometimes taking different denominations as “modernization”, “westernization” or “industrialization.”⁴⁴¹ What was once labelled “rude and barbarous” in the eighteenth century, “backward” in the nineteenth century and “underdeveloped” in the pre-war period now became the “less developed countries” or “developing countries.”⁴⁴²

Economists have relied on indicators to show development and, thus, the term does not carry an autonomous meaning.⁴⁴³ Traditionally, welfare economics has focused on the economic growth or GDP of a country as an indicator of development. However, Sen argued successfully (and rightly so) that economic development is not just about economic growth.⁴⁴⁴ The Commission on the Measurement of Economic Performance and Social Progress (CMEPSP)⁴⁴⁵ addresses this question and reached the conclusion that GDP, as a measure of market production, has often been treated as a measure of “economic well-being.”⁴⁴⁶ Confusing these two measures can provide misleading “indications about how well-off people are and entail the wrong policy decisions.” Thus, adopting a “multidimensional” definition of wellbeing to include various elements such as health, education, personal activities, social connections and relationships and the environment⁴⁴⁷ requires calling for an amendment to our measurement system to “shift emphasis from measuring economic production to measuring people’s wellbeing.”⁴⁴⁸ The Human Development Index is now used to measure

⁴⁴⁰ *Id.*

⁴⁴¹ Economic development became an objective in post WWII Europe especially in Germany and Japan and other European countries, additionally in Russia and later China and other developing countries. There were, however, few earlier attempts where scholars employed the concept of “economic development”, such as the German economist J.A. Schumpeter in his book “Theory of Economic Development”. The book was not translated to English until 1937. Also, the term was featured in the works of economic historians Lillian Knowls and R. H. Tawney of London School of Economics, however, in relation to the “economic development of British overseas empires”. See Heinz Wolfgang Arndt, *Economic development: a semantic history*, 29 *ECONOMIC DEVELOPMENT AND CULTURAL CHANGE* (1981), p.458.

⁴⁴² GERALD M MEIER, *BIOGRAPHY OF A SUBJECT: AN EVOLUTION OF DEVELOPMENT ECONOMICS* (OXFORD UNIVERSITY PRESS, 2004), p. 40.

⁴⁴³ However, it usually denoted “an increase in living standards. *Supra* note 14 p. 4. Nobel laureate, Simon Kuznets defined economic growth of a country as “a long-term rise in capacity to supply increasingly diverse economic goods to its population, this growing capacity based on advancing technology and the institutional and ideological adjustments that it demands. See Simon Kuznets, *Modern economic growth: findings and reflections*, 63 *THE AMERICAN ECONOMIC REVIEW* (1973).

⁴⁴⁴ AMARTYA SEN, *FREEDOM AS DEVELOPMENT* (Oxford University Press, Oxford, 1999). See also Peter Evans, *Collective capabilities, culture, and Amartya Sen’s Development as Freedom*, 37 *STUDIES IN COMPARATIVE INTERNATIONAL DEVELOPMENT* (2002).

⁴⁴⁵ The aim of the CMEPSP was to: “identify the limits of GDP as an indicator of economic performance and social progress, including the problems with its measurement; to consider what additional information might be required for the production of more relevant indicators of social progress; to assess the feasibility of alternative measurement tools, and to discuss how to present the statistical information in an appropriate way.” CMEPSP REPORT ON THE MEASUREMENT OF ECONOMIC PERFORMANCE AND SOCIAL PROGRESS, Executive Summary, No.1 p.1. Available at http://www.stiglitz-sen-fitoussi.fr/documents/rapport_anglais.pdf. Last visited 1 September 2016.

⁴⁴⁶ *Id.* at 12 and 21.

⁴⁴⁷ *Id.* at 14-15.

⁴⁴⁸ *Id.* at 12 and 21.

development, i.e. “quality of life,” and the IHI reflects the inequality levels as an indicator for development. Consequently, development is a broad, complex process that should reflect “major changes in social structures, popular attitudes, and national institutions, as well as the acceleration of economic growth, the reduction of inequality and the eradication of poverty.”⁴⁴⁹

Colonialism had a profound impact (mostly negative) on development in Africa, which many countries are still trying to redress,⁴⁵⁰ and fighting poverty is still a top priority in Africa. As a recent report shows, although the share of Africans who are poor fell from about 57 per cent in 1990 to 43 per cent in 2012, nonetheless, because of population growth, the actual number of poor was more than 330 million in 2012, up from about 280 million in 1990.⁴⁵¹ The report also indicates mixed results on the inequality issue.⁴⁵² It found that inequality levels are comparable to the rest of the world but with large differences between urban and rural areas and across regions. However, it found seven of the ten most unequal countries in the world are in Africa, with most in southern Africa. An analysis of household survey data did not reveal a systematic increase in inequality across countries in Africa but the number of extremely wealthy Africans is increasing. However, this report does not reflect the situation in North Africa. There is no recent data available for North Africa except for some historic indicators for the MENA region, which shows the poverty ration at 2.7% in 2008. Despite the relatively acceptable rate of inequality, standard development indicators failed to capture the overwhelming discontent across MENA, leading researchers to argue that wealth disparities (intergroup inequality, rather than monetary inequality), which are typically higher, could have been the main culprit.⁴⁵³ Similarly, unemployment indicators in North Africa are considerably different from Sub-Saharan Africa with a declining trend in the latter and the rising numbers in the former.⁴⁵⁴ In Sub-Saharan Africa, the unemployment rate is at 7.4%, but over 70 per cent of workers are in vulnerable employment, against the global average of 46.3 per cent.⁴⁵⁵ Also, unemployment rates drastically vary between countries within the same region (for example, in 2015 Egypt was at about 12%, Libya about 20%, Kenya about 12%,

⁴⁴⁹ M Todaro & S Smith, *Economic Development, united states of America*, (2012), p.16.

⁴⁵⁰ Leander Heldring & James A Robinson. Colonialism and economic development in Africa. (2012).

⁴⁵¹ Kathleen; Beegle, *et al.* Poverty in a Rising Africa. (2016).

⁴⁵² *Id.* p. 117.

⁴⁵³ Chovichina, *et al.* 2015.

⁴⁵⁴ *Id.* Northern Africa recorded the highest unemployment rate globally, at 12.1 per cent in 2015 and the highest regional youth unemployment rate in the world, at close to 30 per cent in 2015.

⁴⁵⁵ These are workers that have limited access to social protection schemes and are often confronted by low and highly volatile earnings. ILO. World Employment and Social Outlook 2015: The Changing Nature of Jobs. (2015).

and SA about 25%).⁴⁵⁶ Without prejudice to the special attributes of each country, the development process should take these challenges into consideration.⁴⁵⁷

The methods used in the multidimensional development process and how these relate to competition are the subject of investigation in the next section.

4.4.2 Legal reform, competition law and development

Each economic theory has its own specific policy objectives which require matching instruments to materialize.⁴⁵⁸ An early example was when Great Britain started to shift to free trade, and its laws needed to be altered to align with the change, resulting in the abolishment of the corn laws.⁴⁵⁹ Rostow presented a linear-stages-of-growth model as a road map for development in reaction to Marx's earlier thesis on the same topic.⁴⁶⁰ He argued that development stages are universally applicable and presented five steps of development: traditional, transitional, take-off, maturity, and high mass consumption.⁴⁶¹ Accordingly, in the 1960s, the challenge was how to deploy the law to contribute to the "take-off into self-sustaining growth"⁴⁶² at a time when the prevailing economic theory envisaged a greater role for the state in managing the economy.⁴⁶³ Industrialization was identified as the main cause for the rapid economic growth and the success of the Marshall plan.⁴⁶⁴ This required a "great deal of law" to bring to life the teachings of the leading post-war economic theories of development into policy.⁴⁶⁵ Competition law was not necessarily among these laws since it is mainly a tool used in the market economy to, among other things, maintain its competitiveness. In contrast, in a planned economy the state is the main generator of economic activities.

Similarly, with the next wave of changes and the shift to the market paradigm, an extensive modernization of national laws and regulatory reforms from more developed countries was

⁴⁵⁶ *Id.*

⁴⁵⁷ This may give grounds to study these two regions independently.

⁴⁵⁸ David Kennedy, *Law and development economics: toward a new alliance*, in LAW AND ECONOMICS WITH CHINESE CHARACTERISTICS: INSTITUTIONS FOR PROMOTING DEVELOPMENT IN THE 21ST CENTURY (David Kennedy & Joseph E Stiglitz eds., 2013).

⁴⁵⁹ CHERYL SCHONHARDT-BAILEY, FROM THE CORN LAWS TO FREE TRADE: INTERESTS, IDEAS, AND INSTITUTIONS IN HISTORICAL PERSPECTIVE (Mit Press. 2006).

⁴⁶⁰ WALT WHITMAN ROSTOW, THE STAGES OF ECONOMIC GROWTH: A NON-COMMUNIST MANIFESTO (Cambridge University Press. 1990) and KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (Penguin. 2002).

⁴⁶¹ ROSTOW. 1990.

⁴⁶² DUNCAN KENNEDY, *THREE GLOBALIZATIONS OF LAW AND LEGAL THOUGHT: 1850–2000*, IN THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (DAVID TRUBEK & ALVARO SANTOS EDS., 2006).

⁴⁶³ *Id.* DAVID M TRUBEK & ALVARO SANTOS, THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (Cambridge University Press. 2006), p. 19. See also (for background) Duncan Kennedy, *Two Globalizations of Law and Legal Thought: 1850–1968*, (2003), 36 SUFFOLK UNIVERSITY LAW REVIEW (2003)

⁴⁶⁴ TRUBEK & SANTOS. 2006.

⁴⁶⁵ JAMES A ROBINSON, *Industrial Policy and Development: A Political Economy Perspective* (World Bank Publications 2011).

needed for the law to meet the new policy objectives: liberalization, privatization, and deregulation. With the free market paradigm gaining momentum again and the rise of new institutional economics, emphasis was on the rule of law and the role laws play in translating development policies into action.⁴⁶⁶ The work of Douglas North has addressed what “institutions” mean. He adopted a broad view of the term, to cover all “humanly devised constraints,” whether formal such as legislation, or informal such as customs and traditions, “that structure political, economic and social interactions.”⁴⁶⁷ “Like a power grid or transportation network, modern law is viewed in the core conception as a functional prerequisite of an industrial economy.”⁴⁶⁸ Thus, law was a means to achieve market autonomy and integration into the world market. At this stage, “law was understood as a foundation for market relations and as a limit on the state.”⁴⁶⁹

One of the implications of this shift in dogma was a return to a mono-economics approach to development. Neoclassical economics became the dominant theoretical point of reference for economic activities as it also influenced the policies of major IOs like the WBG and the IMF at the time.⁴⁷⁰ The teaching of these institutions was later termed the “Washington Consensus”.⁴⁷¹ As Stiglitz explains, the Washington Consensus demanded liberalized trade, macroeconomic stability, and getting prices right and “once the government ‘got out of the way’ private markets would allocate resources efficiently and generate robust growth,” or so was the plan.⁴⁷² Accordingly, followers of the Washington Consensus focused their policy reforms on maximizing efficiencies, getting prices right and integrating the developing countries into the world economic order.

Adherence to the teachings of the consensus yielded mixed results. On the one hand, while

⁴⁶⁶ *Id.* at p. 102.

⁴⁶⁷ See Oliver E Williamson, *The new institutional economics: taking stock, looking ahead*, 38 JOURNAL OF ECONOMIC LITERATURE (2000) and Ronald H Coase, *The Problem of Social Cost*, 3 JOURNAL OF LAW AND ECONOMICS (1960) .

⁴⁶⁸ Douglas North, *Economic performance through time: the limits to knowledge*, 9612004 ECONWPA SERIES ECONOMIC HISTORY (1996), Douglass C North, *Transaction costs, institutions, and economic history*, ZEITSCHRIFT FÜR DIE GESAMTE STAATSWISSENSCHAFT/JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS (1984), Williamson, JOURNAL OF ECONOMIC LITERATURE, (2000), DOUGLASS CECIL NORTH, STRUCTURE AND CHANGE IN ECONOMIC HISTORY (Norton. 1981), and NORTH, Institutions, institutional change and economic performance. 1990.

⁴⁶⁹ David M Trubek, *Toward a social theory of law: an essay on the study of law and development*, 82 THE YALE LAW JOURNAL (1972), p. 6. Also see, MAX WEBER, *ECONOMY AND SOCIETY*, GUENTHER ROTH AND CLAUS WITTICH, EDS, NEW YORK: BEDMINSTER PRESS.(ORIGINALLY PUBLISHED 1922) WEBERECONOMY AND SOCIETY 1968 (1968).

⁴⁷⁰ PRESTON, UK DEPARTMENT FOR INTERNATIONAL DEVELOPMENT, (1993), p. 255.

⁴⁷¹ John Williamson coined the term in 1990. He explained that it is used to refer to “the lowest common denominator of policy advice being addressed by the Washington-based institutions to Latin American countries as of 1989.” John Williamson, *What should the World Bank think about the Washington Consensus?*, 15 THE WORLD BANK RESEARCH OBSERVER (2000). Also see John Williamson, *Short History of the Washington Consensus*, A, 15 LAW & BUS. REV. AM. (2009).

⁴⁷² JOSEPH E STIGLITZ, MORE INSTRUMENTS AND BROADER GOALS: MOVING TOWARD THE POST-WASHINGTON CONSENSUS (UNU/WIDER Helsinki. 1998). Done through SAPs which were later rebranded as this outcome was seen with the poverty reduction strategy papers (PRSPs), which was the key framework promoted by the World Bank to address criticisms if the SAP's. Ibrahim A Elbadawi, *et al.* Why structural adjustment has not succeeded in Sub-Saharan Africa. (1992).

Latin American countries were ideal students of the consensus, others like China, East Asian countries and India, decided only to adopt some of the “consensus.” However, they managed to make a record growth rate in comparison to Latin America.⁴⁷³ The success of the latter put the consensus in a vulnerable position and many started to question its effectiveness.⁴⁷⁴ Williamson, in his review of the Washington Consensus argued that sub-Saharan Africa moved “spottily and grudgingly, too often under foreign pressure rather than out of conviction.”⁴⁷⁵

With the Washington Consensus and a limited ability to achieve sustained economic growth rates, attention shifted to other factors that may play a role in attaining this goal. These factors were law and institutions. “As a result, development economists and policy makers [spoke] about law all the time and arguments about law – how it works, what it can and cannot do [became] part of the common repertoire of development practitioners.”⁴⁷⁶ Legal reform was to focus on contract enforcement and global integration. Countries in Asia, the former Soviet Union, Easter Europe, Latin America, sub-Saharan Africa, and the Middle East engaged in a wide range of rule of law reform initiatives.⁴⁷⁷ The WBG was one of the leading IGOs to promote legal reform.⁴⁷⁸ In one of its publications on the Bank’s activities in relation to judicial and legal reform, it is asserted that a critical lesson from the East Asian financial crisis and the collapse of some of the Eastern European transition economies in the 1990s was that “without the rule of law, economic growth and poverty reduction can be neither sustainable nor equitable.”⁴⁷⁹ Hence, the WBG promoted legal reform as a means to safeguard market operations, as well as allow for limited government intervention, when needed.⁴⁸⁰ Sen highlights the role of legal and judicial reform in promoting development.⁴⁸¹

⁴⁷³ See SHAHID JAVED BURKI & GUILLERMO PERRY, *BEYOND THE WASHINGTON CONSENSUS: INSTITUTIONS MATTER* (World Bank Publications, 1998) and PEDRO-PABLO PEDRO-PABLO KUCZYNSKI & I WILLIAMSON, *AFTER THE WASHINGTON CONSENSUS: RESTARTING GROWTH AND REFORM IN LATIN AMERICA*, NO. 0881323470(2003) and Dani Rodrik, *Goodbye Washington consensus, hello Washington confusion? A review of the World Bank's economic growth in the 1990s: learning from a decade of reform*, 44 *JOURNAL OF ECONOMIC LITERATURE* (2006).

⁴⁷⁴ DANI RODRIK, *GROWTH STRATEGIES*, IN *HANDBOOK OF ECONOMIC GROWTH* (AGHION PHILIPPE & N. DURLAUF STEVEN EDS., 2005).

⁴⁷⁵ Williamson, *THE WORLD BANK RESEARCH OBSERVER*, (2000).

⁴⁷⁶ “When the unity and self-confidence of development economics ebbs, as occurred in the nineteen seventies and is again the case today, and the details and context for policy seem more salient, ideas about law and institutions often lie closer to the surface in discussions of development policy.” See Kennedy, 2013, at p1.

⁴⁷⁷ See Thomas Carothers, *The rule of law revival*, 77 *FOREIGN AFFAIRS* (1998), p. 95.

⁴⁷⁸ This move has been led by Dr.Ibrahim Shehata, the former General Council of the World Bank. See Ibrahim FI Shihata, *Judicial Reform: Issues Addressed in the World Bank Projects* (1995).

⁴⁷⁹ World Bank. *Legal and Judicial Reform Observations, Experiences, and Approach of the Legal Vice Presidency*. (2002).

⁴⁸⁰ It also took into consideration other social causes such as human rights and poverty reduction. Hence, came the title of the next WB Projects the “Comprehensive Development Framework” which was launched in 1999. See the Joint Note by JAMES D WOLFENSOHN & STANLEY FISCHER, *THE COMPREHENSIVE DEVELOPMENT FRAMEWORK (CDF) AND POVERTY REDUCTION STRATEGY PAPERS*, WASHINGTON, DC: WORLD BANK (2000). The term comprehensive emphasizes a more inclusive approach to development including economic, political, social and legal aspects. TRUBEK & SANTOS, 2006, at p. 12. The PRSP was introduced in 1999 which requires a country to create a Poverty Reduction Strategy Paper (PRSP), which purports to outline programs that will promote growth and reduce poverty over the next several years. Through the Poverty Reduction Growth

He also argues that legal development should be a goal in its own right under a broader development process and not just a vehicle to achieve economic development. Nonetheless, one may not deny possible interdependence between legal development and economic or political development.⁴⁸² Sen, using game theory, demonstrates that what can be considered as justice and thus worthy of protection differs from one society to another, and thus context matters.⁴⁸³

Accordingly, an adjusted approach to reform emerged as the “second-generation” focusing on institutional reform and “good governance.”⁴⁸⁴ Now, the list has expanded to include other policy goals such as corporate governance, anti-corruption, flexible labour markets, social safety nets and targeted poverty reduction.⁴⁸⁵ As Rodrik rightly expressed, “[i]f there is a consensus today about what strategies are most likely to promote the development of the poorest countries in the world, it is this: there is no consensus except that the Washington consensus did not provide the answer.” Though one cannot deny its merits and functionality for some countries at a given point in time, however, “its recipes were neither necessary nor sufficient for successful growth.”⁴⁸⁶

A question now arises, if there is no consensus about the Washington consensus, what policies should guide the development path of developing countries? Shapiro noted that the “default policy recommendation is still the market”; however, “the emphasis of reform has switched to institutions that will allow the market to perform more efficiently.”⁴⁸⁷ Further, Shapiro and Taylor pointed out some very important issues when dealing with the resurgence of neoclassical economics.⁴⁸⁸ There is little empirical evidence to support either of the two premises of the neoclassical revolution: that elimination of price distortions will enhance

Facility (PRGF) the World Bank and IMF approve and then finance these poverty reduction programs. Available at http://unctad.org/en/Docs/gdsmdpbg2420032_en.pdf. Last visited 1 September, 2016.

⁴⁸¹ SEN AMARTYA, *THE IDEA OF JUSTICE* (Penguin Books, 2009), at p.6. In his speech, he addressed the question “what is the role of legal and judicial reform in the development process?” emphasizing the importance of a comprehensive approach to development. He reasoned his stand on two factors: “casual interdependence” which he defined as “the casual interconnections between the different domains that can be fruitfully seen together”, and conceptual integrity, which is based on the assumption that “divided concerns are incomplete, so that they could not really be considered independently at all”. See also Paul Collier David Collier & Richard E Messick, *Prerequisites versus diffusion: Testing alternative explanations of social security adoption*, 69 *AMERICAN POLITICAL SCIENCE REVIEW* (1975).

⁴⁸² Collier & Messick, *AMERICAN POLITICAL SCIENCE REVIEW*, (1975), p. at 14-15.

⁴⁸³ See AMARTYA, 2009.

⁴⁸⁴ *Id.* at p. 974. Chang noted that there is yet no consensus on the functions the ‘good’ institutions should perform, nor is there an agreement as to which institutional forms can serve these good functions best. But the dominant view backed by the ‘augmented Washington Consensus’ is that ‘good institutions’ are what we find in the now-developed countries (NDCs), especially in the Anglo- American ones (Chang, 2005). “Good governance” had common attributes to Rostovian mono-view for development. See Ha-Joon Chang & Emre Özçelik, What can we learn from re-reading Albert O. Hirschman in the ‘neo-Rostovian’ age of ‘good governance’? (2008);*id.*

⁴⁸⁵ Dani Rodrik, *After neoliberalism, what?* (2002), p17.

⁴⁸⁶ Joseph E Stiglitz, *Is there a post-Washington Consensus consensus?*, in *THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE* (Narcis Serra & Joseph E Stiglitz eds., 2008), p. 41.

⁴⁸⁷ Helen Shapiro, *Industrial policy and growth*, (2007), p. 14.

⁴⁸⁸ *Id.* at p.2.

economic efficiency and that increased efficiency will lead to higher rates of growth. They also pointed out that these assumptions are not based on the experiences of developing countries. They conclude that “*those who see the invisible hand in all success cases have a biased vision: if an economy grows rapidly, they see market forces in action; if it grows slowly, bad public policy is at work.*”⁴⁸⁹ These developments show that the policy “diffusers” have come to acknowledge the shortcomings of their previous position that ignored, to a great extent, the complexity of the diffusion process.

Looking at the diffusion from the receiving end, Moyo notes the deteriorating conditions in Africa by the end of the 1980s, with a steady decline in economic growth, an increase in poverty levels, and flagrant corruption, all of which has led to stagnation and in some cases regression in many countries.⁴⁹⁰ This has driven an emphasis on policy reform to governance as a tool for sustainable economic growth, which was considered lacking across much of sub-Saharan Africa.⁴⁹¹ Without dismissing these domestic problems, Khan argues that the dependence of many African economies on a narrow range of commodities has made it difficult for them to undertake the proposed reforms under the Washington Consensus.⁴⁹² He also criticizes the Consensus for focusing too much on “stabilisation rather than on growth and development,” and ignoring “the equity dimensions of growth.”⁴⁹³ Mkandawire notes that the reform agenda of the 1980s/1990s had a narrow focus on “how states” should govern rather than “what they should be doing,” resulting in “anaemic regulatory states” that cannot perform the entrepreneurial or dynamic functions required in a developmental state. He also argues that the institutions proposed under the reform were unlikely to be able to produce the “stable, developmental, democratic and socially inclusive social orders that have thus far remained elusive in Africa.”⁴⁹⁴ Comparing the development of East Asia to that of Africa, he notes that the former were “built over many years by trial and error, intelligent emulation and borrowing, new country-specific innovations – and even luck” and for the latter to “catch-up” it needs to resort to “originality and experimentation...and to ‘discover’ its constraints and capacities, selectively and creatively learn from others and manage its destiny.”⁴⁹⁵

⁴⁸⁹ Helen Shapiro & Lance Taylor, *The state and industrial strategy*, 18 WORLD DEVELOPMENT (1990).

⁴⁹⁰ DAMBISA MOYO, *DEAD AID* (New York: Farrar, Straus and Giroux, 2009).

⁴⁹¹ *Id.* She however, notes the impact the Cold War had on providing support to different regimes in Africa to insure their alliance without any consideration to good governance.

⁴⁹² Brian Kahn, *Africa and the Washington Consensus*, WASHINGTON CONSENSUS (2004), p. 216

⁴⁹³ *Id.* at p. 221. He further explains that the NEPAD is to some extent a reaction to the Washington Consensus to finding alternative policies to address the continent’s development challenges with the aim to end “the marginalization of Africa and the global social exclusion of her people”.

⁴⁹⁴ Thandika Mkandawire, *From maladjusted states to democratic developmental states in Africa*, CONSTRUCTING A DEMOCRATIC DEVELOPMENTAL STATE IN SOUTH AFRICA: POTENTIALS AND CHALLENGES, CAPE TOWN: HUMAN SCIENCES RESEARCH COUNCIL (2010), p. 63

⁴⁹⁵ *Id.* at p. 78.

With the focus on legal reforms it seems little has been done to rethink the legal norms and instruments diffused. It has been noted that there is an existing gap between rhetoric and reality.⁴⁹⁶ Dezalay and Garth studied the implementation of the rule of law initiatives in four Latin countries and found that the failure to account for the internal balance of power in the receiving country, or what they referred to as the “palace wars”, is the reason why the law and development initiative has failed.⁴⁹⁷ Looking at the relationship between law and power, they found that although law creates power, it is dependent on how much support it gets from power holders limiting what law can do to what local institutions allow.⁴⁹⁸ Another aspect is international strategies. By this, they meant that powerful interest groups in each jurisdiction use foreign capital (like expertise) as overall narratives in order to enhance their power. Rostow’s ideas were used to combat communism.⁴⁹⁹ Also, Pinochet’s regime adopted Chicago School economics to undermine the allies of the previous government while, in turn, their opponents used international human rights to undermine them.⁵⁰⁰ The utilization of “international strategies” to reinforce political power can be seen in Africa. Moyo notes the impact the Cold War had on Africa, with different factions\regimes aligning their policies with Washington or Moscow in exchange for political support.⁵⁰¹ Twagiramungu describes their path to consolidating their political power as using “market laws of supply and demand to build complex networks of support within the Marxist/Capitalist ideological spectrum,” which was later abandoned after they had succeeded.⁵⁰²

These are particularly important observations for developing countries, especially in Africa, since most are converging from a state planned economy, where the state still has a great amount of power and ability to influence the market. This explains the search for alternative development plans as well as, among other reasons, why in most African countries

⁴⁹⁶ TRUBEK & SANTOS. 2006, p 15.

⁴⁹⁷ Argentina, Brazil, Chili and Mexico. YVES DEZALAY & BRYANT G GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (UNIVERSITY OF CHICAGO PRESS. 2002).

⁴⁹⁸ *Id.*

⁴⁹⁹ Marx’s views were opposed in “The Stages of Growth: A Non-Communist Manifesto”, where Walt Witman Rostow presented his linear-stages-of-growth model as a road map for development. He argued that development stages are universally applicable. Rostow’s approach was that drawing on history, mainly that of Great Britain, one could identify the stages of economic development. He identified a modernization theory based on five development stages: traditional, transitional, take-off, maturity and high mass consumption. Chang notes the similarities and dissimilarities between Rostow and neoclassical economics. Same as the post Washington Consensus discourse, Rostow emphasized the importance of institutional change as a catalyst for economic development. These five stages will be accompanied by institutional change similar to that of developed countries. However, Rostow departed from neoclassical rhetoric by acknowledging the role government plays pre take-off stage. See Chang & Özçelik. 2008at p.2-3 and ROSTOW. 1990.

⁵⁰⁰ DEZALAY & GARTH. 2002, p.7.

⁵⁰¹ MOYO. 2009.

⁵⁰² Noel Twagiramungu, *Embracing Neo-Liberalism in Uganda and Rwanda*, AFRICAN FRONTIERS: INSURGENCY, GOVERNANCE AND PEACEBUILDING IN POSTCOLONIAL STATES (2016).

competition law remained idle or of limited impact, despite the fact that competition statutes were adopted.⁵⁰³

Kennedy acknowledges the importance of context in relation to legal reform as “many of the legal ideas and law reform projects of the neo-liberal era continue to be promoted, long after scepticism about the broader economic and political programme of which they were a part had become common.”⁵⁰⁴ This tendency is counterproductive and goes against the need for a comprehensive approach. Even in instances where there has been a change in policy, the parameters set for this policy may devoid it of any meaning. To highlight this concern, consider the incorporation of social goals discussed above. As Rittich notes, the effect of this incorporation will depend to a great extent on how development agencies define what is “social.”⁵⁰⁵ Thus, the final outcome might not yield different results. As Kennedy further articulated, knowing the context is important to be able to understand the effect, especially the “dynamic ones of specific changes in the legal regime.”⁵⁰⁶

A similar observation can be made about competition law. The role of competition law in development is linked to the prevailing economic policy; the greater the government intervention through regulation, the less significant the competition law will be, and vice versa. The relation between competition law and development has been widely discussed.⁵⁰⁷ Some scholars have argued for a positive correlation between development and competition.⁵⁰⁸ It has been noted that, based on the contributions of twelve different countries, the enforcement of competition law against private actors has contributed to economic development as it had a positive impact on prices, quality, availability, market entry

⁵⁰³ Emphasizing regional integration (following that of the EU), import substitution and export promotion a number of regional development plans were adopted such as Lagos plan of action and the NEPAD, however with little success. Some now note that with new economic powerhouses now on the rise especially China, African countries are forming synergies with them on the basis of mutual benefits to realize economic growth. In stark contrast to the development (aid for trade) conditionality model, the “Beijing Consensus”, based on the Chinese policy of non-interference, forms the basis that governs the Sino- African relations. Oyejide Titiloye Ademola, *et al.*, *China-Africa trade relations: insights from AERC scoping studies*, 21 THE EUROPEAN JOURNAL OF DEVELOPMENT RESEARCH (2009).

⁵⁰⁴ KENNEDY. 2013.

⁵⁰⁵ KERRY RITTICH, *THE FUTURE OF LAW AND DEVELOPMENT : SECOND-GENERATION REFORMS AND THE INCORPORATION OF THE SOCIAL*, IN THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL (DAVID TRUBEK & ALVARO SANTOS EDS., 2006).

⁵⁰⁶ Kennedy, *Three globalizations of law and legal thought: 1850–2000*. 2006.

⁵⁰⁷ FOX & MATEUS. 2011, Bakhoun, *WORLD COMPETITION*, (2011), Singh, *GROWTH AND ECONOMIC DEVELOPMENT: ESSAYS IN HONOUR OF AP THIRLWALL*, (2007), DUTZ & HAYRI. 2000 and Tay-Cheng Ma, *The effect of competition law enforcement on economic growth*, 7 *JOURNAL OF COMPETITION LAW AND ECONOMICS* (2011).

⁵⁰⁸ See for example, Kovacic, *CHI.-KENT L. REV.*, (2001), Paolo Buccirossi, *et al.*, *Competition policy and productivity growth: an empirical assessment*, 95 *REVIEW OF ECONOMICS AND STATISTICS* (2013) (empirical study of the effectiveness of competition policy by estimating its impact on Total Factor Productivity (TFP) growth for 22 OECD countries over the period 1995-2005), UNCTAD, *THE ROLE OF COMPETITION POLICY IN PROMOTING ECONOMIC DEVELOPMENT: THE APPROPRIATE DESIGN AND EFFECTIVENESS OF COMPETITION LAW AND POLICY*, note submitted as part of the package for the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, (2010) and UNCTAD, *COMPETITION POLICY, TRADE AND DEVELOPMENT IN COMMON MARKET FOR EASTERN SOUTH AFRICA (COMESA)* (2000), Matias Busso & Sebastian Galiani. *The causal effect of competition on prices and quality: evidence from a field experiment*. (2014).

and technical development.⁵⁰⁹ The discussion extended to what kind of competition law and policy would be suitable for developing countries.⁵¹⁰ A number of scholars argue that these policies/laws must account for the “special attributes” of developing countries, rejecting mere transplantation of competition laws from developed countries.⁵¹¹ Gal discussed preconditions for the enforcement of competition law in developing countries, noting that the issues facing these countries, such as low level of economic development, institutional design problems, and complex government regulation and bureaucracy, create real-world challenges which should be taken into consideration when adopting and enforcing competition law.⁵¹² Gal, however, cautioned against a “copy-paste” approach, where rules are imported without modification or change from other jurisdictions, citing the Israeli abuse of dominance rules as an example.⁵¹³ Fox suggested six different models (including the US and EU model) for developing countries to choose from, noting that what is important is “knowledgeable choice.”⁵¹⁴ Singh emphasized the significance for developing countries of having a competition policy that takes into consideration their level of development with the objective of long-term sustainable economic growth.⁵¹⁵ He further asserts their urgent need for a competition policy to accompany their privatization process and safeguard their interests *vis a vis* the global merger wave.⁵¹⁶ However, maximum competition is not necessarily optimal and developing countries – at different levels of development and governance capacities – require different types of competition policies than those of developed ones.⁵¹⁷ In a recent cross-country study using a sample of 101 countries, Ma demonstrated that until a country reaches a certain threshold of institutional development, competition law will be idle, i.e. in LDC competition law will have no effect on the country’s economic growth. Once that threshold is reached, without an “efficient enforcement scheme,” competition law may have an adverse effect on growth.⁵¹⁸ Mateus used econometric analysis to demonstrate that the

⁵⁰⁹ OECD, HOW ENFORCEMENT AGAINST PRIVATE ANTICOMPETITIVE CONDUCT HAS CONTRIBUTED TO ECONOMIC DEVELOPMENT. CCNM/GF/COMP(2004).

⁵¹⁰ See Gal & Fox. 2014 *and* Mateus. 2013.

⁵¹¹ OECD, PROMOTING PRO-POOR GROWTH, PRIVATE SECTOR DEVELOPMENT (2006) at p. 43. However, there has been some dissenting voices, see for example Priest who argued that on optimal competition law should be applied and there is no need for special competition law in relation to developing countries. Priest. 2013.

⁵¹² “Developing countries pose unique and interesting issues for competitiveness and competition law enforcement. Their low level of economic development, which is often accompanied by institutional design problems and complex government regulation and bureaucracy, creates real-world challenges that have to be recognized before the successful implementation of an antitrust regime. The experience of many emerging competition authorities underlines the importance of identifying the specific challenges developing countries face in adopting and enforcing competition law as part of an overall public policy mix in pursuit of economic development. Gal, *COMPETITION, COMPETITIVENESS AND DEVELOPMENT*, (2004).

⁵¹³ Michal Gal, *The “Cut and Paste” of Article 82 of the EC Treaty in Israel: Conditions for a Successful Transplant*, NEW YORK UNIVERSITY LAW AND ECONOMICS WORKING PAPERS (2008).

⁵¹⁴ *Id.* at p. 234.

⁵¹⁵ Ajit Singh & Rahule Dhumale, *Competition Policy, Development, and Developing Countries*, in *WHAT GLOBAL ECONOMIC CRISIS?* (2001), p.162.

⁵¹⁶ *Id.*

⁵¹⁷ Singh, *GROWTH AND ECONOMIC DEVELOPMENT: ESSAYS IN HONOUR OF AP THIRLWALL*, (2007).

⁵¹⁸ Ma, *JOURNAL OF COMPETITION LAW AND ECONOMICS*, (2011).

level of democracy, education and control of vested interests in a given country are factors that affect the enforcement of competition law. Their existence is essential to have an effective competition law.⁵¹⁹ Along these same lines, Fox and Mateus put forward a compilation of contributions on the matter, advocating a targeted application of competition law of abusive practices which have a significant impact on the most vulnerable: the poor.⁵²⁰ This is of great importance to competition law literature. It could possibly be that competition law needs to adopt its own definition of developing countries and not use the traditional notion, which is a by-product of specific political-economic factors and of the different policy contexts and actions of various IOs. Research and empirical studies maybe shifted to specific goals such as poverty reduction, and to demonstrate what has worked and how. This may also help developing countries in determining when and how competition law becomes relevant to their developmental path, rather than having unrealistic expectations of what competition law can deliver. Further, to meet its development promise, it must be determined whether competition law in developing countries should have other objectives, i.e. solely economic welfare objectives, or whether they should also include other objectives. Fox and Mateus answer in the affirmative. Competition law is a means and not an end. This “customization” of competition law will make it fit the context in which it operates.

The diffusion of competition law in SA represents a case in point. The adoption of the current competition law regime in SA occurred in the 1990s. Post-Apartheid, the political landscape was dominated by the governing party, the ANC, a party based on social democracy. In addition to boosting economic efficiency and competitiveness, the new competition law and policy is also concerned about equality and fighting racial exclusion. Further, subsequent policy documents set priorities for targeted sectors, anti-competitive conduct, and case selection.⁵²¹ Fighting inequality was the undercurrent which guided many of the new government’s policy choices. The new government had a holistic understanding of its objectives, which affected how it interpreted democracy and human rights. As expressed in Mandela’s own words:

We must address the issues of poverty, want, deprivation and inequality in accordance with international standards which

⁵¹⁹ Mateus. 2013. See also Abel Mateus Abel M Mateus, *Competition and Development: Towards an Institutional Foundation for Competition Enforcement*, 33 WORLD COMPETITION (2010), *Competition and Development*, World Competition, 33(2) (2010): 275-300. Mateus argues that before adopting competition law, a country should answer a set of questions pertaining to these elements. Afterwards, he provides a list of prerequisites that should be satisfied before competition law is introduced regarding, among other things, the public administrative system, corruption and market conditions market. Based on the answers to these questions, a country will determine at which stage it falls: lower level, intermediate or high level.

⁵²⁰ FOX & MATEUS. 2011.

⁵²¹ See the Prioritisation Framework of 2008, OECD Poverty Reduction, p. 245.

*recognise the indivisibility of human rights. The right to vote, without food, shelter and health care will create the appearance of equality and justice, while actual inequality is entrenched. We do not want freedom without bread, nor do we want bread without freedom.*⁵²²

In this context, competition law was framed as part of the “democratization” process rather than “market liberalization,” which insured its support by the public and the once pro-socialist ANC members.⁵²³ This greatly influenced the reception of the US and EU model of economics-based competition laws. As part of the “democratization” process, competition law had to include broader objectives to serve other stakeholders and reflect a “holistic” policy approach.

4.5 Competition Convergence: Are We There Yet?

Our discussion of agents and networks of diffusion shows that NCAs, especially those of resources endows jurisdictions, and plays a significant role in the transfer process whether directly through bilateral relations with other countries or indirectly through their participation in the work of IGOs. The OECD, UNCTAD and ICN are the most active agents/networks in the transfer process. There are clear differences between these various bodies in the structure, membership, scope, and resources. The reach of each of these organizations is also different, with the ICN and the UNCTAD possessing greater ability to disseminate policy work.⁵²⁴ Though these organizations are competing on supplying competition law, they are not disconnected from each other.⁵²⁵ Most notably, what most of these bodies have in common is their pursuit of convergence using different approaches. The OECD seeks to spread best practice as conceived by its elite group of members. To accommodate the needs of developing countries, the UNCTAD is seeking to spread best practice by adopting a development friendly approach. The ICN sole aim is to facilitate convergence, with best practice debated at its forums and where representation is attainable

⁵²² Speech by Nelson Mandela at Investiture as Doctor of Laws, Soochow University, Taiwan, 1 August 1993. Available at http://www.mandela.gov.za/mandela_speeches/1993/930801_taiwan.htm. Last visited 1 September 2016.

⁵²³ David Lewis, *Thieves at the dinner table: enforcing the competition Act, a personal account*, (2012), p. 10.

⁵²⁴ Hollman & Kovacic, *MINNESOTA JOURNAL OF INTERNATIONAL LAW*, (2011).

⁵²⁵ The ICN and the OECD has joined complimentary organizations with the OECD focusing on policy issues and ICN focusing on procedural and substantive convergence. The UNCTAD has been an active participant at the OECD Latin American Competition Forum (LACF) since its creation in 2003. See <http://unctad.org/en/pages/MeetingDetails.aspx?meetingid=364>. The OECD in turn contributes to the UNCTAD activities. The UNCTAD IGE 2012 Roundtable on “Competition and Public Procurement”, the OECD would like to draw attention to the attached paper which presents key findings from the extensive discussions on competition and procurement by the OECD Competition Committee, Working Party 3 and the Global Forum on Competition in recent years. Available at http://unctad.org/meetings/en/Contribution/ciclp2012_RT_PP_OECD_en.pdf. Last visited 1 September 2016.

by all participants without the inhibitions that accompany formal gatherings of state representatives.⁵²⁶

Whether all these efforts will lead to convergence is questionable. Convergence is about similarities in structures, processes, and performances.⁵²⁷ In the competition (antitrust) law context, convergence refers to “a process in which the characteristics of individual competition law systems increasingly resemble some set of characteristics which represents the convergence point [...] or model.”⁵²⁸ We have discussed how offering rewards (assistance and loans by the WBG) has achieved, to a great extent, formal convergence. Underneath this very fine (and fragile) consensus lies divergence, in relation to goals, institutions, and the enforcement of the law. Even underneath the common understanding between the US antitrust law and EU competition law, there is divergence in varying degrees.⁵²⁹ Gerber finds that globalization compels deep convergence,⁵³⁰ which is achieved either by agreement or voluntary convergence. Competition law convergence is currently dependent on the latter. The work of competition law networks discussed above is relevant to this quest for voluntary convergence. By socialization and learning about these model laws and best practices, new and different regimes may be inclined to follow the lead of the policy innovators.

However, when it comes to voluntary convergence, the devil is in the detail. Chang explains that there are three different levels of convergence: procedural, substantive, and normative.⁵³¹ By substantive convergence, he means “the standard for the legality of various modes of business conduct” being the main focus of most convergence efforts, and taking the form of administrative⁵³² or judicial⁵³³ substantive convergence. However, it is normative convergence which he finds to be the deepest yet most elusive kind of convergence. He adopts Budzinski’s notion of normative convergence and defines it as “the goal(s) of competition policy, its relation to other political and societal goals, the borderline between fair and unfair (legitimate and illegitimate) means of competitive interaction.”⁵³⁴ This analysis

⁵²⁶ But see Marsden. 2012 (arguing that ICN should focus on pragmatic discussion so not to become another “Talk Shop”).

⁵²⁷ GERBER. 2010, p. 208. Hollman and Kovacic defined it as “a broad acceptance of standards concerning the substantive doctrine and analytical methods of competition law, the procedures for applying substantive commands, and the methods for administering a competition agency. Hollman & Kovacic, MINNESOTA JOURNAL OF INTERNATIONAL LAW, (2011), p. 278.

⁵²⁸ Deputy Assistant Attorney General Antitrust Division U.S. Department of Justice MAKAN DELRAHIM, INTERNATIONAL ANTITRUST AND INTELLECTUAL PROPERTY: CHALLENGES ON THE ROAD TO CONVERGENCE (2004).

⁵²⁹ Commenting on the GE/Honeywell merger, Fox notes the convergence of EU system towards the US system attributing it to an inter- European movement towards a more economic approach which had been in the works for sometime. Eleanor M Fox, *GE/Honeywell: The US Merger that Europe Stopped-A Story of the Politics of Convergence*, in ANTITRUST STORIES (Eleanor M. Fox & Daniel A. Crane eds., 2007), p. 358.

⁵³⁰ GERBER. 2010, p. 339.

⁵³¹ Cheng, CHICAGO JOURNAL OF INTERNATIONAL LAW, (2012), p.438.

⁵³² See GAL Project mentioned in Fox & Trebilcock, (2012).

⁵³³ when domestic courts do refer to the jurisprudence of other jurisdictions when confronted with a novel issue". Cheng, CHICAGO JOURNAL OF INTERNATIONAL LAW, (2012).

⁵³⁴ *Id.* at p.440.

of the different types of convergence sheds light on the complexity of the matter. It also helps in identifying how successful convergence is on these different levels and achieves 'sensible convergence' in areas where there is room for that.

The US/EU dominance, as policy innovators, over the development of and discussions on competition law across the various networks is undeniable. Lianos argues that the US antitrust law, based on neoclassical price theory (NPT-based) is the “model” for convergence, and it continues to dominate convergence, similar to the “neo-functionalist integration model”, and face a similar “legitimacy crisis.”⁵³⁵ The literature argues that the attributes of developing countries should be taken into consideration for a policy to be successful. There are different propositions on how these attributes may affect competition law. African countries, some more than others, showed a tendency to expand competition law objectives beyond the narrow economic welfare model to meet societal and development needs.⁵³⁶ This may not neatly fit with the pre-existing competition models.

Another important issue arising with convergence is trust. Trust is a belief that the other side prefers mutual cooperation to exploiting one's own cooperation, while mistrust is a belief that the other side prefers exploiting one's cooperation to returning it.⁵³⁷ There is no doubt that trust is an issue for some developing countries. This is not surprising given their history with imperial powers and the on-going regional competition between some of them. Trust is also an issue for developed countries. In discussing the reasons behind the reluctance of the US to back the WTO agenda on global competition law, Wigger pointed out that “the underlying reason for disapproval is rooted in a deeply held distrust with regard to the competition culture practised elsewhere.”⁵³⁸ Another example of distrust is the resistance of the US and Western countries to developing a mechanism to exchange information between competition agencies around the world of restrictive practices of firms, as indicated under the Set to develop a mechanism to share information based on the Set.⁵³⁹ The ICN seems aware of this issue. It is reflected in the selection of the chairs heading the various working groups where usually a representative is selected from a developed country and another from a developing country. Scarcity of resources and skills in developing countries will remain an obstacle undermining this approach.

⁵³⁵ Ioannis Lianos, *Global Governance of Antitrust and the need for a BRICS Joint Research Platform in Competition Law and Policy* (forthcoming 2017), p. 7.

⁵³⁶ Angela Wigger, *The Convergence Crusade: The Politics of Global Competition Laws and Practices* § 5 (2008).

⁵³⁷ ANDREW H KYDD, *TRUST AND MISTRUST IN INTERNATIONAL RELATIONS* (Princeton University Press, 2005).

⁵³⁸ Wigger, 2008, p. 2.

⁵³⁹ Ioannis Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, 15 *TULANE JOURNAL OF INTERNATIONAL & COMPARATIVE LAW* (2007), p. 14.

Countries need to devise economic policies that serve their special attributes, i.e. context does matter. However, there is no absolute consensus as to what these policies are (and there should not be, which is the point). Therefore, we should abandon convergence as a sought after goal for a dynamic global dialogue with equal representation of all stakeholders, from both the developed and developing countries, and instead understand how the different models of competition law operate, and how to form synergies and the means for co-operation.

4.6 Conclusion

In this chapter, we addressed the subject of the diffusion of competition law. The diffusion process is concerned with more than just the transplantation of laws, and instead looks at how these laws are impacted by local factors. Looking at the objectives of competition laws (expressly stated or as reflected in substantive provisions) as an indication of the normative core in select jurisdictions in Africa, we found that a plurality of objectives is pursued under these laws.

Examining the different types of objectives adopted, and guided by typologies put forward in earlier studies by the OECD, ICN and Barnes, we categorized competition law objectives as either economic welfare-based, allocative, productive, total or dynamic (adopting a broad definition of consumer welfare to include competitive prices and consumer choice), or non-economic welfare-based (anything that is not the former); the latter includes “grey zone” objectives (industrial policy) and public interest/benefit objectives. These two categories are not mutually exclusive. To the contrary, economic welfare-based objectives are always present where non-efficiency-based objectives may be considered (on an equal footing thereto or supplemental objectives subordinated to economic welfare ones).⁵⁴⁰ Non-economic welfare objectives are mostly found in the substantive provisions, especially merger control. Also, authorisation and exemptions systems based on PICs or provisions providing political overrides are common. There is an almost absolute consensus on economic welfare as the main objective of the competition law, although there may still be some room for debate as to what exactly this notion means. Other than that, we found a fusion of adopted objectives. The most common “grey zone” objectives are export promotion (international competitiveness) and the protection or promotion of SMEs. The inclusion of societal and developmental objectives in competition law is prominent. The main social goals incorporated into the law are the

⁵⁴⁰ Balancing and lexical order will be discussed in details in chapter 6.

protection of employment and fighting inequality. Economic development is also a stated objective in a number of jurisdictions without further demarcation of what it means. In some instances, this was linked to government development plans, which, arguably, should give it more definition. Other objectives include consumer protection, price liberalization, regional integration, and protecting the environment.

When we think of competition law for developing countries we need to find the right approach to stay loyal to the economics behind it, while taking into consideration the views on the multidimensional aspects of the development process and the specific challenges that each country faces. A dynamic approach to development is being sought with emphasis on poverty reduction and equality. Integrating other development aspects into competition may make people question whether competition law has outstepped its boundaries. This is not an easy balance to achieve, as adhering to the economics teachings of neoclassical price theory would not accommodate such expansion.

Our analysis of the variety of objectives that characterizes the policy innovators and the followers showed that, when diffused, competition law may take very different trajectories that depend on a variety of factors, including the relation of experts and politics, the capability of institutions, legal culture, and socio-economic system. To what extent competition norms are diffused to, and later by, other countries such as SA, how their diverse objectives are different from that of the US/EU, and how this affects the shaping of competition law around the world, is a matter that will impact policy convergence (divergence).

Convergence is a sought after goal for a variety of reasons, most importantly the detrimental impact that divergence may have on the global economy. Through, and by, the different agents and networks, there has been a great deal of progress on many fronts. However, identifying a convergence point or a model where all countries (or at least major economies) will converge does not seem achievable, especially now that the majority of competition law adopters are developing countries with variable internal and external factors impacting their socio-political realities. Rather, focusing on understanding these models and the unique features of each of them and possible co-operation platforms would seem more advantageous than convergence.

PART II

CHAPTER 5 DIFFUSION PATTERNS OF COMPETITION LAW IN AFRICA

5.1 Introduction

African countries are classified as developing economies, where thirty-four countries out of forty-eight are considered LDCs.⁵⁴¹ These countries deal, in varying degrees, with issues that hinder development, political instability, poor institutional capacities, weak rule of law, corruption, high unemployment rates, chronic poverty, inequality, poor or non-existent infrastructure, and health hazards. On the other hand, Africa has been one of the fastest growing regions in the world.⁵⁴² This is of course a bird's eye view of the continent; Africa is not at all one homogenous block. Growth rates vary considerably from country to country and different sub-set of elements affect each country. Striving to find their way to prosperity, many adopted open market economy models in the late 1980s or improved existing ones. Similar to other countries of the world, many African countries adopted competition law in the process. The introduction was both on the national and regional levels.

Except for particular studies on individual countries or regional organizations in Africa, to date, we have not seen an in depth analysis of their state of play.⁵⁴³ One reason is that the fuel of such analysis is still under development, i.e. some of these countries are still at an early stage of formulating or introducing competition law and for those that have an existing competition regime there may not yet be enough enforcement. In case of enforcement, researchers are faced with difficulties in collecting and verifying data.

In the second part of the chapter, we will discuss diffusion patterns of competition law in Africa on the national level. In the third part, we will look at the diffusion of regional competition law in Africa. The chapter will end with concluding remarks.

5.2 Diffusion Patterns of Competition Law in Africa

The diffusion of competition law across Africa is still a work in progress. To date, less than half of the continent has adopted competition law (see **ANNEX II Competition**

⁵⁴¹ World Economic Situation and Prospects 2015, Statistical Annex of Country Classifications 2015, Date, 2015) .

⁵⁴² See WBG. Africa's pulse (2016).

⁵⁴³ Alemayehu Geda & Haile Kebret, *Regional economic integration in Africa: A review of problems and prospects with a case study of COMESA*, 17 JOURNAL OF AFRICAN ECONOMIES (2008), ROBERTS. 2010, Daniel P Weick, *Competition Law and Policy in Senegal: A Cautionary Tale for Regional Integration?*, 33 WORLD COMPETITION (2010) and Mor Bakhom, *Institutional coherence and effectiveness of a regional competition policy - the case of the West African Economic and Monetary Union (WAEMU)*, in COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES (Josef Drexler, et al. eds., 2012).

Laws in Africa).⁵⁴⁴ The first country to adopt a fragmented competition law was SA in 1955, addressing mainly resale price maintenance, which was later replaced in 1979 with a more comprehensive version.⁵⁴⁵ Next came Senegal in 1965, but the country was following a planned economy model and so what was adopted was not competition law as we know it today.⁵⁴⁶ This specific competition law regime included business practices and price regulation law pursuant to which a cartel commission was to be established, to examine whether or not business agreements that may restrict competition in the market can be authorized. This remained law on the books until the country adopted a market economy in 1994. The Ivory Coast issued a competition law in 1978.⁵⁴⁷ This was in line with the adoption by the Ivory Coast of an open market economy in the 1960s, after its independence from Great Britain. Under the law, unfair competition, monopolies, cartels and other arrangements, which restrict or reduce competition, were prohibited.⁵⁴⁸ It too passed a more recent competition law in 1991, following the entry into a SAP with the WBG. A decade later in 1988, Kenya adopted a competition act. In the north of the continent, competition law was first adopted by Tunisia in 1991. Almost all of these laws were either replaced or updated a decade (or two) later. Most of the other countries adopted competition law in the period between 1990 and 2010. Competition law is almost non-existent in central Africa at the national level.⁵⁴⁹ More importantly, however, one needs to explore the typology of competition law adopted in each of these jurisdictions.

Drawing on our discussions in Chapter One, policy diffusion could be a result of involuntary or voluntary transfer.⁵⁵⁰ In the former, externalities (coercion, conditionality, contractualization or competition) are the most likely mechanism of diffusion, while in the latter learning, emulation and socialisation may be more relevant. There is, however, no absolute division between the different mechanisms as they may overlap depending on a given situation. In the case of voluntary diffusion, many factors may impact a country's policy choices. The two competing

⁵⁴⁴ As of 2015, twenty-eight African countries adopted competition laws, four of which are in North African and twenty-four countries in Sub-Saharan Africa.

⁵⁴⁵ OECD. Competition Law and Policy in South Africa An OECD Peer Review, 2003. (2003).

⁵⁴⁶ Weick, WORLD COMPETITION, (2010).

⁵⁴⁷ Law no. 78-633 concerning Competition and Pricing of 1978. UNCTAD, Voluntary Peer Review of Competition Policy: West Africa Economic and Monetary Union, Benin and Senegal 2007.

⁵⁴⁸ PRADEEP S MEHTA, COMPETITION REGIMES IN THE WORLD: A CIVIL SOCIETY REPORT (Competition Regimes in World. 2006), p. 273 – 275.

⁵⁴⁹ On the regional level, almost all of Africa has competition law. This only leaves South Sudan and Zaire. We will discuss this in more details in the next part of the chapter.

⁵⁵⁰ Policy transfer is either voluntary or coercive. Dolowitz & Marsh, POLITICAL STUDIES, (1996). Advocates of the voluntary adoption acknowledge that even if external policy influenced adoption, it will not guarantee the outcome. External pressure matters but far from decisive. See Joan M Nelson, *Promoting policy reforms: the twilight of conditionality?*, 24 WORLD DEVELOPMENT (1996).

views that arise here are legitimacy and self-interest. Influenced by new international norms that redefine proper state action, constructivists argue that normative appeal and the quest for international legitimacy prompt the emulation of foreign innovations.⁵⁵¹ Alternatively, from a rationalist view, policy makers undertake a cost-benefit analysis and adopt policies that allow them to achieve their interests. It is a utilitarian approach to policy selection: the rational actor framework.⁵⁵² However, with limited data and lack of ability to rationally analyse the best policy option (Bayesian), policy makers usually draw inferences from the apparent success of a given policy elsewhere. This legitimacy vs. utility driven policy distinction is not an absolute one and both categories may overlap.⁵⁵³

Also, in democratic countries, research shows that foreign templates and international organization recommendations can shift voters' policy positions and produce electoral incentives for politicians to mimic certain foreign models.⁵⁵⁴ If we look at the democracy index for Africa, we find that the index average by world region shows Sub-Saharan Africa as having mostly hybrid regimes, while MENA has authoritarian ones. Individually, we find only Mauritius to be considered as a full democracy while countries like SA, Namibia, Tunisia, Zambia, and Senegal are still in the lead but considered as flawed democracies.⁵⁵⁵ Countries like Tanzania, Malawi, Kenya, Morocco, Nigeria and Mozambique are considered to have a hybrid system while on the extreme end we find the majority of African countries are considered as authoritarian systems.⁵⁵⁶ All these different factors variably affect the diffusion process in each country. Diffusion by democracy may not be very relevant for Africa and will not be considered any further; however, it is still important to note this, in particular with regard to the on-going and expected improvements of the political systems in Africa.⁵⁵⁷

⁵⁵¹ KURT WEYLAND, *BOUNDED RATIONALITY AND POLICY DIFFUSION: SOCIAL SECTOR REFORM IN LATIN AMERICA* (Princeton University Press, 2009) and Kurt Weyland, *Theories of Policy Diffusion: An Assessment.* "Presented at American Political Science Association, Philadelphia, PA, (2003).

⁵⁵² WEYLAND, *Bounded rationality and policy diffusion: social sector reform in Latin America.* 2009.

⁵⁵³ Braun & Gilardi, *JOURNAL OF THEORETICAL POLITICS*, (2006).

⁵⁵⁴ Katerina Linos, *Diffusion through democracy*, 55 *AMERICAN JOURNAL OF POLITICAL SCIENCE* (2011), p.1. "Theories of democracy centre on the proposition that voters' opinions heavily constrain politicians' positions. Moreover, this proposition finds substantial empirical support in both the United States and the comparative literature." [reference omitted]

⁵⁵⁵ The Economist Intelligence Unit. *Democracy Index 2015: Democracy in an age of anxiety.* (2015).

⁵⁵⁶ South Africa, Namibia, Tunisia Lesotho, Zambia, Senegal and Papua New Genie are considered flawed democracies, Benin, Mali, Tanzania, Malawi, Kenya, Uganda, Liberia, Burkina Faso, Morocco, Nigeria, Mozambique and Sierra Leona have a hybrid system while on the extreme end we find Algeria, Ethiopia, Gabon, Comoros, Cameroon, Togo, Angola, Ivory Coast, Egypt, Guinea, Swaziland, Rwanda, Zimbabwe, DRC, Djibouti, Burundi, Eritrea, Libya, Republic of Congo, Guinea Bissau, Equatorial Guinea, CAR and Chad. *Id.* at p.2.

⁵⁵⁷ "Sub-Saharan Africa recorded an improvement in their average score." *Id.* at p. 2.

In case of involuntary diffusion, to show coercion one must identify the coercive actors and a causal link between their actions and the outcome. In this regard, the concepts of hard and soft power are relevant.⁵⁵⁸ Soft power is understood to mean the ability to get what you want by persuading and attracting others to adopt your goals, where hard power is the ability to use the carrot and stick of economic and military might to make others follow your will, such as economic sanctions.⁵⁵⁹ SAPs of the IMF and WBG have also been considered a form of hard power. While the EU approach in international relations varies, it is usually thought to be soft power.⁵⁶⁰ In a globalized world, the pressure of competition over FDI between countries, especially neighbouring ones, is visible. This may result in a race to the top by enacting similar favourable regulations or race to the bottom by abandoning or relaxing burdensome regulations. Where such factors do dominate the diffusion process, we must consider learning, emulation and socialization as a catalyst of diffusion as well. (See **ANNEX III** International and Regional Relations - Competition Law in Africa)

5.2.1 Competition law and conditionality in Africa

The first hypothesis we will address is that conditionality was the main diffusion mechanism of competition law in African countries. We will be testing for conditionality as a diffusion mechanism. With the exception of a few countries, competition law was pursued as a necessary reform under SAPs.⁵⁶¹ It was, however, one of the “finishing touches” on the newly introduced legal and regulatory market framework.⁵⁶² To that end, competition law was mainly contemplated as a tool to regulate market concentration and anti-competitive practices post-market privatization and liberalization. The rationale for adopting competition law has shifted, following international trends, to focus on development in the broader sense and not just economic aspects.⁵⁶³ The narrow focus in the 1980s on achieving short-term stabilization and addressing distortions gave way in the 1990s to a more developmental perspective, with

⁵⁵⁸ JOSEPH S NYE, *THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE* (Oxford University Press, USA, 2003).

⁵⁵⁹ *Id.*

⁵⁶⁰ Anna Michalski, *The EU as a soft power: the force of persuasion*, in *THE NEW PUBLIC DIPLOMACY* (2005).

⁵⁶¹ For the sake of our discussion, SAPs include any form of lending extended by the IMF and / or the WBG that includes structural adjustment component. These may take many forms such as stand-by, extended arrangements, Structural Adjustment Facilities, and Enhanced Structural Adjustment Facilities (recently renamed Poverty Reduction and Growth Facilities). See William Easterly William Easterly, *IMF and World Bank structural adjustment programs and poverty*, in *MANAGING CURRENCY CRISES IN EMERGING MARKETS* (2003).

⁵⁶² WBG. Report and Recommendation of the President of the IBRD to the Executive Directors on Proposed SAL to the Democratic and Popular Republic of Algeria (1996). See also our discussion of the second-generation reforms in chapter four p. 58.

⁵⁶³ WBG. Adjustment Lending Retrospective Final Report. (2001), p. 56. “Adjustment lending and associated TA loans have supported a wide range of PSD [Private Sector Development] activities during the last two decades, with the emphasis shifting from the mere adoption of policies and the passage of laws to their implementation and to institutional development, capacity building, and improvements in procedures and systems. One measure of this transformation is the increase in conditions supporting reforms in regulatory framework and competition policies, which rose from 7 per cent of total PSD conditionality in FY80-88, 14, 8 to 32 per cent in FY98-00.

growing attention to reducing poverty, building institutions, and implementing complex social and structural reforms.⁵⁶⁴ A study by the WBG of Private Sector Development (PSD) activities shows an increase in conditions supporting reforms in regulatory framework and competition policies of 7% of total PSD conditionality in the FY80-88, which rose to 32% in the FY98-00.⁵⁶⁵

It is important to note that requirements regarding competition are neither constant nor consistent in all PSD conditionality.⁵⁶⁶ Requirements especially those relating to competition law varied under the different SAPs. In some instances, a direct relation can be seen between the adoption of the law and access to finance. Under some of these loans, adoption of competition law was a requirement, among others, for loan dispersal (Tunisia and Algeria⁵⁶⁷). A draft law on competition was among the “Conditions of Effectiveness” under the Competitiveness and Regulatory Reform Adjustment Programme concluded with the Ivory Coast.⁵⁶⁸ In Malawi, following the application of SAPs, competition and consumer protection were found to be necessary to combat monopolistic, oligopolistic and concentrated markets to realize economic efficiency and consumer welfare gains.⁵⁶⁹

One of the areas that have gained attention in the practice of the IMF and the WBG is to emphasize greater country ownership of the agreed adjustment plans. Government plans that included the enactment of a competition law are aligned with the goals of a structural loan. For example, in Zimbabwe a competition law was adopted in 1996 in compliance with the

⁵⁶⁴ *Id.* at p. 25.

⁵⁶⁵ WBG Report, Private Sector Development Strategy- Directions For The World Bank Group, 2001.

⁵⁶⁶ “In 1990, the Bank established a small unit concerned with competition policy in DCs [developing countries], and in 1991 the first competition related conditionality appeared in a Bank industrial sector adjustment loan to Argentina.” *Id.* p. 36.

⁵⁶⁷ The Tunisian government letter to the Head of the World Bank under the SAL of 1986 sets an example. In said letter, the Tunisian government expressed its apprehensions regarding price liberalization since it may lead to collusive behaviour among suppliers and the need to be able to deal with anti-competitive practices of international firms. A draft law agreed with the Bank and presented for Parliament's approval before the second tranche release. Tunisia adopted its first competition law in July 1991. In the case of Algeria, the law was adopted before the SAL came into force. However, among the measures to be taken before presentation of the SAL to the Board was drafting of the implementing regulations, in consultation with the Bank. It is worth noting that Morocco entered into a number of comprehensive economic reform programs supported by several IMF standby loans and by nine adjustment loans from the World Bank between 1980s and 1990s. See WBG. Report and Recommendation of the President of the IBRD to the Executive Directors on Proposed SAL to the Democratic and Popular Republic of Tunisia. (1988) and WBG, Report and Recommendation of the President of the IBRD to the Executive Directors on Proposed SAL to the Democratic and Popular Republic of Algeria 1996.

⁵⁶⁸ See the Implementation Completion Report, Republic Of Cote D' Ivoire, Competitiveness And Regulatory Reform Adjustment Program, (Loan 3429-Ivc, Credit 2324-Ivc, Credit 2324-1-Ivc), Trade, Finance and Investment Division West Central Africa Department Africa Regional Office, June 27, 1995. Available at <http://documents.worldbank.org/curated/en/612741468027658604/pdf/multi0page.pdf>. Last visited 1 September 2016.

⁵⁶⁹ Project Completion Report Structural Adjustment Loan, Republic Of Malawi, January 2006. Available at <https://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADF-BD-IF-2006-167-EN-REV.1-MALAWI-REV-PCR-SAL-1999-2001.PDF>. See also, USAID, Analysis of Policy Reform and Structural Adjustment Programs in Malawi: With Emphasis on Agriculture and Trade, Productive Sector Growth and Environment Division Office of Sustainable Development Bureau for Africa, 1996. Available at http://pdf.usaid.gov/pdf_docs/pnabz695.pdf. Last visited 1 September 2016. In Cameroon, pursuant to the SAP II programme a competition law was adopted in 1998. Reform of Trade Sector Programme under the PAML concluded with Senegal also covered the adoption of competition law. Operations Evaluation Department (OPEV) at AfDB. Cameroon Structural Adjustment Programme II (SAP II): Project Performance Evaluation Report (PPER) (2002) and WORLD BANK POLICY RESEARCH REPORT, ADJUSTMENT IN AFRICA: REFORMS, RESULTS, AND THE ROAD AHEAD (Oxford University Press. 1994).

government's Framework for Economic Reform (FER) 1991-95, which represented the policy-orientation for the government's Economic and Structural Adjustment Programme (ESAP).⁵⁷⁰ In order to review the 1984-88 Development Plan and to provide a basis for increased donor support, Kenya adopted Sessional Paper No. 1 of 1986 on economic management for renewed growth, which articulated the need for a market-driven economy. Pursuant to the proposals of the WPGE, the Restrictive Trade Practices, Monopolies and Price Control Act of 1988 was adopted.⁵⁷¹ The Public Sector Reforms under the Economic Recovery Strategy for Wealth and Employment Creation 2003-2007 prepared by the government of Kenya included provisions to amend and update the Monopolies and Price Control Act.⁵⁷² Some years later a new law was adopted: the Competition Act No 12 of 2010.⁵⁷³

Assistance extended beyond the adoption phase. With the help of the WBG, Zambia sought to put in place a competition enforcement mechanism that would ensure gains of privatization and protect new investments coming into the country from the anti-competitive conduct of private monopoly and dominant players in the newly liberalized economy. A law was adopted in 1994 and a competition commission established in 1997.⁵⁷⁴ The WBG continued to support competition policy development in Zambia under subsequent loan and credit programmes. In Tanzania, both the Fair Trade Commission (FCC) and the Fair Trade Tribunal (FCT) were recipients of substantial support from the Privatization and Private Sector Development Project (PPSDP) of 1999 with the WBG.⁵⁷⁵ Under the fourth Development Policy Loan (DPL) programmatic series, Mauritius's competition policy was to be strengthened and appropriate institutions set up to detect, address and sanction anti-competitive behaviours in the product market. The second Development Policy Loan (DPL 2) was granted to the

⁵⁷⁰ Operations Evaluation Department (OPEV) at AfBD. Zimbabwe Structural Adjustment Programme II (SAP II): Project Performance Evaluation Report (PPER) (2002).

⁵⁷¹ The purpose of the RTPA was to regulate market conduct through prohibiting restrictive trade practices, regulation of horizontal mergers and acquisitions as well as unwarranted concentration of economic power. The slow and inconsistent performance of Kenya resulted in the suspension of funding in a number of occasions. But when a new government came in power in 2003 cooperation resumed with WB & IMF. World Bank. Kenya - Country assistance evaluation. No. 21409(2000).

⁵⁷² Government of Kenya, Economic Recovery Strategy for Wealth and Employment Creation 2003 - 2007 (Ministry of Planning and National Development ed., 2003).

⁵⁷³ Same applies to Ethiopia Gambia and Gabon. Under Ethiopia's Structural Adjustment Credit Project (ESAC), the government Action Plan for 2001/02 emphasizes the need to reduce opportunities for rent seeking, and to eliminate anti-competitive practices. A competition law was subsequently adopted in 2003. The Gambia, since 1998 entered into various facilities, Enhanced Structural Adjustment Facility and various Poverty Reduction Growth Facility (PRGF) programmes in 2002 as well as benefited from substantial debt relief 2008. WTO, Trade Policy Review Report by The Gambia, 2010, p. 7. As for Gabon, economic reform started in 1986 under the first SAP. "The Gabonese authorities completed these reforms by adopting a competition policy." WTO, Gabon's economic reform stands to gain from greater participation in the multilateral trading system (2001).

⁵⁷⁴ Privatization And Industrial Reform Technical Assistance Credit, JUNE 3, 1992 "The Credit would provide funds for the following:(a)...to define the objective and scope of a possible competition law...Specifically...(i) identify existing monopolies and recommend actions for their removal; and (ii) if considered appropriate, recommend the establishment of a monopolies commission; and (iii) identify the staffing and equipment needs of such a commission. President of IDS. Report on Privatization And Industrial Reform Technical Assistance Credit to the Republic of Zambia. (1992).

⁵⁷⁵ WBG. Privatization and Private Sector Development Project (PPSDP) to the United Republic of Tanzania. (1999).

Republic of Seychelles to improve public sector effectiveness and the business environment. Towards this end, the reforms included the establishment of a Fair Trading Commission to promote competition in the marketplace.⁵⁷⁶

In the above context, competition law is an indispensable component of the regulatory toolkit in a market economy. It is part of a bigger scheme to achieve trade liberalization, freedom of prices, and privatization. One of its tasks is to curb counter-productive government interference in the market such as through price controls and “no-objection” certificates regarding imports. Also, government-backed enterprises posed particular challenges to economic reform. For example, in Kenya, Zambia, and Zimbabwe, the various SAPs/SACs programmes concluded with each country attempted to tackle these structures.⁵⁷⁷ Under the SAP II concluded with Cameroon, an action plan to be taken within the context of a public enterprise rehabilitation programme included the encouragement of competition and reduction of monopolies that hamper the efficient allocation of resources.⁵⁷⁸

The Egyptian narrative is slightly different. By the end of the 1980s, Egypt’s economic situation had become critical. As many developing countries, Egypt adopted a structural adjustment programme (ERSAP) backed by a loan from the WB and a stand-by commitment from the IMF.⁵⁷⁹ The main policy measures for achieving the country’s development objectives were macroeconomic reforms, public enterprise reforms, domestic price liberalisation, foreign trade liberalisation, private sector reform, and social development programmes.⁵⁸⁰ Egypt’s ERSAP programme focused on creating laws and mechanisms to implement the privatization programme, which became the litmus test for the success of the ESRAP.⁵⁸¹ However, competition law did not feature as a programme milestone rather, it was recognized as an important aspect of the public enterprise reform and the privatisation programme. The idea was to increase economic efficiency through competition by restructuring public enterprises, as well as reforming relations between public enterprises and the government. Competition law, however, lagged behind.⁵⁸² It could be argued that this is

⁵⁷⁶ Report on Second Development Policy Loan to the Republic of Seychelles. 2011. (Similar provisions are found under Second Economic Reform Support Grant (ERSG II) to Burundi and PARPA II with Mozambique.

⁵⁷⁷ Kenya letter of intent “The Government’s Letter of Intent covers in detail the various measures to be taken to: (a) revise the Government’s investment program to make it more realistic; (b) ensure the country’s creditworthiness and improve the management of external debt; (c) reorient the industrial development strategy through a rationalization of protection; and (d) promote exports. In Kenya, parastatals continued to ‘drain the budget and, indirectly, the banking system.’ Report No. 21409: Kenya: Country Assistance Evaluation, World Bank, November 20, 2000.

⁵⁷⁸ AfBD, Cameroon Structural Adjustment Programme II (SAP II): Project Performance Evaluation Report (PPER) 2002.

⁵⁷⁹ Egypt began implementing an Economic Reform and Structural Adjustment Program in 1991 with the help of the IMF and the WBG. Project Completion Report, Arab Republic Of Egypt Structural Adjustment Loan 1991-1994, 1999-2001.

⁵⁸⁰ KHALID IKRAM, THE EGYPTIAN ECONOMY, 1952-2000: PERFORMANCE POLICIES AND ISSUES (Routledge. 2007).

⁵⁸¹ *Id.*

⁵⁸² Ikram noted the absence of competition component in the privatization programme [structural reform program] for Egypt. IKRAM. 2007, p. 84.

not odd given the need to first create (or enlarge) the private sector. Also, as we indicated competition law was not always a component in such programmes. The ERSAP programme ended before its completion as the Egyptian government requested the cancellation of the second tranche “as a result of a favourable change of fortunes of the economy.”⁵⁸³ With this stop-and-go approach to development, where structural loans are agreed and government plans are adopted, adoption lags are not unique. Nonetheless, the possibility of including competition law under the WTO created pressure to introduce competition law, although it withered with time.

A few countries that adopted competition law did not enter into such agreements with the WBG. Here a question arises, other than the SAPs, which centres on whether there were any other external forces that had a similar effect and which may have impacted the diffusion of competition law in other African countries.

5.2.2 Soft power: economic realities and influence trading partners have on policy choices

5.2.2.1 EU International Relations in Africa and Competition Diffusion

The EU adopts different approaches to foreign relations with the outside world. Four approaches have been identified: enlargement in Europe, stabilization in the neighbourhood area, bilateralism with great powers, and inter-regionalism with peers.⁵⁸⁴ Its methods also vary depending on the adopted approach. However, they are all voluntary and dependent on dialogue and consensus building.⁵⁸⁵

We will discuss each one of these approaches as they relate to Africa and competition law (except for the enlargement approach since it is not relevant here).

a. The European Neighbourhood Policy: Harmonization of competition laws

The new European Neighbourhood Policy (ENP) offers a privileged relationship with the EU’s neighbours, distinct from enlargement. The Barcelona process is a strategy of cooperation between the EU and its Mediterranean neighbours (Euro-Med), where peace is the first priority, in accordance with the basic concern for stability.

The EU concluded a number of Association Agreements with third countries to create an “all-embracing framework” that will govern their bilateral relations. These agreements generally

⁵⁸³ BAHAA ALI EL-DEAN, PRIVATISATION AND THE CREATION OF A MARKET-BASED LEGAL SYSTEM: THE CASE OF EGYPT § 82 (Brill. 2002).

⁵⁸⁴ Björn Hettne & Fredrik Söderbaum, *Civilian power or soft imperialism? EU as a global actor and the role of interregionalism*, 10 EUROPEAN FOREIGN AFFAIRS REVIEW (2005).

⁵⁸⁵ *Id.*

provide for progressive liberalisation of trade but vary in scope and objective. Stabilization policy, an “asymmetric partnership based on conditionalities”, is based on incentives in the form of development assistance or association agreements.⁵⁸⁶ Some would aim at establishing a Free Trade Area or a preparatory step to join the EU. In any case, a degree of harmonization is expected under these agreements. Among the issues covered under these agreements is competition.

These agreements mainly affected the North Africa region. All the Maghreb countries and Egypt signed an association agreement with the EU that addresses competition law. These agreements either led to the adoption of their competition laws or guided the content and design of the same in these countries. Tunisia was the first to sign an Association Agreement with the EU in 1995, which came into force in 1998.⁵⁸⁷ As part of the Action plan between the EU and Tunisia of 2004 and within the framework of the structural adjustment of the Association Agreement, the Tunisian competition law was further amended in 2005 to align it to the EU competition rules. When Algeria entered into a new co-operation agreement with the EU, the Association Agreement, the Algerian government issued a declaration stating that in applying its own competition law, Algeria would bear in mind the competition policy guidelines developed within the EU. Also in 1996, Morocco signed an Association Agreement with the EU. The agreement came into force in 2000. Pursuant to its international commitments, Morocco adopted in 1999 law no. 06-99 on prices and competition freedom.⁵⁸⁸

Going back to Egypt, in addressing the question what were the international and national factors that have affected the adoption of the competition law and policy in Egypt, Shahein finds that the EU plays a key role in persuading Egypt to adopt a competition law.⁵⁸⁹ This external pressure was expected. Bahaa El Dean anticipated that if Egypt entered into an EU association agreement similar to that of Tunisia or Algeria, this would put pressure on it to adopt competition law.⁵⁹⁰ The Egypt-EU Association Agreement was signed in 2001 and entered into force in 2004. Under Article 35 (A) of the agreement, Articles 81 and 82 of the EU Treaty (now Articles 101 and 102 TFEU), namely competition law-related provisions,

⁵⁸⁶ *Id.*

⁵⁸⁷ Under Article 36 of the Association Agreement, two types of anticompetitive practices are prohibited i.e. anticompetitive agreements between undertakings and the abuse of a dominant position. This was in line with the existing Tunisia competition law of 1991. The Agreement also cover state aid provisions and stipulates the application of the EU competition rules of Articles 85, 86 and 92 of the Treaty to said contravening acts. Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Tunisia, of the other part – Official Journal L 097, 30/03/1998 P. 0002 – 0183.

⁵⁸⁸ See EURO-Mediterranean Agreement establishing an association between the European Communities and their Member States and the Kingdom of Morocco, L 70/2 / 2000.

⁵⁸⁹ Heba Shahein, *The Influence of the EU Competition Law on the Design and Implementation of the Egyptian Competition Law* MEDITERRANEAN COMPETITION BULLETIN (2012).

⁵⁹⁰ EL-DEAN. 2002, p.165.

were adopted. These addressed anticompetitive agreements, abuse of dominance and state aid.⁵⁹¹ Under the memorandum submitted to the Peoples' Assembly in 2005, a number of internal and external factors have been cited as reasons behind adopting competition law. The internal reasons included the growing role of the private sector in the economy and the need to combat anticompetitive practices in the market and international cartels, monitoring M&A transactions affecting market structures, and excessive pricing. The possibility of including competition matters on the WTO agenda and entry into various free trade agreements requiring the adoption of competition law affected the adoption decision as well. Reference in that regard was later made to Egypt's obligation to adopt the law as per its international commitment with the EU, COMESA, and the Pan Arab investment treaty (GAFTA).⁵⁹² Technically though, conditionality in the Egyptian context mainly stems from the EU association agreement.⁵⁹³

It could be argued here that conditionality may have affected the adoption decision. However, the EU's soft power may have influenced the content of the law and policy adopted.

b. Bilateral trade agreements

Not all agreements with the EU had the same impact on the diffusion process in other African countries. Outside the Association framework, the EU entered into a bilateral trade agreement with SA.⁵⁹⁴ The agreement regulates competition issues that may arise between its members. Horizontal or vertical agreements which have the effect of substantially preventing or lessening competition in the territory of either party are prohibited unless the parties can show that anticompetitive effects are outweighed by pro-competitive ones. State aid favouring certain firms or the production of certain goods, which distorts or threatens to distort competition, is incompatible with the proper functioning of the agreement, provided it does not support a specific public policy objective of either party. Other provisions of the agreement cover comity, co-operation and technical assistance between the parties. The agreement does put an obligation on SA to adopt a competition law within three years from its entry into force. This obligation is, however, irrelevant since SA had its law in place in

⁵⁹¹ Article 34(2) of the Euro Mediterranean Partnership Agreement (EMP) between Egypt and the European Union.

⁵⁹² Parliament Session No. 21, 2/1/2005, (available on file with author, in Arabic). The inclusion of competition policy under the WTO was removed from the agenda early on in 1995. As for the GAFTA, it only calls for a harmonized competition policy amongst its members who mostly at the time did not have a competition law in place.

⁵⁹³ To a lesser extent, the COMESA. See Article 55 of the COMESA Treaty where Egypt agreed with the other member states on prohibiting practices, which have as its objective or effect the prevention, restriction or distortion of competition within the Common Market. It has also been agreed that a set of competition regulations shall be adopted to effect said provision. These regulations were adopted in December 2004 however, without a functioning institutional structure until 2013. Available at http://www.comesacompetition.org/wp-content/uploads/2016/03/COMESA_Treaty.pdf. Last visited 1 September 2016.

⁵⁹⁴ The Agreement on Trade, Development and Cooperation between the European Community and its Member States and the Republic of South Africa (EU – SA Agreement). Available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf. Last visited 1 September 2016.

1998.⁵⁹⁵ In general, these provisions are in line with the South African Competition law, and hence, unlike its Northern neighbours, it did not trigger a change in national statutes.

c. Interregional relations

The Cotonou Agreement of 2000 governs interregional relations between the EU, and Africa, the Caribbean and Pacific State (APC). The Agreement encourages regionalisation (following the EU model), where countries are encouraged to form regional groups to enter into Economic Partnership Agreements with the EU. Following the EU integration model, the Agreement incorporates competition provisions. Article 45 stipulates that Parties should implement national or regional rules and policies that prohibit agreements and concerted practices between undertakings, which have as their object or effect the prevention, restriction or distortion of competition, and the abuse of a dominant position in the common market established between the parties or in the territory of ACP states. The EU concluded a number of interim EPAs with Cameroon,⁵⁹⁶ and Eastern and Southern states⁵⁹⁷ and agreements with regional groups the EAC,⁵⁹⁸ SADC⁵⁹⁹ and West African communities.⁶⁰⁰ In general, the agreements stipulated that the parties would negotiate on competition policy issues at the national level and/or on a regional basis. The agreement with SADC also included provisions relating to co-operation on competition enforcement.

This aid for trade is the underlining framework for cooperation between the EU and these regional groups.⁶⁰¹ It emphasises the mutual benefit of both parties. There has been a debate whether this approach is an idealist project to spread EU norms or rather a realist project to

⁵⁹⁵ Article 36 of the EU – SA Agreement. Available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf Last visited 1 September 2016.

⁵⁹⁶ Article 57 (Continuation of Negotiations on Competition), Interim Economic Partnership Agreement between the EU and Cameroon, 2007. Available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/central-africa/>. Last visited 1 September 2016.

⁵⁹⁷ These are Madagascar, Mauritius, Seychelles, Zambia and Zimbabwe. Article 53 (Rendezvous clause), Interim Economic Partnership Agreement between the EU and Eastern and Southern States. Available at <http://ec.europa.eu/trade/policy/countries-and-regions/regions/esa/>. Last visited 1 September 2016.

⁵⁹⁸ Article 3 (Rendezvous Clause), Available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153845.compressed.pdf. Last visited 1 September 2016.

⁵⁹⁹ Economic Partnership Agreement concluded between the EU and SADC. Available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153915.pdf. Last visited 1 September 2016.

⁶⁰⁰ Economic Partnership Agreement concluded between the EU and ECOWAS and WAEMU Article 106 Rendezvous clause. Available at http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153867.pdf Last visited 1 September 2016.

⁶⁰¹ 'The idea is to help the ACP countries integrate with their regional neighbours as a step towards global integration, and to help them build institutional capacities and apply principles of good governance. At the same time, the EU will continue to open its markets to products from the ACP group, and other developing countries. 'European Commission (2004), A World Player: The European Union's External Relations, DG for Press and Communication.' MAURIZIO CARBONE, THE EUROPEAN UNION IN AFRICA: INCOHERENT POLICIES, ASYMMETRICAL PARTNERSHIP, DECLINING RELEVANCE? (Oxford University Press. 2013).

peruse strategic interest.⁶⁰² Cox argues that this approach is a hybrid of consent and coercion.⁶⁰³

5.2.2.2 What about other trading partners?

Similar to the EU, the US relations with Africa are either based on bilateral relations or inter-regional relations. The US concluded Trade and Investment Framework Agreements (TIFAs) with various African countries including SA, Angola, and regional organizations like the COMESA, EAC, WAEMU Investment, and Development Agreement (TIDCA) with the South African Customs Union. Also, it is mainly based on voluntary interaction, dialogue, and consensus setting of the frameworks and principles for dialogue on trade and investment issues between the parties. These agreements provide a framework for further developing the parties' trade and investment and the possibility of concluding further agreements, particularly in the areas of commerce, taxation, intellectual property, labour, and investment. In relation to competition, the US championed a diffusion pattern based on learning (socialization and emulation. This is indicated in its position not to back a global competition law under the WTO but rather take part in establishing the ICN as a means for convergence.⁶⁰⁴

One cannot discuss Africa's trading partners without mentioning the People's Republic of China. China has become a major trading partner with African countries (especially sub-Saharan Africa).⁶⁰⁵ Based on the principle of non-intervention, China does not use its leverage to impose certain policies on its trading partners. Also, China joined the competition (antitrust) law community fairly recently so there might not be enough knowledge, experience or jurisprudence to impact Africa. This may be the case for now but China is considered a prodigy among developing countries, and some may seek to follow its lead. Alternatively it too may find some common understanding on developmental issues and follow the lead of more experienced competition authorities in Africa. Also, other countries are competing for a

⁶⁰² For example see Article 12 (2) "Under the agreement, Parties agree to recognise the principles of the social market economy, supported by transparent competition rules and sound economic and social policies." Farrell disagrees and argues the agreement reflects neoliberal goals and the extension of economic liberalization in the self-interests of the EU rather than the normative agenda so often stated in the official discourse. M. Farrell, 'A Triumph of Realism over Idealism? Cooperation Between the European Union and Africa' (2005) 27/3 *Journal of European Integration*, pp. 263–284. See also Stephen R Hurt, *Co-operation and coercion? The Cotonou Agreement between the European Union and ACP states and the end of the Lomé Convention*, 24 *THIRD WORLD QUARTERLY* (2003).

⁶⁰³ Robert Henry Cox, *Ideas, policy borrowing and welfare reform*, REFORMEN IN WESTEUROPÄISCHEN WOHLFAHRTSSTAATEN–POTENTIALE UND TRENDS, TÜBINGEN (1999), p.163.

⁶⁰⁴ Kovacic notes that by depicting U.S. policy outcomes as the product of gravely flawed decision making processes, the irrationality interpretation of the American antitrust system reduces the ability of the United States to play a constructive role in the development of global competition policy standards. Antitrust paradox Kovacic, *WAYNE L. REV.*, (1989), p. 859.

⁶⁰⁵ China has become Africa's largest single commercial partner, registering \$210bn in two-way trade in 2013 that was only half as much as EU countries. Trade relations vary from one country to another. Researchers analysed trade patterns between China and Africa both at the aggregate Africa and at the national level. They conclude that African countries that gain from trade with China are oil exporters; ore and metal exporters; cotton exporters; and log timber exporters. See Ademola, *et al.*, *THE EUROPEAN JOURNAL OF DEVELOPMENT RESEARCH*, (2009).

bigger presence in Africa, including India and Brazil. This aspect should be revisited in the future especially in relation to diffusion via emulation and learning.

Taking into consideration all the above, the question that arises concerns the nature of the diffusion pattern in countries which did not adopt a SAP. This leaves us with a small group of countries in Southern Africa, namely: SA, Namibia, Botswana, and Swaziland.

5.2.3 Learning as a diffusion mechanism of competition law

5.2.3.1 South Africa

South Africa first introduced comprehensive competition legislation in 1979. Before that, some aspects of competition law were addressed under the Regulation of Monopolistic Conditions Act of 1955, namely, resale price maintenance but not other anti-competitive conduct or merger control.⁶⁰⁶ The Maintenance and Promotion of Competition Act of 1979 established a competition board to apply its provisions but did not endow it with actual independence.⁶⁰⁷ Investigations could only be carried by the order of the Minister and with less than twenty investigations ordered over the course of over twenty years it was not put into use often. It did, however, stipulate a merger control regime and introduced a prohibition on various restrictive business agreements such as resale price maintenance, cartels and bid rigging.⁶⁰⁸ These feeble attempts to introduce competition law in SA are reflective of the then prevailing socio-economic circumstances. The economy was dominated by a few powerful, mostly white, families with close ties to the government.⁶⁰⁹

By abandoning the apartheid system, SA was ready to end its international isolation.⁶¹⁰ It was not until the ANC came to power that competition law and policy became an important tool to rectify the mistakes of the past. Competition policy goals under the White Paper for Reconstruction and Development of 1994 focused on tackling concentration of power.⁶¹¹

⁶⁰⁶ OECD, Competition Law and Policy in South Africa An OECD Peer Review, 2003, p. 12.

⁶⁰⁷ *id.* at p 19.

⁶⁰⁸ Introduced in 1986. *Id.* at p. 13.

⁶⁰⁹ The OECD report illustrated the level of market concentration when the ANC government came to power in 1994 “5 investment conglomerates, with roots in the mining houses of the 19th century, accounted for 84% of the capitalisation of the stock exchange—and one of them accounted for 43% all by itself.” *Id.* at p. 10.

⁶¹⁰ By the international opening of the South African economy, importation was made possible and also required under the GAAT and WTO. CUTS. Competition Policy & Law In South Africa: A Key Component In New Economic Governance. (2002), p.16.

⁶¹¹ “Introduce strict anti-trust legislation to create a more competitive and dynamic business environment...to systematically discourage the system of pyramids where they lead to over-concentration of economic power and interlocking directorships, to

However, the Report also addressed institutional design, calling for the reconsideration of the current institutions in accordance with the new policy orientation.⁶¹² Competition law and policy was presented in this context at a given historic moment, debated, and reconstructed over the course of five years.⁶¹³ Lewis attributed the success of law to the unique legislative process engaging the National Economic Development and Labour Council (Nedlac) as the forum where the competition act was framed, discussed, and debated.

At the time of the inception of the new law, almost everything in SA drew its legitimacy from “*confronting the inequality of the past and the poverty and disposition*”.⁶¹⁴ Using methods from the past, such as nationalization, would have been contrary to South Africa’s new commitments to trade liberalization and what is now accepted in the international community as the path for development (relative comparative advantage).⁶¹⁵ State actors from various bodies engaged in a learning process to find the best suitable policy that would serve these competing interests.⁶¹⁶ They studied vetted laws of established competition regimes to design their own model. In reaching the best model that would suit the South African context, drafters surveyed various legal systems to evaluate their ease of administration (complexity), “applicability” and “whether it supported the balance between public interest concerns and economic efficiency” (compatibility). An inclusive drafting process engaged relevant stakeholders from trade, labour, and consumer groups. Lewis explains that the main issues raised were dealing with concentrated ownership and employment (trade unions) and certainty, protection from the arbitrary judgement by the implementing institutions (businesses) and international competitiveness (government).⁶¹⁷ This led to a customization of competition law to include social objectives, which are considered paramount for the country,

abolish numerous anti-competitive practices such as market domination and abuse, and to prevent the exploitation of consumers.” OECD, Competition Law and Policy in South Africa An OECD Peer Review, 2003. 2003, p. 15.

⁶¹² “Existing state institutions and regulations concerned with competition policy must be reviewed in accordance with the new anti-trust policy”. PATRICK BOND & MESHACK M KHOSA, AN RDP POLICY AUDIT (HSRC Press. 1999), p. 142.

⁶¹³ “Five years of debate and formal consultations explored, developed, and refined the scope of this major reform. An ambitious competition policy reform was part of the ANC’s 1992 Policy Guidelines for a Democratic South Africa.” OECD, Competition Law and Policy in South Africa An OECD Peer Review, 2003. 2003 OECD Report (2013), p. 14.

⁶¹⁴ Lewis, (2012), p. 5. Lewis notes that not only did this narrative guide the public policy choices but also non-governmental bodies and private institutions.

⁶¹⁵ For a government with a strong socialist heritage, nationalism would be at the forefront of policy choices. Lewis explains that nationalisation was at some point suggested to deal with the issue of concentrated ownership but was soon dropped for an “alternative robust intervention”: antitrust enforcement. *Id.* at p 9. This understanding can be inferred from Mandela’s speech “When I was released from prison I announced my belief in nationalization as a cornerstone of our economic policy. As I moved around the world and heard the opinions of leading business people and economists about how to grow an economy, I was persuaded and convinced about the free market. The question is how we match those demands of the free market with the burning social issues of the world.” Nelson Mandela, The Export of American Capitalism: Encouraging or Impeding Democracy Abroad? (2003).

⁶¹⁶ OECD, Competition Law and Policy in South Africa An OECD Peer Review, 2003, p. 17.

⁶¹⁷ Labour pressed for the most far-reaching principles such as the break-up of conglomerates and restrictions on cross directorships. Business focused on the detail of the specific provisions to be contained in the legislation and emphasised the need for certainty and protections on the discretionary exercise of powers by the authorities. Ten years of enforcement report ...I recall that contentious issues in the negotiations related to using public interest criteria in decision making, divestiture as a remedy, political interference in decision making, and the right to appeal decisions of the competition authorities.” Africa & Africa. 2009, p. 15 - 18.

as well as the adoption of an institutional model acceptable to stakeholders.⁶¹⁸ This choice is, however, a choice within constraints. An alternative policy to market liberalization would have affected the country's competitiveness to attract foreign investments in the international markets and access to investments, something that the South African economy direly needed at that time. Also, it was important to adhere to international best practice for the country to gain credibility with the international community.⁶¹⁹

The story of competition law in SA is more a story of learning about successful economic policies, how they work, and how to make them relevant to the country. Also, the emulation of tested and proven models of competition law adopted in the US and the EU gives the clout of legitimacy to the country's choice of policy. However, what objectives they pursue must be relevant to the context of the country based on a cost-benefit analysis where all stakeholders actively participate. Otherwise, the policy loses its legitimacy internally and eventually its effectiveness.

5.2.3.2 Regional conditionality and competition: Namibia, Botswana and Swaziland

South Africa is a leading jurisdiction in competition enforcement. This fact undoubtedly affects the policy choices of its neighbours. Southern Africa is also tied together through the SACU and SADC agreements, which both provide for the adoption of and co-operation on competition matters. Competition among these groups of countries is also an important factor especially taking into account the asymmetric balance of power (as the second biggest economy on the continent SA is an economic powerhouse). Until its independence in 1990, Namibia used to be governed by the laws of SA..⁶²⁰ The government of Namibia adopted a competition law in 2003.⁶²¹ In a statement made by the Commission's Chief Executive Officer of the Namibian competition commission, unlike most other African and developing countries, the adoption of competition law by Namibia was not a condition of the WBG or the IMF, but became imperative because of Namibia's closeness with SA, whose companies have many subsidiaries in Namibia and are engaged in various anticompetitive practices.⁶²²

⁶¹⁸ Lewis, (2012), p. 48 -53. See debate regarding the institutional set-up.

⁶¹⁹ This prerogative was reflected in the Act where it was stipulated that the Competition Tribunal should pay close attention to international jurisprudence. Section. In practice, comparative jurisprudence is used but applied with caution. Case "Competition law develops in an international arena because of both the globalisation of business and the international reach of academics and practitioners in the field." Ten years of enforcement by the South African competition authorities Africa & Africa. 2009, p 3 The DTI consulted with a range of international lawyers, policy experts and enforcers to ensure that the law was consistent with international best practice. *Id.* at p. 18.

⁶²⁰ Namibia was annexed by SA and claimed as the "Fifth Province". HARVEY GLICKMAN, TOWARD PEACE AND SECURITY IN SOUTHERN AFRICA (Taylor & Francis. 1990).

⁶²¹ With the assistance of the European Union a competition was first drafted in 1996. UNCTAD. Voluntary Peer Review Report, Namibia. (2014), p. 5

⁶²² *Id.* at p.59.

Similarly, Botswana, a small country with a stable government and steady economic growth is susceptible to anti-competitive practices from its powerful neighbour, SA. An Economic Mapping study of the economy found collusion by foreign firms to be the source of major anti-competitive business practices in Botswana.⁶²³ Recognizing the anti-competitive vulnerability that faces the country, Botswana resolved to have a national competition policy, which was adopted in 2005. As for Swaziland's economy, it is characterized by high dependency on external trade and the South African economy.⁶²⁴

The network effects of competition provisions in RTAs (discussed in more detail below) tend to spread competition law to other countries, raising opportunities for cooperation and experience sharing among competition authorities.⁶²⁵ As part of a survey, Namibia expressed that the adoption of competition law was motivated because of RTA agreements that they had signed with other countries, though not all of them have yet done so.⁶²⁶ In Swaziland, the adoption of competition law "was a natural response from pressure from the four regionally driven competition related provisions to which the [country] belongs: SACU, COMESA, SADC and the Cotonou Agreement."⁶²⁷

5.3 Diffusion of Regional Competition Regimes in Africa

Regional integration plays a vital role in the roadmap to economic growth in Africa. The regional integration movement swept the continent in the 1960s but with very little success and sustainability. The dream of regional integration was revived again in the 1990s with the signing of the African Economic Community Treaty of 1991 (the Abuja Treaty).⁶²⁸ The aim of the treaty is to realize Pan African economic cooperation by strengthening the existing regional economic agreements. Many regional agreements came into existence or underwent restructuring at that time.

⁶²³ The Economic Mapping Study (2002) reported that collusion by foreign firms was found to be the major anti-competitive business practice in Botswana...Foreign companies (particularly South African firms supplying Botswana firms) quote high prices for local firms intending to participate in tenders, and they collude with other South African firms on submission of quotations (with prices relatively lower than local firms can quote), in the event deliberately causing local companies to lose tenders because they have relatively higher prices. Collusion by foreign companies is not only anti-competitive, it also inhibits progress of local companies. The study further reports complaints of Chinese companies imposing unfair competition on local companies. Monnane M Monnane. Competition Scenario in Botswana (2006), p.12.

⁶²⁴ AfDB. Country Strategy Paper 2014 - 2018. (2013).

⁶²⁵ Note also in Egypt COMESA was one of the reasons for adopting a competition law. Also under one of the objectives of adopting competition law in Kenya is meeting obligations of RTAs. This was discussed in the first part of this chapter.

⁶²⁶ PHILIPPE BRUSICK, *et al.*, COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS (Citeseer. 2005).

⁶²⁷ MEHTA, 2006, p.284-5.

⁶²⁸ Treaty Establishing The African Economic Community (1991). Available at http://www.au.int/en/sites/default/files/treaties/7775-file-treaty_establishing_the_african_economic_community.pdf. Last visited 1 September 2016. For discussion see Richard Frimpong Oppong, *African Union, the African Economic Community and Africa's Regional Economic Communities: Untangling a Complex Web*, *The*, 18 AFR. J. INT'L & COMP. L. (2010).

Competition policy has been included in the framework of regional economic integration. This took the form of a model that focuses on measures to adopt and apply specific substantive rules to address anti-competitive conduct. The EU trade agreements with third parties are the leading example. The NAFTA agreement represents an alternative approach, emphasising agreement on general principles governing competition in the trade block. These different types of competition provisions are relevant to the nature of the agreement in question and the level of integration proposed.

Many scholars addressed the issue of regional economic integration in Africa.⁶²⁹ Some studies addressed, in very broad terms, regional competition provisions under regional integration agreements in Africa as part of a generalized discussion of the typology of these provisions.⁶³⁰ Some studies were dedicated to particular ones.⁶³¹ However, there is not, to date, an in-depth study of the diffusion of the different types of regional competition provisions under regional integration agreements for Africa.

In this part, we will address the diffusion of regional competition provisions in sub-regional integration agreements in Africa. We will discuss the general framework of the different kinds of regional trade agreements (RTAs) and the typology of competition provisions under these agreements. We will look closely at the diffusion of RTAs in Africa, the typology of the competition provisions of these agreements, and how they relate to the typology presented in the earlier part. The third part will discuss challenges related to the success of regional competition law, namely the overlapping membership problem.

5.4 Diffusion of Competition through Regional Trade Agreements

Surveying the data of the WTO regional agreements database, we found that by the end of 2015, over 600 RTAs (goods and services) have been notified to the WTO.⁶³² These

⁶²⁹ PETER ROBSON, *ECONOMIC INTEGRATION IN AFRICA* (Routledge. 2012), and Christof Hartmann, *Sub-Saharan Africa, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM* (Tanja A. Börzel & Thomas Risse eds., 2016), OECD, *Bilateral and regional trade agreements and technical barriers to trade: an African perspective*, TAD/TC/WP(2009)36/FINAL, and Morten Valbjørn, *North Africa and the Middle East, in THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM* (Tanja A. Börzel & Thomas Risse eds., 2016) On economic integration in general see BELA BALASSA, *THE THEORY OF ECONOMIC INTEGRATION (ROUTLEDGE REVIVALS)* (Routledge. 2013).

⁶³⁰ Peter Holmes, *et al.*, *Trade and Competition in RTAs: A missed opportunity?*, *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS* (2005).

⁶³¹ ARTHUR HAZLEWOOD, *ECONOMIC INTEGRATION: THE EAST AFRICAN EXPERIENCE* (London: Heinemann. 1975), Philip Ndengwa, *The common market and development in East Africa*, (1965), UI Ezenwe, *ECOWAS and the economic integration of West Africa*, (1983). From a competition perspective see Josef Drexl, *Economic Integration and Competition Law in Developing Countries, in COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES* (J. Drexl, *et al.* eds., 2012), and Gerber GERBER. 2010. On North Africa see DAMIEN GERADIN, *COMPETITION LAW AND REGIONAL ECONOMIC INTEGRATION: AN ANALYSIS OF THE SOUTHERN MEDITERRANEAN COUNTRIES* (World Bank Publications. 2004).

⁶³² Of these, 413 were in force. Also these figures correspond to 452 physical RTAs (counting goods, services and accessions together), of which 265 are currently in force. See *Regional Trade Agreements Date*, (WTO, *Regional Trade Agreements Information System (RTA-IS)*). Available at https://www.wto.org/english/tratop_e/region_e/region_e.htm. Last visited 1 September 2016.

agreements cover a variety of issues: economic, financial, security and foreign policies. Integration is a “process designed to abolish discrimination between economic units belonging to different national states” resulting in the “absence of various forms of discrimination between national economies.”⁶³³ Integration may take one or both of these two types: negative integration where countries eliminate restrictions on the movement of goods, services and factors of production, or positive integration where states agree to create a supranational norms and institutions.⁶³⁴ Balassa identified five different categories of economic integration, depending on the degree of integration: free trade areas, custom unions, common markets, economic union, and total integration.⁶³⁵ “Regionalism” is defined by the WTO as “actions by governments to liberalize or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions.”⁶³⁶ Such agreements are considered a violation of the non-discrimination principle under the WTO since members of a RTA offer favourable trade policies to each other and against non-members, but it is a sanctioned departure from multilateralism as featured under the WTO system.

Since it is in contradiction with the multilateralism of the WTO system, RTAs are allowed provided they meet certain conditions.⁶³⁷ The GATT/GATS provisions recognize two main types of RTAs: free trade agreements, trade agreements establishing a trade area between two or more customs territories, where parties agree to eliminate duties on products originating in these territories on (most of) the trade between them, and custom unions, which additionally adopt a common external tariff applied *vis a vis* other countries.⁶³⁸ A custom union may evolve into a common market where trade barriers are removed between members with free movement of labour and capital. The highest form of cooperation is economic integration agreements where, in addition to the forgoing, members adopt a common economic policy and may extend this to broader policy issues such as monetary policies and security. The most prominent regional economic integration example to date is the European Union. The degree of integration is agreed between the member states and, in some cases, is not static. A free trade agreement may develop to become a custom union or further to become an economic integration agreement, based on the members’ willingness to adopt shared policies towards achieving shared goals.

⁶³³ BALASSA. 2013, p.2.

⁶³⁴ Fritz W Scharpf, *Negative and positive integration in the political economy of European welfare states*, 15 GOVERNANCE IN THE EUROPEAN UNION (1996).

⁶³⁵ BALASSA. 2013.

⁶³⁶ “[A]ctions by governments to liberalize or facilitate trade on a regional basis, sometimes through free-trade areas or customs unions”. WTO, Dictionary of Trade Policy Terms. Available at https://www.wto.org/english/tratop_e/region_e/scope_rta_e.htm. Last visited 1 September 2016.

⁶³⁷ GATT Article XXIV.

⁶³⁸ *Id.*

5.4.1 Diffusion of RTAs⁶³⁹

The diffusion of regionalism is defined as “processes by which regionalism, regional institutional solutions, and policies are affected by prior choices of other world regions.”⁶⁴⁰ Many factors may impact the decision of a State to enter into a (regional) trade agreement. These factors may be divided into independent and interdependent ones.⁶⁴¹ The functional and neo-functional theories on the EU are proponents of independent factors where the creation of supranational sovereignty is born out of the need to reach common policy for the common good.⁶⁴² The second set of factors focus on interdependence between regions.⁶⁴³ The diffusion perspective focuses on the interdependent rather than independent decision-making, i.e. that choices by regional trade blocks are conditioned by previous choices made by other regional or international bodies.⁶⁴⁴ In any case, both independent and interdependent factors may influence the decision to enter into a regional agreement.

The patterns of diffusion in regionalism are the same as discussed earlier, learning externalities and emulation. Physical or legal coercion as a diffusion mechanism in regionalism is not very common. The most notable example is “Europeanisation” which works to a large extent through “legal coercion”; the accession process to the EU.⁶⁴⁵ A less coercive kind of diffusion is the direct influence mechanism. This is when either positive or negative incentives are provided for adoption, for example, by offering assistance (financial or technical) for compliance or sanctions for infringements.⁶⁴⁶ In influencing incentives, diffusion is based on utility or functional considerations, and there is still a choice even if within constraints. Competition between states may raise the likelihood of joining RTAs if another competing state joins.⁶⁴⁷ Regionalism may be a product of learning or lesson-drawing, or a desire to find solutions to dire problems by looking to more successful peers and

⁶³⁹ Addressing diffusion mechanisms of RTAs is outside the scope of our study. This is more of a background notes to address the types of competition provisions under said agreements.

⁶⁴⁰ TANJA A. BÖRZEL & THOMAS RISSE, *THE OXFORD HANDBOOK OF COMPARATIVE REGIONALISM* (Oxford University Press, 2016), p. 90

⁶⁴¹ Researchers must account for the influence of both external diffusion and internal determinants. Frances Stokes Berry & William D Berry, *State lottery adoptions as policy innovations: An event history analysis*, 84 *AMERICAN POLITICAL SCIENCE REVIEW* (1990).

⁶⁴² “The dominant approaches to regionalism argue that regional cooperation and integration come about resulting from independent decision-making within one region or part of the world.” Thomas Risse, *The Diffusion of Regionalism*, *Regional Institutions, Regional Governance* (2015), p.87.

⁶⁴³ Anja Jetschke & Tobias Lenz, *Does regionalism diffuse? A new research agenda for the study of regional organizations*, 20 *JOURNAL OF EUROPEAN PUBLIC POLICY* (2013).

⁶⁴⁴ Risse, 2015, p.15.

⁶⁴⁵ Tanja A Börzel & Thomas Risse, *When Europeanisation meets diffusion: Exploring new territory*, 35 *WEST EUROPEAN POLITICS* (2012). This article discusses to what extent the combination of Europeanisation and diffusion approaches offers new insights in the domestic impact of Europe that challenge the state of the art and offer new avenues for future research.

⁶⁴⁶ *Id.*

⁶⁴⁷ Joseph Jupille, *et al.*, *Regionalism in the world polity* (2013).

formulating appropriate models (contextualization).⁶⁴⁸ Emulation or mimicry also involves the search for appropriate policies (in this case regionalism); however, it does not include a process of critical consideration but rather takes for granted the transplanted policy. Some scholars give the example of the EU institutional model of integration, which is being emulated as a problem-solving model.⁶⁴⁹ It has been argued that belonging to a regional group has become part of the identity of modern statehood, which in turn emphasises mimicry.⁶⁵⁰

Observing the outcome of the diffusion of regional integration models, Borzel and Risse find that rarely any “full-scale adoption or convergence around specific model” occurs and if convergence does happen, “decoupling between institutional rules and behavioural practices is the most likely result” to explain why there are so “few behavioural consequences,” such as the case in many regional organizations in Sub-Saharan Africa.⁶⁵¹ This further indicates that a “recipient-driven diffusion mechanism of competition, lesson-drawing and normative emulation [quest to gain legitimacy],” i.e. an indirect influence mechanism, leads to “selective adoption, and localization of particular institutional models into a particular regional context.”⁶⁵²

5.4.2 Inclusion of competition provisions in RTAs

Competition provisions have become a feature of regional trade agreements in recent years.⁶⁵³ Various reasons have been put forward for adopting competition provisions in RTAs.⁶⁵⁴ The basic consideration for competition provisions addressed in a trade agreement is preventing distortion of competition within the geographical scope of the agreement.⁶⁵⁵ This is to prevent market access from being undermined by cross-border anticompetitive business practices and

⁶⁴⁸ “With the opportunities of the EU to exert direct influence declining, its role becomes less of a promoter, although the EU does seek to actively export its policies and institutions. Yet diffusion is much more indirect and driven by the demand for institutional solutions rather than active EU promotion of its models.” Borzel & Risse, *WEST EUROPEAN POLITICS*, (2012).

⁶⁴⁹ BÖRZEL & RISSE. 2016, p. 101.

⁶⁵⁰ Jupille, *et al.* 2013. We also find South-South emulation of regionalism. “[SADC] was not only a reaction to Apartheid South Africa, but was also inspired by Latin America’s developmental structuralism, particularly Raul Prebisch and the Economic Commission for Latin America happens through sociological institutionalism. Diffusion of policies and institutional models following the global scripts of what constitute legitimate institutions and that these scripts are emulated across the globe.” BÖRZEL & RISSE. 2016, p. 96. Hettne & Söderbaum, *EUROPEAN FOREIGN AFFAIRS REVIEW*, (2005) (arguing that the U.S. and the EU promote two different world orders through inter-regionalism, one based on sovereignty and unilateralism (the U.S.), the other based on multilateralism).

⁶⁵¹ BÖRZEL & RISSE. 2016, p. 101-2 (arguing for a dual approach to studying regional integration; functional and diffusion).

⁶⁵² *Id.* at p. 101-2 (arguing for a dual approach to studying regional integration; functional and diffusion).

⁶⁵³ OECD, Solano & Sennekamp. 2006 and the UNCTAD Secretariat, *A Presentation of Types of Common Provisions to be Found in International, Particularly Bilateral and Regional, Cooperation Agreements on Competition Policy and their Application*, U.N. Doc. TD/RBP/CONF.6/3 (Sept. 6, 2005). “[C]ompetition law is experiencing a “new wave of regionalism”.” Michal S Gal, *Regional Competition Law Agreements: An Important Step for Antitrust Enforcement*, 60 *UNIVERSITY OF TORONTO LAW JOURNAL* (2010), p.25.

⁶⁵⁴ Holmes, *et al.*, *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS*, (2005) (addressing the reasons for which competition provisions have been included in RTAs and the relationship of these provisions with anti-dumping measures and subsidies countervailing duties).

⁶⁵⁵ Baldwin Richard, *et al.*, *Beyond Tariffs: Multilateralising Deeper RTA Commitments* (2007), p. 40.

to insure regulatory co-operation on such matters.⁶⁵⁶ Further, the need for coordinated action on the regional level to address regional anti-competitive activity which cannot be sufficiently addressed by a single state is another rationale for a regional competition law. International cartels are a case in point.⁶⁵⁷ Also, competition provisions may be included, signalling to foreign investors a commitment to free and fair market.⁶⁵⁸ The provision may require the adoption of certain substantial provisions as a minimum requirement for the protection of competition to establishing a full body of regional regulations and institutions. The higher the level of integration, the more extensive the competition provisions may become.

5.4.3 Types of competition law provisions in RTAs

Examining the database available at the WTO portal on goods/ goods and services regional trade agreements, we found over 130 trade agreements that include competition provisions.⁶⁵⁹ Excluding BITs, only six of the hundred and thirty agreements are regional South-South trade agreements in Africa. In addition to the agreements accounted for in the WTO database, we identified other regional agreements, which contain competition provisions.⁶⁶⁰

Competition provisions in RTAs vary from a simple best endeavours requirement to uphold competition norms, information sharing, and cooperating on competition law enforcement, to setting a legally binding regional competition law regime. The overwhelming number of agreements and diversity in competition provisions made it difficult to identify an exact typology for them. Cernat provided a three-dimensional taxonomy of competition provisions in RTAs: trade dimension (type of agreement: FTA, CU, EIA...etc.),⁶⁶¹ development dimension (North/South agreements),⁶⁶² and competition dimension (provisions on adopting competition law, harmonization, exchange of information, comity, sectoral exceptions,

⁶⁵⁶ JEAN-PIERRE CHAUFFOUR & JEAN-CHRISTOPHE MAUR, *PREFERENTIAL TRADE AGREEMENT POLICIES FOR DEVELOPMENT: A HANDBOOK* (World Bank Publications. 2011), p. 350.

⁶⁵⁷ For example studies have shown that cross-border competition problems are widespread in SADC member countries. See SADC, *Sixth United Nations conference to review all aspects of the set of Multilaterally agreed equitable principles and rules for the control of restrictive business practices southern African development community*, (2010), p.3 Available at http://unctad.org/sections/wcmu/docs/tdrbpconf7_s2_SADC.pdf. Last visited 1 September 2016.

⁶⁵⁸ D Daniel Sokol, *Order Without (Enforceable) Law: Why Countries Enter into Non-Enforceable Competition Policy Chapters in Free Trade Agreements*, 83 CHICAGO-KENT LAW REVIEW (2008), p. 271.

⁶⁵⁹ See WTO, *Regional Trade Agreements Database*. Available at https://www.wto.org/english/tratop_e/region_e/region_e.htm. Last visited 1 September 2016.

⁶⁶⁰ RICHARD WHISH & CHRISTOPHER TOWNLEY, *NEW COMPETITION JURISDICTIONS: SHAPING POLICIES AND BUILDING INSTITUTIONS* (Edward Elgar Publishing. 2012), p.124.

⁶⁶¹ "The trade dimension is important since trade and competition objectives, although to a large extent overlapping, may differ, depending on the level of ambition of regional integration...A new set of issues comes into play when regionalism leads to the establishment of a common market or economic union. When investment and labour issues are taken into account, regional trade and competition provisions may lead to conflicting objectives or adverse welfare effects. Cernat. 2005, p. 40.

⁶⁶² "North - South RTAs would require CRPs dealing with cooperation and implementation...Given that many South-South RTAs aim for a high level of economic integration...the focus of such RTAs should be to create an effective regional competition enforcement mechanism and the promotion of competition at national level in those RTA members lagging behind...in this regard... RTAs of transition economies tend to have disciplining CRPs on state aid and the use of anti-dumping." *Id.* at p. 43.

dispute settlements etc.).⁶⁶³ Holmes et al., focusing on the competition dimension, identified two main types of competition provisions in trade agreements: provisions that either aim to (a) harmonize competition rules of the contracting parties, or (b) provide for cooperation on competition-related issues.⁶⁶⁴ Also, studying the competition provisions of 47 RTAs, Solano and Sennekamp identified two (flexible) families, the “EC-style agreements”, which contain substantive competition rules, and the “North American Agreements,” which focus on coordination and co-operation.⁶⁶⁵ Another study divided competition law provisions into four types based on the degree of institutional integration.⁶⁶⁶ They are either centralized regimes (supranational regional competition law is applied via a regional institutional framework),⁶⁶⁷ partially centralized systems (a supranational regional competition law is applied and a regional institution is established; however, enforcement is to be carried out by national authorities⁶⁶⁸), partially decentralized regimes (regional law exists but without an independent regional body, leaving the application of the law to NCAs) or a decentralized regime (an agreement on cooperation principles and criteria for addressing anticompetitive practices that are detrimental to the functioning of the trade agreement).⁶⁶⁹ Most recently, Lapr votte et al. revisited the topic and in addition to the two model-approach examined above (Holmes et al. and Solano et al.), they identified a third model, the “Oceania model” represented by the ANZCERTA. They argue that under such a model member states agree to harmonize their competition laws to that of the FTA, replacing trade defences (anti-dumping measure) with competition law enforced by NCAs.⁶⁷⁰

Accordingly, the majority of scholars have identified two main distinct models of competition law provisions in RTAs: provisions on specific measures addressing anti-competitive conduct (the EU model), and provisions on coordination and cooperation between competition enforcement agencies (NAFTA model).⁶⁷¹ The problem with this categorization is that it mainly reflects provisions under North-South agreements. Subsequently, all other divergent

⁶⁶³ *Id.*

⁶⁶⁴ Holmes, *et al.*, COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS, (2005), p. 72.

⁶⁶⁵ Solano & Sennekamp. 2006 p. 15.

⁶⁶⁶ CHAUFFOUR & MAUR. 2011. Not everyone subscribed to this division. Evenett was of the view that “Diversity, it would seem, is the dominant attribute of RTA provisions on competition law and policy.” Simon J Evenett, *What can we really learn from the competition provisions of RTAs?*, COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS (2005).

⁶⁶⁷ The EU, The Andean Community, the West African Economic and Monetary Union (WAEMU), and COMESA are examples of centralized competition regimes.

⁶⁶⁸ ANZCERTA (Australia–New Zealand Closer Economic Relations Trade Agreement) & CARICOM are examples of partially centralized systems.

⁶⁶⁹ These include SACU, Canada-Chile and Canada-Costa Rica.

⁶⁷⁰ See Fran ois-Charles Lapr votte & Burcu Can Sven Frisch. Competition Policy within the Context of Free Trade Agreements. (2015).

⁶⁷¹ We consider the “Oceania model “ to represent a degree of harmonization which would fall under the umbrella of EC model discussed in details below. Waller, LAW & SOCIAL INQUIRY, (1997).

provisions are disregarded as an anomaly to the typology.⁶⁷² In all fairness, these studies do acknowledge that there is a spectrum of competition law-related provisions other than these two. However, these are not necessarily represented in the typology. These studies also indicate that regional integration is a global phenomenon spreading all over the world and that Africa has been a very active contributor to regional integration. More specifically, we have yet to see a typology that would reflect the nature of the competition law provisions under sub-regional RTAs in Africa.

In the next part, we will discuss the typology of competition provisions in sub-regional Africa trade agreements and the diffusion of these two models, the “EC harmonization” and the “NAFTA” models.

5.5 Diffusion of Competition Provisions in Africa RTAs

Since the independence of African countries, regional integration has been favoured as a means to address the major economic crises facing the continent.⁶⁷³ Their logic is apparent: if small or weak economies come together they may collectively form large-scale economies with more political weight, thus emulating the success of the European Union.⁶⁷⁴ This should also minimize if not eliminate regional conflicts and wars. The establishment of the Organization of African Unity (OAU) in 1963 is a direct result of this approach.

The goal of regional integration was not always pursued with the same intensity through the years, but the scope of the integration usually went beyond economics to cover many other aspects such as security, with the ultimate goal of African political unity. After the first race towards regional integration in the 1960s, there was a period of stagnation. Many countries were pursuing ISI programmes, depending on the State as the principal provider of goods and services. When these programmes failed, the strategy of a self-reliant African development plan materialized in an initiative of the Organization of African Unity (OAU) and the UN Economic Commission for Africa as the Lagos Action Plan for the Economic Development of Africa (LPA) 1980.⁶⁷⁵ A decade later, the dream of regional integration was revived.

⁶⁷² Evenett commenting on OECD “readers should note that a clear majority of RTAs in the OECD study do not include the EC, the USA, or Canada as a signatory, and these RTAs do not necessarily fall into the two families identified above. Diversity, it would seem, is the dominant attribute of RTA provisions on competition law and policy. Evenett, *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS*, (2005), p. 40.

⁶⁷³ Early integration attempts date back to the South African Customs Union (SACU) of 1910 Member countries Botswana, Lesotho, South Africa and Swaziland being the founding Member States and the East African Community (EAC) of 1919. ROBSON, 2012.

⁶⁷⁴ The allocation effect and the accumulation (or growth) effect of free trade within a regional bloc. See Richard E Baldwin, *The causes of regionalism*, 20 *THE WORLD ECONOMY* (1997) and for review of theoretical developments on regional integration, in Elbadawi, *et al.* 1992.

⁶⁷⁵ ROBSON, 2012.

Important steps towards regional integration were taken, and one of these was the signing of the African Economic Community Treaty of 1991 (the Abuja Treaty). The aim of the treaty is to realize Pan African economic cooperation by strengthening the existing regional economic agreements. The WBG and donor countries as a means for Africa to integrate into the world market supported this second wave of regionalism. Accordingly, many regional trade agreements were either concluded or amended among African countries in this period.⁶⁷⁶ Despite this, intra-Africa trade is progressing very slowly while external trade maintain its dominance, especially with the EU and China, being the continent's main trading partners.⁶⁷⁷ Regional integration in Africa still has a long way to go but is very much present in the debate on the development of Africa. There are eight sub-regional trade agreements in effect in Africa which include competition provisions. These are: Agadir, COMESA, ECOWAS, CEMAC, EAC, WAEMU, SADC, and SACU.

The deeper the integration is, the more likely it will require a higher degree of “institutionalization” that includes the transfer of (some) authority from member states to a supra-national entity. Competition provisions adopted under the umbrella of such deep integration agreements will most likely require harmonization of the rules and the establishment of regional competition enforcement bodies,⁶⁷⁸ which, even if such integration pursues similar goals to convergence, is different as convergence mainly depends on the voluntary actions of member states.⁶⁷⁹ Accordingly, for the review of the different types of competition provisions under the relevant RTAs in Africa, we identify three types of provision, based on their main mechanism to achieve convergence: “integration,” “harmonization,” and “co-operation.” The former type of competition provisions includes the adoption of a regional competition law and authority in addition to coordinating technical regulations and standards. The harmonization model also emphasises the coordination of substantive provisions of competition, but for the sake of trade facilitation without requiring institutionalization. Based on the NAFTA model, the co-operation model emphasises co-operation and exchange, but in the African context, as a way to reach convergence. The competition provisions of these types of models are not mutually exclusive. There may be

⁶⁷⁶ Most importantly, the OAU was succeeded by the African Union (AU) in 2001. The African Union (AU) is a 54 member federation consisting of all of Africa's states except Morocco. The union was officially established on 9 July 2002 as a successor to the Organization of African Unity (OAU). Oppong, *AFR. J. INT'L & COMP. L.*, (2010).

⁶⁷⁷ Terence Corrigan. *Puzzling Over the Pieces: Regional Integration and the African Peer Review Mechanism*. (2015), p.22.

⁶⁷⁸ Cernat tested the hypothesis that many South-South RTAs aim for a high level of economic integration (customs unions, common markets, and economic unions) and thus their focus should be to create an effective regional competition enforcement mechanism and the promotion of competition at national level in those RTA members lagging behind in this regard and found that a large proportion of ‘deeper’ integration RTAs (50 per cent of South-South common markets/economic unions and 43 per cent of South-South customs unions) contain CRPs in comparison with 10 per cent of bilateral and 7 per cent of plurilateral South-South FTAs.” Cernat. 2005, p. 13 & 22.

⁶⁷⁹ GERADIN, *Competition law and regional economic integration: an analysis of the Southern Mediterranean countries*. 2004, p. 69.

overlapping provisions such as in the case of technical assistance and consultation, but these do not amount to a shift in their main objective. It should be noted that this classification should be revisited since these agreements envisage that future development will evolve into deeper integration, which may result in the need to revisit the typology or their categorization.⁶⁸⁰ From a diffusion perspective, we note that the competition regime of the integration model is the predominant one in sub-regional African trade agreements. In North Africa, the harmonization model is more dominant, while the co-operation model is more prominent in southern Africa.

5.5.1 The integration model

The African intra RTAs which follow the EU integration model are the COMESA, ECOWAS, CEMAC, EAC and WAEMU. Diffusion of the EU integration model is evident in these agreements. They all share similar objectives and an institutional structure with each other on the one hand, and with the EU integration model, on the other hand. They may not have all been born as economic integration agreements from the outset, but they all aim to evolve into one.

Table 3 Africa Integration Treaties – Competition Provisions

Treaty	Date	Competition provisions in the Treaty?	Year adoption of regional competition law	Regional competition authority?
CEMAC	1994	No	1999	Not active yet
WAEMU	1994	Yes	2002	2003
COMESA	1994	Yes	2004	2013
EAC	2000	Yes	2006	Not active yet
ECOWAS	1993	No	2007 (Policy) 2008 (Act)	Not active yet

Source: Based on review of regional agreements and regulations.

This is important to note because more integration requires a higher degree of policy coordination and greater centralization of regional institutions with supra-national authority; hence, it is more likely that the competition provisions will be more elaborate.⁶⁸¹ The agreements provide for a regional competition law and enforcement bodies. Two of these agreements, the COMESA and the WAEUM, have functioning competition commissions. We

⁶⁸⁰ On the difference between the EU and NAFTA see Frederick M Abbott, *Integration without Institutions: The NAFTA Mutation of the EC Model and the Future of the GATT Regime*, 40 THE AMERICAN JOURNAL OF COMPARATIVE LAW (1992).

⁶⁸¹ Cernat. 2005.

will briefly discuss the each of the two below, looking at their objectives, scope of application, substantive provisions and their institutional structure (information on the rest of the RTAs in **ANNEX VIII NOTE ON COMPETITION PROVISIONS UNDER RTAS IN AFRICA (INTEGRATION MODEL)**).

5.5.1.1 COMESA

The COMESA Treaty is one of the first among its regional agreements to address competition. The agreement required its member states to “*agree to prohibit any agreement between undertakings or concerted practice, which has as its objective, or effect the prevention, restriction or distortion of competition within the Common Market.*”⁶⁸² A decade later, the COMESA Competition Regulations were adopted in 2004. The Regulations aim to promote competition “*by preventing restrictive business practices and other restrictions that deter the efficient operation of markets*” for “*enhancing consumer welfare in the Common Market*”.⁶⁸³ The Regulations includes also consumer protection provisions. The Regulations are not applicable to competition matters, which are strictly domestic i.e. not affecting two or more member states. The Regulations cover all economic activities undertaken by private and public persons within, or having an effect within, the Common Market. Although the Regulations are applicable to regulated sectors, they do however acknowledge exemptions of national competition laws.⁶⁸⁴ Currently, seven member states do not have competition laws in place (see **ANNEX II Competition Laws in Africa**).

Mimicking the “EC-style/EU model”, the Regulations prohibit restrictive business practices, which “affect trade between member states” and “have as their object or effect the prevention, restriction and distortion of competition within the common market”.⁶⁸⁵ Among the agreements/activities which are prohibited by ‘object’ are: fixing prices, output restrictions, bid rigging and collusive tendering, market allocation, and refusal to deal or give access to an arrangement or association, which is crucial to competition. The Regulations address vertical restraints, providing for a safe harbour for undertakings with a market share below 30%. It also prohibits abuse of dominance in addition to regulating mergers and acquisitions.⁶⁸⁶ The COMESA regulations prohibit member states from granting subsidies or state aid that will restrict or distort competition between member states.⁶⁸⁷

⁶⁸² Article 55 (1) of the COMESA Treaty.

⁶⁸³ Article 2 of the COMESA Competition Regulations.

⁶⁸⁴ Article 3 of the COMESA Competition Regulations. This Article does not apply to conduct expressly exempted by national legislation.

⁶⁸⁵ Article 7 COMESA Competition Regulations.

⁶⁸⁶ Articles 18 - 23 of the COMESA Competition Regulations.

⁶⁸⁷ Article 52 of the COMESA Competition Regulations.

Under the Regulations, the decision-making bodies are the COMESA Competition Commission (CCC). In addition to the expected duties of the CCC, the Regulations stipulate that the CCC is tasked with helping member states “promote national competition laws and institutions, with the objective of the harmonization of those national laws with the regional Regulations.” The CCC enjoys the customary rights of competition enforcement bodies. It has the right to investigate anti-competitive practices in the Common Market.⁶⁸⁸

The Board of Commissioners is the “supreme policy body” of the CCC.⁶⁸⁹ Its 9 to 13 members are all nominated by the COMESA Secretary General and should be experienced in any of the following: competition law and policy, industry, commerce, public administration, labour, economics, law, consumer protection and small scale business matters.⁶⁹⁰ The Board is the final decision maker and also functions as an appellant body for the CCC’s decisions.⁶⁹¹ The Committee of Initial Determination (CID) is composed of three members of the full Board. The COMESA Court of Justice (CCJ) has a role to play here. It has jurisdiction over disputes arising from the application of the Law and hears appeals brought against the board’s decision. Disputes will first be heard at the First Instance Division of the CCJ with the right of appeal to the Appellate Division of its decisions at the CCJ.⁶⁹² The Court hears appeals on matters of law, lack of jurisdiction, or procedural irregularities.⁶⁹³ The language addressing the scope of the CCJ is conflicting with Article 23 of the Treaty, which does not limit its review powers to matters of law. There is a statutory gap in terms of provisions addressing the procedures and timing of the appeal, whether at the Board level or at the CCJ.

It took COMESA almost another decade to put the Regulations into action.⁶⁹⁴ The COMESA Competition Regulations came into effect on 14 January 2013. Its enforcement to date is focused on merger review, and it was criticized for its high notification fees and lack of a threshold. This lapse of time between the enactment of the Regulations in 2004 and the time for their enforcement in 2013 affected the suitability of the Regulations, which have been subject to review and amendments.⁶⁹⁵ It also faced, and is still facing, some reluctance from national competition authorities to adhere to its jurisdiction.

⁶⁸⁸ Article 7 of the COMESA Competition Regulations.

⁶⁸⁹ Article 12 of the COMESA Competition Regulations.

⁶⁹⁰ Article of the COMESA Competition Regulations.

⁶⁹¹ Article 15 COMESA Competition Regulations.

⁶⁹² Article 16.5 Draft Merger Assessment Guidelines p. 45. Available at <http://www.comesacompetition.org/images/Documents/draft%20merger%20assessment%20guidelines.pdf>. Last visited 1 September 2016.

⁶⁹³ *Id.*

⁶⁹⁴ The COMESA Competition Commission started its operations on 14 January 2013.

⁶⁹⁵ Director of the COMESA Competition Commission George Lipmle, Interview with George Lipmle, Director of the COMESA Competition Commission (Fiona Schaeffer ed., 2014)

5.5.1.2 WAEMU

The WAEMU treaty is the second African RTA to address competition. The main treaty establishing the Union, Treaty of Dakar, included a few competition prohibitions similar to that under the TFEU.⁶⁹⁶ WAEMU adopted regional competition regulation in 2002 and was the first to enforce such regulations in Africa. The three regulations cover concerted anti-competitive practices, abuses of a dominant market position, and state aid, respectively, in addition to directives on issues such as transparency in financial relations between member states and public enterprises and cooperation between the WAEMU Commission and national competition authorities. The WAEMU regulations outlaw anticompetitive practices with the effect of distorting competition in whole or in part within the union market. It tackles agreements and concerted practices on restraint of trade, monopolization (abuse of dominance) and a voluntary merger control system. The regulations also address government-induced market distortions such as state aid and the anticompetitive market conduct of state-owned enterprises.

Half of the WAEMU countries have not yet adopted national competition laws.⁶⁹⁷ In a battle over the jurisdiction with national competition authorities, the WAEMU court of justice confirmed the Commission's exclusive jurisdiction over anticompetitive practices in the member states.⁶⁹⁸ This "over-centralized approach" by the WAEMU was heavily criticized.⁶⁹⁹ It yielded mixed results; it has benefited countries without a national competition law, but it was to the detriment of those member countries that had functioning national competition laws and authorities.⁷⁰⁰

5.5.2 The harmonization model

The Agadir agreement was concluded between Egypt, Jordan, Morocco, and Tunisia in 2004.⁷⁰¹ As a by-product of the Barcelona Declaration, it is an example of competition law provisions which focus on policy harmonization. The Agadir Agreement establishes a Free

⁶⁹⁶ See Articles 88 and 89 Treaty of Dakar. Article 90 Treaty of Dakar vests the Commission with the competence to enforce the community law.

⁶⁹⁷ These are: Benin, Burkina Faso, Guinea-Bissau and Niger.

⁶⁹⁸ Opinion 003/2000/CJ/UEMOA. The Competition Commission's field of operations was considerably narrowed under Opinion No. 003/2000 of 27 June 2000 of the WAEMU Court of Justice on the interpretation of Articles 88, 89 and 90 of the Constitutive Treaty of the Union, which says that states may not know about issues relating to abuse of dominant position, antitrust and state aid. Bakhoun. 2012.

⁶⁹⁹ *Id.*

⁷⁰⁰ UNCTAD, Voluntary Peer Review of Competition Policy: West Africa Economic and Monetary Union, Benin and Senegal 2007. It showed that the Union's competition rules changed the way member States handled competition cases. It pointed out that in Senegal, the exclusive competence of the WAEMU Competition Commission is perceived as "an obstacle to the emerging work in this area of both the Ministry of Trade and the Competition Commission". It further notes that, in Côte d'Ivoire, despite a relatively large number of cases between 1994 and 2001, there have not been any since then.

⁷⁰¹ Technically this is not an all Africa agreement (Jordan) however it represents the competition provisions model in North Africa.

Trade Area between the four Mediterranean countries, three of which are in North Africa. The Agreement is concluded pursuant to the Barcelona Declaration. Two types of agreements are considered to achieve this goal: north-south agreements, i.e. the Euro-Mediterranean Association Agreements, concluded between the EU and its Mediterranean Partners, and south-south FTAs, concluded between the partners themselves. The first kind of agreement insures the harmonization of national competition laws to that of the EU, while the latter addresses co-operation between the member countries.⁷⁰²

The Agadir agreement requires its parties to unify their public and private economic policies in, among others, areas dealing with external commerce and to bring closer their economic legislation.⁷⁰³ Recently, the member states signed a protocol to co-operate in competition law enforcement and co-ordinate their national competition authorities.

5.5.3 The co-operation model

Similar to the NAFTA-inspired competition provisions, this model typically focuses on setting a framework for cooperation and coordination between its members in competition issues. The two African RTAs contain competition law provisions – following the rules-based co-operation model – and only enforcement co-operation and coordination competition issues are the SADC and the SACU.

It may also extend to requiring the adoption of a competition law. It should be noted that other parts of the SACU and SADC follow the EU Model with regard to their institutional integration but not in relation to competition law provisions.

5.5.3.1 SACU

The Southern African Custom Union (SACU) is arguably the oldest custom union in Africa.⁷⁰⁴ The custom union is among the smaller RTAs in terms of size in Africa with only five members: Botswana, Lesotho, Namibia, SA and Swaziland. Lesotho is the only member state that does not have competition law. Similar to most RTAs, in Africa it has evolved from its predecessor to address problems under the former structure. The amended agreement was signed in 2002.⁷⁰⁵ Amendments to the institutional framework were also introduced and

⁷⁰² The EU also concluded an Agreement on Trade, Development and Cooperation with the Republic of South Africa.

⁷⁰³ Article 2 of the Agadir Agreement.

⁷⁰⁴ ARTHUR HAZLEWOOD, *AFRICAN INTEGRATION AND DISINTEGRATION: CASE STUDIES IN ECONOMIC AND POLITICAL UNION* (Oxford UP, 1967).

⁷⁰⁵ Changes had to be introduced to reflect the new reality post apartheid as well as promoting shared decision-making (on the basis of consensus) Robert Kirk & Matthew Stern, *The new Southern African customs union agreement*, 28 *THE WORLD*

resulted in the establishment of the SACU secretariat to manage its affairs, the ‘SACU Tariff Board’ and the SACU ‘Council of Ministers.’ This consists of one Minister from each member state, and the ‘Council of Ministers’ is the highest body of the union.⁷⁰⁶ The union also has an independent but ad-hoc Tribunal to arbitrate disputes.⁷⁰⁷ SACU aims to “promote economic development among its members.”⁷⁰⁸

In relation to competition, one of the SACU objectives is “to promote conditions of fair competition in the Common Customs Area.” Article 40 of the SACU agreement stipulates that each member state agrees to have a competition policy and will commit to cooperate on enforcement matters.⁷⁰⁹ Article 42 further stipulates that parties to the agreement may formulate annexes to “facilitate the implementation of the SACU Agreement” which will be considered part of the agreement.⁷¹⁰ SACU members contemplated formulating a protocol on competition policy and consumer protection with the help of UNCATD.⁷¹¹ It was suggested under the study that “[G]iven the treaty’s narrow trade objectives, the extent of cooperation required to satisfy the SACU agreement might include only those practices that injure competition by restricting importation or exportation.”⁷¹² It is still however a work in progress.⁷¹³

5.5.3.2 SADC

SADC was a reconfiguration of the former SADCC whose mandate to liberate the region came to an end.⁷¹⁴ The new entity shifted its focus from political to economic. The SADC started as a development conference in 1980 and evolved over the course of a decade to become a community uniting for development.⁷¹⁵ Pursuant to the SADC agreement, a free trade area was established in 2000 between SA, Botswana, Lesotho, Namibia, and Swaziland. It soon expanded to include Mauritius, Zimbabwe, Madagascar, Malawi, Mozambique, Tanzania, and Zambia.⁷¹⁶ The SADC integration plan is set to realise a common market,

ECONOMY (2005). Article 26 on Protection of Infant Industries permits national protection for infant industries in the BLNS but not in South Africa.

⁷⁰⁶ “Critically, all technical work is subjugated to ‘national bodies’ to be established by each member state.” *Id.*

⁷⁰⁷ *Id.*

⁷⁰⁸ *Id.*

⁷⁰⁹ Article 40 Competition Policy SACU Agreement “there shall be competition policies in each Member State...Member States shall co-operate with each other with respect to the enforcement of competition laws and regulations.”

⁷¹⁰ Article 42 of the SACU Agreement makes provision to develop such annexes as may be necessary to facilitate the implementation of the SACU Agreement and further states that such annexes shall form an integral part of the Agreement.

⁷¹¹ UNCTAD, SACU Regional Cooperation Framework on Competition Policy and Unfair Trade Practices, 2005. Available at http://unctad.org/en/Docs/ditccp20053_en.pdf . Last visited 1 September 2016.

⁷¹² *Id.* p. 7.

⁷¹³ “It is to be expected that in the customs union, SACU...discussions on coordination and cooperation of regulatory enforcement will expand.” Hartzenberg, NW. J. INT’L L. & BUS., (2005), p.675.

⁷¹⁴ GLICKMAN. 1990

⁷¹⁵ Percy S Mistry, *Africa's record of regional co-operation and integration*, 99 AFRICAN AFFAIRS (2000).

⁷¹⁶ Angola, Democratic Republic of Congo and Seychelles remain outside the FTA.

monetary union and a single currency in the future.⁷¹⁷ SADC members entered into various protocols covering a wide range of topics including security and defence, drug trafficking, movement of money and people, and trade. Similar to SACU, SADC focuses on development as a starting point with an over-reaching agenda across various issues. Compared to SACU, SADC is larger in terms of size but still, as an FTA, limited in scope.

Following the Protocol on Trade of 1996,⁷¹⁸ SADC members signed a Declaration on Regional Cooperation in Competition and Consumer Policies in 2008 that addresses SADC's view on competition within the community. In the Declaration, member states agree to converge their policies to preserve equity in trade and fair competition throughout the region, with the ultimate aim of regional policy harmonisation. The Declaration addresses the means of effective cooperation on competition law and consumer protection matters. To achieve this aim, it requires member states to take the necessary steps to adopt, strengthen and implement the necessary competition and consumer laws in their respective countries.⁷¹⁹ It also requires them to cooperate with each other with respect to the enforcement of these laws i.e. positive comity. SADC member states may be divided into four categories depending on the development of their competition law regimes. The first category comprises of ten SADC countries with functioning competition law systems;⁷²⁰ the second features two SADC countries which adopted competition legislations but have not yet gone into effect;⁷²¹ the third is a single SADC country with a draft competition law;⁷²² and the fourth category is of two SADC counties which are still in the preparation stage for adopting competition law.⁷²³ The Declaration also addresses the means of soft convergence through the establishment of a regional committee to follow up the implementation of the co-operation framework, taking into consideration the UN Set of Principles on Competition as a basis for building consensus, providing technical assistance, designing advocacy programmes and dealing with other regional and international third parties in the field of competition.⁷²⁴ SADC members decided to enhance their co-operation by introducing a pilot project of an online competition case management database. The database would include information uploaded by member states

⁷¹⁷ SADC. Regional Indicative Strategic Development Plan of SADC. (2001).

⁷¹⁸ Article 25 of the Protocol on Trade "Member States shall implement measures within the Community that prohibit unfair business practices and promote competition."

⁷¹⁹ Declaration on Regional Cooperation in Competition and Consumer Policies in 2008. Available at http://www.sadc.int/documents-publications/show/SADC_Declaration_on_Competition_and_Consumer_Policies.pdf . Last visited 1 September 2016.

⁷²⁰ Botswana, Mauritius, Namibia, Seychelles, Swaziland, Malawi, South Africa, Tanzania, Zambia and Zimbabwe.

⁷²¹ Madagascar and Mozambique.

⁷²² Lesotho.

⁷²³ DR Congo and Angola.

⁷²⁴ Declaration on Regional Cooperation in Competition and Consumer Policies in 2008.

on on-going and closed cases based on agreed case reporting guidance rules and criteria.⁷²⁵ Currently, there are over fifty competition cases uploaded to the database.⁷²⁶

Although not a trade agreement in the conventional sense, it is worth noting the relevant competition provisions under the Cotonou Agreement concluded between the EU and the African, Caribbean and Pacific States in 2000 for the Financing and Administration of [EU] Community Aid to these regions.⁷²⁷ The economic partnership agreements are being negotiated on the regional level.⁷²⁸ The competition provision under the agreement stipulates that member states undertake to implement national or regional rules to prohibit acts by object or effect that will prevent, restrict or distort competition or lead to an abuse of a dominant position in the common market of the Community or in the territory of ACP states.⁷²⁹ The agreement also addresses co-operation and technical assistance between the Community and the ACP states. Under the Economic Partnership Agreement (EPA) with SADC, parties agree to co-operate on competition matters. In any case, negotiations should be compatible with the future development of a SADC regional competition framework.⁷³⁰

As we have seen, these types of competition provisions are not set exclusively from each other. Our review of the competition provisions in sub-regional trade agreements in Africa finds that in the SADC, and to a lesser extent the SACU, competition provisions are not typical co-operation model provisions since they aspire to develop into a regional law (following the EU integration model). The method is however different from the integration and harmonization models discussed above. The difference, we find, is in the approach of developing and fostering regional competition, through top-down or bottom-up approaches. Both approaches have the same aim (convergence) but one focuses on centralized policies applied by supra-national actors to which national laws should conform, and the other focuses on designing a regional law through the engagement of local actors.⁷³¹ Both approaches have

⁷²⁵ SADC, Session II: Review of the experience gained in the implementation of the UN Set, including voluntary peer reviews (2010), p.2.

⁷²⁶ *Id.* at p 3.

⁷²⁷ Hurt, *THIRD WORLD QUARTERLY*, (2003).

⁷²⁸ Article 35 (2) of the Cotonou Agreement. Available at http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf . Last visited 1 September 2016. We have discussed some of these agreements in 5.2.2 above.

⁷²⁹ Article 45 of the Cotonou Agreement.

⁷³⁰ Article 18 of the EPA concluded between SADC and the EU.

⁷³¹ Norm diffusion maybe bottom-up or top-down vertical diffusion. Bottom-up vertical diffusion happens when an idea travels from one specific country to an international organization, “occurs when practices...move from international actors to national ones...International relations scholars Finnemore and Sikkink have formulated a three-stages norm life cycle theory: norm emergence (a norm entrepreneur leading the effort to introduce and develop a new norm and attempting to persuade other countries to endorse it), norm cascade (several states adopt the norm) and norm internalization (meaning it is no longer contested, and compliance is almost a given). Not every evolving norm reaches the stage at which it becomes widely accepted. Martha Finnemore & Kathryn Sikkink, *International norm dynamics and political change*, 52 *INTERNATIONAL ORGANIZATION* (1998).

their merits.⁷³² Some regional blocs may need to focus on the cultivation of competition law and culture on the national level while for others it may be more appropriate to focus on formulating regional regulations, guidelines and strengthening regional institutions. It is important to note, however, that the two approaches are not mutually exclusive (for example, ECOWAS takes into consideration existing national competition provisions in drafting its own regional law).⁷³³ This will require the careful consideration of the development stages of both regional and national competition laws and what “sequence” should be followed in developing regional competition policy. This is also relevant given the broad objectives of these agreements that go beyond trade issues to include social and economic development. Utilizing sub-regional networks (formal or informal) of exchange and learning, such as the ACF, may prove to be helpful in reaching a regional approach to competition that would be fit for Africa.

5.6 Regional Economic Integration and Diffusion of Competition Law in Africa

Many countries in Africa are members of more than one RTA that includes some type of competition provision (the overlap). Because of this regional overlap, enforcement of the regional competition laws faces many difficulties.⁷³⁴ Gal identifies ten problems regional integration faces on competition law issues, to include structural, cultural, legal, and political economy issues.⁷³⁵ In particular, the overlapping membership in RTAs was raised as a serious predicament to efficient and effective enforcement of regional competition in Africa.⁷³⁶ Nevertheless, most of these conflicts are still theoretical, given that one or both overlapping

⁷³² A top-down approach may be appropriate for issues of “complex technical nature”. “[L]egal systems diverge but they do communicate with each other...at the intellectual level, in the proverbial marketplace of ideas. If the various legal epistemic communities are introduced to each other’s ideas, one could expect that they will compare them. Over time, they might adopt the policies, concepts, reasoning or outcomes of another community if they are convinced that it is preferable. A certain amount of convergence will then result.” See Filomena Chirico & Pierre Larouche, *Convergence and divergence, in law and economics and comparative law*, in NATIONAL LEGAL SYSTEMS AND GLOBALIZATION (2013), p. 39. “For lasting success, domestic actors are crucial in providing information from a bottom-up perspective that will strengthen and inform strategies.” Johanna Martinsson, *Global Norms: Creation, Diffusion, and Limits*, THE WORLD BANK-COMMUNICATION FOR GOVERNANCE & ACCOUNTABILITY PROGRAM (COMM-GAP).[SERIAL ON THE INTERNET] (2011), p. 14.

⁷³³ Both “top-downers” and bottom-uppers” appear willing to view the different perspectives as complementary rather than mutually exclusive.” K.I. Hanf KI HANF & THEO AJ TOONEN, POLICY IMPLEMENTATION IN FEDERAL AND UNITARY SYSTEMS: QUESTIONS OF ANALYSIS AND DESIGN § 23 (Springer Science & Business Media. 2012).

⁷³⁴ The main issue arising from the overlap in membership in different RTAs is a trade related issue. See Nico Meyer, *et al.*, *Bilateral and Regional Trade Agreements and Technical Barriers to Trade: An African Perspective*, OECD TRADE POLICY PAPERS, No. 96 (2010), p.10

⁷³⁵ JOSEF DREXL, COMPETITION POLICY AND REGIONAL INTEGRATION IN DEVELOPING COUNTRIES (Edward Elgar Publishing. 2012).

⁷³⁶ Jagdish Bhagwati & Arvind Panagariya, *Preferential trading areas and multilateralism-strangers, friends, or foes*, TRADING BLOCs: ALTERNATIVE APPROACHES TO ANALYZING PREFERENTIAL TRADE AGREEMENTS (1999). In relation to competition see DREXL, Competition Policy and Regional Integration in Developing Countries. 2012.

regional competition law regimes in question are not yet operational.⁷³⁷ This is, however, still a cause of concern for the development of regional competition and for entities doing business in the region.

We found a significant overlap in membership between member countries in the WAEMU and ECOWAS with a total of eight countries.⁷³⁸ This is followed by the overlap between the COMESA and SADC (seven countries).⁷³⁹ COMESA and EAC on the one hand and SADC and SACU on the other hand each have an equal number of overlapping membership (four countries). Further down the line is the overlap between the member countries of EAC and SADC, Agadir and COMESA, and between COMESA, SADC and SACU with single state overlap (see also **ANNEX VII REGIONAL TRADE AGREEMENT IN AFRICA – OVERLAPPING MEMBERSHIP**).

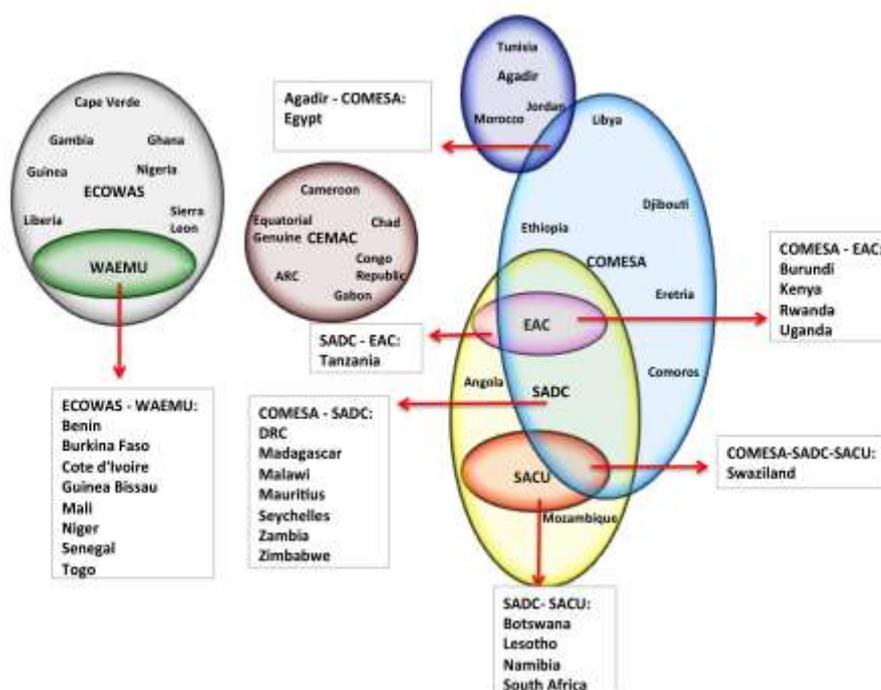


Figure 4 Overlapping memberships – Africa Regional Competition Laws

Source: illustration by author based on the review of relevant RTAs

⁷³⁷ Lipimile and Gachuiiri discussed the allocation of competences among the different RTAs. George Lipimile & Elizabeth Gachuiiri, *Allocation of Competencies Between National and Regional Competition Authorities: the Case of COMESA*, in *COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS* (Philippe Brusick, *et al.* eds., 2005), p.365.

⁷³⁸ Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.

⁷³⁹ Congo (DR), Madagascar (suspension lifted in 2014), Malawi, Mauritius, Seychelles, Zambia and Zimbabwe.

Looking at the number of overlapping memberships is not enough. In some of these overlaps, another may consume an entire trade block. For example, all member states of the WAMEU are also members in the ECOWAS. The same applies to the SACU and the SADC. Almost all of the EAC members are members in the COMESA, with the fifth member belonging to SADC. Also, the relevant regional competition provisions may be different in nature and scope. Take for example the overlap between the COMESA and the SADC, where the former provides for a regional competition regime, while the latter, to date, focuses on co-operation and policy harmonization across its member states rather than on creating a supra-national law and authority.

Different possible approaches may help in resolving this problem: natural selection, policy harmonization and co-operation, or full integration (merger) of trade blocks. The first approach is based on the notion that membership is not static. Countries may try to strengthen their position by belonging to more than one trade block. Swaziland is a member of three RTAs: COMESA, SADC, and SACU, while Egypt is a member of COMESA, Agadir, and GAFSA. Countries change their preferences and alliances based on their own socio-political circumstances. For example, Tanzania and Namibia withdrew from COMESA, where the former opted to stay in EAC and SADC and the latter in SADC and SACU. Angola suspended its membership in COMESA, preferring its membership in SADC, while Mozambique left COMESA to stay in SADC. Both Uganda and Zambia indicate that they will reassess their memberships in multiple RTAs to deal with the problem of membership overlap.⁷⁴⁰ In any case, it is expected that, with time, countries will pick and choose between the different RTAs based on their own cost-benefit analysis. Therefore, the overlaps may decrease due to a natural selection process.

Agreeing on a frame for co-operation, an information exchange and dispute settlement mechanism is, in such cases as NAFAT, possible but requires a degree of trust sophistication of competition institutions. Mutual recognition and harmonization is another approach adopted by the ECOWAS and WAEMU. The ECOWAS competition rules expressly mention that the Authority should collaborate with other existing competition agencies, namely WAEMU, in implementing the Act.⁷⁴¹ When designing its own competition policy, ECOWAS focused on similarities in substantive and procedural competition rules among the competition laws of WAEMU and the draft laws of its member countries to create its own

⁷⁴⁰ Corrigan. 2015.

⁷⁴¹ ECOWAS Supplementary Act A/SA.2/06/08 on the establishment, Duties and Functions of the Regional Authority. Available at <http://www3.nd.edu/~ggoertz/rei/rei260/rei260.36tt1.pdf> . Last visited 1 September 2016.

competition law.⁷⁴² The direction is to consider WEAMU, as a single national territory for all practical purposes, i.e. the WAEMU should be treated as a single state in respect of application of ECOWAS regional law. In such a case, it could be argued that the ECOWAS competition would be superior to WAEMU competition law in case of conflict. The approach also calls for adopting a consultation mechanism between the two regional authorities to deal with issues arising from the enforcement of their respective laws.⁷⁴³ ECOWAS progress has been relaxed.⁷⁴⁴ Even if competition is one of the pillars under ECOWAS 2020 Vision, this may take time to materialize.

The three RTAs, COMESA, EAC, and SADC are considering deeper integration through a tripartite agreement bringing the three trade blocks together to form a FTA.⁷⁴⁵ The agreement envisages the adoption of a joint competition policy including a dispute settlement mechanism. The annex on competition policy provides a set of substantive competition rules that should apply to all member states. These include prohibition of restrictive business practices, abuse of dominance, and anti-competitive mergers. In addition, the agreement also covers consumer protection. It further puts an obligation on member states to ensure that they have national and regional laws in force that address restrictions on competition and consumer welfare within their jurisdiction, and a body designated for the implementation within a period of five years from the date of entry into force of the agreement.⁷⁴⁶ As a platform to exchange information and expertise the agreement establishes a “Tripartite Competition Policy and Consumer Protection Forum.”⁷⁴⁷ Membership in the forum is voluntary and open to all national and regional competition authorities in the region. It is in that sense an EU model agreement.

5.7 Conclusion

In this chapter, we discussed the diffusion patterns of competition law and policy in Africa on the national and regional level. The first hypothesis we addressed was that conditionality was the main diffusion mechanism of competition law in African countries. Testing for conditionality as a diffusion mechanism, with the exception of a few countries, we found that,

⁷⁴² JH Mathis & K Dawar, *Is there potential for competition policy in the ECOWAS?*, (2008).

⁷⁴³ *Id.*

⁷⁴⁴ Outside of peacekeeping missions in the region, which usually reminds the people in the sub-region of the existence of ECOWAS, ECOWAS has achieved very little. Dean M Hanink & J Henry Owusu, *Has ECOWAS promoted trade among its members?*, 7 JOURNAL OF AFRICAN ECONOMIES (1998).

⁷⁴⁵ The COMESA-EAC-SADC Tripartite Free Trade Area was launched in 2015 and will come into force once ratification is attained by two-thirds of the 26 member states. Phase II negotiations covers, among other topics, competition policy. Available at http://www.tralac.org/images/Resources/Tripartite_FTA/Third_Tripartite_Summit_Communique_10062015.pdf. Last visited 1 September 2016.

⁷⁴⁶ Article 9 of the COMESA-EAC-SADC Tripartite Free Trade Agreement.

⁷⁴⁷ Article 11 of the COMESA-EAC-SADC Tripartite Free Trade.

as expected, the adoption of competition law in most of African countries has been an item on its structural reform agenda concluded with the international financial institutions. This signals a top-down approach in the adoption process. Also, the influence of trading partners and regional competition are factors that impacted the transfer process. We found that, indeed, soft power played a major role in the introduction of competition law in the continent, with the EU having the greater influence in that regard. Regional trade networks positively affected the diffusion process, motivating member countries to adopt competition law and raising opportunities for cooperation and experience sharing among competition authorities. However, we also found in Southern Africa other diffusion models. SA represents a model based on learning. The unique aspects of when and how the law was adopted greatly influenced its content. The story of competition law in SA is a compelling one. The South African experience teaches us to look deep into our countries' needs and goals and to design our laws accordingly. Other southern African countries have adopted competition laws as a means to regulate the anti-competitive practices of South African companies.

The chapter also addressed the diffusion of competition provisions in sub-regional trade agreements in Africa. We started by looking at the general framework of the different forms of RTAs and the typology of competition provisions under these agreements. The general typology is based on two main models: the EU model (harmonization) and the NAFTA model (co-operation). We identified eight RTAs in Africa that include competition provisions. The emphasis on the dichotomy of EU vs. NAFTA models did not give much room to reflect on the special attributes of the sub-regional African trade agreements. Using a modified typology based on the mechanism employed to achieve convergence, we identified three models instead: integration (policy alignment and institutionalization, similar to EU integration), harmonization (policy coordination – similar to EU harmonization with its trade partners), and co-operation (similar to NAFTA agreements emphasising co-operation and information sharing agreement). These models are not mutually exclusive and may have common provisions. Except for two of the RTAs, the competition regions under these RTAs are not yet functional. With limited resources and low inter-regional trade in Africa, it is not expected that much development will happen soon. However, the commencement of enforcement of COMESA Competition regulations in 2013 may raise regulatory competition and be a catalyst for expediting the enforcement of other regional competition provisions elsewhere, especially ones with member countries affected by it.

The adoption of competition provisions under the different RTAs represents a successful (adoption) story. However, due to the overlapping membership, it is not clear how all these regional competition regimes will co-exist.⁷⁴⁸ Different possible solutions are possible in dealing with this problem: natural selection (selecting one RTA over another), co-operation (coordinating enforcement and dispute settlement), policy harmonization, or full integration of trade blocks. The diffusion of regional competition law in Africa may be considered a triumph story but on a closer look, adoption with hardly any implementation may just be a triumph in numbers.

⁷⁴⁸ Not the only enforcement problem. Asymmetries of the degree of enforcement of competition law and lack of trust between NCAs have been cited as reasons for the delayed progress. See Marco Botta, *The role of competition policy in the Latin American regional integration: A comparative analysis of Caricom, Andean Community and Mercosur* (2011).

Accordingly, in this chapter we will examine the law and enforcement of PICs in merger control, focusing our discussion on SA as a leading jurisdiction in this regard with a growing body of case law. We will explore the actual weight these PICs have in the merger process, how they are administered, and what challenges await competition authorities that adopt this model. We will also discuss select Sub-Saharan African countries in order to highlight the convergence (or divergence) with the South African model. In chapter four, we have shown how PICs are widely featured in the laws of different countries in Africa. We will exclude North African countries from our review here since Egypt has no merger control mandate under its competition law but a notification system,⁷⁵³ and until very recently the Moroccan, Tunisian and Algerian NCAs enjoyed limited powers when it came to merger control.⁷⁵⁴ Further, as we have seen in chapter 4, PICs in regimes of this region are confined to specific substantive provisions, namely mergers and authorizations where the former (the focus of our study) mostly addresses “grey zone” objectives (industrial policy).⁷⁵⁵

The chapter will be divided into six parts. In the second part, we give a brief overview of the comparative frameworks of merger control, focusing on the US and the EU and best practices in this regard. The third part examines how PICs have weighed under South African’s merger control. We will answer the question of how these considerations were interpreted and enforced by the relevant competition authorities,⁷⁵⁶ especially the SACT, and examine large merger cases from 1999 to 2015. We will focus particularly on how the PICs were applied, and review the evidence and analyse the impact on undertakings and the remedies imposed. In part four, we look at merger control regimes in other selected countries in Sub-Saharan Africa, attempting a comparison with SA, in particular by focusing on the typology of the merger test adopted and categories of PICs covered under these jurisdictions. Part five examines the different processes of weighing different considerations in a merger situation, where competing and sometimes contradicting interests have to be reconciled, and the institutional choices of these different jurisdictions. Part six presents our concluding remarks.

⁷⁵³ Article 19 Law No. 3 of 2005 on the Protection of Competition and the Prohibition of Monopolistic Practices. Limited merger review powers have been granted by the Minister of Health and Population Decree no. 239 of 2016.

⁷⁵⁴ Morocco competition council had only consultative powers to review mergers where all decisions and measures had to be adopted by a government department. Substantial amendments were introduced in 2014 which came into effect in 2015. The changes empower the Competition Council to decide on mergers maintaining the right of the head of government to take over the case for reasons of general interest. Marta Giner Asins & Mélanie Thill-Tayara. Morocco: Overview. (2016). For Tunisia see Law no. 91-64 of 1991 (as amended) which was replaced by Law no. 36 of 2015 (Articles 7 - 10). For Algeria, see Articles 19 - 21 of the Ordinance No. 03-03 of 2003 on Competition (as amended) and Tunisia see Article 10 of Law No. 2015-36.

⁷⁵⁵ However, authorization/exemption process includes broad PICs as discussed in the previous chapter. Algeria and Morocco do provide for public interest / benefit under their merger review but no further information is available on content or their practice.

⁷⁵⁶ We use the term “competition authorities” in the broad sense to mean SACC, SACT and CAC.

6.2 The General Framework of Merger Analysis under Comparative Competition Law and International Best Practices

The purpose of reviewing a merger (merger control) is to screen for anti-competitive mergers and set a mechanism to address them through appropriate remedies, including prohibition, if necessary.⁷⁵⁷ Two main tests have been put forward to assess the impact a merger may have on competition in the relevant market. These are the dominance test and the significant lessening of competition test (SLC).⁷⁵⁸ Out of these two, a hybrid test emerged which combines both SLC and dominance.⁷⁵⁹ These tests focus on increasing market power without outweighing efficiency gains.⁷⁶⁰ Market power, in the context of a merger analysis, may be defined as “the ability to increase prices profitably (or reduce quality, innovation, choice or other ways in which competition may be inhibited) from pre-merger levels for a significant period of time... through the individual decisions of the merged firms and their competitors or through coordinated behaviour.”⁷⁶¹

Under the dominance test, a merger is anti-competitive and may be prohibited if it strengthens or creates a dominant position in the market. In this regard, the concept of dominance is generally equivalent to the possession of substantial market power.⁷⁶² Dominance may extend not just to situations where the merged entity becomes dominant, but also to collective dominance, in situations where the merger affects the competitive structure of the market in a manner that is conducive to creating a coordinated equilibrium among competitors.⁷⁶³ The SLC test, on the other hand, focuses on the effects of the merger on the market and on the loss of competition among firms rather than on threshold structural issues such as market shares. The presence of any practical differences between these two standards has been widely discussed.⁷⁶⁴ Those who advocate the SLC test argue that there are mergers giving rise to competition concerns, which would be prohibited under the SLC test but not necessarily under the dominance test.⁷⁶⁵ This is what has been called the “blind spot” or “gap” in the

⁷⁵⁷ Office of Fair Trading, The Analytical Framework For Merger Control Available at

<http://www.internationalcompetitionnetwork.org/uploads/library/doc333.pdf>. Last visited 1 September 2016.

⁷⁵⁸ OECD. Standard for Merger Review (2009). Available at <http://www.oecd.org/competition/abuse/46503256.pdf>. Last visited 1 September 2016.

⁷⁵⁹ *Id.*

⁷⁶⁰ Trading. p.8.

⁷⁶¹ *Id.*

⁷⁶² “The notion of dominance is not clearly defined in economics but it certainly reaches situations in which a market leader with a degree of independence from competitive pressures is created.” OECD, Standard for Merger Review 2009, p. 7.

⁷⁶³ *Id.*

⁷⁶⁴ Trading.

⁷⁶⁵ Non-collusive oligopoly gap. WHISH & BAILEY. 2012, p. 864.

dominance test.⁷⁶⁶ A narrow interpretation of the dominance test precludes it from addressing unilateral effects, but, if interpreted broadly, the scope of the dominance might not be very different from the scope of SLC test.⁷⁶⁷ In some countries, a hybrid test was adopted to reconcile the two tests.

The US antitrust law prohibits mergers if “the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly”⁷⁶⁸ which is absent of any redeeming factors, i.e. efficiencies.⁷⁶⁹ After abandoning the dominance test,⁷⁷⁰ the EU Merger Regulation of 2004 adopted the significant impediment to effective competition (SIEC test).⁷⁷¹ Under the hybrid test, a merger is anti-competitive if it significantly impedes effective competition in the market in particular through the creation or strengthening of a dominant position. By adopting the hybrid test the EU was able to reach a compromise through which it is able to uphold the practice and case law of the European Commission regarding the dominance test and to enable it to take a more effects-based approach when assessing mergers.⁷⁷² In case a merger was found to be anti-competitive, the merger analysis then proceeds to examine whether there are any efficiencies that may offset the harmful impact on competition.⁷⁷³ These may include allocation efficiency, production efficiency, and dynamic efficiency in addition to the failing firm’s defence.⁷⁷⁴ Accordingly, in both systems, the emphasis is on using a substantive test that takes into account all the relevant factors rather than focusing solely on structural ones that address market power in the case of the absence of any redeeming efficiencies.

There is no universal definition of public interest. For the purposes of this chapter, we consider PICs to mean non-economic welfare factors taken into account in merger control.⁷⁷⁵ There is no consensus regarding the inclusion of PICs in merger analysis.⁷⁷⁶ However, PICs

⁷⁶⁶ ALISON JONES & BRENDA SUFRIN, *EU COMPETITION LAW: TEXT, CASES, AND MATERIALS* (Oxford University Press (UK), 2014), p. 1182.

⁷⁶⁷ OECD, *Standard for Merger Review 2009*, p.8.

⁷⁶⁸ 15 U.S.C. §18.

⁷⁶⁹ US Department of Justice & Federal Trade Commission *Horizontal Merger Guidelines 2010*. Available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>. Last visited 1 September 2016.

⁷⁷⁰ Article 2 of the EEC Merger Regulation (4064/89). Available at <http://ec.europa.eu/competition/mergers/legislation/archive.htm>. Last visited 1 September 2016.

⁷⁷¹ Council Regulation (EC) No 139/2004 of 20 January 2004, *Official Journal L 24*, 29.01.2004. Available at <http://ec.europa.eu/competition/mergers/legislation/archive.htm>. Last visited 1 September 2016.

⁷⁷² OECD, *Standard for Merger Review 2009*.

⁷⁷³ *Id.*

⁷⁷⁴ OECD, *Dynamic Efficiencies in Merger Analysis*, DAF/COMP (2007), “Although a substantial number of jurisdictions have explicitly recognized efficiency claims in mergers, the insertion of efficiency-related provisions is not yet a common practice.” See more broadly on the role of economics in competition proceedings OECD, *The Role of Efficiency Claims in Antitrust Proceedings*, DAF/COMP 23. (2012) p.6.

⁷⁷⁵ See discussion on typology of objectives in chapter 4.

⁷⁷⁶ OECD. 2003.

are not a unique feature in developing countries' merger control regimes. Developed economies do consider them but usually under different settings.

In the US, competition agencies do not consider PICs in the enforcement of the antitrust laws, but rather focus solely on the competitive effects and consumer benefits of the transaction under review.⁷⁷⁷ However, following what the OECD calls “dual responsibilities model”, some mergers may be subjected to the review of other regulators, which include PICs as factors in their test.⁷⁷⁸ Take for example national security considerations.⁷⁷⁹ The take-over by Dubai Ports World, a United Arab Emirates based company, of the Peninsular and Oriental Steam Navigation Company, was, although regulatory authorities approved the sale, later opposed by the US Congress, resulting in the subsequent sale of the US operations to a US buyer.⁷⁸⁰ More recently, the Committee on Foreign Investment in the United States (CFIUS) flagged the acquisition of the Waldorf Astoria hotel; it succeeded in passing the review process also on the basis of national security.⁷⁸¹ The acquisition of 80% of the Lumileds (LEDs) business of Royal Philips NV (Lumileds), a technology company, by Chinese private equity firm Go Scale Capital Ltd was blocked by CFIUS over concerns regarding Chinese control over the dual-use semiconductor technology involved in making LEDs, due to its applicability to the development of weapons systems.⁷⁸² Other policy objectives co-exist with antitrust laws but are better pursued by other instruments disconnected from antitrust enforcement.⁷⁸³

The EU Merger Regulations acknowledges specific PICs which allow member states to protect certain public interests. These are public security, the plurality of the media, and prudential rules.⁷⁸⁴ Further, EU member states are permitted to take appropriate measures to protect “legitimate public interests” that are not taken into consideration under the EUMR, provided these measures are non-protectionist and do not undermine the principles of the

⁷⁷⁷ OECD, Public Interest Considerations in Merger Control, Note by the United States (2016).

⁷⁷⁸ The “dual responsibilities model” means is a model where competition authorities apply “standard competition assessment” whereas PICs are assessed by a sectoral regulator or a political body such as a ministry, compared to a “single authority model” where PICs test is entrusted to the competition authority.’ See OECD, Public Interest Considerations in Merger Control, Background Paper by the Secretariat (2016), p.9 - 10.

⁷⁷⁹ The US is not the only country in this regard. See for example cases from The ABA Section of Antitrust Law, *Report Of The Task Force On Foreign Investment Review*, (2015).

⁷⁸⁰ *Id.*

⁷⁸¹ *Id.*

⁷⁸² *Id.*

⁷⁸³ ICN, Report On The Objectives Of Unilateral Conduct Laws, Assessment Of Dominance/Substantial Market Power, And State- Created Monopolies 2007, p. 13.

⁷⁸⁴ Article 21(4) of the EU Merger Regulations. Available at <http://ec.europa.eu/competition/mergers/legislation/archive.htm>. Last visited 1 September 2016. See also Alison Jones & John Davies, *Merger control and the public interest: balancing EU and national law in the protectionist debate*, 10 EUROPEAN COMPETITION JOURNAL (2014), p.453.

common market. On the national level, research has shown that a number of factors may be taken into consideration in competition enforcement, such as “industrial development, protecting employment, promoting the competitiveness of the undertakings in international competition in France; benefits to the economy as a whole or an overriding public interest in Germany, national defence and security, protection of public security and public health, free movement of goods and services within the national territory, protection of environment, promotion of technical research and development and the maintenance of the sector regulation objectives in Spain and general interest reasons in the Netherlands”.⁷⁸⁵ Further, recent research of 75 jurisdictions of developed and developing countries confirmed that over 60% of these countries give some role to public interests in their merger control.⁷⁸⁶

It is important here to emphasize the difference between taking into account PICs, a matter which is not exclusive to SA, and the weight these considerations have in reaching a final decision, as opposed to other factors, such as economic efficiency and/or consumer welfare, legal process, and administrative considerations. Here, we aim to address the latter issue by examining the relative weight of the PIC, i.e. the relative weight as it is measured in opposition to the other forms of consideration usually taken into account. In some European regimes, Canada and Australia, PICs are sometimes taken into account, but this is not done systematically and in any case the relative weight they have, as opposed to other considerations, is limited.⁷⁸⁷ In SA, their relative weight is significant. This distinction is not always clear, which directs the discussion to factors for or against the inclusion of public interest consideration rather than empirically considering their impact on the merger review process.⁷⁸⁸

6.3 Public Interest Considerations (PICs) in SA Merger Control Regime

6.3.1 The general framework of the merger analysis

Under the SA Competition Act No. 89 of 1998 (the “Act 89”), “a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole

⁷⁸⁵ Note by the European Union, *Public Interest Considerations in Merger Control*, (2016) and OECD, *Public Interest Considerations in Merger Control*, Background Paper by the Secretariat. 2016 p.7.

⁷⁸⁶ David Reader, *Accommodating Public Interest Considerations in Domestic Merger Control: Empirical Insights*, (2016).

⁷⁸⁷ See Australian Competition and Consumer Commission, *Authorization Guidelines*, 2013. Available at <http://www.accc.gov.au/system/files/Authorisation%20guidelines.pdf>. Last visited 1 September 2016. However, in all cases nothing as systematic as this approach we are discussing here.

⁷⁸⁸ See for example D Sokol, *What Drives Merger Control*, COMPETITION AND THE STATE (2014) (discussing the impact of political factors on merger control that result in either including non-economic factors “within antitrust” or “outside of antitrust law”).

or part of the business of another firm.”⁷⁸⁹ The Act has departed from the previously adopted dominance test to adopt a substantial lessening of competition (SLC) test. A merger may be prohibited if it is “likely to substantially prevent or lessen competition.”⁷⁹⁰ This economic test (SLC) is then followed by an assessment of the proposed merger under PICs. The procedural aspects of merger analysis are thus undertaken in two main stages. The first stage is the SLC test.⁷⁹¹ The test is not whether a merger necessarily prevents or lessens competition but whether it is probable that it will do so in a material or considerable amount or duration.⁷⁹² If the merger fails the SLC test, the next step is to determine whether there are any efficiencies and/or PICs that would likely arise to offset the anti-competitive effects which would not likely be obtained absent of the merger.⁷⁹³ If said trade-off is found to offset the negative impact of the merger on competition, then it passes the competition analysis. If the trade-off does not redeem the merger then the merger is found to be anti-competitive. The Act uses the term ‘otherwise’ to introduce the PIC analysis in case of an unfavourable competition analysis; however, both the practice and the newly adopted Public Interest Guidelines clarify that what is meant is ‘notwithstanding’ the competition test. In any case, mergers, whether they pass the SLC test or not, are then subjected to the PICs test as the second stage of analysis.⁷⁹⁴ This second stage of inquiry is to determine whether the merger can or cannot be justified on substantial public interest grounds.⁷⁹⁵ This, however, does not mean that the merging parties are required to affirmatively justify a merger on public interest grounds.⁷⁹⁶ Once the negative impact of substantial PIC is established, the merging parties may justify it on the basis of an equally weighty and countervailing public interest.⁷⁹⁷

⁷⁸⁹ Section 12 of Act 89.

⁷⁹⁰ Section 12 of Act 89.

⁷⁹¹ In making such a determination consideration must be given to the non-exhaustive list of factors set out in Section 12A(2) of Act 89.

⁷⁹² *Schumann Sasol (SA) (Pty) Ltd v Price's Daelite (Pty) Ltd* (10/CAC/Aug01) [2002], p.10, *Mondi Limited v Kohler Cores and Tubes*, 20/CAC/Jun02, (2003), p.11, and *Medicross Healthcare Group (Pty) Ltd and Another v Prime Cure Holdings (Pty) Ltd* ZACAC 3, 2006), p.11.

⁷⁹³ *OECD, Competition Law and Policy in South Africa An OECD Peer Review, 2003. 2003.*

⁷⁹⁴ Section 12 of Act 89. “Section 12A(1)...sets out three separate but interrelated enquiries that the Commission must engage in: (i) Determine whether the merger is likely to substantially prevent or lessen competition; (ii) If the enquiry reveals a substantial lessening of competition, then determine whether there are any technological, efficiency or pro-competitive gains that would outweigh the negative competitive effects, and whether there are any substantial public interest considerations that could justify permitting or refusing the merger; (iii) Notwithstanding the conclusion of the enquiry in (i) or (ii) above, assess whether the merger can or cannot be justified on substantial public interest grounds as set out in Section 12A(3) of the Act.” South Africa Competition Commission, *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998* (2016). Available at <http://www.compcom.co.za/wp-content/uploads/2016/01/Gov-Gazette-Public-Interest-Guidelines.pdf>. Last visited 1 September 2016.

⁷⁹⁵ Section 12 of Act 89. It is worth noting that in practice PIC analysis becomes relevant either, if it was positive, as a redeeming factor in case of a negative outcome of the competition analysis or, if it was negative, as a cause to block the merger in case of a positive outcome of the competition analysis. In these situations, competition authorities balance the outcome of the two tests on a case-by-case basis. This will be discussed in more details in the next section.

⁷⁹⁶ *Harmony Gold Mining Company Limited and Gold Fields Limited*, 93/LM/Nov04, (2005), p.13. It was argued that a merger must be prohibited if there is no evidence that it can be justified on public interest grounds. The Tribunal did not agree with this interpretation of the Act.

⁷⁹⁷ *Metropolitan Holdings Ltd v Momentum Group Ltd*, 41/LM/Jul10, (2010). It was held that once prima facie a merger may not be justified on substantial public interest grounds, the evidential burden will shift to the merging parties to rebut it.

There is no explicit hierarchy between these tests, but rather a certain analytical progression that is being followed.⁷⁹⁸ By the same token, the public interest test may not encroach on the competition analysis.⁷⁹⁹ The simple version of this exercise is a merger where both competition and public interest analyses are not in tension with each other, that is both lead to the prohibition or clearance of the merger.⁸⁰⁰ But what happens in the case where the outcome of one analysis is positive and the other is negative? Technically, a merger will not be allowed if it fails either test.⁸⁰¹ However, the practice of the competition authorities so far is that no merger has been approved for PICs where it was found to be anti-competitive. On the other hand, pro-competitive mergers have been approved despite their detrimental impact on PICs with conditions mitigating that impact.

6.3.2 Categories of PICs: substantive aspects

Merger analysis must take into consideration the effect that the merger will have on four categories of PICs:

- particular industrial sector or origin;
- employment;
- the ability of small businesses or firms controlled or owned by historically disadvantaged persons to become competitive (SMEs/HDI); and
- the ability of national industries to compete in international markets.⁸⁰²

The PICs test is not an open-ended one. The Act limits the competition authorities' ability to remedy negative impact on PICs in two ways. First, it recognizes only a specific set of PICs, in merger analysis.⁸⁰³ The competition authorities scrutinize the nature of the PICs claimed, ensuring that the theory of harm/benefit to PICs fits the facts.⁸⁰⁴ Generally, the competition authorities are careful not to step out of their boundaries. Nevertheless, in practice they may still find room to exercise some discretion. In some instances this has led the competition

⁷⁹⁸ The CAC affirmed that there is no subordination of the public interest considerations to competition considerations. *Anglo American Holdings Ltd and Kumba Resources Ltd / Industrial Development Corporation (intervening)*, 46/LM/Jun02, (2003). See Commission. 2016, p. 9 -10.

⁷⁹⁹ *Medicross Healthcare Group (Pty) Ltd and Another v Prime Cure Holdings (Pty) Ltd*, ZACAC 3, (2006). The CAC criticized the Tribunal for moving to the public interest analysis before deciding on the impact on competition.

⁸⁰⁰ *Telkom SA Limited and Business Connexion Group Ltd*, 51/LM/Jun06, (2007).

⁸⁰¹ '[P]ublic interest can operate either to sanitise an anticompetitive merger or to impugn a merger found not anticompetitive.' *Anglo American and Kumba merger supra note 798*.

⁸⁰² Section 12A(3) of Act 89.

⁸⁰³ *JD Group Limited and Ellerine Holdings Limited*, 78/LM/Jul00, (2000). The Tribunal noted that the public interest consideration raised (franchising issue) did not clearly correspond to any declared consideration under the Act.

⁸⁰⁴ *Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd*, 21/LM/Mar05, (2005). The protection against imports has been unsuccessfully presented as a PIC. Similar arguments were raised again in *Pepkor Limited and Manrotrade Four (Pty) Ltd*, 06/LM/Jan06, (2006). In this case, the Tribunal held that this was a sector-wide, phenomenon and must be addressed at that aggregated level with the appropriate instruments. Thus it was not a merger-specific issue.

authorities to adopt broad interpretations of these categories to enable the Tribunal to address other PICs not covered under the Act.⁸⁰⁵ Second, the PICs must be merger-specific and substantial.

There is no conclusive answer to what should happen if there are competing PICs, i.e. where a merger has positive impact on a given consideration and a negative one on another. This issue presented itself in some cases where parties argued that the merger had a positive effect on public interest by creating an internationally competitive firm, while the unions asserted its adverse effect on employment. Although the SACT did not have to rule on this matter as it found no evidence of an adverse effect on public interest grounds, it did explain that in such situations the SACT must first perform a balancing of the interests claimed in order to come to a conclusion on whether there is a substantial public interest implicated by the merger or not.⁸⁰⁶

6.3.3 Intervention in Merger Proceedings involving PICs: procedural aspects

An interesting aspect of how merger review is conducted in SA pertains to the scope of third-party intervention in merger proceedings. In practice, the Competition Commission (the “Commission”) undertakes investigations of large mergers by consulting competitors, customers, the Minister of Economic Development, other regulators and stakeholders. During this process, the Commission may consider undertakings and propose remedies. After that, it refers the matter to the SACT for adjudication. It is at this point that formal intervention can be requested from the SACT.

When notifying a merger, both the primary acquiring and target firms must each provide a copy of the notice to the registered union that represents a substantial number of its employees. If no such union exists, the notice is provided directly to the employees concerned.⁸⁰⁷ Not only do employees (or their unions) have the right to be notified, they also have the right to participate in merger proceedings.⁸⁰⁸ A question arises as to what happens if there is more than one trade union representing the employees. Can the merger parties find

⁸⁰⁵ Media 24 Limited and Paarl Coldset (Pty) Ltd and The Natal Witness Printing and Publishing Company (Pty) Ltd, 15/LM/Mar11, (2011). In this merger, media plurality was not addressed as such but as a SMEs concerns.

⁸⁰⁶ Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd, 08/LM/Feb02, (2003) and Anglo American and Kumba merger *supra note* 798.

⁸⁰⁷ Section 13A(2) of Act 89.

⁸⁰⁸ Section 13 B and Section 53(1)(c) of Act 89. The Commission notes that in the beginning, the unions’ engagement with the competition authorities was limited but through awareness the unions have become more involved in the process. South Africa Competition Commission & South Africa Competition Tribunal. The South Africa Competition Commission, 10 Years of Enforcement by South African Competition Authorities, . (2009), p.38. Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/10year.pdf>. Last visited 1 September 2016.

comfort if the union holding the majority of employees does not object to the merger? The SACT was undeterred by this fact and decided that ‘the level of representation does not alter the concerns if they are legitimate.’⁸⁰⁹ Participation rights are also extended to the Minister of Economic Development who may raise any PICs in relation to the merger.⁸¹⁰ Subsequently, not only can parties to the merger appeal the decision of the SACT to the CAC, but so can any person who has been a participant in the proceedings of the SACT.

Some consumer interest groups have also made use of their intervention rights. In *Glaxo Wellcome plc and Smithkline Beecham*, the Aids Law Project, the legal representatives of the Treatment Action Campaign (TAC), were allowed to make a last minute submission on the day of the hearing requesting conditional approval of the merger, forcing the merging parties to allow generic competition for all medicines needed for the treatment of opportunistic infections in HIV/AIDS, as well as anti-retroviral drugs for HIV.⁸¹¹ Also in *Pioneer Hi-Bred International Inc., Pannar Seed (Pty) Ltd and Competition Commission*, the African Centre for Biosafety (ACB) was granted leave to intervene in the proceedings before the SACT, as an interested third party, on the basis that it represented the interests of small scale commercial and subsistence farmers in SA, who would have been affected by any potential maize seed price increases, as a result of the proposed merger.⁸¹² In the merger of *AGFRI and AgriGroupe*, the South African Communist Party challenged the merger by raising various PICs.⁸¹³

Intervention in competition proceedings is not exclusive to these categories of persons. The CAC adopted a broad interpretation of the provisions of the Act and found that it does not exclude any other party from intervening on public interest grounds.⁸¹⁴ Moreover, the CAC overruled the application of the ‘material and substantial interest test’ to limit intervention in merger cases, finding it too restrictive a test to be applied.⁸¹⁵ Hence, a party who is unable to

⁸⁰⁹ *Avi Limited and Green Cross Manufacturers (Pty) Ltd, Green Cross Properties (Pty) Ltd and Green Cross Retail Holdings as (Pty) Ltd*, 58/LM/May12, (2012). The trade union SACTWU represented 15 out of a total 426 employees while the majority of the employees were represented by another union, which did not object to the merger.

⁸¹⁰ Section 18 of Act 89.

⁸¹¹ *Glaxo Wellcome Plc and Another v Competition Commission of South Africa*, ZACT 33 (28 July 2000).

⁸¹² *Pioneer Hi-bred International Inc. and Another v Competition Commission and Another*, 113/CAC/NOV11, (2012). Note that this was an intermediate merger however we include it in our discussion for relevance.

⁸¹³ *AgriGroupe Holdings (Pty) Ltd v Afgri Ltd* (017939) [2014].

⁸¹⁴ Upholding the Tribunal’s position where it decided that “the potential harm of turning merger proceedings into battlefields open to disgruntled minority shareholders, customers or competitors in pursuit of private interests...should not overshadow the greater potential for legitimate issues to be raised by third parties in merger proceedings and the assistance they may render in facilitating our vigorous truth- seeking mission.” *Anglo American and Kumba merger supra note 798*, p. 14. “To be able to assess whether a merger is justified on public interest grounds, the Tribunal might admit persons beyond those persons or bodies who are directly or indirectly involved in the merger.” See *Anglo South Africa Capital (Pty) Ltd, Others vs. Industrial Development Corporation of South Africa*, 26/CAC/Dec02, 2003.

⁸¹⁵ *American Soda Ash Corporation CHC Global (Pty) Ltd and Another v Competition Commission of South Africa and Others*, ZACAC 7, (2003).

show a material substantial interest in the matter may be admitted if it is able to provide evidence of its ability to assist the SACT in its task.⁸¹⁶ This is a pragmatic approach followed by the court in order to ensure that the objectives of the Act are met.⁸¹⁷

With every right, there is always the possibility of abuse, which may lead to prolonged merger proceedings. This is particularly important because parties to the merger may not implement the merger before obtaining approval. The competition authorities in general try to accommodate applicants who raise PICs. With such a broad interpretation, the authorities engage in careful consideration as to who may intervene. An applicant for intervention should set out in their affidavits the matters upon which they seek to make representations identifying their interests and specifying the scope and nature of their proposed participation.⁸¹⁸ In some cases, the pattern of the applicant's conduct has been to generate delays.⁸¹⁹ Consequently, a request for postponement which is unaccompanied by any affidavit or any substantive explanation may be considered a delay tactic and will likely be disregarded.⁸²⁰ Further, the Commission adopted prescribed timelines under the published Service Standard.⁸²¹ The review of the Service Standard in 2015 showed that these timelines were not met in particular in relation to Phase 1 and Phase 3 mergers. This was attributed to the growing volumes in the number of mergers notified and the increasing complexity of investigations. The new standards issued by the Commission added a sub-category to Phase 3 to allow the extension of the review period from 60 to 120 business days.⁸²²

Third party interventions in the merger proceedings discussed above are different to those followed under US antitrust law. US law prohibits mergers that may substantially lessen competition or create a monopoly.⁸²³ Under the Horizontal Merger Guidelines, in their search for evidence, agencies may contact customers, other industry participants, and industry observers to collect reasonably available and reliable evidence.⁸²⁴ Third parties are not privy to the filings and can only infer information about the merger if they have been contacted by the relevant agency in the course of review or if the parties themselves announced the

⁸¹⁶ Community Healthcare Holdings (Pty) Ltd and Another v Competition Tribunal and Others, 44/CAC/Feb05, (2005).

⁸¹⁷ *Id.* at p. 7. The CAC found that Rule 46 sets out a higher threshold than the one, which is required in terms of the Act for a party to be able to participate. Rule 46(1) required material interest to be able to intervene in the Tribunal proceedings.

⁸¹⁸ See Anglo American and Kumba merger *supra* note 798.

⁸¹⁹ Community Healthcare Holdings merger *supra* note 816. The CAC dismissed an intervention made as the third-party failed to specify on what basis such intervention could be made despite countless invitations extended to them by the court.

⁸²⁰ MYBICO v Lewis NO and Others, 59CACFeb06, (2006).

⁸²¹ 20 business days for non-complex mergers, 45 business days for complex merger and 60 business days for very complex mergers. See Service Standard of 2015. Available at http://www.compcom.co.za/wp-content/uploads/2014/09/Service-Standards_2015_Final1.pdf. Last visited 1 September 2016.

⁸²² Service Standard of 2015.

⁸²³ 15 U.S.C. §18.

⁸²⁴ US Department of Justice & Federal Trade Commission Horizontal Merger Guidelines 2010.

merger.⁸²⁵ In case they become aware of the merger, private third parties including customers, competitors, suppliers, distributors, or wholesalers may complain to the relevant agency reviewing the merger. In addition to complaining to competition agencies, challenges to the merger can be brought independently, through a private civil antitrust lawsuit,⁸²⁶ or through state attorneys.⁸²⁷ Nevertheless, in relation to remedies, there is a statutory period for seeking public comments that is applied by the courts on a proposed consent decree or divestiture order.⁸²⁸ Also, settlement agreements with the FTC are subject to a 30-day public comment period where anyone may file comments concerning the case.⁸²⁹ In a few instances, labour unions submitted comments raising concerns over the impact of a divestiture order on employment. The FTC countered their claims stating that “antitrust laws are not subject to this proposed weighing of policy interests” on which the court concurred.⁸³⁰

EU competition law also grants the Directorate General for Competition at the European Commission the right to seek information from the merger parties and third parties, and interview any natural or legal person who consents, in order to collect information in relation to an investigation. Third parties are identified as those having a ‘sufficient interest’ in the Commission’s procedure, such as customers, suppliers, competitors, members of the administration or management organs of the undertakings concerned or recognized workers’ representatives of those undertakings.⁸³¹ An appeal can be brought by the merging parties, as well as by third parties “*directly and individually concerned*” by the decision. Further, a full text of the commitments is made public for interested third parties to comment.⁸³²

⁸²⁵ 15 U.S.C. §18.

⁸²⁶ A third party may file a private civil antitrust lawsuit at any stage whether after the merger was announced, during the review period, or after it was cleared by the antitrust agencies /consummated. Third parties need to show to the court antitrust injury in order to have standing. Consumers may also bring collective actions, i.e., class action against the merger. Direct consumers can ask for injunctive relief and treble damages while indirect consumers may only ask for injunctive relief but not damages. See DOJ, Antitrust Division Manual Investigation and Case Development § Fifth Edition (2015). Available at <https://www.justice.gov/atr/file/761141/download>. Last visited 1 September 2016, and AMERICAN BAR ASSOCIATION, FTC PRACTICE AND PROCEDURAL MANUAL (2007).

⁸²⁷ Harm to third parties may also be addressed under *parens patriae*, where a state attorney general may bring a civil action on behalf of natural persons residing in the State to secure monetary relief for injury sustained by such natural persons to their property by reason of any violation. In price fixing cases, the US Supreme court limited damages to direct purchasers. Aimee H. Goldstein & Paul J. Sirkis, *Raising Antitrust Merger Challenges Third-party Strategies*, PRACTICAL LAW JOURNAL (2013).

⁸²⁸ Pursuant to the Antitrust Procedures and Penalties Act, a consent order is subject to sixty-day comment period for third parties and the public after which the court must determine whether entry of the proposed final judgment “is in the public interest.” OECD, United States Contribution To Working Party No. 3 On Co-Operation And Enforcement, DAF/COMP/WP3/WD (2011) 58, p.9-10. Available at <http://www.justice.gov/sites/default/files/atr/legacy/2011/07/29/273459.pdf>. Last visited 1 September 2016.

⁸²⁹ *Id.*

⁸³⁰ OECD, United States Contribution To The Global Forum On Competition, Does Competition Create Or Kill Jobs, DAF/COMP/GF/WD (2015) 43, p.4 Available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2015\)43&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)43&docLanguage=En) Last visited 1 September 2016.

⁸³¹ Council Regulation (EC) No 139/2004 On The Control Of Concentrations Between Undertakings (The EC Merger Regulation). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:024:0001:0022:en:PDF>. Last visited 1 September 2016.

⁸³² Article 9 of Council Regulation (EC) No 1/2003 Of 16 December 2002. Available at <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001>. Last visited 1 September 2016.

Although the EU criterion for third parties is broader than that of the US, it is still, in practice, narrower than that of SA.⁸³³ This illustrates that integrating PICs in merger control not only affects the substantive tests performed but also the organisation of the merger review process and, more broadly, the various procedures put in place in order to enhance participation from the affected interests and groups (e.g. consumers, employees, the general public) legislation seeks to protect.

6.3.4 Enforcement of PICs in SA

In this part, we will examine how SA competition authorities enforced these PICs. We will focus on published decisions of the SACT (and a few intermediate mergers and CAC decisions, where relevant) from 1999 up to 2015, in order to understand in which instances PICs were applied and how.

We will first quantify the impact PICs have on the decisions of the SACT. We surveyed the SACT’s decisions in large mergers (LM) from the date of operation in 1999 to the end of 2014.⁸³⁴

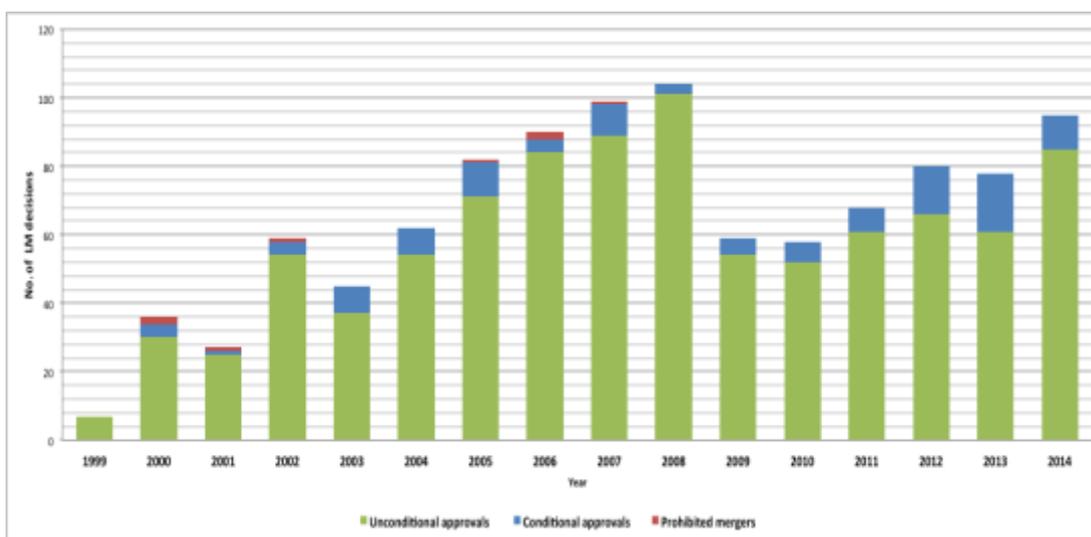


Figure 5 No. of SACT decisions LM (1999-2014) by type of decision

Source: Compilation by author based on the review of the database of the published decisions of the SACT

⁸³³ “The language of the statute is clear. There is no reference to interest at all. The mere requirement is that a party must be recognized by the Tribunal as a participant. The recognition could be on the basis of some other grounds, other than an interest in the matter as stipulated in the common law. Even if it were to be argued that the party must have an interest, such interest is not qualified. In other words, there is no threshold for the interest for a party to participate. In the absence of specified criteria for participation this court should be reluctant to read in a test such as “substantial and material interest”. *Anglo South Africa Capital merger supra note 814.*

⁸³⁴ Under SA merger control, mergers are divided into small, intermediate and large mergers. Large merger is where the combined turnovers/asset values of the acquiring group and the target firm exceeds R6.6bn and where the target firm’s turnover/asset value exceeds R190 m. See Section 3 of Act 89.

The above figure shows that almost 89% of these mergers were approved with no conditions. Approximately 10% of these mergers were conditionally approved, while 1% were prohibited. It also shows an increase in the number of conditions adopted lately, especially in the years 2012 and 2013. However, we need to identify the number and percentage of the PICs related conditions compared to the competition related conditions to be able to quantify how much negative PICs featured in the work of the Tribunal during the said period.

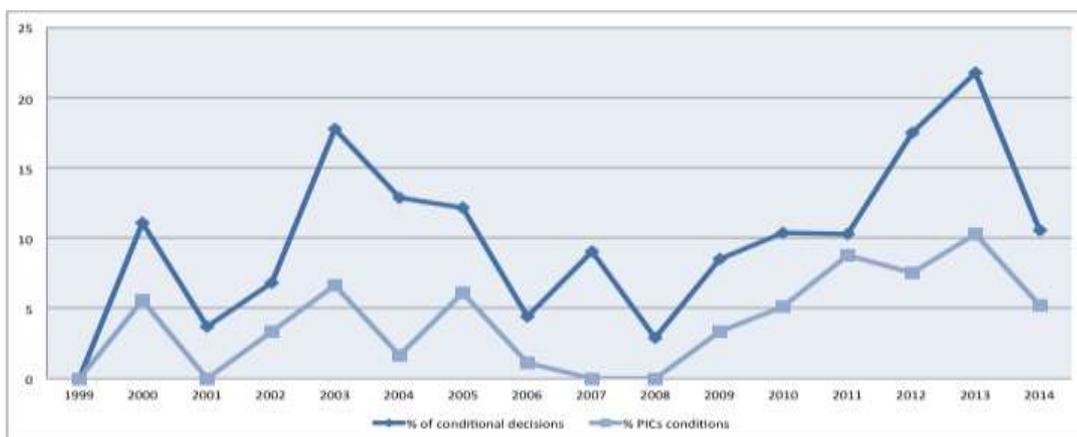


Figure 6 Percentage of conditional decisions and percentage of PICs conditional decisions compared to total number of SACT LM decisions (1999-2014)

Source: Calculations by author based on the review of the database of the published decisions of the SACT

Accordingly, we found that, of the 10% of conditional approvals, approximately 40% were public interest-related conditions (4% of all decisions). This, however, does not address situations where the PICs were raised in the positive sense, i.e. in order for the SACT to approve the merger.⁸³⁵

⁸³⁵ This does not mean that a merger has to be justified on public interest basis. We will discuss this point in details later in the chapter.

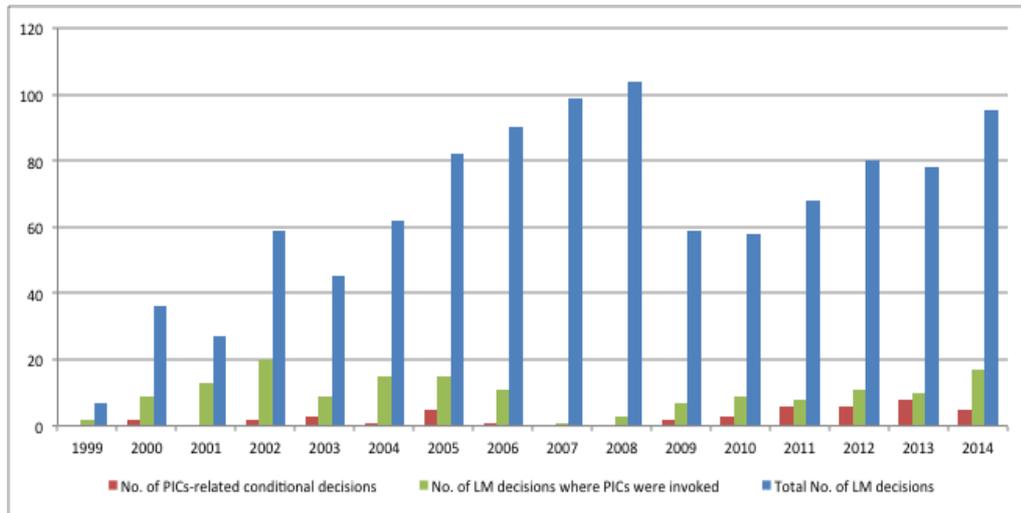


Figure 7 No. of decisions where PICs (+/-) were invoked by parties compared to total no. of LM decision of the SACT and no. of PICs conditional decisions

Source: Calculations by author based on the review of the database of the published LM decisions of the SACT

To get an indication of this, we ran a variation of a word search relevant to PICs on LM merger decisions (if not technically possible, we read through them) to check when one or more PICs were invoked (whether in positive and negative sense), and if so which one(s) were invoked, regardless of whether conditions were adopted (figure insert ref.). This should not be confused with applying the PICs test, which is always a part of the analysis (in the absence of PICs, the decision usually indicates that the proposed merger does not raise any PIC). Also, we looked at the average percentage for this period (1999-2014), which happened to be 15% of decisions where PICs were invoked during merger proceedings.

We wanted also to identify the most frequently used PICs of all four categories. The data on PICs conditions may provide us with an indication of the most featured ones.

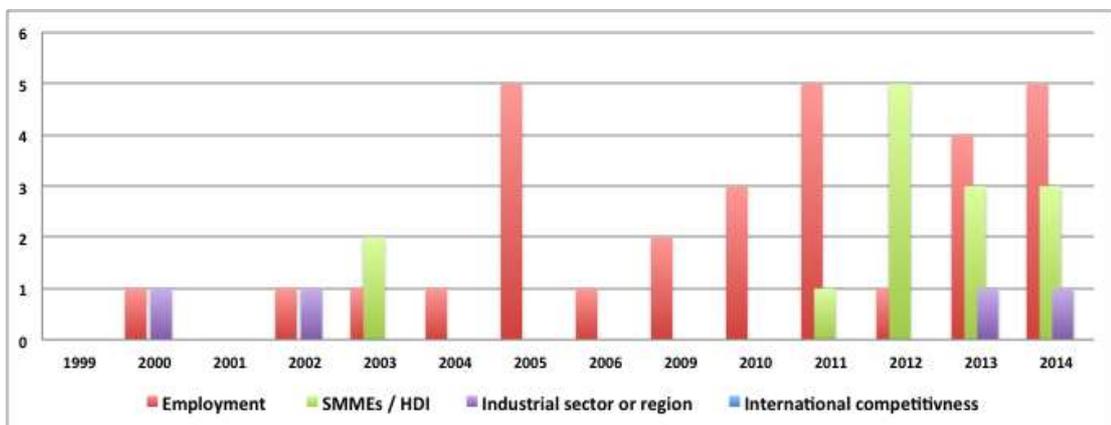


Figure 8 No. of PICs conditional approvals by the SACT in LM- by category of PIC

Source: Calculations by author based on the review of the database of the published LM decisions of the SACT

We found employment to be the most frequent PIC, followed by SMEs/HDI, ability of a sector or a region to compete, and finally international competitiveness. In practice, however, a merger can raise two or more of these PICs, whether in the positive or negative sense.

6.3.5 PICs criteria under the SA merger control

The general rule is that for PICs to be considered they must be merger-specific, substantial and unjustifiable on any other grounds. This framework seems similar to the methodology used in assessing efficiencies. It was further developed under the recently adopted guidelines into five steps:

- 1- determine the likely effect of the merger on PICs;
- 2- determine whether it was merger specific;
- 3- determine whether it is substantial;
- 4- determine any positive/negative effects on PICs that, in case of the former, justifies a merger or, in case of the latter, whether there are any justifications that may allow the merger; and
- 5- consider possible remedies to address any negative effect on PICs.⁸³⁶

What is of interest here is how these familiar notions of an efficiencies defence were remodelled in order to fit each PIC under the Act.

6.3.5.1 Employment

Employees' rights are safeguarded under the SA Constitution and the Labour Relations Act no. 66 of 1995 ("Labour Act").⁸³⁷ The Labour Act dealt with the issue of job loss in the case of ordinary or insolvency transfers. In both transfer scenarios, the new employer is obligated to honour the employment obligations of his predecessor, i.e. the new employer takes over the employees subject to the terms and conditions of employment, which are on the whole not less favourable than those awarded by its predecessor.⁸³⁸ Accordingly, competition law should be a measure of last resort where no other law or regulation can remedy the situation by either

⁸³⁶ Commission. 2016, p. 12.

⁸³⁷ Section 23 of the South Africa Constitution of 1996 (Bill of Rights). The SA Constitution stipulated some fundamental rights for labour such as the right to form and join a union and to participate in its activities, the right to strike and the right of trade union, employers' organization and employers to engage in collective bargaining. Available at <https://www.capetown.gov.za/en/CityHealth/Documents/Legislation/Act%20-%20Constitution%20of%20the%20RSA%20Act%20-%20108%20of%201996.pdf>. Last visited 1 September 2016.

⁸³⁸ S197 of the Labour Act defines 'business' as including the whole or a part of any business, trade, undertaking or service; and 'transfer' as the transfer of a business by one employer ('the old employer') to another employer ('the new employer') as a going concern. Available at <http://www.labour.gov.za/DOL/legislation/acts/labour-relations/labour-relations-act>. Last visited 1 September 2016.

prohibiting or imposing conditions.⁸³⁹ In that regard, the Guidelines explain that the SACC will consider first both direct effects on employment within the merging parties and indirect effects on general levels of employments in a given sector or region.⁸⁴⁰

To be considered as a PIC, job losses must be merger-specific, substantial, and not recognized under any other public interest grounds.⁸⁴¹ We will discuss below the factors which the SACT took into consideration in making its assessment.

a. Merger-specific retrenchments

Merger-specific retrenchment is conceptually an outcome that can be shown, as a matter of probability, to have some nexus associated with the incentives of the new employer.⁸⁴² This is different from an operational employment loss, which only concerns the Labour Act.⁸⁴³ Distinguishing between the two is not simple. It is rather easy for companies to disguise merger-specific retrenchments so that it appears that these would have occurred even in the absence of the merger, and hence this explains the emphasis the competition authorities put on transparent and *bona fide* disclosure by the parties of any retrenchment, whether they consider it merger-specific or not, so that the authorities can decide on the matter.⁸⁴⁴

A few precedents may provide useful guidance as to the SACT's position. Merger-specific retrenchment is more prevalent in firms with overlapping activities since 'the nexus is more easily established because the inference of merger specificity is highly probable'.⁸⁴⁵ In another case, the employment policies of the new acquirer served as an indicator of this nexus.⁸⁴⁶ Further, employment loss may not be seen as merger-specific if they arise from the dire financial circumstances of the target firm, which would necessitate retrenchments.⁸⁴⁷ The timing of the retrenchment may also be an indication of whether it was merger-specific or

⁸³⁹ Distillers and Stellenbosch *supra note* 806, Super Group Trading (Proprietary) Limited and Businesses of DNA Supply Chain Investments Limited, 38/LM/Jul03, (2003), Lexshell 296 Investment Holdings and Molohe Group Ltd, 04/LM/Jan00, (2000), and AECI Coatings (Pty) Ltd / PPG Securities Industries Inc. and AECI (Pty) Ltd, 17/LM/Feb00, (2000).

⁸⁴⁰ Commission. 2016, p. 19.

⁸⁴¹ DB Investments SA and De Beers Consolidated Mines Ltd / De Beers Centenary AG, 20/LM/Mar01, (2001).

⁸⁴² BB Investment Company (Pty) Ltd and Adcock Ingram Holdings (Pty) Ltd CT, 018713. The Tribunal resisted the pressure to impose conditions in case of hypothetical future job losses in unrelated industries or offering broad undertakings regarding maintaining employment levels into the distant future. This was later reflect in the Guidelines as "an effect that is casually related to, or result / arise from the merger". Commission. 2016, p. 12

⁸⁴³ Employers must consider alternatives to retrenchment and should consult all the relevant parties when considering worker retrenchment. If retrenchment is unavoidable, fair procedures must be followed. Section 189 of the Labour Act.

⁸⁴⁴ Daun et Cie AG and Kolosus Holdings Limited, 10/LM/Mar03, (2003).

⁸⁴⁵ BB Investment and Adcock merger *supra note* 842.

⁸⁴⁶ Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc., 110/CAC/Jun11, 111/CAC/Jul11, (2012). Available at <http://www.comtrib.co.za/assets/Uploads/Wal-Mart-and-Massmart-decision/110111CACJun11-Walmart-judgment.pdf>. Last visited 1 September 2016. The Tribunal decided that an acquiring firm's history of being hostile to collective bargaining justified imposing a condition on the merged firm to protect existing collective bargaining rights.

⁸⁴⁷ Wispeco (Pty) Ltd and the Business of AGI Solutions (Pty) Ltd, 69/LM/Oct09.

not.⁸⁴⁸ Implementing a merger prior to obtaining the required approvals, i.e. jumping the gun, may lead to a determination that the retrenchment is merger-specific.⁸⁴⁹ When in doubt, the competition authorities seem to take a cautious approach and impose conditions on the retrenchment.⁸⁵⁰

b. Substantial employment losses:

i. Quantitative factors: number and percentage of employees retrenched

While the Act offers no threshold number for when job losses become substantial, the proper approach is to start by having regard to the number of jobs that will be lost post-merger.⁸⁵¹ The SACT will also consider the percentage of job losses when analysing the merger's impact on employment.⁸⁵² Reaching the exact number/percentage of job losses is not easy.⁸⁵³ Both however were regarded as a far from conclusive factor. Even with a significant number of job losses, the SACT emphasized that what matters is the substantial effect on employment, for example despite the high retrenchment percentage, the impact was mitigated by a privately negotiated retrenchment package.⁸⁵⁴

Given that employment is an internal matter, the SACT usually take the numbers indicated by the parties as a basis for any conditions imposed, provided they are derived from a reliable method of estimating job losses.⁸⁵⁵ It is not acceptable for the notification forms to be 'sugar coated' in order to ensure a favourable decision, while later in the process less favourable facts are disclosed.⁸⁵⁶ Generally, the competition authorities will hold the parties accountable for the numbers provided. In the *Bidpaper Plus (Pty) Ltd and Pretoria Wholesale Stationers (Pty) Ltd merger*, the SACT imposed a condition on the approval of the merger, limiting retrenchment to the number of job losses the parties indicated in their submissions.⁸⁵⁷ While in

⁸⁴⁸ Wal-Mart and Massmart merger *supra note* 846, para. 140.

⁸⁴⁹ BB Investment and Adcock merger *supra note* 842. Also it may be considered an aggravating circumstance should the parties be prosecuted for implementing the merger without the prior approval. Nedbank Limited and Retail Brands Interafrica (Pty) Ltd and Continental Beverages (Pty) Ltd / Retail Brands Interafrica (Pty) Ltd, 71/LM/Dec03, (2004) and Caixa Geral de Depositos S. A. and Mercantile Lisbon Bank Holdings Ltd, 07/LM/Jan02, (2002).

⁸⁵⁰ Lexshell 826 Investments (Pty) Ltd v Umcebo Mining (Pty) Ltd and Another, 09/LM/Feb11, (2011). In Sun International (SA) Ltd and GPI Slots (Pty) Ltd (CDM case no.:019083). The Commission sought the imposition of a two-year moratorium on retrenchments on both the acquiring and target firm though there was no nexus between the retrenchments at SISA and the merger.

⁸⁵¹ Liberty Group Limited and Investec Employee Benefits Limited, 32/LM/Jun03, (2003). The percentage should be based on the acquired firm's work force that the retrenchments represent.

⁸⁵² *Id.*

⁸⁵³ Distillers and Stellenbosch *supra note* 806. The unions argued that the number of job losses would be 1,414 (including all voluntary retirements and retrenchments) that accounted for 24% of the workforce. The parties argued that this figure would be less than 164 (excluding all voluntary retirements and retrenchments), which accounted for a 3% loss of the workforce.

⁸⁵⁴ *Id.*

⁸⁵⁵ Aon South Africa (Pty) Ltd and Another v Competition Commission, 37/AM/Apr11, (2011).

⁸⁵⁶ Daun et Cie AG and Kolosus Holdings Limited *supra note* 844.

⁸⁵⁷ Bidpaper Plus (Pty) Ltd v Pretoria Wholesale Stationers (Pty) Ltd, 03/LM/Jan09, (2009).

other mergers the SACT used the figures submitted by the parties to provide a ceiling on the number of retrenched employees⁸⁵⁸ or a commitment not to retrench.⁸⁵⁹

The SACT addressed the method for quantitative assessment of job losses in the Harmony Gold Mining Company and Gold Fields Limited merger. In this merger, the SACT was of the opinion that the parties must ensure that ‘a rational process has been followed to arrive at the determination of the number of jobs to be lost, i.e. that the reason for the job reduction and the number of jobs proposed to be shed are rationally connected’.⁸⁶⁰ This in practice means that the due diligence/negotiation process requires businesses to be very mindful of their retrenchment plans and to be ready to explain and defend them as they will be subject to a high degree of scrutiny. The SACT puts emphasis on the consultation process.⁸⁶¹ Parties to a merger should inform their employees/unions of the worst-case scenario for job losses.⁸⁶² Further, they should engage in proper consultation with employees prior to the merger.⁸⁶³ The SACT refused the argument that the number of retrenchments is considered sensitive business information (and therefore confidential) and that it should only be disclosed to the parties, the Commission and the unions and their members but not to the non-unionized employees.⁸⁶⁴ Thus, failure to consult with employees properly leads to retrenchments plans being deemed inadequate.⁸⁶⁵ Timely disclosure of retrenchment plans is also essential, otherwise the whole point of the disclosure process may be frustrated.⁸⁶⁶ The consultation process should also cover the drafting of the conditions pertaining to employment considerations.⁸⁶⁷ In general, if an agreement has been reached after sharing full information with employees/unions and a consultation process, the SACT will respect their agreement.⁸⁶⁸

⁸⁵⁸ Heinz Foods South Africa (Pty) Ltd and Today Frozen Foods (a business unit of Pioneer Foods (Pty) Ltd) / John West (a division of Heinz SA (Pty) Ltd)/Heinz Wellington (Pty) Ltd, 42/LM/Aug03, (2003) and Glencore International PLC v Xstrata PLC, 33/LM/Mar12, (2013).

⁸⁵⁹ Ferro Industrial Products (Pty) Ltd and NCS Resins (Pty) Ltd., 51/LM/May12 (CDMcase no.: 015032).

⁸⁶⁰ Harmony Gold Mining Company and Gold Fields Limited merger *supra* note 9.

⁸⁶¹ Form CC 4(1), Schedule 2 of CC 4(1). Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/CC-4-2-Statement-of-merger-information.pdf>. Last visited 1 September 2016.

⁸⁶² Liberty Group Ltd and Capital Alliance Holdings Ltd, 04/LM/Jan05, [2005]. The Tribunal found that employees had not been sufficiently informed of the potential impact of the transaction. The parties were ordered to inform their employees, in writing, of the potential worst-case scenario. Commission. 2016, p. 20.

⁸⁶³ BB Investment and Adcock merger *supra* note 842. The term consultation here has the same meaning as that of the Labour Appeal Court ‘to provide the employee or its representatives with relevant and sufficient information that would place them in a position to make the informed representations and suggestions on the subjects specified for the consultation’.

⁸⁶⁴ Unilever Plc Unifoods (a division of Unilever South Africa (Pty) Ltd) / Hudson & Knight (a division of Unilever South Africa (Pty) Ltd) / Robertsons Foods (Pty) Ltd / Robertsons Food Service (Pty) Ltd and Competition Commission of South Africa / CEPPWAWU / FAWU / NUFBWSAW, 55/LM/Sep01, (2002). The Tribunal refused this argument finding such information neither confidential as it didn’t satisfy the definition of the same under the Act nor of economic value like business secrets.

⁸⁶⁵ Wispeco (Pty) Ltd v The Sheerline Business of AGI Solutions (Pty) Ltd, 69/LM/Oct09, (2010). A dispute of fact arose over the adequacy of the consultation process. The Tribunal found that consultation process was not adequate as the parties consulted with NUMSA’s local organizer of the union and not the head office where merger related issues are handled.

⁸⁶⁶ DCD Dorbyl (Pty) Ltd v Globe Engineering Works (Pty) Ltd, 108/LM/Oct08, (2009).

⁸⁶⁷ Lonmin Plc and Southern Platinum Corp, 41/LM/May05, (2005).

⁸⁶⁸ Nedbank Ltd v Imperial Bank Ltd, 70/LM/Oct09, (2010).

ii. Qualitative factors: the type of employees affected and alternative employment opportunities

In general, competition authorities divide the work force into three main categories: unskilled, semi-skilled, and skilled employees. The competition authorities give more weight to the retrenchment of unskilled employees.⁸⁶⁹ The presumption is that skilled and semi-skilled employees are professionals who do not require retraining and should be able to find alternative work opportunities.⁸⁷⁰ There is no definition of these three categories. In the merger of *Aon South Africa (Pty) Ltd and Glenrand MIB Ltd*, employees were identified by pay scale.⁸⁷¹ Similar to the above factors, the SACT based its findings on the information presented by the parties.⁸⁷²

In practice, employment has been assessed in both the negative sense (job loss especially for semi-skilled and unskilled workers and/or no short term prospect of re-employment for a large portion) and positive sense (job creation especially for semi-skilled and unskilled workers in sectors vulnerable to job losses).⁸⁷³ The protection of employment was extended to any jobs that may be threatened as a result of the merger whether of those employed by the merged parties or not.⁸⁷⁴ PICs should not be used to ‘improve on existing collective bargaining rights.’⁸⁷⁵ Given that it is a measure of last resort, competition authorities should respect the agreement reached between employees and employers.⁸⁷⁶ Further, the Guidelines explain that it will consider the relation between the effects on employment and the intentions, incentives, policies, rationale and decision of the acquiring group, which follows closely what happened in the *Wal-Mart merger*. It will also consider the “counter-factual,” i.e. whether the impact on employment (negative or positive) would have occurred absent of the merger.⁸⁷⁷

⁸⁶⁹ Tiger Food Brands LTD And Bromor Food (PTY) LTD, 33/LM/Apr06, (2006).

⁸⁷⁰ BHP Steel Southern Africa (Pty) Ltd / BHP Minerals International Exploration Inc. / BHP World Exploration Inc. and Billiton SA Limited and Mine & Smelter Investments (Pty) Ltd, 32/LM/Jun01, (2001), and BoE Bank Limited and Cashbank Limited, 40/LM/Jul01, (2001). Under the Guidelines skilled employees are not excluded automatically. The SACC may exclude management employees if it finds that they have alternative jobs in the short term. Commission. 2016. P.21.

⁸⁷¹ Aon SA and Glenrand MIB merger *supra note* 52. The conditions were based on a cap on number of employees retrenched based on their pay scale (earning between R15 000 and R30 000 per month).

⁸⁷² Metropolitan and Momentum merger *supra note* 795.

⁸⁷³ See for example *Steinhoff Africa Holdings (Pty) Ltd and North Eastern Cape Forest Joint Venture Goeiehoop Farming (Pty) Ltd*, 93/LM/Sep05, (2006) and *Rustenburg Platinum Mines Ltd and Aquarius Platinum (South Africa) (Pty) Ltd*, 82/LM/Sep05 (2005) where the transaction is estimated to extend the life of the Marikana mine and the parties estimate that the increase in PGM production would lead to the creation of approximately 900 job opportunities at the Marikana mine. Commission. 2016P.22.

⁸⁷⁴ Wal-Mart and Massmart merger *supra note* 846.

⁸⁷⁵ In *Edgars Consolidated Stores Ltd and Pick n Pay Retailers (Pty) Ltd*, 05/LM/Feb04, employees were to be transferred to the new employer as per the terms of the Labour Act. The relevant trade union, sought to impose conditions over and above what has been agreed with the previous employer.

⁸⁷⁶ *Multichoice Subscriber Management (Pty) Ltd and Tiscali (Pty) Ltd*, 72/LM/Sep04, 2005.

⁸⁷⁷ Commission. 2016, p. 21.

The mere fact that retrenchments are merger-specific and substantial does not automatically result in prohibiting the merger. This only constitutes a *prima facie* case that the merger will produce an adverse effect on employment and shifts the onus to the merging parties to justify the retrenchments as not contrary to the public interest. Such justifications may include saving a failing firm and realizing cost savings/efficiencies. Retrenchments to realize cost saving goals for the benefit of shareholders will not suffice, but lowering prices for consumers will; that is, private gains will not be considered.⁸⁷⁸

6.3.5.2 The Ability of SMEs (especially ones owned by HDI) to Become Competitive

SMEs are categorized under the National Small Business Act No. 102 of 1996 on the basis of their turnover, assets and number of employees into four categories: micro, very small, small, and medium sized entities. Black Economic Empowerment Programme (BEE) is a tool to bring HDI in the economic mainstream.⁸⁷⁹ Both SMEs and HDI considerations often arise together since individuals covered by BEE are usually the owners of these SMEs. Throughout SA's constitutional and legal framework one may find provisions for BEE. These include human resource development, employment equity, enterprise development, and preferential procurement, as well as ownership and control of enterprises.⁸⁸⁰ These provisions are also mirrored under some sector-specific acts, charters and memorandums of understandings.⁸⁸¹ Similar to other PICs, SMEs/HDI arguments may be used in order to approve a merger (positive sense) or prohibit a merger (negative sense). It is not clear how the two requirements for PICs (being merger-specific and substantial) apply in this context. In the merger of *Piruto B.V and Optimum Coal Holdings Limited and Others*, the SACT imposed conditions to address concerns raised regarding the competitiveness of SMEs arising from structural problems already present in the coal market, rather than being merger-specific.⁸⁸² In *Sasol*

⁸⁷⁸ *Id.*, p.22.

⁸⁷⁹ Regulation 1(h) of the Preferential Procurement Regulations 2001 provides that: 'Historically Disadvantaged Individual (HDI) means a South African citizen (1) who, due to the apartheid policy that had been in place, had no franchise in national elections prior to the introduction of the Constitution of the Republic of South Africa, 1983 (Act No 110 of 1983) or the Constitution of the Republic of South Africa, 1993 (Act No 200 of 1993) ('the Interim Constitution'); and/or (2) who is a female; and/or (3) who has a disability. Provided that a person who obtained South African citizenship on or after the coming into effect of the interim Constitution, is deemed not to be an HDI.' Available at http://www.treasury.gov.za/legislation/pfma/supplychain/gazette_22549.pdf. Last visited 1 September 2016. Broad-Based Black Economic Empowerment (B-BBEE) is also a relevant extension of BEE policies which covers not only direct empowerment (equity and management equality) but also indirect empowerment (employment, skills development, enterprise development and socio-economic development). See Broad-Based Black Economic Empowerment Act 53 of 2003. Available at http://www.saflii.org/za/legis/consol_act/bbeea2003311.pdf. Last visited 1 September 2016.

⁸⁸⁰ Broad Based Black Economic Empowerment Bill of 2003, the Employment Equity Act of 1998 and Section 217 of the Constitution. See Irene-marié Esser & Adriette Dekker, *Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles*, 3 J. INT'L COM. L. & TECH. (2008).

⁸⁸¹ *Id.*

⁸⁸² *Piruto B.V and Optimum Coal Holdings Limited and others*, 86/LM/Oct11, para. 17. "The Tribunal was of the view that the concerns of the junior miners, albeit not entirely merger-specific, will be addressed to some extent by the conditions imposed. "

Engen merger, it seems that determining whether BEE is merger-specific or not may not be that simple. In this case, the SACT was able to reach a finding that introducing an empowerment partner was not merger-specific, “as regardless of whether or not the merger takes place, Sasol Oil will, as required by the empowerment charter applicable to the industry, sell the requisite portion of its equity to historically disadvantaged persons.”⁸⁸³ In many instances, the concerns raised by the SMEs were linked to contractual obligations. In a number of decisions, the SACT imposed conditions on exclusivity clauses in retail space leasing agreements. Typically, under such clauses a property developer enters into an exclusive anchor lease agreement with a major retailer for a long period of time. This has the effect of keeping the retailer (and possibly other business) tied to the specific property developer. The SACT has found this problematic as it prevents small businesses from gaining access to rentable retail space in a given shopping complex.⁸⁸⁴ In that sense, an argument can be made that these conditions raise or present barriers to entry, which may impede the ability of SMEs to compete. However, such clauses are not merger-specific, i.e. they do not arise as a consequence of the merger.⁸⁸⁵

Further, under this PIC, the SACT addressed mergers that jeopardize the access of SMEs to resources and their ability to compete with imports. In the Pioneer merger, the ACB, a non-profit organization, argued that an increase in maize seed prices post-merger would have a detrimental effect on small-scale commercial and subsistence farmers in SA. The SACT concurred and found that such an increase would result in a decrease in the maize yields required to feed small-scale commercial subsistence farmers, their families, and communities.⁸⁸⁶ In the *Wal-Mart and Massmart merger*,⁸⁸⁷ the CAC raised the issue of the impact of Global Value Chains (GVCs) on domestic supply chains mainly composed of SMEs, where local supplies may be substituted with imports. The CAC had to weigh the benefit to consumers from lower prices against the impact on local supply chains. Despite acknowledging the former, it approved the merger subject to conditions ensuring the

⁸⁸³ Sasol Limited Engen Limited Petronas International Corporation Limited And Sasol Oil (Pty) Ltd Engen Ltd (101/Lm/Dec04) [2006] Zact 15 (23 February 2006), para. 179.

⁸⁸⁴ Growthpoint Properties Ltd v Liberty Group Ltd, 20/LM/Mar12, (2012).

⁸⁸⁵ In 2009, the Commission commenced an investigation into the supermarket chains sector in SA. Among the issues raised was long-term exclusive lease agreement with developers. When the investigation was concluded in 2014 the Commission found that exclusive lease agreements raised barriers to entry into grocery retailing but did not find sufficient evidence to meet the tests set out in the Competition Act for demonstrating anticompetitive effects. Accordingly, the SACC will use its advocacy powers to advise against such conditions. SACC, Commission non-refers supermarkets investigation (2014). Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/Commission-non-refers-supermarkets-investigation.pdf>. Last visited 1 September 2016. In 2015, the STCC initiated a market inquiry into the retail market sector to address this issue (among others). Available at <http://www.compcom.co.za/retail-market-inquiry/>. Last visited 1 September 2016.

⁸⁸⁶ Pioneer Hi-bred International Inc. and Another v Competition Commission and Another, 113/CAC/NOV11, (2012). Note that this was an intermediate merger however we include it in our discussion for relevance.

⁸⁸⁷ Wal-Mart and Massmart merger *supra note* 846.

continuity and development of the local value chains and possible greater vertical integration of the same within the GVCs. Based on the above, the Guidelines delivered some guidance on the “substantiality” requirement, linking it with whether the relevant SME/HDI will be impeded/allowed, and how this would impact dynamic efficiencies in the market, their expansion, and their impact on other PICs such as employment and industrial sector or region. Justifications for negative effect on SMEs/HDI include better prices, consumer choices, and new investment.⁸⁸⁸

6.3.5.3 The Ability of an Industrial Sector or Region to Compete

There is no definition or clarification of what constitutes an ‘industrial sector’ but it is interpreted to include both products and services. There are not many decisions we can draw on for this particular PIC. The SACT did not expressly address what would be specific in this context but it did assert that industry-wide concerns are not to be considered merger-specific.⁸⁸⁹ The Guidelines, however, used the same “casualty” criterion to determine specificity.

When assessing the substantiality factor, the SACT looks at whether the merger would lead to the substitution of the local supply with imports or directing local resources to international markets. An example of that can be seen in the *AGFRI and AgriGroupe merger* where the competition authorities examined parties’ strategies and sector-specific regulations. AFGRI is one of the largest players in the grain supply sector, servicing more than 7,000 farmers in SA. Concerns were raised regarding whether the merger would result in AgriGroupe exporting/diverting grain to other countries (which would impact negatively on SA’s food security), and whether the merger might lead to AGFRI and AgriGroupe having the ability and incentive to foreclose or deny access to key strategic resources such as railway infrastructure and services for farmers.⁸⁹⁰ The SACT concluded that the merged entity would not have the ability or incentive to transfer grain to other countries to the detriment of food security in SA. Another example is the *Industrial Development Corporation of South Africa Limited (IDC), Hebei Iron & Steel Group Co Limited, and Mauritius SPV and Rio Tinto South Africa Limited merger*. In this merger, the SACT was concerned that the proposed transaction would result in the diversion of locally produced DMS iron ore volumes to the merging parties, or entities in which they have an interest to the detriment of domestic

⁸⁸⁸ Commission. 2016P. 27.

⁸⁸⁹ Glencore International PLC and Xstrata PLC, 33/LM/Mar12, 2013.

⁸⁹⁰ AgriGroupe Holdings (Pty) Ltd v Afgrit Ltd (017939), 2014.

customers of DMS iron ore.⁸⁹¹ In this merger, the SACT dealt with concerns over access to input. Further, the strategic nature of a sector or a product is a major factor in the substantiality analysis.⁸⁹² The SACT adopted a broad interpretation of this provision, extending it to the education sector and telecommunications, which are not *per se* industrial in nature. In both of these mergers, the impact was considered to be far-reaching to the broader economy (for telecommunications) and societal welfare (for education) and therefore was a warranted intervention.⁸⁹³

The impact of a proposed merger on a given region may function as a mitigating factor for a finding of a lessening of competition and a decision to approve a merger conditionally. In the merger of *Iscor Limited and Saldanha Steel (Pty) Limited*, the SACT examined the impact that the absence of the merger would have had on the West Coast region, and found an adverse effect on the region and employment.⁸⁹⁴ However, for such a claim to succeed, the impact on the region must be substantial and may only be realized through the merger, i.e. being merger-specific.⁸⁹⁵

6.3.5.4 The Ability of National Industries to Compete on the International Level

This consideration is very relevant to the concept of national champions. What is protected here is the ability to compete and not the ability to become competitive (as in the case of SMEs and HDIs). These two represent different policy choices. On the one hand, a policy choice to protect national champions existing in the market, while on the other hand to engage in the promotion of the underprivileged, such as the SMEs of HDIs. This reflects the prerogative of the competition authorities under the Act, which expands beyond the role of protecting competition to protecting certain interests not only to remain in the market but also to enter it.

In general, an increase in production and subsequently exports constitutes grounds for finding a positive impact of the merger on the ability to compete internationally.⁸⁹⁶ This does not, however, mean that a merger that will likely increase production capacities (so that the entity will be able to compete internationally) should be approved if it is at the expense of local

⁸⁹¹ Industrial Development Corporation of South Africa Ltd and Another v Rio Tinto South Africa Ltd (016329), (2013).

⁸⁹² The same was reflected in the newly adopted guidelines. Commission. 2016.

⁸⁹³ Nasionale Pers Limited Educational and Investment Corporation Limited, 45/LM/Apr00, (2002) and Telkom SA Limited and Business Connexion Group Ltd, 51/LM/Jun06, (2007).

⁸⁹⁴ ISCOR Limited and Saldanha Steel (Pty) Ltd, 67/LM/Dec01, (2002).

⁸⁹⁵ *Id.*

⁸⁹⁶ Toyota Motor Corporation (Japan) and Toyota South Africa (Pty) Ltd, 61/LM/Aug02, (2002).

competition. This approach was rejected by the SACT, which emphasized that “International competitiveness does not mean domination of domestic markets.”⁸⁹⁷ This consideration has sometimes been tied to the impact of the merger on a given sector, where its impact may be so grave that it may also affect the international competitiveness of the country.⁸⁹⁸ In general, enforcement in this area has been less frequent and thus provides very few cases to consider. The Guidelines, however, explain that merger-specific here means that the SACC will decide whether, in the absence of the merger, the parties would be able to compete in international markets; substantiality is assessed based on the importance of the said sector in national and international markets, the structure and size of the national relevant market, the effects on the ability of the national sector to compete internationally, and the impact of the merger on related policy considerations in the sector.⁸⁹⁹

6.3.6 Evidence and expert testimony about PICs

Economic evidence and expert testimony play a paramount role in merger analysis.⁹⁰⁰ Among the main criticism of the inclusion of PICs in the merger review process is the difficulty in administering such rules, in terms of the balancing test required, and subsequently the types of evidence the authority/court will hear.

In the SA context, the SACT assumes an inquisitorial role by examining evidence submitted by parties to the proceedings and cross-examining witnesses. The SACT consists of three members, one of whom is an economist. There are no guidelines which cover the submission of evidence to the competition authorities.⁹⁰¹ This leaves room for unnecessary lengthening of the process and a possible abuse by the various parties to the proceedings. As one member of the SACT notes, the Act, being an effects-based law, is heavily dependent on economic analysis.⁹⁰² Without such rules on economic evidence the SACT is faced with infinite (and sometimes baseless) economic arguments, which exhausts the already scarce time and resources it has at its disposal. The SACT endeavours to control the proceedings and the

⁸⁹⁷ The Tribunal emphasizing that ‘International competitiveness does not mean domination of domestic markets Tongaat-Hulett Group Limited and Transvaal Suiker Beperk Middenen Ontwikkeling (Pty) Ltd / Senteeko (Edms) Bpk / New Komati Sugar Miller’s Partnership TSB Bestuursdienste, 83/LM/Ju100, (2000).

⁸⁹⁸ See Telkom and BCX merger *supra note* 893 and ISCOR Limited merger *supra note* 894.

⁸⁹⁹ Commission. 2016, p. 30.

⁹⁰⁰ The Merger Working Group at the ICN, The Role of Economists and Economic Evidence in Merger Analysis, Updated Chapter 4 of the ICN Investigative Techniques Handbook for Merger Review (2013), p. 2.

⁹⁰¹ Recently guidelines on PICs have been adopted although it offers some insight on the analysis it however, does not address evidence. Commission. 2016.

⁹⁰² On the use of economic evidence in the South Africa merger analysis see OECD, South Africa Contribution To The OECD Policy Roundtable On Economic Evidence, DAF/COMP (2011) 23, p. 279-287.

production of evidence by holding a pre-hearing session with the relevant parties, based on which it issues directions for the conduct of future hearings.

Consideration of PICs opens the door to new types of evidence not traditionally present in merger analysis, which compounds this problem. The SACT should base its decisions on both economic and factual evidence.⁹⁰³ In relation to employment, for example, trade unions may make written submissions and provide expert witness testimonies.⁹⁰⁴ Evidence submitted in that regard is in essence factual, for example whether there are any merger specific retrenchments, types of employees impacted, and the timing of retrenchments, etc. Individuals from the merging parties providing evidence may extend beyond the top management and business operation staff to others such as human resources.⁹⁰⁵

Additionally, labour unions are not precluded from presenting evidence pertaining to economic analysis such as market definition, a matter worthy of ex post evaluation and possibly reconsideration by the competition authorities. In relation to SMEs/HDI and impact on specific sector, arguments are mainly in relation to foreclosure and access to resources, which overlaps with the competition analysis of the merger.⁹⁰⁶ Impact on a specific region seems to be based on factual findings; as evidence, to demonstrate the positive impact on the region, the SACT has used numbers of the gross regional product during the construction phase of the project and compared it to the small number of existing industries in the region.⁹⁰⁷ There are a few mergers where evidence on international competitiveness has been addressed.⁹⁰⁸ These mainly revolved around claims of increased efficiencies resulting in ability to export or an/increase in exports as a proxy to measure international competitiveness.

Evidence – factual and economics – is not only required to decide on the merger but also to determine the conditions imposed. In general, it is the Commission’s responsibility to demonstrate the necessity of the proposed conditions. Also, it is the party calling for a more

⁹⁰³ Masscash Holdings (Pty) Ltd v Finro Enterprises (Pty) Ltd t/a Finro Cash and Carry, 04/LM/Jan09, (2009).

⁹⁰⁴ Wal-Mart and Massmart merger *supra note* 846.

⁹⁰⁵ Nedbank Ltd and Imperial Bank Ltd merger *supra note* 868.

⁹⁰⁶ See case no. 23/AM/May10 Bedrock Mining Support (Pty) Ltd and Mondi Ltd. Also see case no. 01/LM/Dec04, Sasol and Engen merger *supra note* 881 para. 582, In 10/AM/Jan12 (013946) Thaba Chueu Mining (Pty) Ltd and Samquarz (Pty) Ltd merger, the Tribunal discussed “non-competitive foreclosure” finding it to be directly related to public interest “the Commission’s concern is that the merged entity would convert one of its existing ferrosilicon furnaces in order to produce silicon metal because margins are higher in the production of silicon metal, and then divert supplies of silica from existing customers in order to boost its of silicon metal.”

⁹⁰⁷ “There is evidence that the Saldanha Steel plant is a vital part of the town’s economic life. If the plant was to be shutdown or be mothballed for a period this would not only have a substantial impact on the employees of the plant who would be retrenched, but also on all the firms and individuals in the West coast region whose livelihoods are so dependent on the plants functioning. Iscor and Saldanha merger *supra note* 894.

⁹⁰⁸ See for example DCD Dorbyl (Pty) Ltd v Globe Engineering Works (Pty) Ltd, 108/LM/Oct08, (2009).

stringent condition to be imposed that bears the responsibility to present evidence for such a request. In the *Wal-Mart and Massmart* merger, a high profile expert panel of economists was tasked with answering the question of how a fund should be designed to support SMEs and what size it should have.⁹⁰⁹ The CAC received two expert reports, one prepared by the merging parties, and the other by the Ministers and the union. The experts disagreed fundamentally on the function of the fund and amount thereof. The CAC was in favour of a more focused remedy, finding the approach of the Minister and the union to be a ‘comprehensive policy initiative’ that goes beyond the intended role of PICs under the Act. The CAC emphasised that “*the quantum is not the sole touchstone; integration of local SMSE’s into the global value chain of Wal-Mart is the core objective.*”⁹¹⁰ This shows that in such model, economists are faced with different sets of questions that deal with broader policy goals, which goes beyond traditional competition (partial equilibrium) analysis for which new hybrid models of economic analysis may be needed.

6.3.7 Undertakings and conditions

Another area of innovation that accompanies the analysis of PICs consists in finding and tailoring an appropriate, proportionate and enforceable remedy. This is amplified since remedies have been utilized to address PICs rather than an outright prohibition of mergers. In case the above factors are satisfied, the parties may offer undertakings and/or the competition authorities may intervene to impose conditions to mitigate the effect on the PICs.

Standard undertakings/conditions pertain to a quantification of retrenchment and job retention conditions with a moratorium period. The SACT often orders a cap to be set on merger-specific retrenchments usually using the retrenchment figures that the merging parties originally communicated to the unions. In earlier cases, the competition authorities seemed more critical of imposing such conditions.⁹¹¹ But in some recent cases, although parties have indicated that no job losses were anticipated, conditions on job retrenchment were still adopted. A moratorium period can run from 12 to 36 months, decided on a case-by-case basis. Such determination involves a complicated balancing exercise. On the one hand, there is a clear consumer benefit in allowing these retrenchments to occur and save costs, which will be passed on in the form of better pricing to customers, promoting consumer welfare. On the other hand, there is a detriment to the interest of the employees. The CAC held that the

⁹⁰⁹ The CAC ordered the commission of a study ‘to determine the most appropriate means together with the mechanism by which local suppliers may be empowered to respond to the challenges posed by the merger. *Wal-Mart and Massmart supra note 844.*

⁹¹⁰ *Wal-Mart and Massmart supra note 846*, para. 45 p. 28.

⁹¹¹ *Bid Industrial Holdings (Pty) Ltd and G. Fox and Company (Pty) Ltd*, 58/LM/Aug04.

ultimate onus lies with the Commission, which must be in a position to persuade the SACT that the condition that it seeks to impose is necessary to address the public interest. There must thus be evidence to support a more extensive moratorium and it is the parties requesting prolonged periods that carry the burden of proof.⁹¹² The undertaking/conditions may also be accompanied by a duty to report to the Commission on the matter for a given period of time.⁹¹³ They may include a promise of redeployment (usually for unskilled workers) and giving priority to the retrenched employees to apply for the created positions, subject to them possessing the necessary qualifications and skills.⁹¹⁴ Undertakings/conditions have evolved to cover other venues beyond job retention to include establishing a support structure which provides affected employees with psychological and financial counselling, assistance in updating their curricula vitae, circulating it within the acquirer, and providing reference letters.⁹¹⁵

Providing for training funds has become a familiar condition.⁹¹⁶ In the merger of *Tiger Brands Ltd and Ashton Canning Company Ltd and Others*, the SACT ordered the merged parties to fund skills training in the amount of ZAR 2 million for retrenched seasonal farm workers in the Ashton community.⁹¹⁷ While in *Glencore and Xstrata* merger, a condition was imposed to establish a training fund to enable any retrenched employees to receive an amount of money (ZAR10, 000) each towards an approved training course.⁹¹⁸ Training, however, is not expected in case of skilled and highly skilled workers. The purpose of these conditions was mainly to train workers in new skills in order to increase their economic value in the job market.⁹¹⁹

A common condition in SMEs cases involving an exclusivity clause in the retail space lease agreements is to order the parties to negotiate with their (more powerful) lessees to have the

⁹¹²In the Wal-Mart decision, which imposed 2-year moratorium, there was no reason in the circumstances to go for a more extensive remedy as proposed by the trade unions and by the Minister. Wal-Mart and Massmart *supra note* 846. In *KWV Ltd and NMK SCHULZ Fine Wine and Spirits (PTY) LTD*, 74/LM/Sep06, (2006), a request for a 48-month moratorium on retrenchments by the Food and Allied Workers Union was not successful since it failed to provide the basis for such a condition.

⁹¹³Heinz and today merger *supra note* 856.

⁹¹⁴Lewis Stores (Pty) Ltd and Ellerine Furnishers (Pty) Trading as Beares Stores, 019893, (2014).

⁹¹⁵Mobile Telephone Networks (Pty) Ltd v Nashua Mobile (Pty) Ltd, 019018, (2014).

⁹¹⁶AECI Ltd v Qwemico Distributors (Pty) Ltd, 67/LM/Oct10, (2011).

⁹¹⁷Tiger Brands Ltd / Ashton Canning Company (Pty) Ltd / Newco and Langeberg Foods International Ashton Canning Company (Pty) Ltd, 46/LM/May05, (2005). The consequence of the merger was the loss of 45 permanent jobs and 1000 seasonal jobs.

⁹¹⁸Glencore International PLC v Xstrata PLC, 33/LM/Mar12, (2013). In *Reutech Limited and The Tactical Communications Business of SAAB Grintek Defence (Pty) Ltd*, 2012May0258, a similar employment training fund was imposed for ZAR 1 million.

⁹¹⁹Imperial Group (Pty) Ltd v Midas Group (Pty) Ltd, 31/LM/Mar09, (2010). Guidelines provided for same remedies, capping, staggering, providing moratorium on job losses, training funds, reemployment and counselling as remedies. Commission. 2016, p. 24.

exclusivity clause in the lease agreement removed at the renewal of the lease.⁹²⁰ In case the renewal period was not close, the merging parties undertook to negotiate with the relevant tenants to have the exclusivity clauses in the lease agreements removed within a specified period from the SACT's order, i.e. well in advance of the renewal dates contained in the lease agreements.⁹²¹ However, the value of these conditions has come under scrutiny.⁹²² These clauses can only be invoked against tenants below a certain size, so they do not target small businesses but larger competitors.⁹²³ Further, in fact in every case, the relevant lessor's request to the tenant to waive the exclusionary clause had been rejected or met with a dismissive response, which renders such conditions ineffective. With the power dynamics of the retail space developers and their tenants where the scale tips in favour of the latter, attempting to impose these conditions is not met with much success.⁹²⁴ Another alternative to imposing conditions was adopted by the SACT in the *DCD-Dorbyl (Pty) Ltd and Elgin Brown and Hamer Group Holdings (Pty) Ltd* merger, where it ordered the Commission to use advocacy and engage with the Transnet National Ports Authority (TNPA) to highlight the competition – and/or public interest-related issues which may arise in relation to ship repair facilities in general, and more specifically in relation to tenders involving access by small and medium sized enterprises to ship repair facilities.⁹²⁵

The *Wal-Mart and Massmart* merger is a landmark decision for many reasons, one of which is the conditions stipulated to address the various PICs raised by the merger.⁹²⁶ Among the requests made to the SACT under the premise of SMEs consideration was to impose a form of quota of mandatory domestic purchases on the merged entity. The SACT rejected such condition finding that it may violate the country's trade obligations and that it may be anti-competitive or incapable of practical implementation. Unable to reach an appropriate remedy, the CAC ordered the merged entity to commission a study 'to determine the most appropriate means together with a mechanism by which local South African suppliers may be empowered to respond to the challenges posed by the merger and thus benefit thereby.' Pursuant to the findings of the study, it ordered the establishment of an investment fund for the benefit of the existing and potential body of suppliers of the Massmart supply chain and the creation and facilitation of highly focused clusters of micro enterprises which would be sourced in

⁹²⁰ For example *Fairvest Property Holdings Ltd v Portfolio of commercial properties of SA Corporate Real Estate Fund*, 84/LM/Aug12, (2012) and *Redefine Properties Ltd v Hyprop Investments Ltd*, 47/LM/Apr12, (2012).

⁹²¹ *Accelerate Property Fund Ltd v 15 Letting Enterprises being sold by Fourways Precinct (Pty) Ltd*, 16170, (2013).

⁹²² In some subsequent merger the Tribunal did not adopt such condition. *Octodec Investments Limited v Premium Properties Limited*, 019042, (2014).

⁹²³ *Resilient Properties (Pty) Ltd v NAD Property Fund (Pty) Ltd in respect of Jubilee Mall Property*, 019216, (2014).

⁹²⁴ *Id.*

⁹²⁵ *DCD Dorbyl (Pty) Ltd v Globe Engineering Works (Pty) Ltd merger supra note 65.*

⁹²⁶ *Wal-Mart and Massmart merger supra note 846.*

historically disadvantaged communities. The amount of the fund was set at a maximum amount of ZAR 200 million and will operate for at least five years.⁹²⁷

In some cases BEE factors are evident, such as in the case of a merger leading to BEE through representation in management or ownership.⁹²⁸ In other cases, the merger parties sought to use the BEE as a means to approve an otherwise anti-competitive merger, which was blocked by the SACT.⁹²⁹ In other mergers, the boundaries of the BEE considerations were put to the test. In the *Anglo American Holdings Ltd and Kumba Resources Ltd* merger, the Industrial Development Corporation (IDC), a state-owned national development finance institution mandated to promote, economic growth, industrial development and economic empowerment, argued that the BEE should be interpreted in accordance with Section 2(f) of the Act to promote a greater spread of ownership. The SACT however found this interpretation over-reaching as it would have transformed the Act ‘from an antitrust statute, albeit with a public interest aspect, into an unchecked vehicle for redistribution.’⁹³⁰ Also in the *Shell and Tepco* merger, the SACT rejected the Commission’s decision to impose a condition on a merger where a black-owned firm sold a struggling wholly owned subsidiary to Shell in exchange for a minority shareholding in Shell’s distribution arm. The argument of the Commission was that the remedy should prevent the elimination of the empowerment firm’s brand and business from the market. The SACT explained that “*empowerment is not furthered by obliging firms controlled by historically disadvantaged persons to continue to exist on a life support machine,*”⁹³¹ pointing out that the owner of the target firm was itself a BEE entity that had decided that its best commercial course laid in selling its subsidiary. This logic still stands: in a recent merger decision, the SACT emphasized that their job is not to second-guess decisions by BEE investors to sell.⁹³² It is the ability of firms controlled or owned by HDIs to become competitive that must be considered and not the protection of BEE controlled firms against contractual obligations that were freely entered into.⁹³³ The SACT also refused to second-guess the seller’s decision on buyer selection favouring BEE over

⁹²⁷ *Id.*

⁹²⁸ *Clidet 323 (Pty) Ltd and MCG Industries (Pty) Ltd*, 59/LM/Oct01, (2001).

⁹²⁹ *Business Venture Investments 790 (Pty) Ltd and Afrox Healthcare Limited*, 105/LM/Dec05, (2005).

⁹³⁰ *Anglo American and Kumba merger supra note 796.*

⁹³¹ “We would however go further and insist that even if Tepco had been a company in perfect health, the Commission should be extremely careful when, in the name of supporting historically disadvantaged investors, it intervenes in a commercial decision by such as investor.” *Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd*, 66/LM/Oct01, (2002).

⁹³² *Id.* See also *Grindrod Holdings South Africa (Pty) Limited v Sturrock Grindrod Maritime Holdings (Pty) Ltd*, In Re: *Grindrod Shipping South Africa v Unicorn Calulo Shipping Services (Pty) Ltd*, 019125, (2014).

⁹³³ *Government Employees Pension Fund represented by Public Investment Corporation Ltd and Afrisam Consortium (Pty) Ltd.*, 99/LM/Nov11, (2011).

others.⁹³⁴ Hence, it is not the mere existence of BEE in the market but their ability to compete that is protected.

Undertakings and conditions adopted in relation to BEE included continuing a commercial agreement to supply a BEE company as part of the conditions.⁹³⁵ When a merger raises competition concerns that require structural remedies, this may be used to realize BEE, such as an undertaking (that became order) to dispose of part of the business to black empowerment partner(s) acceptable to the buyer within a specific timeframe.⁹³⁶ However, the latter was not mentioned as a possible remedy under the Guidelines.⁹³⁷

Input foreclosure was raised under SMEs and industrial sector ability to compete. In the Pioneer merger, the parties undertook to adopt a time-limited price cap, a commitment to offer certain products in sufficient commercial quantities to meet demand and to ensure that such seed is accessible. The conditions also extended to establishing a research hub in SA by 2016 and a partnership with the Government to invest in programs in the interests of farmers.⁹³⁸ The impact on industrial sector merger led the SACT to impose a condition to provide local customers post-merger with access to sufficient volumes to satisfy the annual demand of the South African companies.⁹³⁹ The guidelines in this regard provide for an obligation to establish/continue/expand investments in local supply chains, continue supply local chains, or source from the same.⁹⁴⁰

Based on the cases reviewed, to date, no remedies have been imposed in relation to international competitiveness, i.e. this PIC mainly operates in the positive sense. However, the Guidelines provided potential remedies in this regard, including an obligation to investment, create jobs, offer training or re-skilling and introduce new products and technologies.⁹⁴¹

⁹³⁴ Vodafone Group PLC and Venfin Limited, 110/LM/Nov05, (2006), Pamodzi Gold Ltd and President Steyn Gold Mines (Free State) (Pty) Ltd., 110/LM/Oct07 and MYBICO v Lewis *supra note* 820.

⁹³⁵ Bedrock Mining Support (Pty) Ltd v Competition Commission of South Africa, ZACT 71, (2010).

⁹³⁶ Coleus Packaging (Pty) Ltd and Rheem Crown Plant (a division of Highveld Steel and Vanadium Corporation Limited), 75/LM/Oct02, (2003).

⁹³⁷ Guideline Commission. 2016 p.28.

⁹³⁸ Pioneer v. Commission merger *supra note* 844.

⁹³⁹ Industrial Development Corporation of South Africa Ltd and Another v Rio Tinto South Africa Ltd, 016329, (2013).

⁹⁴⁰ Commission. 2016.

⁹⁴¹ *Id.*, p. 27.

6.4 PICs in Merger Control Regimes of Sub-Saharan Africa

6.4.1 Merger test in Sub-Saharan Africa

We identified nineteen countries in Sub-Saharan Africa that, in addition to having merger control, also adopt provisions in relation to PICs as part of their merger review process. At least fifteen of these have functioning competition authorities.⁹⁴² Nigeria was included among the sample, although its merger control system is under the Investments and Securities Act of 2007, essentially because it is Africa's (second) largest economy. It should also be noted that the study of any merger related provisions in sectorial regulations of these countries is outside the scope of this research. These (19 jurisdictions) will be the subject of our inquiry (**ANNEX V MERGER CONTROL REGIMES IN SELECT SUB-SAHARAN AFRICAN COUNTRIES**).

In addition to SA, the majority of jurisdictions under review also adopt some form of the SLC / SIEC test. These are Burundi,⁹⁴³ Cameroon,⁹⁴⁴ the Gambia,⁹⁴⁵ Malawi,⁹⁴⁶ Mauritius, Nigeria,⁹⁴⁷ Rwanda,⁹⁴⁸ Seychelles,⁹⁴⁹ and Zimbabwe.⁹⁵⁰ Fewer jurisdictions adopted the SIEC test. These are Madagascar⁹⁵¹ and Mozambique.⁹⁵² For example, under the Mauritius Competition Act of 2007, the NCA may prohibit a merger if it has reasonable grounds to believe that the merger will or likely result in a substantial lessening of competition within any market for goods or services.⁹⁵³ However, among the factors that the NCA considers is creating or strengthening a dominant market position, which may lead to significant impediment of effective competition in the national market or in a substantial part of it.⁹⁵⁴ Tanzania adopts a dominance test, which allows under its authorization system for mergers for an efficiency defence in addition to a failing firm defence.⁹⁵⁵

⁹⁴² These are Botswana, Cameroon, Gambia, Kenya, Malawi, Mauritius, Namibia, Nigeria, Seychelles, SA, Swaziland, Tanzania, Zambia and Zimbabwe. It should be noted that we included Madagascar, Mozambique, Rwanda where competition authorities are being set-up and Burundi where there is no information available on the functions of competition bodies. We also add Nigeria since it has a functioning merger control regime as well as its economic importance. We make no judgment as to how strictly the laws are enforced.

⁹⁴³ Article 46 of Law No. 1/06 of 2010.

⁹⁴⁴ Article 25 of The Competition Law no. 98/013 of 1998.

⁹⁴⁵ Article 32 (c) of Law no. 4 of 2007.

⁹⁴⁶ Section 35 (1) of Competition and Fair Trading Act no. 43 of 1998.

⁹⁴⁷ Article 121 of the Investment and Securities Act of 2007.

⁹⁴⁸ Article 19 of Law no. 36 of 2012.

⁹⁴⁹ Article 23 (2) of the Fair Competition Act of 2009.

⁹⁵⁰ Article 34 of the Competition Act of 1996.

⁹⁵¹ It should be noted that the language under the law is closer to the 'dominance test' of the former ECC Merger Regulation (4064/89). We added it to this category since the wording is closer to SIEC than a pure dominance test such as in the case of Tanzania. See Article 26 of Competition Law no. 20 of 2005.

⁹⁵² Mozambique adopted the 'dominance test' similar of the former ECC Merger Regulation (4064/89), See Article 51 (1) c) of Law no. 10 of 2013.

⁹⁵³ Article 26 of the Competition Act of 2007.

⁹⁵⁴ *Id.*

⁹⁵⁵ Section 5(6) Fair Competition Act No. 8 of 2003.

The remaining six jurisdictions under review adopt a hybrid test of SLC and dominance. These are Botswana,⁹⁵⁶ Gabon,⁹⁵⁷ Kenya,⁹⁵⁸ Namibia, Swaziland,⁹⁵⁹ and Zambia.⁹⁶⁰

6.4.2 Categories of PICs

Among the challenges that face this model of competition law is identifying which considerations should be taken into account, given a wide range of possible public interest issues. We will discuss here the different considerations addressed under the competition laws subject of our review, starting with SA (the benchmark jurisdiction).

Unlike SA, the majority of jurisdictions subject to our review adopt a non-exhaustive list of PICs.⁹⁶¹ Very few jurisdictions opted, similarly to SA, for a closed list of PICs. Nigeria adopted the same four considerations as SA.⁹⁶² In Rwanda, PICs include employment, SMEs and international competitiveness.

The remaining jurisdictions either adopt a non-exhaustive list of PICs and/or very broad considerations under the public interest criteria.⁹⁶³ Botswana,⁹⁶⁴ Kenya,⁹⁶⁵ Namibia,⁹⁶⁶ and Zambia⁹⁶⁷ adopted what we call the four-plus (4+) categories: a non-exhaustive list in addition to the four categories of PICs similar to SA. This allows, for example, Kenya to address, in addition to the four PICs of SA, the impact of mergers on media plurality.⁹⁶⁸ National development programmes, or more broadly economic and social development, are among the declared PICs under the competition laws of Burundi,⁹⁶⁹ Cameroon,⁹⁷⁰ the Gambia,⁹⁷¹ Madagascar,⁹⁷² and Zambia.⁹⁷³ Mozambique additionally considers national

⁹⁵⁶ Section 59 of the Competition Act of 2009.

⁹⁵⁷ Article 3 of Law no. 14 of 1998.

⁹⁵⁸ Section 46 Competition Act no. 12 of 2010.

⁹⁵⁹ Section 35 of Competition Act no. 8 of 2007. See also. Contribution from Swaziland, Does Competition Kill Or Create Jobs? (2015) Available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2015\)8&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)8&docLanguage=En). Last visited 1 September 2016.

⁹⁶⁰ Article 30 of Competition and Consumer Protection Act of 2010.

⁹⁶¹ We equate having a non-exhaustive list to including very broad considerations such as progress and economic and social development.

⁹⁶² Article 121 (1) of the Investment and Securities Act of 2007.

⁹⁶³ These are Botswana, Burundi, Cameroon, Gambia, Kenya, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Swaziland, Zambia and Zimbabwe.

⁹⁶⁴ Section 59(2) Competition Act of 2009.

⁹⁶⁵ Section 46(2) of the Competition Act no. 12 of 2010.

⁹⁶⁶ Section 47(2) of Competition Act no. 2 of 2003. The Merger Guidelines however states that in general the Commission will limit itself to listed PICs, except in “extraordinary cases”. Namibian Competition Commission, Merger Guidelines (2016), p. 39

⁹⁶⁷ Article 31 of Competition and Consumer Protection Act of 2010.

⁹⁶⁸ Competition Authority of Kenya, Public Interest Considerations Guidelines. Available at http://www.cak.go.ke/images/docs/balancing_public_interest_guidelines1.pdf. Last visited 1 September 2016.

⁹⁶⁹ Article 46 of Law No. 1/06 of 2010.

⁹⁷⁰ Section 17 of The Competition Law no. 98/013 of 14 July 1998.

⁹⁷¹ Article 37 (4) Act 4 of 2007.

⁹⁷² Article 26 Competition Law no. 20 of 2005.

entrepreneurship as a public interest consideration.⁹⁷⁴ The competition laws of Mauritius, Seychelles and Tanzania include unique PICs to their counterparts, such as the safety of goods and services and environment protection.⁹⁷⁵

Almost all the jurisdictions subject to this review, whether they dispose of an exhaustive list of PICs or not, include a number of various considerations.⁹⁷⁶ We found that the most featured public interest consideration is international competitiveness/export promotion. This reflects the importance of international competitiveness as a public interest consideration in these jurisdictions. It is then followed by the competitiveness of SMEs and empowerment of historically disadvantaged citizens. This reflects both an economic desire to integrate in the world's economy and a social one to bring equality to disfranchised segments of the society.

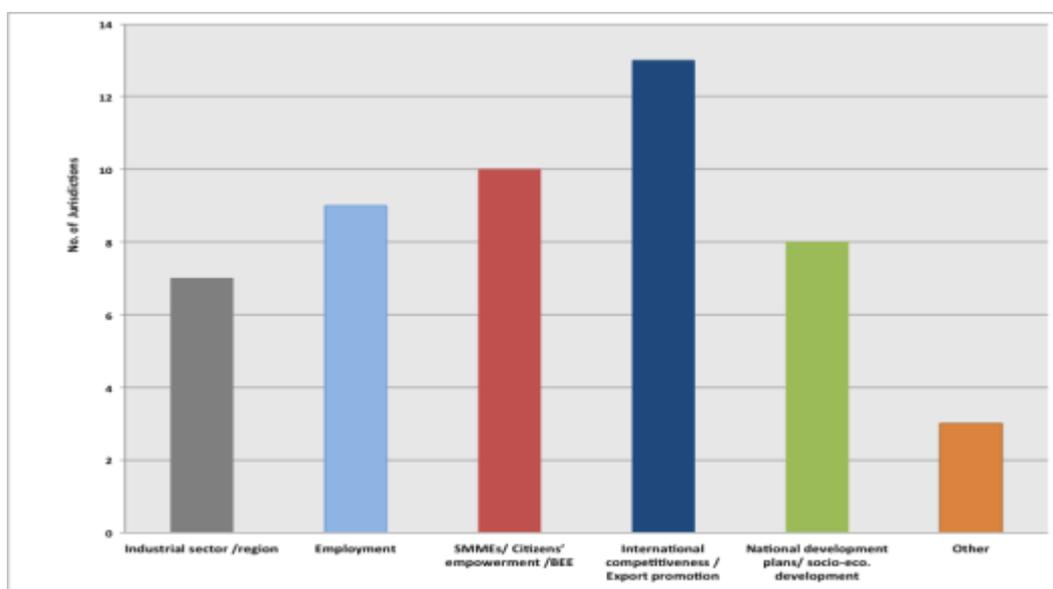


Figure 9 Categories of PICs in in Sub-Saharan Africa (select jurisdictions)

Source: Compilation by author based on the review of national competition laws

Employment takes third place despite being the most controversial and the subject that features the most in merger conditions. National development or and / or socio-economic development follows employment, then competitiveness of industrial sectors or regions. Some jurisdictions adopted or are in the course of adopting guidelines addressing how public interest consideration will be dealt with (for example SA, Kenya and Botswana). In others, it

⁹⁷³ Article 31 of the Competition and Consumer Protection Act no. 24 of 2010.

⁹⁷⁴ Article 21 of Law no. 10 of 2013.

⁹⁷⁵ See article 22 of Seychelles Fair Competition Act of 2009 and Section 13 of Tanzania Fair Competition Act no. 8 of 2003.

⁹⁷⁶ Except for Zimbabwe. This may be due to the fact that the act dates back to 1996. See Article 31 -32 of Competition Act of 1996.

is left to the consideration of a competition enforcement body or a political decision by a minister with no further guidance. In any case, a competition analysis of a given transaction must be performed first. How these competing and in some cases contradicting considerations are assessed in a merger analysis is the subject of our discussion in the next part.

6.5 Assessing PICs

A deferential competition model is emerging as the preferred approach in addressing societal and developmental needs. The competition authorities are thus required to assess various public policy concerns, whether in the narrow sense (competition) or the broader sense (PICs). This echoes a problem that was much debated among a number of theorists: how to reconcile conflicting principles. In this part, we will discuss the main approaches to reconciling competing principles and then look at how the various competition laws of Sub-Saharan jurisdictions assessed public interest in merger analysis. In collecting data pertaining to mergers and PICs we were faced with some difficulties. We only found a few available merger decisions and included them whenever relevant in order to give a definite picture regarding how these provisions were implemented.

6.5.1 Competing interests in legal theory

Assessing competing principles has been debated by a number of philosophers, jurists and social scientists. Our aim here is not to discuss each one of these theories, but to explore how these different theories dealt with conflicting principles. The first possible answer is that only one principle should prevail. From a utilitarian perspective, the principle that maximizes utility should prevail, i.e. preference is given to the principle which would lead to the highest sum of utility regardless of how this utility is distributed.⁹⁷⁷ If the outcome is similar then it is a matter of moral indifference which policy we choose. However, some might say we care not merely about the aggregate utility but about how this is distributed across the population.⁹⁷⁸

⁹⁷⁷ See discussion of utilitarianism in the works of Bentham, HENRY SIDGWICK, *THE METHODS OF ETHICS* (Hackett Publishing, 1907). JOHN STUART MILL & GEORGE SHER, *UTILITARIANISM* (Hackett Publishing Company 2nd ed. 2001). What is of interest to us is the approach to solving the priority problem.

⁹⁷⁸ Compare to the difference principle under Rawls theory of justice. John Rawls, *Justice as Fairness: Political not Metaphysical*, 14 *PHILOSOPHY AND PUBLIC AFFAIRS* PRINCETON, NJ (1985). The difference principle is a maximin principle, directing us to make a minimum as large as possible. Of two social schemes, that one will be preferred, from the point of view of justice, in which the long-run expectations of the worst off are the best. See J.E.J. Altham, *Rawls's Difference Principle*, 48 *PHILOSOPHY* (1973).

Accordingly, if we need to weigh more than one value, how can we weigh these plural values against each other? Some proposed balancing as a solution to the problem.⁹⁷⁹ Ross's moral theory in the context of plurality of principles calls for balancing different obligations coming from different sources of morality.⁹⁸⁰ Balancing may be more appropriate if competing principles are considered independent from each other without a relation of hierarchy.⁹⁸¹ It is not clear, however, what weight should be given to each principle. This will be left to the person doing the weighing. It should be noted that under the realm of constitutional law, it was suggested to address the conflict of principles through proportionality, by balancing competing principles against each other.⁹⁸² A distinction has to be made first between conflict of rights and conflict of principles. In the case of the former, there is flexibility as a judge may decide to give priority, invalidate, or consider a right as an exception in a given situation.⁹⁸³ As for the latter (conflict between two principles) the only possible approach is through balancing, where one principle outweighs the other based on the circumstances of the case.⁹⁸⁴ This approach has been criticized as not providing a real solution to the problem of balancing competing principles.⁹⁸⁵

Another approach is to order these competing principles so that one knows when and how much weight to give to each of them. Rawls discussed the "priority problem" that is how to assess weights of competing principles of justice.⁹⁸⁶ Rawls' theory of justice does acknowledge the plurality of principles and proposes two possibilities to address it.⁹⁸⁷ Either a single overall principle can be identified and takes precedent over any other principles (prioritization), or a lexical order, where a certain sequence must be followed when considering the various principles at play.⁹⁸⁸ Prioritization may be suitable if it is possible to identify an "initial choice situation" of a certain priority to be followed based on a given

⁹⁷⁹ See also discussions of concept of balancing and proportionality in constitutional law may be of relevance. See Robert Alexy, *Constitutional rights, balancing, and rationality*, 16 *RATIO JURIS* (2003). Also Ayal argues that in case a balancing test is to be applied antitrust should follow the rules set under constitutional law in that regard. See ADI AYAL, *FAIRNESS IN ANTITRUST: PROTECTING THE STRONG FROM THE WEAK* (Hart Publishing, 2014), p.158.

⁹⁸⁰ WILLIAM DAVID ROSS & PHILIP STRATTON-LAKE, *THE RIGHT AND THE GOOD* (Oxford University Press, 2002). Ross identifies seven *prima facie* duties to balance one's actions giving special weight to duties of non-maleficence.

⁹⁸¹ *Id.*

⁹⁸² "[co]mpetitions between principles are played out in the dimension of weight," Alexy, *RATIO JURIS*, (2003) p.50.

⁹⁸³ *Id.*

⁹⁸⁴ *Id.*

⁹⁸⁵ See for example John C Harsanyi, *Can the maximin principle serve as a basis for morality? A critique of John Rawls's theory*, 69 *THE AMERICAN POLITICAL SCIENCE REVIEW* (1975) and AMARTYA, 2009.

⁹⁸⁶ See JOHN RAWLS, *A THEORY OF JUSTICE* (Oxford University Press, 1999), pp. 36-46. Rawls criticised the utilitarian approach to the priority problem, whereas Rawls theory of justice acknowledges the plurality of principles and proposes prioritization or lexical order to solve it.

⁹⁸⁷ It should be noted that Rawls bases his theory of justice on the concept of intuitionism. See critique of the theory Ruth Barcan Marcus, *Moral dilemmas and consistency*, 77 *THE JOURNAL OF PHILOSOPHY* (1980), pp. 121-136. Compare to Rawls difference principle. "The difference principle is a maximin principle, directing us to make a minimum as large as possible. Of two social schemes, that one will be preferred, from the point of view of justice, in which the long-run expectations of the worst off are the best." See. Altham, *PHILOSOPHY*, (1973), pp. 75-78.

⁹⁸⁸ RAWLS, *A Theory of Justice*. 1999.

hierarchy between competing principles.⁹⁸⁹ In case it is possible to identify some considerations as more important than others, balancing could take the form of lexical order of principles.⁹⁹⁰ Lexical order is defined as “*an order requires us to satisfy the first principle in the ordering before we can move on to the second...[A] principle does not come into play until those previous to it are either fully met or do not apply.*”⁹⁹¹ One important qualification of the lexical order is that unless the earlier principles have but a limited application and establish definite requirements which can be fulfilled, later principles will never come into play.⁹⁹²

Accordingly, applying the above to the merger analysis, the interaction between competition and PICs may take the form of (a) prioritization, where for example competition analysis trumps public interest, (b) balancing, where both considerations have equal weight and can either cure or prohibit a merger, or (c) a lexical⁹⁹³ order where a balancing act occurs with the acknowledgment that certain considerations are more important than others. Prioritization is easier to administer with the order usually set under a statute or legislation. However, this is not the case in merger regimes that adopt economic and non-economic considerations, i.e. there is not always an explicit hierarchy between those two independent sets of considerations. In such cases, this leaves two policy options: balancing equal considerations or a lexical order of unequal considerations.

⁹⁸⁹ *Id.*

⁹⁹⁰ *Id.* Also see, Ioannis Lianos, *La Transformation du droit de la concurrence par le recours à l'analyse économique* (Bruylant, 2007), Chapter 1 (discussing taking a Rawlsian perspective on the issue of the objectives of competition law and proposing a lexical order instead of balancing as a way forward) and Lianos, *Some reflections on the question of the goals of EU competition law. 2013* (discussing distributive justice objective in EU based on Rawls theory).

⁹⁹¹ For example the principle of liberty is followed by economic and social inequality. "By the priority of liberty I mean the precedence of the principle of equal liberty over the second principle of justice. The two principles are in lexical order, and therefore the claims of liberty are to be satisfied first. Until this is achieved no other principle comes into play" RAWLS, *A Theory of Justice*. 1999, p. 244. The first modern liberal political philosopher to deal systematically with the issue of justice while explicitly accepting the orientation of modern welfare economics, where social equity assumes priority over property right...Rawls' strategy is to derive from the principles chosen in the "original position" a set of institutions to which all will bear allegiance despite unequal status. See Barry Clark & Herbert Gintis, *Rawlsian justice and economic systems*, PHILOSOPHY & PUBLIC AFFAIRS (1978), p. 310.

⁹⁹² "While it seems clear that, in general, a lexical order cannot be strictly correct, it may be an illuminating approximation under certain special though significant condition" RAWLS, *A Theory of Justice*. 1999 p 45. Also, Jeremy Waldron, *Rights in conflict*, 99 ETHICS (1989), pp. 503-519. Another way of putting it is that the second-rank criterion comes into operation only to break ties between things which cannot be distinguished on the basis of the first-rank criterion. In the present case the implications of lexicographic ordering are that as between two situations the smallest superiority on the first principle outweighs any amount of superiority on the second principle, and that the smallest amount of improvement on the first principle is worth sacrificing any amount of loss on the second principle contrast is with a "pluralistic" relation, in which each of the principles would be ascribed a weight and choices made between alternative situations by "trading off" gains and losses on the two principles at the prescribed rate of exchange. See Brian Barry, *John Rawls and the Priority of liberty*, PHILOSOPHY & PUBLIC AFFAIRS (1973), pp. 274-290.

⁹⁹³ It was argued that lexical order was used in Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] to balance competition law and collective labour agreements (social protection) principle where agreement between employers and employees to make affiliation to a sectoral pension fund compulsory was excluded from the scope of article 101(1). See, Lianos, *Some reflections on the question of the goals of EU competition law. 2013*, p. 63.

6.5.2 Competing interests in Sub-Saharan Africa merger regimes

Two approaches to the order of objectives (competition vs. non-competition related) in merger analysis can be distinguished here. The majority of jurisdictions allow PICs only when the merger has anti-competitive effects. In other jurisdictions mergers may be prohibited or conditioned even if there are no anti-competitive effects.

6.5.2.1 Balancing considerations

Under the SA merger regime, there is no explicit hierarchy between the competition test and the public interest test, but rather a certain analytical progression that is being followed.⁹⁹⁴ By the same token, the public interest test may not encroach on the competition analysis. Accordingly, the SA merger regime adopts the second approach in giving equal balance to both competition and PICs and attempts to find means to measure these principles and weigh them against each other. The simple version of this exercise is a merger where both competition and public interest analysis are not in tension with each other, i.e. both lead to the prohibition or clearance of the merger. But what happens in the case where the outcome of the analysis of one is positive and the other is negative? Can a merger which has failed the competition test but justified on public interest grounds be approved? Or can a merger that has passed the competition test but failed the public interest test be prohibited? The answer is in the affirmative in both cases. “[P]ublic interest can operate either to sanitise an anticompetitive merger or to impugn a merger found not anticompetitive” [emphasis added].⁹⁹⁵

⁹⁹⁴ Early on, the CAC affirmed that there is no subordination of the PICs to competition ones. See American and Kumba merger *supra* note 796.

⁹⁹⁵ *Id.*

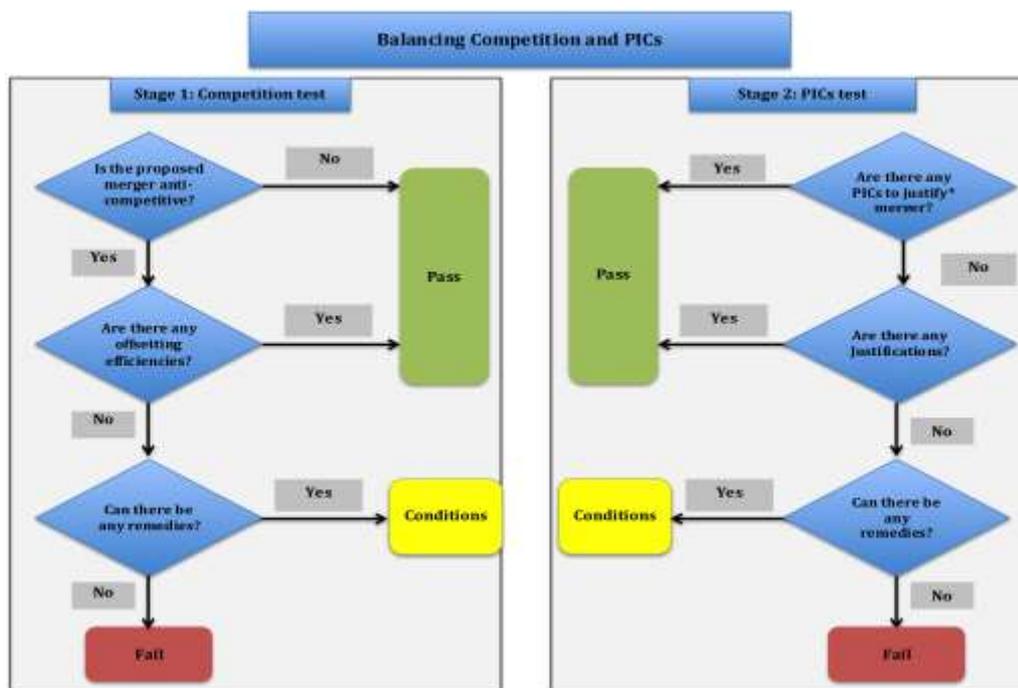


Figure 10 Balancing competition and PICs

Source: Illustration by the author based on a review of NCAs that adopts the balancing approach.

*Justifications means PIC, whether positive or negative, that justifies allowing or blocking a merger, as the case may be i.e. the public interest conclusion is justified in relation to the prior competition conclusion (*Harmony Gold Mining Company and Gold Fields merger*)

The practice of the South African competition authorities so far is that no merger has been approved for PICs in case it was also found to be anti-competitive. However, pro-competitive mergers may be approved despite their detrimental impact on public interest with conditions mitigating that said impact.⁹⁹⁶

Another question arises here: what happens if there are competing PICs, i.e. a merger has a positive impact on a given consideration and a negative one on another? Is there any hierarchy between PICs considerations? There is no conclusive answer. This issue presented itself in some cases when parties argued that the merger had a positive effect on public interest as it created an internationally competitive firm while the unions asserted that the job losses arising from the merger have a very adverse effect on employment and hence should be prohibited on public interest grounds. Although the SACT did not have to rule on this matter, as it found no evidence of an adverse effect on public interest grounds, it did explain that in such situations (conflicting public interests) the SACT must first perform a balancing of the interests claimed to come to a “*net conclusion*” on whether there is a substantial public

⁹⁹⁶ See for example Wal-mart and Massmart merger *supra* note 846.

interest implicated by the merger or not.⁹⁹⁷ The competition authorities are thus required to strike a balance between the various PICs in addition to the balance between competition analysis and PICs mentioned above.

A number of merger regimes under review follow the South African framework for merger analysis: the balancing act. Namibia adopted a similar approach to balancing competition and public interest to that of SA.⁹⁹⁸ As the Commission has only been in operation since 2009 there are relatively very few merger cases.⁹⁹⁹ When we were not able to locate the relevant Official Gazette, we used secondary resources to identify mergers where PICs were raised. We found that Namibia addressed employment issues in a number of mergers. In the purchase of *Navachab gold mine by Guinea Fowl Investments*, the Commission imposed a condition prohibiting any retrenchments for two years from the date of sale.¹⁰⁰⁰ In relation to SMEs, the merger of *Colas South Africa & The Roads Contractor Company Ltd/Guinea Fowl Investments Seventeen (Pty) Ltd* was prohibited both for being likely to result in the prevention and lessening of competition in the downstream road surfacing market and the upstream market for the supply of bituminous binders and bitumen products and strengthening of Colas's dominant position in the upstream market. Additionally, small subcontractors largely owned by historically disadvantaged persons could be restricted from gaining access, or continuing, to operate in the relevant markets as subcontractors to the RCC.¹⁰⁰¹ Thus, under this particular merger both competition and PICs' tests led to the prohibition of the merger.

Most notably, the NaCC Commission reviewed the *Wal-Mart-Massmart merger* in relation to the Namibian portion of the transaction.¹⁰⁰² The merger was approved subject to similar

⁹⁹⁷ Case no. 08/LM/Feb02 Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd and Anglo and Kumba merger case no. 46/LM/Jun02 Anglo American Holdings Ltd and Kumba Resources Ltd with the Industrial Development Corporation intervening.

⁹⁹⁸ Article 47 of the Competition Act no. 2 of 2003.

⁹⁹⁹ Also lack of annual reports explaining the activities of the commission. In the first financial year of the Commission's operation, namely, 2009–10, a total of eight merger determinations were made; by 2010–11, this had increased to 30. In 2011–12, determinations jumped to 71, while 2012–13 saw a rise to 84. Of these mergers, 84 per cent were approved without conditions; 15 per cent were approved with conditions; and only 1 per cent was prohibited from being carried out. Of the merger cases notified, 17 transactions were not determined either because the merging parties withdrew the notification, or because the Commission did not have jurisdiction to review the transactions. See Bridget Dundee, Technical advisor to the CFO of the Namibian Competition Commission, Namibia: Competition Commission, *The African and Middle Eastern Antitrust Review* 2015, GCR, 2015.

¹⁰⁰⁰ Edgar Brandt, *Namibia: Competition Commission Approves Navachab Gold Mine Sale, With Conditions*, NEW ERA, 9 June 2014, 2014, available at <https://www.newera.com.na/2014/06/09/competition-commission-approves-navachab-gold-sale-with-conditions/>. Last visited 1 September 2016.

¹⁰⁰¹ Namox Namibia (Pty) Ltd // Lpg Business Of Puma Energy Namibia (Pty) Ltd, 2013apr0019mer, in NaCC, NaCC Competition News § 4 (2014).

¹⁰⁰² The merger transaction affected fourteen different countries. It entailed applications to five national competition regulators and was approved in Tanzania, Malawi, Swaziland, Zambia and SA. Competition authorities in other southern African countries approved the merger transaction before Namibia and South Africa. The Namibian Supreme Court stated in this regard that "As

provisions as those in SA.¹⁰⁰³ The order was challenged on the grounds that the conditions imposed were vague, unlawful and irrational, therefore invalid in addition to not being negotiated with the parties.¹⁰⁰⁴ They were later set aside by the High Court. The Commission and the Minister appealed against the judgment of the High Court. The Supreme Court found that the parties had not exhausted the ministerial review process and should therefore refer the matter back to the relevant authorities.¹⁰⁰⁵ Finally, the transaction was approved with conditions along the lines of those adopted by the SA Competition Commission, which included a ban on retrenchments for two years, honouring existing labour agreements and consulting with the Minister of Trade and Industry with regard to the establishment of a programme of activities for the development of domestic suppliers.¹⁰⁰⁶ The *Wal-Mart-Massmart merger* in the Namibian context provides an understanding of how a recent cross-border merger has been dealt with in the African context. It also indicates that the SA decision on the matter may have influenced the outcome in Namibia.

Kenya's merger control regime provides for both the competition and PICs in merger analysis. The first part of the analysis is the competition test. The next enquiry then is whether the merger would affect PICs, especially employment, the ability of small and medium enterprises (SMEs) to gain access or to be competitive in any market, the ability of national industries to compete in international markets, the impact on a particular industrial sector or region, and the salvaging of dormant and failing firms.¹⁰⁰⁷ Similarly to SA, the PICs test may cure an anti-competitive merger, resulting in its approval or leading to the prohibition of a merger that raises no competition concerns. The Guidelines issued by the Competition CAK explain that this is a balancing act that is determined on a case-by-case basis. As a general condition, a PIC should be substantial and merger-specific. Once a *prima facie* case has been established, the evidential burden shifts to the notifying parties to justify any negative impacts to the public interest factor(s) under consideration. In case of conflicting PICs that cannot be

the Competition Act makes plain, mergers can have many public policy implications that need to be considered prior to their being approved. In addition, there may be a range of interested parties who may wish to be heard on the implications of the merger. Parties to proposed merger transactions need to accept that compliance with national competition processes is required.” *Wal-Mart Stores Inc v Chairperson of Namibian Competition Commission and Others*, A 61/2011, (2011). Available at <http://www.saflii.org/na/cases/NAHC/2011/126.html>. Last visited 1 September 2016.

¹⁰⁰³ *Id.*

¹⁰⁰⁴ Wal-Mart argued that the first condition, that the merger allow for local participation in accordance with section 2(f) of the Act, was unlawful on the ground that it was in conflict with section 3(3) of the Foreign Investment Act, and also on the grounds that it was vague, arbitrary and irrational. no employment losses as a result of the merger, on the ground that it was irrational and disproportionate. And it challenged the third condition, that there be no harmful effects on competition, on the basis that it was irrational, vague and ultra vires the powers of the Commission. Issues pertaining to that this being a retail business transaction, the approval of the Minister of Trade and Industry is required in terms of Section 3(4) of the Foreign Investment Act, 1990 (Act No. 27 of 1990). *Wal-Mart Stores Inc. v Chairperson of Namibian Competition Commission and Others*, A 61/2011.

¹⁰⁰⁵ *Namibian Competition Commission and Another v Wal-Mart Stores Incorporated*, SA 41/2011.

¹⁰⁰⁶ *Id.*

¹⁰⁰⁷ CAK, Public Interest Considerations Guidelines Available at <http://www.cak.go.ke/images/docs/Merger%20Guidelines.pdf>. Last visited 1 September 2016.

reconciled, the competition authority will perform another balancing act reaching a net conclusion. This all, to a great extent, mimics the South African model. The CAK has started operations fairly recently in 2010. Based on available annual reports, it reviewed a total of 153 mergers for the years 2012/2013 and 2013/2014.¹⁰⁰⁸ So far, only one appeal has been brought forward, which is pending the constitution of the Appeal Tribunal. In relation to assessing the impact of proposed mergers on employment, the rules derived from SA case law are reflected in the Kenyan guidelines.¹⁰⁰⁹ A rational process must be followed to arrive at the determination of the number of jobs to be lost.¹⁰¹⁰ The merging parties are also under an obligation to provide the employees and/or their representatives' meaningful and correct information concerning how the merger will impact their jobs in a timely manner.¹⁰¹¹ Similar behavioural remedies for job losses are adopted under the guidelines: moratorium on job losses for a defined period of time, redeployment and training of staff for alternative employment. The only example available in the CAK publications where employment was raised is the horizontal merger in the non-life insurance market between *British American Investments Company Limited (Britam) and Real Insurance Company Limited*.¹⁰¹² The CAK found that the merger would not raise any competition concerns; however, it will cause job losses due to the overlap in the activities of the parties. Accordingly, a condition was imposed on the acquirer to retain at least 85% of the staff of the target post-merger. The obligation did not seem to have a timeline.¹⁰¹³

Two aspects stand out when dealing with SMEs under Kenyan competition law. The requirement on merger parties to engage with "affected parties" is extended to SMEs (not just employees and/or their representatives) to ensure that they have been treated fairly.¹⁰¹⁴ The Guidelines addressed the impact of a merger on the local supply chains and import substitution. This includes "putting a limit on imports" as a possible remedy in such a case,

¹⁰⁰⁸ CAK, Annual report of 2013/2014 (2014) Available at <http://www.cak.go.ke/images/docs/CAK%20Annual%20Report%20%20final%20print%202013-2014.pdf>. Last visited 1 September 2016. The Authority granted three (3) exemption applications from the provisions of Part III of the Act. The exemptions were granted in the franchise concession, airline and Stadia management services markets. 88 mergers were finalized, compared to 65 in the previous year.

¹⁰⁰⁹ CAK, Public Interest Considerations Guidelines p. 3.

¹⁰¹⁰ CAK, Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act (CAK ed.). Available at <http://www.cak.go.ke/images/docs/Merger%20Guidelines.pdf>. Last visited 1 September 2016.

¹⁰¹¹ *Id.*

¹⁰¹² CAK, Annual report of 2013/2014. 2014, p. 30.

¹⁰¹³ It should be noted that in earlier case before the adoption of the new law in 2010, employment conditions were adopted (employment levels, post-acquisition, to remain at least at the same level as that subsisting at the time of the takeover application). Premier Food Industries Limited and Trufoods Limited and Kabazi Cannery Limited as mentioned in Commissioner Monopolies and Prices Commission Peter Muchoki Njoroge, Kenya. 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. p. 13. Available at <http://siteresources.worldbank.org/INTCOMPLEGALDB/Resources/PeterNjoroge.pdf>. Last visited 1 September 2016.

¹⁰¹⁴ CAK, Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act. , p.51.

while in contrast it was something the SACT refused to do, finding it to be anticompetitive, harming consumers and having an adverse effect on the target *vis a vis* its competitors which are free to import.¹⁰¹⁵ In relation to the impact of a merger on a given sector, the CAK in its guidelines usually resorts to the *Wal-Mart merger* answer to the problem and set up development fund to ensure that a particular industry or local sector continue to be competitive. However, when it comes to international competitiveness, it seems that the guidelines adopt a slightly different approach to that of SA competition authorities in the *Tongaat merger*¹⁰¹⁶ by recommending the approval of a merger where it is demonstrated that there would be adverse effects on the regional competitiveness of the undertaking if the merger were not approved.¹⁰¹⁷ Also it is worth noting the CAK merger guidelines address evidence admissible when considering PICs while SA Guidelines are silent in this regards.¹⁰¹⁸

The first point of departure of the Botswana Competition Act of 2009 from the SA merger control model is that it is up to the competition's authority's discretion to consider the bearings of a proposed merger on the broader public interest.¹⁰¹⁹ This follows the Australian competition law approach under the authorization system, where the ACCC has the power to refuse authorisation even when the public benefit test has been satisfied.¹⁰²⁰ If the competition authority chooses to consider "the broader public interest" it should look at the benefits to the public, which would outweigh any detriment attributable to the anti-competitive merger. These benefits include efficiencies, technical or economic progress and other societal and developmental goals. We find here another departure from the SA model where the list of PICs is not an exhaustive one, leaving the door open for the authority to consider other public interests if it deems fit. As a general rule, the authority will adopt the two tests from the Australian merger authorization system which mainly focuses, on the one hand, on the public benefit resulting or likely to result from the merger, and, on the other hand, on that the benefit

¹⁰¹⁵ Same arguments were raised again in *Pepkor Limited and Manrotrade Four (Pty) Ltd*, 06/LM/Jan06 where the Tribunal continued that this is a sector-wide, phenomenon and must be addressed at that aggregated level with the appropriate instruments, which is not merger control issue. Also in *In Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd*, 21/LM/Mar05, SACTWU's concerns with the employment effects of this merger lie less with the relatively small number of jobs lost in direct consequence of the transaction than with the larger question of Edcon's alleged support for imported merchandise.

¹⁰¹⁶ "In general we are skeptical of arguments that insist that a precondition for successful international competition is domination of the domestic market. In select instances scale economies and rationalization of production units may support this argument. However, to the extent that broad generalizations assist merger analysis, we incline to the view that the most aggressive and successful international competitors are those who face robust competition at home." See *Tongaat merger* supra note 895. It should be noted that in this particular merger *Tongaat* was planning on acquiring one of its two competitors in the market and in addition regulations were in place which adversely affected the market. Also the ability to become competitive was not found to be merger specific i.e. can be attained outside the merger.

¹⁰¹⁷ See CAK, Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, p. 49. Compare to SA guidelines where it states that in similar cases benefits have to be substantial to allow such merger (positive significant positive economic effects/benefits that flow back to the domestic economy). That being said, among the facts for assessing substantiality is whether the merger impedes on any relevant industrial policies. Commission. 2016 p. 25-27.

¹⁰¹⁸ CAK, Consolidated Guidelines on the Substantive Assessment of Mergers under the Competition Act, p. 52.

¹⁰¹⁹ Section 59(2) of Competition Act 2009.

¹⁰²⁰ Section 90. of Competition Act 2009.

outweighs the detriment to the public constituted by any lessening of competition that has resulted, or is likely to result from the merger.¹⁰²¹ In making such a decision, the competition authority of Botswana will rely on analogous cases in similar systems, such as that of SA.¹⁰²²

Table 4 Botswana Merger Cases 2011- 2015

Merger Cases	2011/2012	2012/13	2013/14	2014/15	TOTALS (2011/15)
Notified	19	28	33	32	112
Finalised/Determinations	11	33	33	26	103
Approved without Conditions	3	17	18	23	61
Approved with Conditions	8	15	15	3	41
Prohibited	0	1	0	0	1

Source: Botswana Competition Authority Annual Reports of 2011-2012 and 2014-2015

In over 100 mergers reviewed between the years 2011 and 2015, almost 40% were approved with conditions. Similar to SA, the competition authority was of the view that employment issues should be dealt with initially in accordance with labour laws.¹⁰²³ Nonetheless, mergers that raised the authority’s concern over employment were dealt with through broad conditions that ranged from commitment to exert best endeavour not to produce substantial job losses, an undertaking to maintain the current level of employment and that no redundancies would be made without the consent of the employees of merging parties.¹⁰²⁴ There is, however, no discussion available of the factors on which these conditions relied, i.e. merger-specificity or substantiality criteria under these decisions. However, the guidelines make reference to the “rational process” under SA case law in this regard (Metropolitan and Momentum merger).¹⁰²⁵

The authority was faced with the balancing test between *competition and public interest benefits in the Supasave, Megasave and Choppies Enterprise merger* in the consumer goods

¹⁰²¹ Section 59(2) Competition Act 2009.

¹⁰²² Botswana Competition Authority, Guidelines On The Application Of Public Interest Under The Competition Act (2015). Available at <http://www.competitionauthority.co.bw/sites/default/files/PUBLIC%20INTEREST%20GUIDELINES.pdf>. Last visited 1 September 2016.

¹⁰²³ See MER/034/2012 in Botswana Competition Authority Annual Report 2012 – 2013 and MER/023/2014 in Botswana Competition Authority Annual Report Available at <http://www.competitionauthority.co.bw/annual-report-201213>. Last visited 1 September 2016.

¹⁰²⁴ See for example MER/001/2011 2011-2012, MER/032/2012, MER/022/2012 and MER/032/2012, Botswana Competition Authority Annual Report 2012 – 2013 Available at <http://www.competitionauthority.co.bw/annual-reports>. Last visited 1 September 2016.

¹⁰²⁵ Authority. 2015, p. 11. Same with regards to industrial sector or region where the Guidelines makes reference to Iscor merger in SA.

market in Gaborone, Molepolole and Palapye.¹⁰²⁶ The proposed transaction raised substantial competition concerns due to the parties being close competitors and the existing dominance of the acquiring firm, despite the failing firm defence. Nonetheless, taking into consideration the detrimental impact on employment as a result of the imminent exit of Supasave and Megasave, the authority approved the merger on condition that Choppies would, within a period of 5 years (from 2013), come up with a reasonable exit plan to divest from the target where they both have outlets to allow for new entrants.¹⁰²⁷ It seems that the merger was approved on public benefit considerations and conditions adopted to deal with the competition concerns arising out of it, which is something unprecedented in the context of PICs.

Citizens' ownership and empowerment was raised in a number of mergers. Here the authority took an interventionist approach compared to that of SA. *AON Botswana (Pty) Ltd and AON Holdings Botswana (Pty) Ltd* was the first merger to be initially prohibited on solely PICs in Botswana.¹⁰²⁸ The proposed merger would have resulted in shares that were previously owned by Botswana's citizens being taken over by a non-citizen owned firm, which was considered against the empowerment act. The proposed acquisition was rejected on public interest grounds. However, after some negotiations, the merger was approved subject to the conditions that AON Holdings should look for a citizen partner to acquire the 25% shares it had purchased within a period of 12 months.¹⁰²⁹ Also other possible undertakings took the form of a condition to use best efforts to engage citizen entities as sub/contractors.¹⁰³⁰ Other than taking the form of undertakings, the authority made public their "wishes" regarding the future conduct of the parties. As part of its decision, the authority was "hopeful that the merged entity would intensify its participation in the growth of SMEs in Botswana by outsourcing some jobs to, as well as sourcing from SMEs in the country."¹⁰³¹ How binding

¹⁰²⁶ Decision on the Proposed Acquisition of Supasave and Megasave by Choppies Enterprises. Available at <http://www.competitionauthority.co.bw/sites/default/files/Supasave%20and%20Megasave%20by%20Choppies%20Enterprises.pdf>. Last visited 1 September 2016.

¹⁰²⁷ *Id.*

¹⁰²⁸ MER/035/2012 in Botswana Competition Authority Annual Report 2012 – 2013.

¹⁰²⁹ Botswana Competition Authority Annual Report 2012 – 2013. In another merger the authority accepted the acquisition of 39.6% shares in MRI Botswana by BOMAID on the condition that, in the event that BOMAID decides to dispose of the acquired shares, it would first offer them to "citizens" who are not already shareholders in MRI Botswana. MER/033/2012 Botswana Medical Aid Society (BOMAID) and Medical Rescue International Botswana (MRI Botswana) Botswana Competition Authority Annual Report 2012 – 2013.

¹⁰³⁰ Based on the statutory requirements in respect of services reserved for citizens of Botswana or companies wholly owned by citizens of Botswana and condition to subcontract to wholly citizen owned companies or citizens of Botswana the provision of reserved services was included. See MER/002/2013 ECH Management Solutions Botswana (ECH Botswana) and Servest (Pty) Limited (Servest) in Botswana Competition Authority Annual Report 2012 – 2013.

¹⁰³¹ See for example Merger Decision No 3 2015 - Steinhoff International And Pepkor Holdings. Available at <http://www.competitionauthority.co.bw/sites/default/files/Merger%20Decision%20No%203%202015%2020%20-%20Steinhoff%20International%20and%20Pepkor%20Holdings-2.pdf>. Last visited 1 September 2016.

such statements are is questionable. However, one needs to monitor whether they will have any *bearings* on future plans of the parties or not.

A number of mergers reviewed by the authority involved regional investments particularly from South African companies. In the *Defy Botswana and Defy South Africa merger*, where the former was the distribution arm of the latter's kitchen, laundry and air conditioning appliances, the authority did not find that the merger would increase competition or create substantial public interest concerns. However, it approved the merger with the desire that the parties would consider in the future local manufacturing or assembling of their products in Botswana to help in technology transfer and industrial growth.¹⁰³² In *Clover SA and Clover Botswana*, the authority found that the proposed transaction was not likely to substantially lessen competition in the manufacturing and distribution of dairy products in Botswana. It found the transaction to have a positive public interest impact given the undertakings made by Clover SA to assist the upstream market, particularly small-scale dairy producers to identify local milk farmers and assist them to develop a dairy business, through providing technical assistance and training. In a merger involving the buy-back of *Woolworths*, a mega South African retailer, of their franchise stores in Botswana, the authority approved the merger subject to a commitment of doubling its (and the target's) sourcing from Botswana suppliers over the next two years. It also required Woolworths to submit within one year from the date of approval a programme of how they intended to roll out their "Good Business Journey Strategy" in Botswana, facilitating citizen participation in the group's business.¹⁰³³

Zambia's competition law has similar merger provisions to that of SA.¹⁰³⁴ Malawi has a general provision that stipulates that the Commission may not authorize a merger unless on balance, the advantages to Malawi outweigh the disadvantages, without any further explanation or available case law to examine implementation.¹⁰³⁵ Nigeria adopted the South African approach to balancing considerations in addition to the requirement of ensuring that all shareholders were fairly, equitably and similarly treated and given sufficient information regarding the merger.¹⁰³⁶ The latter may be understood since merger regulations are under the Investments and Securities Act.¹⁰³⁷

¹⁰³² MER/005/2011 in Botswana Competition Authority Annual Report 2012 – 2013.

¹⁰³³ Botswana Competition Authority Annual Report 2014 – 2015.

¹⁰³⁴ Article 31 of the Competition and Consumer Protection Act no. 24 of 2010. It should be noted that merger decision from these jurisdictions was not available.

¹⁰³⁵ Section 35 (1) of Competition and Fair Trading Act no. 43 of 1998.

¹⁰³⁶ No competition law adopted in Nigeria yet. Article 121 of the Investment and Securities Act of 2007.

¹⁰³⁷ *Id.*

6.5.2.2 Lexical order of objectives

In the majority of merger control regimes in the jurisdictions examined, PICs unless a merger fails the competition test. i.e. these considerations only come into play if the merger is found to be anti-competitive operating positive sense.¹⁰³⁸ In doing so, these jurisdictions adopt a lexical order where competition assessment takes first place. Only if the outcome is negative a balancing act is then performed in case there are PICs that may outweigh the harm to competition. Under Burundi's Competition Law No. 1/06 of 2010, the Commission may authorize concentrations that have the effect of materially reducing competition if they result in efficiency gains for the national economy that *outweigh* the detrimental effect on competition in the relevant market.¹⁰³⁹ Also, in Cameroon, a merger that improves or will improve the performance of the national economy in a way that *outweighs* the negative effects of the merger on competition may be sanctioned.¹⁰⁴⁰ According to the Gambian Competition Law no. 4 of 2007, if the Commission finds that a merger will adversely affects competition it will, consider if any of the *offsetting* public benefits are present.¹⁰⁴¹

¹⁰³⁸ Public interest considerations may also affect the remedies adopted and whether and to what extent the benefits, if they are present, should be taken into account in determining the remedial action (if any) to be taken

¹⁰³⁹ Gain must not have been achievable without the concentration-taking place. Article 46 of Law No. 1/06 of 2010.

¹⁰⁴⁰ In addition, the improvement to the national economy would not be achieved without the merger or acquisition Competition Section 17 of the Competition Law no. 98/013 of 1998.

¹⁰⁴¹ Competition Act, 2007, sections 35 and 52.

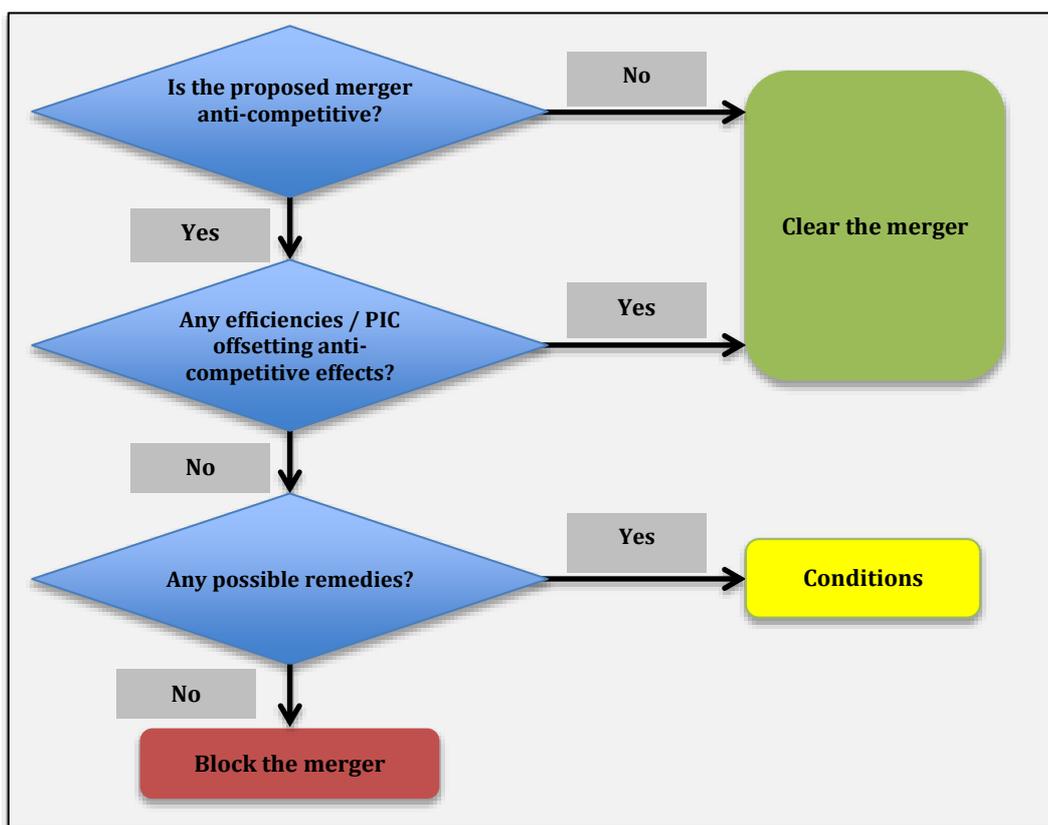


Figure 11 Lexical order of merger analysis

Source: Illustration by author based on the review of national competition laws of countries subject of review. This is a basic chart for illustration purposes. National competition laws may vary in the details of the analysis

Similar provisions are included in the competition laws of Gabon,¹⁰⁴² Madagascar,¹⁰⁴³ Mauritius,¹⁰⁴⁴ Mozambique,¹⁰⁴⁵ Rwanda,¹⁰⁴⁶ Tanzania,¹⁰⁴⁷, Seychelles,¹⁰⁴⁸ Swaziland,¹⁰⁴⁹ and Zimbabwe.¹⁰⁵⁰

One of the most unique features of the SA merger control is its institutional choice of entrusting the competition authorities with the task of balancing competition and PICs. The

¹⁰⁴² Article 37 of Law no. 14 of 1998.

¹⁰⁴³ “Competition commission should assess whether a proposed merger transaction will bring a sufficient contribution to economic progress to compensate possible adverse effects on competition”. See Article 26 of Competition Law no. 20 of 2005

¹⁰⁴⁴ Article 26 of the Competition Act of 2007.

¹⁰⁴⁵ Article 21 of Law no. 10 of 2013. The law additionally requires that PICs “may not imply the elimination of competition or the imposition on the enterprises in question of any restrictions that are not indispensable in order for these objectives to be achieved.”

¹⁰⁴⁶ Article 19 of Law no. 36 of 2012.

¹⁰⁴⁷ Article 13 of the Fair Competition Act no. 8 of 2003.

¹⁰⁴⁸ Article 23 (2) of the Fair Competition Act of 2009.

¹⁰⁴⁹ Section 35 of Competition Act no. 8 of 2007. However in practice, the Commission previously considered broader public interest issues “such as employment (i.e. whether or not the employees will be retained by the merged entity). See Bowman Gilfillan Africa Group, *Competition law Africa*, (2015). Available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD\(2015\)8&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF/WD(2015)8&docLanguage=En) Last visited 1 September 2016.

¹⁰⁵⁰ Article 34 of the Competition Act of 1996

literature identified three alternatives to this social decision-making process. It may be carried out by the government (the political realm), the courts (adjudicators) or the markets.¹⁰⁵¹ On the one hand, incorporating PICs denotes distrust in the market's ability to address these PICs and requires government intervention. Administrative entities may enjoy more flexibility in enforcement actions, because they handle the entire antitrust case, from investigation to final disposition but this may also present rule-of-law issues since a single entity is responsible for the investigation and final decision. Also, how much the government may influence the authority is another issue that may undermine this choice. Though courts are independent from the government and provide the required oversight, possessing more investigative and injunctive powers, they may lack the required knowledge to decide on complex economic matters.

The OECD presented a typology of the different institutional models in relation to the administration of PICs; the single authority model where NCA are responsible for applying the PIC to mergers in addition to the competition test, and the dual responsibilities model where NCA are only responsible for the application of competition test while PICs are assessed by another body.¹⁰⁵² Dual responsibility may take the form of shared or concurrent competence (with a sector regulator) or through external intervention by a minister or such.¹⁰⁵³ Research showed that the prevailing choice of most competition laws in developed countries is entrusting the balancing test to a political body such as a minister or council of ministers. Developing and transitioning countries tend to take the opposite approach, i.e. the competition authority or adjudicative body.¹⁰⁵⁴ In SA, three independent bodies are responsible for competition enforcement and adjudication. These are the SACC, the SACT and the CAC (a special division of the high court). The SACC is the main investigative and enforcement body, while the SACT is the adjudicative body and the CAC is the appellant body. When a merger notice is filed with the SA Competition Commission, the Commission is required under the Act to inform the minister in order for the ministry to be able to intervene in the proceedings at the Commission or Tribunal if it sees fit. Accordingly, the competition authorities, while allowing stakeholders the right to intervene in the merger proceedings, perform the entire merger assessment including the PIC test.¹⁰⁵⁵ However, this institutional choice is directly affected by the independence of the competition authority from

¹⁰⁵¹ See discussion of comparative institutional analysis of the EU competition law. Lianos, Some reflections on the question of the goals of EU competition law. 2013

¹⁰⁵² OECD, Public Interest Considerations in Merger Control, Background Paper by the Secretariat. 2016.

¹⁰⁵³ *Id.* p. 10.

¹⁰⁵⁴ OECD, The Objectives of Competition Law and Policy 2003. Later also confirmed in Reader, (2016).

¹⁰⁵⁵ Lewis recounts how such structure was undermined when the Ministry entered into side negotiations with Wal-mart regarding PICs concerns and failed to communicate the same to the Commission. See Lewis, (2012) p. 134.

the government, i.e. lack of independence may obscure the institutional choice of the competition authority as the administrator of the balancing test and create internal conflict of interest.¹⁰⁵⁶

6.6 Conclusion

A competition model that embraces broader policy objectives is emerging as a way to address societal and developmental needs. Each country, however, pursues this model, in varying degrees. In this chapter, we discussed the merger regimes of nineteen jurisdictions in Sub-Saharan Africa, reflecting on the similarities and differences of these regimes compared to that of SA. These models have one point in common: they have a merger control regime which includes multiple policy objectives (economic and non-economic) in their merger analysis. There is not much solace they can find in international best practices since this subject falls outside the realm of their recommendations. Faced with the duty of upholding their statutory obligations, such competition regimes strive to design a system that will satisfy their primary function as gatekeepers to well-functioning competitive markets, while respecting the broader public policies embraced by their respective laws.

Among the challenges that face this model of competition law is identifying which considerations will be taken into account given a wide range of possible public interest issues. We find that the majority of jurisdictions examined, in contrast to SA, adopt a non-exhaustive list of PICs or very broad considerations that makes it unclear exactly what may be considered as PICs. Looking at how the South African competition authorities enforced these PICs, focusing on published large merger decisions of the SACT (and a few intermediate mergers and CAC decisions, when relevant) from 1999 up to 2015, we found that employment is the most frequent PIC followed by SMEs / HDI, ability of a sector or a region to compete and finally international competitiveness. In practice, a merger can raise two or more of these PICs, whether in the positive or negative sense, or all at once. Despite this, and following the South African model, four considerations are widely identified as worthy of protection: a particular industrial sector or origin, employment, the ability of small business

¹⁰⁵⁶ The WBG report on Africa found that “Heads of governments and ministries in Africa appear to play a key role in appointing competition authority members...which may hamper their independence. In none of the countries that responded to the 2015 survey were members appointed by parliament, although in Kenya members were vetted by parliament. It was most common for members to be appointed by the president or the prime minister; this procedure was reported in Algeria, Malawi, Mauritius, Morocco, Rwanda, Senegal, and Tunisia. Next most frequent was appointment by a single minister, such as the trade minister (in Botswana, Burkina Faso, Egypt, Mali, Namibia, Zambia, and Zimbabwe), the national treasury minister (in Kenya), and the economic development minister (in South Africa). In a few cases, appointments were made by the president or prime minister in conjunction with a minister; usually the competent minister would propose the candidate, and the president or prime minister would make the appointment (as in the Seychelles, Tanzania, and Togo).” WBG. *Breaking Down Barriers: Unlocking Africa’s Potential through Vigorous Competition Policy*. (2016), p.13.

of firms controlled or owned by historically disadvantaged persons to become competitive, and the ability of national industries to compete in the international markets. Some jurisdictions, although adopting a non-exhaustive list approach, expressly acknowledge one or more of these four considerations. The three most featured considerations are international competitiveness/export promotion, competitiveness of SMEs especially those owned by historically disadvantaged citizens and employment. This reflects the importance of industrial policy as an objective. The economic desire to promote SMEs is mixed with a social aspect: to bring equality to marginalised segments of the society. Employment takes the third place, notwithstanding being the most controversial and most featured PIC in merger conditions which may be because it is the least welfare economics-related one.

The analytical process followed in a merger situation where competing and sometimes contradicting interests are to be reconciled is arguably the principal challenge in this holistic model of competition law.¹⁰⁵⁷ Using approaches addressing the priority problem under legal theories, we found that the interaction between competition and PICs may take the form of balancing, where both principles have equal weight and can either cure or prohibit a merger, or a lexical order where a principle does not come into play until those previous to it are either fully met or do not apply. Under SA merger control, the Act adopts a balancing approach to the various considerations under review. Other jurisdictions following this approach are Botswana, Namibia, Kenya, Malawi, Zambia and Nigeria. The majority of the jurisdictions subject to our review, however, adopt a lexical order of PICs; PICs are assessed only in case a merger is found to be anti-competitive, and then the need arises to demonstrate that the benefit to public interest outweighs the harm to competition. Enforcement activities of the competition authorities show reluctance in prohibiting a merger just on the basis of PICs. Nevertheless, in order not to ignore the detrimental impact on public interest they expanded the use of tailor-made remedies to rectify the negative impact on public interest.¹⁰⁵⁸

With these varying degrees of divergence, PICs are being pursued within a set of parameters, some of which are still under development. Countries search for more relevant and recent examples of jurisdictions to emulate in implementing their newly acquired competition laws. SA is a prominent example of the multiple policy objective model. With the increase in numbers of competition laws in Sub-Saharan Africa that embrace such a model, South African

¹⁰⁵⁷ Another important issue is the institutional set up, however it is outside the scope of this paper. See also Lianos discussion of holistic competition law in Lianos, *Some reflections on the question of the goals of EU competition law*. 2013.

¹⁰⁵⁸ In competition law, remedies are conventionally classified as either structural or behavioural. They should be appropriate, proportional and enforceable.

competition law and jurisprudence may prove to have an even greater impact on the development of merger control in jurisdictions that adopt a similar approach.¹⁰⁵⁹

This calls for, on the one hand, identifying the unique challenges faced by these authorities in this regard and, on the other hand, continuing our research into these differential models in order to better understand their priorities, needs, and methods.

¹⁰⁵⁹ See for example Wal-Mart – Massmart merger in Namibia where the NaCC reviewed the Wal-mart- Massmart merger in relation to the Namibian portion of the transaction. The transaction was approved with conditions along the lines of those adopted by South Africa Competition Tribunal. Under merger assessment guidelines in Botswana, the competition authority will generally rely on the cases which are a product of similar systems such as that of South Africa. Kenya adopted the same test in relation to assessment of employment considerations.

CHAPTER 7 CONCLUDING REMARKS

7.1 Introduction

In this thesis, we have discussed the theoretical framework for the proliferation of competition law with special focus on Africa, and proposed the use of an alternative approach based on diffusion theories to study this trend. So far, this has been studied through the prism of legal transplant theories, mainly focused on whether borrowing legal concepts, detached from their environment, is possible or not. There has also been an emphasis on convergence as a measure for success. However, these theories do not provide a holistic framework to cover all the aspects of the transfer process. On the other hand, and to the same end, policy diffusion theories can enable us to have a better understanding of the different aspects of the transfer process, as well as the role agents and networks play in this regard and how the transfer process may have impacted the content of the transferred policies.

Together with Asia, Africa has contributed the largest number of adopters of competition law in the last decade. These countries deal, in varying degrees, with many social and economic development challenges such as unemployment, poverty, and inequality, all of which need to be reflected in their policy choices. Striving to find their way to prosperity, many adopted open market economy models in the late 1980s or tried to enhance existing ones. Similar to other countries of the world, many African countries have adopted competition law in the process. However, in order to reconcile the different competing objectives, they have adopted a holistic approach to the analysis of competition issues side-by-side with broader policy objectives, especially in relation to merger control, which contributes to an increasing divergence in the substantive rules on the matter.

Accordingly, the first part of the thesis addressed the following questions:

- How is competition law diffused? That is, what are the transfer mechanisms?
- Who are the agents and networks that diffuse competition law?
- What is the subject matter of the transfer and how does the diffusion process impact upon it?

The empirical part of the thesis addressed the following questions:

- What are the dominant diffusion patterns of competition law in Africa?
- Is there any relation between the patterns of diffusion and the outcome of diffusion?
- After identifying jurisdictions with broader policy objectives, which go beyond the economic welfare-based ones, how did competition law diffuse to SA, as the leading

jurisdiction in this regard? How is it being interpreted and implemented there? How has SA's experience impacted the diffusion in other jurisdictions?

We will present a summary of the conclusions of the thesis followed by some policy implications and suggestions for further research.

7.2 Summary of Conclusions

Chapters 1 and 2 discussed diffusion theories as an alternative approach to the narrow focus of legal transplants and convergence as an indicator for its success. Comparative law literature has engaged with the concept of the diffusion of laws through the study of legal transplants. Many articulated the transfer of competition law from this viewpoint. In essence, legal transplant literature is comprised of two main competing concepts in the field of comparative law, debating whether transplantation is possible (functionalists and culturists), and which elements affect its success (convergence) or failure (divergence). However, what legal transplant does not show us is how this process is done and its impact on the diffused polices going beyond convergence. Legal transplant focuses on a bipolar, one-way transfer of legal rules and institutions between a single exporter (parent\developed country) and importer (less developed) with no changes or just a few minor adjustments, and this has a number of shortcomings. For these reasons, we propose using an alternative framework based on diffusion theories. Policy diffusion, on the other hand, is a two-fold concept incorporating the formal adoption of an act and the implementation of the said act. The latter aspect emphasises the "depth of adoption," which can only be observed through examining the "stages after the decisional point of adoption," including, among others, scope, quality, its role in the specific polity, and its institutionalization and permanence. Diffusion literature provides a typology of patterns through which policies are transferred. These can take the form of learning, emulation, or socialization or be due to externalities (coercion, contractualization, or competition). This enables us to investigate a number of diffusion patterns of competition law, going beyond intuitive assumptions of coercion in the context of developing countries. As for agents involved in the transfer process, except for acknowledging the role played by bureaucratic elites in transplanting laws (Watson), legal transplant is not particularly informative. Diffusion theory can help us understand the role of the various agents and networks involved in the competition law transfer. Identifying diffusion patterns and transfer agents would inform us about diffusion multipliers, i.e. the most influential adopters, and in turn guide the technical assistance efforts of IOs by focusing their work and co-operation with regional diffusion multipliers for maximum impact.

Through the lens of policy diffusion, we allow ourselves to draw a fuller picture that complements the existing literature on competition law as a legal transplant. Bound up at birth with a painful and unpopular economic reform programme, competition law shares the stigma that accompanied the implementation of these programmes: coercion. While coercion has been influential in initiating the transplantation process, it fades over time and other diffusion patterns such as competition, learning, and emulation may become more relevant. It is important to understand that these patterns are not mutually exclusive and may be present, all or in part, at the same time.

Chapter 3 examined agents and networks of competition law diffusion. Looking at state actors, resource endowed competition law agencies of mature economies play a significant role in the transfer process either directly through bilateral relations with other countries and/or indirectly through their participation in IGOs and networks, especially the OECD, UNCTAD and the ICN. On the non-state level, our study of competition law networks sheds light on efforts less talked about by other actors such as NGOs, think tanks, academics, private practice and the business community. The epistemic communities formed in this field are divided between supporters of a customized – development-oriented – competition law for developing countries and supporters of a universally ‘optimal competition law,’ i.e. the ‘absolutist’ view. The work of these networks drives the discussions within the various IGOs. With few exceptions, the participants of these networks, however, are predominantly Western. This does not seem to be due to a conscious act of exclusion but rather to the scarcity of agents in developing countries who may join these networks. With competition law coming of age in many other countries, the diffusion of competition law will not (or at least not for long) be dominated by a one-way legal transplant model, such as one emanating from the centre of US / EU competition (antitrust) regimes towards the less developed countries in this regard.

Chapter 4 looked at whether, and to what extent, the diffusion process impacted on the norms, rules and institutions. One cannot deny the continued role of neoclassical economics in shaping the intellectual currents in relation to development issues, as they still dominate modern economic thinking. We focus in particular here on one of these aspects analysing the objectives of the law to identify the normative core that guides enforcement activities in the recipient country. We can categorize objectives based on their numbers into singular and plural objectives, or the nature of the objectives into economic welfare and non-economic welfare objectives.

Following the “Chicago school”, competition law should only have a single objective of consumer welfare and efficiency, meaning neoclassical price theory economic efficiency (this being considered the dominant model for convergence). On the other hand, other jurisdictions such as the EU include multiple objectives in their laws. Looking at the objective(s) of competition law, there is an almost absolute consensus on economic welfare as the main objective of the law. Other than that, we found a high degree of diversity over the objectives of the law. Some jurisdictions may supplement or even incorporate objectives of similar weight under their competition laws. To be able to identify these “other” objectives, we coupled the two approaches of the OECD and Barnes, and categorized competition objectives as either economic welfare-based or non-economic welfare-based, the latter including industrial policy (grey zone) objectives and broader non-economic welfare objectives. These two categories are not mutually exclusive. To the contrary, economic welfare-based objectives are always present where non-economic welfare objectives may be added to the list of objectives (on an equal footing thereto) or as supplemental objectives subordinated to competition as the superior objective. In this regard, economic welfare-based objectives include promoting consumer welfare, maximizing efficiencies, ensuring an effective competitive process as a goal and/or a means, providing consumer choice and competitive/lower prices (broad consumer welfare). Non-economic welfare objectives include grey zone objectives (industrial policy) and broader public interest objectives. Grey zone objectives include ensuring a level playing field for SMEs, and promoting competitiveness in international markets, while public interest objectives include promoting fairness and equity, progress and development.

To test for the singularity vs. plurality of objectives in Africa and to distinguish the most common objectives among the different jurisdictions, as a starting point in identifying jurisdictions and areas of enforcement that warrant further research, we surveyed competition laws of nineteen jurisdictions in Africa that have established NCAs observing explicit objective as well as implied objectives based on substantive rules of the legal text or policy statements made by the relevant NCAs.¹⁰⁶⁰ For Western Africa, we included the WAEMU competition law since it applies at the national level.¹⁰⁶¹ Competition laws of African countries vary in many ways; however, they all display a plurality of objectives going beyond

¹⁰⁶⁰ These are Algeria, Botswana, Cameroon, Egypt, Gambia, Kenya, Malawi, Mauritius, Morocco, Namibia, Seychelles, Swaziland, South Africa, Tanzania, Tunisia, Zambia and Zimbabwe. These countries are clustered on sub-regional basis. In North Africa we surveyed Algeria, Egypt, Morocco and Tunisia, in West Africa Gambia and WAEMU in east Africa Kenya, Malawi, Mauritius, Seychelles, Tanzania, Zambia and Zimbabwe, in central Africa Cameroon and in southern Africa Botswana, Namibia, South Africa and Swaziland.

¹⁰⁶¹ As member of WEAMU, we did not review the laws of Burkina Faso, Cote d'Ivoire, Mali, Senegal, and Togo although we understand they have established NCAs. We note that Nigeria has an active merger control regime in place, which we will include in chapter 6.

economic welfare objectives. The most common economic welfare objective is the protection of competition, economic efficiency, RBS, consumer prices, consumer welfare and consumer choices. It is important to note the different economic welfare objectives adopted since these may, in some cases, be in conflict with each other (e.g. consumer and total welfare).

The spectrum of non-economic welfare objectives varies by the addition of a carve-out for SMEs, finding an equitable solution for disadvantaged segments of the society, meeting development goals to protecting the environment. The inclusion of societal and developmental objectives in competition law is prominent. The main social goals incorporated into the law are the protection of employment and fighting inequality. Development is also a stated objective in a number of jurisdictions without further demarcation of what it means. In some instances, it was linked to government development plans, which, arguably, should give it a narrower definition. Other objectives include consumer protection, price liberalization, regional integration, and protecting the environment. As a broad concept that now is understood to mean more than just economic growth, development as an objective of competition law will arguably change the nature of the law. Accordingly, when we think of competition law for developing countries we need to find the right approach to stay loyal to the economics behind it, while taking into consideration the views on the multidimensional aspect of the development process. This is not an easy balance to achieve. Adhering to the economics teachings of neoclassical price theories that confines competition objectives to economic welfare does, to some, render it inappropriate for developing countries, as it ignores other objectives. A dynamic approach to development is being sought with emphasis on poverty reduction and equality. This will impact the design of competition law in particular in developing countries. Integrating other development objectives into competition may make some people question whether competition law has stepped outside its boundaries.

Our analysis of the variety of objectives that characterize policy innovators and adopters showed that, when diffused, competition law may take very different trajectories that depend on a variety of factors, including the relation of experts and politics, the capability of institutions, legal culture, and the socio-economic system among others. To what extent their diverse objectives are different from that of the US/EU, and how that affects the shaping of competition law around the world, is a matter that will impact policy convergence (or divergence). With the integration of world markets, there are merits to seeking convergence. Different agents and networks have managed to score some success on many fronts in this regard. However, identifying a convergence point or a model where all countries (or at least major economies) will converge does not seem achievable, especially now that the majority

of competition law adopters are developing countries with variable internal and external factors impacting their socio-political realities. Rather, focusing on understanding these models and finding commonalities and co-operation platforms seems more advantageous.

Chapter 5 investigated diffusion patterns in Africa. The first hypothesis we addressed was whether conditionality was the main diffusion mechanism of competition law in African countries. Testing for conditionality as a diffusion mechanism, with the exception of a few countries, we found that, as expected, the adoption of competition law in most African countries has been an item on their structural reform agenda concluded with international financial institutions. This signals a top-down approach characterizing the adoption process. Also, the influence of trading partners and regional competition are factors that impacted the transfer process. We found that, indeed, soft power played a major role in the introduction of competition law in the continent with the EU having the greater influence in that regard. However, we also found in Southern Africa that there are other diffusion models. SA represents a choice based on learning and socialization, while other southern African countries have adopted competition laws as a means of facing anti-competitive practices from other countries, as well as of meeting obligations under regional trade agreements.

Also, we addressed the diffusion of competition provisions in sub-regional trade agreements in Africa. To do this, we first examined the existing typology of competition provisions under RTAs. The general typology is based on two main models: the EU harmonization model and the NAFTA co-operation model. The former focuses on provisions on harmonizing measures addressing anti-competitive conduct, while the latter mainly emphasises co-operation and information-sharing between competition authorities of member states. We identified eight RTAs in Africa that prescribe regional competition laws and regulations. Applying this typology to the competition provisions of sub-regional trade agreements in Africa, we found that it requires adjustment. Using a modified typology based on the mechanism employed to achieve convergence, we find three different types of competition provisions: integration (policy alignment and institutionalization, similar to EU integration), harmonization (policy coordination – similar to EU harmonization with its trade partners), and co-operation (similar to NAFTA agreements emphasising co-operation and information-sharing agreements). These models are not mutually exclusive and may have common provisions. Except for two RTAs, the competition regions under these RTAs are not yet functional. With limited resources and low inter-regional trade in Africa, it is not expected that much development will happen soon. However, the commencement of the enforcement of COMESA Competition regulations in 2013 may raise regulatory competition and may be a catalyst for expediting the enforcement of other regional competition provisions elsewhere, especially ones with member countries

affected by it. In such cases, the more pressing issue will become the overlapping membership of member states in more than one RTA, each with its own set of competition regulations. Alternative approaches to dealing with this problem include natural selection (selecting one RTA over another), co-operation (coordinating enforcement and dispute settlement), policy harmonization, or full integration of trade blocks.

Chapter 6 investigated to what extent competition norms diffused by other countries – such as SA and their diverse objectives and public policy considerations – are different from that of the US or the EU and how this affects the shaping of competition law using the diffusion of PICs in merger control in 19 jurisdictions in Sub-Saharan Africa as a case study.

SA is a leading jurisdiction in this regard, providing a unique efficiency and development model of competition law. It is also a compelling one. The fact that these developments have occurred in the recent past makes it a contemporary experience, which may prove more relevant to today's young enforcers in countries facing severe development challenges. In addition, similar to other developing countries in Africa, SA faces issues such as dealing with their colonial heritage, income inequality, and integration into the world economy, unemployment and poverty reduction issues. These predicaments make their experience more relevant than the traditional “diffusers” of competition law, the US and the EU.

The chapter looked closely at the prevalence of PIC and the analytical process (both substantive and procedural) followed in LM from 1999 to 2015. We found that almost 89% of these mergers were approved with no conditions. In general, in 15% of the cases heard by the SATC representing this period, parties invoked PICs (whether positive or negative) as part of the review process. Approximately 10% of these mergers were conditionally approved while 1% were prohibited. We found an increase in the number of conditions adopted more recently, especially in the years 2012 and 2013. We also found that 40% of these conditional approvals were to address PICs. As for the most frequent objective identified in these PICs conditional approvals, we found that, as expected, employment is the most frequent consideration remedied, followed by SMEs/HDI, the ability of a sector or a region to compete, and finally international competitiveness. In practice, however, a merger can raise two or more of these PICs, whether in the positive or negative sense. We also examined the substantive and procedural aspects involved in the review process and discussed factors relevant to the analysis.

Examining the merger regimes of nineteen jurisdictions in Sub-Saharan Africa compared to that of SA, we found these models have one point in common: they have a merger control

regime which includes multiple policy objectives (economic and non-economic) in their merger analysis. However, we found that the majority of the jurisdictions subject to our review had, in contrast to SA, embraced a broader view of PICs in their merger review by adopting a non-exhaustive list of PICs or very broad considerations, such as socio-economic development. Despite this, and following the SA model, four considerations are widely identified as worthy of protection: the particular industrial sector or origin, employment, the ability of small business of firms controlled or owned by historically disadvantaged persons to become competitive, and the ability of national industries to compete in the international markets. Industrial policy considerations featured the most, followed by employment, development, and the competitiveness of industrial sectors or regions.

The analytical process followed in a merger situation where competing and sometimes contradicting interest are to be reconciled is arguably the principal challenge in this holistic model of competition law. Using approaches addressing the priority problem under legal theories, we found that the interaction between competition and PICs may take the form of balancing, where both principles have equal weight in allowing the merger decision to be prohibited or conditioned with no anti-competition effects. In turn, there is also the lexical order where PICs are only weighed if the merger has anti-competitive effects. Under SA merger control, the Act adopts a balancing approach to the various considerations under review. Other jurisdictions following this approach are Botswana, Namibia, Kenya, Malawi, Zambia, and Nigeria. The majority of the jurisdictions examined, however, adopt a lexical order of PICs where they are only assessed in case a merger is found to be anti-competitive, then the need arises to demonstrate that the benefit to public interest outweighs the harm to competition. Enforcement activities of the competition authorities show reluctance in prohibiting a merger just on the basis of PICs. Nevertheless, in order not to ignore the detrimental impact on public interest, they expanded it by using tailor-made remedies to rectify the negative impact on public interest.

7.3 Policy Implications

7.3.1 Reconsidering convergence

From just 40 countries adopting competition law in 1990 to 138 countries in 2015, competition law as an innovative tool to address market failure and government intervention seems to present a successful diffusion story. However, a closer look may reveal that while this is true with regards to the adoption component of diffusion, the implementation aspect exhibits substantial differences on a number of issues. Agents and networks of competition

law aim to reconcile these differences through convergences into a model (best practice), and have been successful on many fronts. Nonetheless, convergence as the ultimate goal for competition diffusion is simply not possible to achieve because of the customization of the normative core of the diffused law at the receiving country, which may, as we demonstrated here, result in the plurality of objectives, which expands the scope of competition law beyond that envisaged by the innovator. In addition, the diffusion process itself is now more polycentric than it was in the past, with diffusion happening between multiple senders and receivers. That receiver, which customized the law to fit its environment, may now itself become a diffusion multiplier.¹⁰⁶² SA is a case in point, with new adopters making further changes in their own versions as well. Also, these new entrants are forming their own networks, whether on a regional basis or on common interests. Indeed, not all new adopters will have the same impact on diffusion.

The rise in the diffusion of competition law accompanied the geopolitical transformation that swept the world in the 1990s with the rise of free markets. We are now witnessing another major geo-political transformation from a unipolar to a multipolar world accompanied by political and financial instabilities and a rise in populism in many countries. Accordingly, in some aspects, such as the normative core of competition law, convergence may be even less of an attainable goal under the circumstances. It is now more crucial to engage jurisdictions with deferential models of competition law at these networks to reach deeper understanding and means for co-operation on divergence issues. A recent OECD meeting acknowledged the need to open discussions on the issue of PICs in merger review, noting the lack of research on the topic, especially impact assessments.¹⁰⁶³

Accordingly, this thesis contributes to this aim by providing an assessment of the challenges arising from the application of PICs in merger regimes in Africa and how the leading jurisdiction in this regard has addressed (some of) them.

7.3.2 Challenges facing the enforcement of PICs test in merger analysis

A holistic competition model is emerging as the preferred approach in addressing societal and developmental needs in Africa. However, the extent to which this model is pursued varies from one country to another. In any case, this model raises a number of challenges that needs to be addressed.

¹⁰⁶² It has been noted that the “interplay between international jurisprudence and local conditions” has affect the market definition in some cases. Lewis, (2012), p. 102. This is however outside the scope of this research which mainly focused on the PIC analysis as a prominent feature of local conditions.

¹⁰⁶³ OECD, 123rd meeting of the Working Party No. 3 on Co-operation and Enforcement, 14-15 June 2016.

The first challenge in applying the PICs test is identifying the PICs which may be included in the review, as well as setting parameters to know when a certain interest becomes relevant and should be addressed under the merger review process. Stating clearly what constitutes a PIC under the law is imperative for legal certainty. Where the PICs are not set, other non-competition PICs may find their way to the enforcement of competition law. There is divergence within this model as to the extent PICs are dealt with under competition enforcement and the majority adopts a rather expansionist view of PICS. Looking closely at SA, one finds that except for employment and equity considerations, other PICs are relevant to competition and industrial policy. The general belief is that more competition leads to job losses and import substitution. Nevertheless, recent research has shown that competition may have positive long-term effects on employment.¹⁰⁶⁴ It was also shown that the negative impact on employment may, however, be expected in the short-term (up to three years).¹⁰⁶⁵ In that sense, it is important to note that undertakings/conditions in SA case law opted to address only the negative short-term impact on employment of unskilled labour.¹⁰⁶⁶ This raises the question of whether such undertakings/conditions have served their intended purpose in redressing the negative impact of competition on employment and also whether, by only considering the short term effects, there have been any spill-over effects to the detriment of the long-term positive impact expected from competition on employment. Another issue linked with identification of PICs is the scope of the interest in question. Also, employment is another example in this regard where the case law (and recently adopted Guidelines) indicated the adoption of an expansive approach to employment in including effects that are both direct and indirect on employment levels in the relevant industry as well as in general.

The competition authorities borrowed the analytical process in evaluating efficiencies under comparative merger control regimes and applied it to PICs requiring them to be merger-specific and substantial.¹⁰⁶⁷ Nevertheless, how they have established these two elements under each PIC has not always been clear and/or consistent. For example, with regard to employment considerations, a nexus must be shown between retrenchment and the proposed merger to evidence specificity; however, competition authorities have on occasions imposed

¹⁰⁶⁴ “[T]he final impact on employment from increased competition is more job creation, possibly associated with higher real wages (as prices are reduced).” Background note by the Secretariat, *Does Competition Kill Or Create Jobs?* (2015), p. 4

¹⁰⁶⁵ “[E]conometric simulations of the effect of increased competition leading to redundancies in an industry demonstrate a return to a steady state growth path with rising employment after two-three years. *Id.* p.20.

¹⁰⁶⁶ Further research is needed to test the impact of this approach on the relevant sector and the economy as a whole.

¹⁰⁶⁷ See William J Kolasky & Andrew R Dick, *The merger guidelines and the integration of efficiencies into antitrust review of horizontal mergers*, 71 ANTITRUST LAW JOURNAL (2003) Substantiality is also an express requirement under the 89 Act.

conditions on retrenchment without such a nexus.¹⁰⁶⁸ Exclusivity clauses in the retail space lease agreements are not merger-specific but are still addressed by imposing conditions. Admittedly, the law, regulations, and enforcement in this regard are developing, faster for some than others (like employment). As a welcome step, a number of jurisdictions issued (draft) guidelines on PICs, which should promote the knowledge and understanding of how they would be applied and hopefully to a higher level of certainty and clarity for businesses.

The second challenge is the procedural framework for intervention and the stand the competition authorities take on intervention and evidence. In order to be informed about all these considerations (economic and non-economic ones), stakeholders have to be able to participate to the merger review process to illuminate the competition authorities.¹⁰⁶⁹ There are a few obvious problems emerging out of this open door policy: (a) the possibility of prolonging the process due to the overzealous participation in the proceeding (whether in good faith or bad faith), which results in an excessive amount of information provided from different stakeholders that needs to be reviewed by the competition authorities, and (b) the quality of the information regarding the relevance of the specific PICs claimed to the merger and whether the information is actually representative of all relevant facts. Stakeholders may, intentionally or unintentionally, provide the authorities with a mixed bag of information reflecting various PICs, whether merger-specific and substantial to the merger, or not.

The SACT faced the first issue by imposing strict timelines to present evidence, which mainly addresses the threat of abuse (by dragging the process for longer than it should), and the CAC concurred with its approach. However, for the sake of procedural fairness, to ensure the participation of the stakeholders the SACT took into account intervention that occurred at the eleventh hour to ensure their participation. Regarding the concerns over the quality of information, given the duty of fairness towards the stakeholders, this will probably require significant time and effort by the competition authorities to sift the information provided. As per the SACT Rules, this screening process should be done ten days from receiving a “*Notice of Motion*” to intervene. Thus, intervention in merger proceedings requires another balancing act that competition authorities need to perform between maintaining procedural fairness, i.e.

¹⁰⁶⁸ See Lexshell 826 Investments (Pty) Ltd and Umcebo Mining (Pty) Ltd and Mopani Coal (Pty) Ltd., 09/LM/Feb11, (2011). “Notwithstanding the Commission having found no nexus between the retrenchments at SISA and the current transaction, it seek the imposition of a condition protecting employment. It was concerned that certain jobs may be duplicated and sought the imposition of a two year moratorium on retrenchments at both the acquiring and target firm.” Sun International (SA) Ltd and GPI Slots (Pty) Ltd, 019083, (2014).

¹⁰⁶⁹ Economic Development, Trade and Industry and Agriculture, Forestry and Fisheries- intervened in the proceedings requesting the merger be approved subject to conditions to protect the public interest, which led to criticism of undue government involvement, and over-reaching of public policy in competition matters. Wal-Mart and Massmart *supra note* 846.

providing an open platform within a specific scope relevant to the PICs in question, and reaching their decisions in a timely manner. Also, the level of sophistication and development of stakeholders will affect the quality of the information provided and the ability to partake in this process. It is expected that businesses, having access to resources and familiarity with the process, will be more capable of engaging in the process than others such as small businesses and civil society. Ensuring the accessibility of the various stakeholders' participation in the process is integral for the competition authorities to pursue their fact-finding mission. A "build it and they'll come" approach to participation is not guaranteed. In the context of SA, advocacy was used to inform unions about the right to intervene and how it can be utilized. This, however, proved to be an effective cure to the modest participation of stakeholders, adding another dimension to the advocacy activities of competition authorities, which are usually focused on preaching benefits of competition to mainly consumers, businesses and the government. Also, identifying what will be considered admissible and relevant evidence in relation to PICs is not always clear and requires careful consideration from these authorities to guide stakeholders on the matter to guarantee procedural fairness.

The third and arguably the principal challenge is weighing the conflicting economic and non-economic arguments presented in complex mergers. The competition authorities are required to perform a balancing exercise, and the outcome of this should be supported by adequate evidence. This means that outcomes may differ (drastically) based on the evidence provided and what weight the authorities attach to it.¹⁰⁷⁰ Following the global nature of trade nowadays, in reaching their findings the competition authorities utilize comparative evidence from other jurisdictions.¹⁰⁷¹ In the *Wal-Mart and Massmart merger*, the Commission recommended the unconditional approval of the merger, while the SACT awarded more weight to consumer welfare over job losses and conditionally approved the merger. The CAC disagreed with the SACT on what is at stake and what constitutes appropriate conditions.¹⁰⁷² This follows the inherent nature of the balancing exercise, which, even if it may allow a few principles to settle, is essentially decided on a case-by-case basis.¹⁰⁷³ Accordingly, the approach in assessing PICs is very dynamic. For employment concerns, the general rule is

¹⁰⁷⁰ "Regarding the main reasons why competition authorities' decisions are overturned, Table 3 shows that the most quoted answer in the survey is that there are divergences in the way competition authorities and the judiciary interpret competition rules." ICN Report on Competition and the Judiciary, p.8. Available at <http://www.internationalcompetitionnetwork.org/uploads/library/doc594.pdf> Last visited 1 September 2016.

¹⁰⁷¹ Evidence from post-merger effect of Wal-Mart merger in Chile (among other countries) was used. *Wal-Mart and Massmart supra note 846*.

¹⁰⁷² See the discussion on GVCs and Wal-Mart and Massmart *supra note 846*.

¹⁰⁷³ "Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests." See, S v Makwanyane and Another, CCT/3/94 para. 104, p. 69. Available at <http://www.saflii.org/za/cases/ZACC/1995/3.pdf> Last visited 1 September 2016.

that consideration of quantifiable short-term losses trumps long-term ones, except in the case of a failing firm. In weighing the harm to local supply chains against the benefit of lower prices for consumers, the SACT seems to have opted for the former over consumer welfare. Since it is an exercise made on a case-by-case basis, we may face a different outcome in the next GVCs' merger in the same sector. Hence, context matters significantly in PIC analysis. This, as noted by many opponents of the mixed objectives model, raises issues of certainty and consistency for businesses. Thus, it is absolutely essential for PICs analysis to be transparent in order to counter these issues.

It is worth pointing out that despite the careful attention to PICs, it is important to ensure that competition authorities only address policy objectives that otherwise will not be met and to allow redress if and when prescribed under other regulations. This is particularly relevant to employment concerns. Also, there seems to be a general reluctance to prohibit a merger solely on the basis of PICs. Nevertheless, in order not to ignore the detrimental impact on public interest, tailor-made remedies to rectify the negative impact on public interest are adopted.¹⁰⁷⁴ Undertakings/conditions to cure the negative impact on employment have mainly taken the form of the behavioural remedies of caps on the number of retrenchments, moratoria on retrenchments, offering re-employment opportunities and training funds. These have also been designed to provide short-term remedies addressing employment concerns with the least impact possible on the competition conditions in the market. However, there may still be some room for improvement. Conditions pertaining to SMEs ranged from obligations to change market practices through negotiations and, in recent years, price caps to ensure continued access to sensitive products and establishing investment funds for the development of SMEs chains. These conditions, especially the allocation of funds, may be better understood in light of the announced policy goals for SMEs promotion under the various government development plans. Some cases warranted the use of structural remedies (and these are usually ones that affect BEE); however, the Guidelines did not provide for such as a remedy. Behavioural remedies raise challenges for the operation, effectiveness, and on going monitoring and compliance, and hence compound the burden of enforcement. In the SA Competition report celebrating fifteen years of enforcement, the competition watchdog went back to examine the effectiveness and the impact employment conditions had on addressing the PIC in question. Their initial examination revealed that training funds have been utilized

¹⁰⁷⁴ In competition law, remedies are conventionally classified as either structural or behavioural. They should be appropriate, proportional and enforceable. Ioannis Lianos, *The Principle of Effectiveness, Competition Law Remedies and the Limits of Adjudication*, CLES RESEARCH PAPER (2014).

in the best-case scenario by 50% of affected employees.¹⁰⁷⁵ The parties then agreed with the Commission on directing the funds to establish an education and training fund for the benefit of the relevant community. How these undertakings are reached is also a matter that warrants contemplation. Technically, the competition authorities have a hold-up power over businesses in that regard. That procedural measures are developed to ensure these conditions are negotiated and agreed upon in a transparent and fair manner is of vital importance for the efficacy of this model.

Furthermore, the competition authorities have dealt with complex issues arising out of globalization such as GVCs, which are of special significance for emerging economies and developing countries.¹⁰⁷⁶ In that sense, they acknowledged that competition enforcement should not become a “*surrogate for a coherent industrial policy*”.¹⁰⁷⁷ They nevertheless engaged in an exercise to quantify the damage arising out of GVCs, and devise remedies to mitigate its long-term effect on the market.¹⁰⁷⁸ The *Wal-Mart and Massmart merger* across the various jurisdictions raises important issues to consider for GVCs. In the OECD Economic Survey of South Africa 2015, it was noted that the said merger “*prevented economic efficiencies through the streaming of operations and slowed down the introduction of new (retail) operations and supply chain techniques.*”¹⁰⁷⁹ The decision of the SACT indicates that there is an understanding of the importance of such GVCs for developing economies, but under different terms of engagement. The first remark here is that these decisions were advised by the desire to direct the GVCs away from their labour policies and supply chain models towards more local engagement and vertical integration with existing local networks. It is a reflection of policies adopted in developmental states. Further, it is worth exploring this process from the business side to consider whether this model will impact how companies perceive these conditions and possibly create new synergies between competition enforcement and corporate social responsibility. Another element that has to be noted here is the risk of a race to the top in the context of such global and regional mergers, where each competition authority imposes similar conditions, possibly increasing the cost and level of engagement post-merger for businesses. This may lead to abandoning the transaction

¹⁰⁷⁵ See 15 Years of Competition Enforcement, A People’s Account, A Joint Report by the South African Competition Commission and Tribunal. Available at <http://compcom.co.za/www15.cpt4.host-h.net/wp-content/uploads/2014/09/15-Years-of-Competition-Enforcement.pdf> Last visited 1 September 2016.

¹⁰⁷⁶ See Implications of Global Value Chains for Trade, Investment, Development and Jobs, a joint report by the OECD, WTO and UNCTAD prepared for submission to the G20 Trade Ministers Meeting Sydney, Australia, 19 July 2014 http://unctad.org/en/PublicationsLibrary/unctad_oecd_wto_2013d1_en.pdf Last visited 1 September 2016.

¹⁰⁷⁷ “[A] comprehensive policy designed by the State is the best way to deal with the challenges that globalisation in general and global value chains in particular posed to the domestic South African economy.” The CAC on Wal-Mart and Massmart *supra* note 846.

¹⁰⁷⁸ *Id.*

¹⁰⁷⁹ OECD, OECD ECONOMIC SURVEY: SOUTH AFRICA (OECD Publishing, 2015), p. 81.

in whole or in part, which would result in losing the opportunity of FDI, possibly where it is most needed.

Other than the complexity of the test, one must note the institutional choice of the competition authorities in SA where this unique framework is constructed, applied and interpreted by the SACC, the SACT and the CAC, and in some instances the Supreme Court.¹⁰⁸⁰ The composition of these authorities is quite different, with the first two comprised of technocrats dealing only with competition matters, while the other two are the fora of generalists.¹⁰⁸¹ The two sets of bodies may by their nature adopt different approaches. The SACC and SACT may adopt a technical approach while the CAC and the Supreme Court may adopt a formalistic one.¹⁰⁸² In such systems, the collaboration of both sets of bodies is essential as only through judicial interpretation are we able to move from “the technocratic process to an economic policy whose implications are understood and accepted.”¹⁰⁸³ In this regard, the concept of deference is most relevant and has not always been followed in SA case law. Also, a choice between an inquisitorial system (such as SACT) and an adversarial one should also be considered. Further, under the SA model, generally the relevant minister may raise PICs as a party to the proceedings vis a vis the other parties and does not enjoy overriding powers with their decisions. Accordingly, the independence of authorities that adopt a broad merger test that includes PICs has become even more crucial.

On the macro-level, competition authorities do not exist in a vacuum. Various government strategies articulate the development challenges they are facing and the plans they hope to

¹⁰⁸⁰ Scope of the Supreme Court powers is not very clear after amendment to s 168(3) of the Constitution in 2012 [T]he Supreme Court of Appeal may decide appeals in any matter arising from the High Court of South Africa or a court of a status similar to the High Court of South Africa, except in respect of labour or competition matters to such extent as may be determined by an Act of Parliament.” See also Competition Commission and Computicket (PTY) LTD, 853/2013 (finding that that Supreme Court has no jurisdiction to hear appeals from the CAC on matters that fall within the CAC’s exclusive jurisdiction in terms of the Competition Act).

¹⁰⁸¹ There seems to be some inconsistency in the application of the deference principle in the SA jurisprudence. In some cases, the CAC acknowledged the importance of deferring to expert bodies. See *TWK Agriculture Ltd. v The Competition Commission*, 67/CAC/Jan07, (2007), p. 16-17 and *Primedia, Capricorn Capital Partners and New Africa Investments* 68/CAC/Mar07 (2007) where the CAC reaffirmed the view that the SACT, as an expert regulatory agency, had been granted a legislative discretion to determine whether a merger should be approved and accordingly should be treated with deference. It decided to remit the case to the SACT based on a material error of law, stating that “the respect and deference owed to the Tribunal means that it is not for this Court to make the determination as to whether the merger should be approved or not...Bad law in this kind of case prevents good economics from being employed.” See also *African Media Entertainment Ltd v Lewis NO and Others*, 68/CAC/MAR/07, (2008). However in other cases the CAC criticized the SACT and decided on the merger rather than remit it to the SACT. See *Medicross Healthcare Group (Pty) Ltd and Another v Prime Cure Holdings (Pty) Ltd*, ZACAC 3 (2006), *Southern Pipeline Contractors and Conrite Walls (Pty) Ltd vs The Competition Commission* 105 and 106/CAC/Dec2010, (2010) and *Netstar (Pty) Ltd and Others v Competition Commission South Africa and Another*, 99/CAC/MAY10, 98/CAC/MAY10, 97/CAC/MAY10, (2011).

¹⁰⁸² The SA Supreme Court overturned some of the decisions of the CAC which were based on “substantive as opposed to a formalistic approach” to interpretation of the competition act, which would arguably affect the CAC approach to a more formal rather than a purposive one. See for example *Woodlands Dairy (Pty) Ltd and Milkwood Dairy (Pty) Ltd v The Competition Commission* 88/CAC/Mar09, (2009). However, also see *Competition Commission of South Africa v Senwes Ltd*, CCT 61/11, (2012).

¹⁰⁸³ OECD, *Judicial Enforcement of Competition Law*, 1996, p.24. Available at <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/1919985.pdf> . Last visited 1 September 2016.

implement in that regard. All these policies should then direct the work of government and administrative agencies' activities, among which are the competition authorities.¹⁰⁸⁴ In such a model, competition authorities are not only gatekeepers for competition; they also have to ensure that competition enforcement is in sync with other relevant economic, societal, and developmental policies. In SA, for example, the Department for Economic Development (EDD) was established in 2009 to realize this goal. It is now responsible for overseeing the work of the Commission and the SACT. One of the EDD's tasks is to ensure the alignment of competition enforcement with the national development strategy. The review process of the work of the Commission and the SACT includes assessing the positive/negative effects of their decisions on employment.¹⁰⁸⁵ This will *de facto* raise the pressure on these authorities to perform well as per the standards of the EDD, adding yet another matter to balance between their mandate under the Act and the EDD's expectations. If not careful about this slippery slope, they may be dragged into meeting success criteria that are broader than their competition function. This is again applicable in relation to all other countries contemplating the inclusion of development plans as an objective to review mergers.

Inclusion of multiple objectives under competition law is a common feature in African countries. Through diffusion, we understand how classical competition law models have been altered and modified during the transfer process. In any case, this uncharted path, in its different variations, raises a number of challenges which, if not contemplated and addressed, may render such merger control models a stumbling block for development rather than a catalyst thereof.

7.4 Further Research

Looking closely at these differential approaches to competition law and policy and adaptation of their normative core raises several lines of enquiries and requires further analysis. The first extension of this research is to expand the dataset by examining jurisdictions not included in the sample and adding them to the analysis.

¹⁰⁸⁴ For example see the Kenya 2030 vision. Available at <http://www.vision2030.go.ke/index.php/vision/>. Last visited 1 September 2016. Addressing the relation between the statute and the economic analysis embedded in competition laws, Davis, Judge President of the CAC makes the following remark "[T]he evidence must be applied to these concepts and , to be sure, that requires an understanding of the economics underpinning of this evidence and thus a good grasp of economic principles. But when the judgment is produced, the order must be justified in terms of the evidence as understood and the application of the applicable provisions of the Act. Only in this way, can the balance of the economic community attempt to comport their activity in the future." Dennis Davis, Reflecting on the effectiveness of Competition authority: Prioritisation, Market Enquiries and impact (2009), p.6-7.

¹⁰⁸⁵ In the past 15 years the Tribunal has placed employment related conditions on more than 29 mergers and prevented more than 3,803 job losses as a result of the conditions placed." See the EDD Annual Report of 2013-2014. Available at <http://www.economic.gov.za/communications/annual-reports> Last visited 1 September 2016.

An important aspect of these approaches that remains understudied is the analysis of the effects that PICs remedies have on addressing the particular consideration, as well as on competition, in both the short and long terms. An extension of this analysis may also address how such merger control regimes impact GVCs and, possibly, corporate social responsibility.

Including other aspects where non-economic welfare objectives are taken into account, such as exemptions and authorization systems, is another area of enquiry that should be addressed. Following our investigation of how “externalities” impact competition enforcement, another subject worthy of study is exploring the interaction of other laws and regulations, such as national security and foreign investment regulations, with merger reviews.

Finally, a related extension of this research is applying diffusion analysis to other aspects of competition law, whether it’s substantive norms (such as abuse of dominance, which in some countries includes fairness considerations) or its institutional models.

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15. 91/CAC/Feb10 The Competition Commission vs Pioneer Foods (Pty) Ltd
16. 105/CAC/Dec10 and 106/CAC/Dec10 Southern Pipeline Contractors and Conrite Walls (Pty) Ltd vs The Competition Commission
17. 97/CAC/May10 Netstar (Pty) Ltd, Matrix Vehicle Tracking (Pty) Ltd and Tracker Network (Pty) Ltd vs The Competition Commission and Tracetec (Pty) Ltd
18. 109/CAC/Jun11 Monsanto South Africa (Pty) Ltd & Monsanto International, SARL vs Bowman Gilfillan, Pioneer Hi-Bred International Inc & Pannar Seed (Pty) Ltd
19. 110/CAC/Jun11 and 111/CAC/Jun11 SACCAWU, the Minister of Economic Development, the Minister of Trade and Industry, The Minister of Agriculture, Forestry and Fisheries vs Wal-Mart Stores Inc and Massmart Holdings Limited
20. 113/CAC/Nov11 Pioneer Hi-Bred International Inc & Pannar Seed (Pty) Ltd vs The Competition Commission, African Centre for Biosafety & Biowatch SA
21. 125/CAC/Nov12 Phindiwe Kema and other and Gold Circle
110/CAC/Jun11, 111/CAC/Jul11, Minister of Economic Development and Others v Competition Tribunal and Others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Wal-Mart Stores Inc.
22. 118/CAC/Apr12 Competition Commission vs Computicket (Pty) Ltd
23. 119/120/CAC/May2013 Reinforcing Mesh Solutions (Pty) Ltd and Other
24. 121/CAC/jul12 Macneil Agencies (Pty) Ltd Vs The Competition Commission
25. 124/CAC/Oct12 Videx Wire Products (Pty) Ltd vs Competition Commission of South Africa

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1. 20107 Nunorex (Pty) Ltd and Sunspray Food Ingredients (Pty) Ltd and Depco (Pty) Ltd
2. 19737 Main Street 1282 (Pty) Ltd and Yebo Guma Investments (Pty) Ltd and Gijima Group Ltd
3. 19893 Lewis Stores (Pty) Ltd and Ellerine Furnishers (Pty) Trading as Beares Stores
4. 19729 Fortress Income 2 (Pty) Ltd and Weskus Mall
5. 19083 Sun International (SA) Ltd and GPI Slots (Pty) Ltd
6. 19364 Adcorp Holdings Ltd and Kelly Group Ltd
7. 19372 Tsogo Investments Holdings Company (Pty) Ltd and Tsogo Sun Holdings Ltd
8. 19570 Fraser Alexander (Pty) Ltd and Close-up Mining (Pty) Ltd
9. 19398 Engen Holdings (Pty) Ltd and South African Oil Refinery (Pty) Ltd
10. 19612 Imperial Group Ltd and Chamber Lane Properties 3 (Pty) Ltd
11. 19554 Dark Fibre Africa (Pty) Ltd and MCT Telecommunications (Pty) Ltd
12. 19166 Altech Autopage Cellular (Proprietary) Limited and Nashua Mobile (Proprietary) Limited in respect of its Cell C subscriber base
13. 19034 Vodacom (Pty) Ltd and Nashua Mobile (Pty) Ltd in respect of its Vodacom (Pty) Ltd subscriber base
14. 19018 Mobile Telephone Networks (Pty) Ltd and Nashia Mobile (Pty) Ltd in respect of its Mobile Telephone Networks (Pty) Ltd subscriber base
15. 19141 Griekwaland- Wes Korporatief Ltd and Trio Trade Gauteng (Pty) Ltd
16. 19497 Actis 4 PCC with Respect to Cell Big Foot and Tekkie Town (Pty) Ltd
17. 19430 Ellerine Bros. (Pty) Ltd and FHP Managers (Pty) Ltd in Respect of Its 25 per cent Interest in Newpark Towers (Pty) Ltd
18. 19406 Redefine Properties Ltd and Macsteel Genprop (Pty) Ltd and Macsteel Coreprop (Pty) Ltd
19. 19042 Octodec Investments Ltd and Premium Properties Ltd
20. 19232 Old Mutual Capital Holding (Pty) Ltd and Old Mutual Finance (Pty) Ltd (RF)
21. 18358 Ferro Industrial Products (Pty) Ltd and Arkema Resins (Pty) Ltd
22. 18994 Delta Property Fund Ltd and Two Properties (Known as OMC Durban and The Marine) Owned by Old Mutual Life Assurance Company (SA) Ltd
23. 18911 Seaboard Overseas Trading and Shipping (Pty) Ltd and The Oilseed Business of The Atlas Trading and Shipping Division of Grinrod Trading (Pty) Ltd; and The Atlas Trading Division of Grindrod Trading Asia PTE Ltd
24. 19307 Investec Property (Pty) Ltd and Spareprops (Pty) Ltd
25. 18903 Business Venture Investments No. 1697 (Pty) Ltd and Government Employees Pension Fund and Menlyn Maine Investment Holdings (Pty) Ltd

26.	19208	Growthpoint Properties Ltd and The Truzen 75 Trust and Erven 99 and 100 Parktown Township share Block (Pty) Ltd
27.	19273	Super Group Dealerships A Division of Super Group Trading (Pty) Ltd and RSF Motors Handelaars (Verkope) (Pty) Ltd in relation to the Business of Land Rover and Volvo in Nelspruit operated by RSF motors
28.	18713	BB Investment Company (Pty) Ltd and Adcock Ingram Holdings Ltd
29.	19026	Air Products SA (Pty) Ltd and The A2100 Air Separation Plant Owned by Sasol Chemical Industries Ltd
30.	19133	First Rand Bank Ltd and Integri-T Property Fund Ltd in respect of Omnicron Investments 005 (Pty) Ltd, Lowmer Investments 005 (Pty) Ltd, Rapidough Properties 509 (Pty) Ltd, Libra Investments 5 (Pty) Ltd, Aquarella Investments 272 (Pty) Ltd and Adamass Investments 5 (Pty) Ltd
31.	19158	Liberty Holdings Ltd and Liberty Health Holdings (Pty) Ltd
32.	18945	Absa Bank Limited and Bytes Technology Group South Africa (Pty) Ltd ("Bytes") in relation to certain automated teller machines and their related sites owned by Bytes
33.	19216	Resilient Properties (Pty) Ltd and Jubilee Mall, The Immovable Property and The Property Letting Enterprise
34.	18937	Blue Label Telecoms Ltd and Viamedia (Pty) Ltd
35.	18978	Investec Property Fund Ltd (the fund) and Erf 3371 Bethlehem Township owned by Bethlehem Property Development Pty Ltd
36.	19125	Grindrod Holdings South Africa (Pty) Ltd and Sturrock Grindrod Maritime Holdings (Pty) Ltd
37.	18457	Bucket Full (Pty) Ltd and The Cartons and Labels Business of Nampak Products Limited
38.	19059	Resilient Properties (Pty) Ltd and Irene Mall (Pty) Ltd
39.	18986	Barloworld SA (Pty) Ltd and Jacmes Motors CC
40.	18960	Liberty Group Ltd and Melrose Arch Investment Holdings (Pty) Ltd
41.	19067	Masstores (Pty) Ltd and Darryl Investments (Pty) Ltd
42.	19109	The Standard Bank of SA Ltd Acting Through its Real Estate Investment Division and LC Golf SA (Pty) Ltd
43.	18887	Imperial Holdings Ltd and Pharmed Pharmaceuticals (Pty) Ltd
44.	18929	Arrowhead Properties Ltd and Vividend Income Fund Ltd
45.	18739	Friedshelf 1508 (Pty) Ltd and RTT Holdings (Pty) Ltd
46.	18762	SA Retail Properties (Pty) Ltd and AFHCO Holdings (Pty) Ltd
47.	18820	AFHCO (Pty) Ltd and 120 End Street Property Investments (Pty) Ltd
48.	18648	Redefine Properties Ltd and Sycom Property Fund Collective Investment Scheme in Property
49.	18796	Fountainhead Property Trust Collective Investment Scheme in Property and Robor (Pty) Ltd
50.	18754	Redefine Properties Ltd and Annuity Properties Ltd, Annuity Asset Managers (Pty) Ltd and Annuity Property Managers (Pty) Ltd
51.	18721	Firststrand Bank Ltd N.O. as Trustees for The Time Being of The Emira Property Fund and Menlyn Corporate Park (Pty) Ltd

52.	18705	Paycorp Group (Pty) Ltd and Saicom Group (Pty) Ltd
53.	18523	Improchem (Pty) Ltd and Clariant Southern Africa (Pty) Ltd in Respect of its Water Treatment Business
54.	18630	Redefine Properties Limited and The Trustees for the time being of the 115 West Street Trust in Respect of an Undivided Half Share of the Property Letting Enterprise known as Alexander Forbes Building
55.	18606	Thebe Investment Corporation (Pty) Ltd and Mohebi Investments LLC and Gourmet Fresh (Pty) Ltd
56.	18572	Friedshelf 1497 (Pty) Ltd and Pangbourne Properties Ltd, Monyetla Property Holdings (Pty) Ltd, Bands Properties (Pty) Ltd, Capital Propfund (Pty) Ltd, Property Fund Managers Ltd
57.	18473	Southern Sun Hotel Interests (Pty) Ltd and The Cullinan Hotel (Pty) Ltd
58.	18531	Barloworld South Africa (Pty) Ltd and Anycar (Pty) T/A Jaguar Land Rover
59.	18556	Pareto Limited and FountainHead Property Trust Collective Investment Scheme In Property
60.	18192	Newsshelf 1273 (Pty) Ltd and The Business of Joint Medical Holdings Ltd
61.	18374	Mediclinic Southern Africa (Pty) Ltd and Mediclinic Limpopo Ltd
62.	17939	AgriGroupe Holdings (Pty) Ltd and AFGRI Ltd
63.	18481	Pareto Limited and Fountainhead Property Trust Scheme and Sycom Property Trust Scheme
64.	18416	The Prepaid Company (Pty) Ltd and Retail Mobile Credit Specialists (Pty) Ltd
65.	18226	Shoprite Checkers (Pty) Limited and Gaterite Hypermarket, The Business of Nafawa TRading CC
66.	18408	MB Technologies Investments (Pty) Ltd (MB Tech) and Securedata Holdings Limited
67.	17186	Aspen Nutritionals, a Division of Division of Pharmacare Ltd and The South African Infant Nutrition Business of Pfizer Nutrition
68.	18341	Imperial Group Ltd and Mitsubishi Motors Paarden Eiland and Mitsubishi as Motors Sandton
69.	18333	Super Group Trading Pty Ltd and Greystone Trading 6 CC Restaurant and Hotel Liquor Distribution
70.	18432	Zeder Financial Services Limited and Agri Voedsel Limited
71.	18317	Barloworld SA (Pty) Ltd and Leatoy (Pty) Ltd T/A Leach Toyota
72.	18085	Microsoft Corporation and Nokia Corporation in Particular the Devices and Services Business of Nokia Corporation
73.	18176	MMI Strategic Investments (Pty) Ltd and Guardrisk Group (Pty) Ltd
74.	18234	Super Group Holdings Pty Ltd and Great Wall Motors SA Pty Ltd
75.	18150	Macneil Proprietary Limited and Brands 4 Africa Distribution and Logistics Proprietary Limited
76.	18382	Dimension Data Middle East and Africa (Pty) Ltd and Dataflo SA (Pty) Ltd
77.	18390	One Mutual Investment (Pty) Ltd and Absa Insurance Risk Management Services
78.	18143	Growthpoint Properties Limited and Tiber Property Group (Pty) Ltd

79.	18242	Acucap Investments (Pty) Ltd Sycom property Fund Collective Investment and Liberty Group Ltd
80.	18325	Redefine Retail (Pty) Ltd and The Trustees for the Time Being of the Maponya Mall Property Trust and Redefine Retails (Pty) Ltd
81.	17855	Sibanye Gold Limited and Newshelf 1114 (Pty) Ltd
82.	18168	Acucap Properties Limited and Sycom Property Fund Collective Investment Scheme in Property, Represented by First Rand Bank Limited as Trustee
83.	18366	Sibanye Gold Limited and Witwatersrand Consolidated Gold Resources Limited
84.	18218	Modern Media Promotions (Pty) Ltd and Main Street 1132 (Pty) Ltd
85.	18309	IPS Investments (Pty) Ltd and Old Mutual Life Assurance CompA) Ltd in Respect of 50% of Vuselela Investments
86.	18424	Redefine Properties Limited and Grapnel Property Investments (Pty) Ltd in respect of the Property Letting Enterprise Known as Ericsson Building
87.	18135	Kendrum Limited and Siemens Turbocare Business and Wood Group GTS Division
88.	17095	Standard Chartered Private Equity (Mauritius) III Ltd and ETC Group (Mauritius) (ETC)
89.	18010	Glencore International AG and BHP Billiton Energy Coal South Africa (Pty) Ltd
90.	18077	Auto & General Insurance Company Ltd and Compass Insurance Company Ltd, Compass Short Term Insurance Book managed by MUA Insurance Acceptances (Pty) Ltd
91.	17707	PPC Limited and Safika Cement Holdings (Pty) Ltd
92.	17962	Desert Star Trading 496 (Pty) Ltd and M-Tech (Pty) Ltd
93.	18044	Mogs (Pty) Ltd and Booyesen Bore Drilling Company (Pty) Ltd
94.	17947	Attacq Ltd and Brooklyn Bridge Office Park (Pty) Ltd
95.	18093	Boe Private Equity Investment (Pty) Ltd and Little Green Beverages (Pty) Ltd
96.	17798	Industrial Electronic Investments Ltd and Community Investment Ventures Holdings Ltd
97.	17848	MH Power Systems Ltd and The New South Africa Company
98.	18002	Growthpoint Properties Limited and Abseq Properties (Pty) Ltd
99.	17673	Business Venture Investments No. 1657 (Pty) Ltd and CJP Chemical (Pty) Ltd
100.	17632	Bidvest Group Limited and Academy Brushware (Pty) Ltd
101.	17780	Unitrans Automotive (Pty) Ltd and Abrina 3765 (Pty) Ltd and phase IV Motor Investments (Pty) Ltd
102.	16899	The Bidvest Group Limited and Mvelaserve Limited
103.	17954	Premier Group (Pty) Ltd and Lil-Lets Group Ltd
104.	17921	ABSA Bank Limited and ABSA Towers Complex
105.	17459	Afgri Operations Ltd and MGK Operating company (Pty) Ltd
106.	17426	Pinnacle Technology Holdings Limited and Datacentrix Holdings Limited
107.	17806	Fortress Income 2 (Pty) Ltd and Arbour Crossing and Galleria Shopping Centre

108.	17111	Dis-Chem Pharmacies (Pty) Ltd and CJ Williams Pharmacies and others
109.	17996	Skynet South Africa (Proprietary) limited and The Warehouse and Skynet Worldwide Express
110.	16881	Zaad Holdings Limited and Klein Karoo Saad Bemarking (Pty) Ltd
111.	17699	Grindrod Holdings South Africa (Pty) Ltd and Racec Group Limited
112.	17434	Premier group (Pty) Ltd and Eastern Cape Bakeries
113.	17749	Redefine Properties Limited and Chantilly Trading 95 (Pty) Ltd in respect of the property letting enterprise known as Ellerines Warehouse Cato Ridge
114.	17582	Imperial Car Imports (Pty) Ltd and Renault SA (Pty) Ltd
115.	17723	Old Mutual Investment Group (South Africa) (Pty) Ltd and Main Street 642 (Pty) Ltd
116.	17533	Old Mutual Life Assurance Company (South Africa) Ltd and Business Venture Investments No. 1360 (Pty) Ltd and Woolworths (Pty) Ltd
117.	17681	BUSHWILLOW GD 271 INVESTMENTS (PTY) LTD and THE CAR TRADER (PTY) LTD
118.	17772	Resilient Properties (Pty) Ltd and Arbour Town (Pty) Ltd
119.	17715	CA Sales Holdings (Pty) Ltd and SMC Brands SA (Pty) Ltd
120.	17541	Ponahalo Investments (Pty) Ltd and De Beers Group Services (Pty) Ltd in respect of Diamond Trading Company South Africa
121.	17442	Hollard Insurance Company Limited and Etana Insurance Company
122.	17640	Government Employees Pension Fund and Trevenna Development Company (Pty) Ltd
123.	16261	Holdco and Lanseria International Airport (Pty) Ltd and Execujet Airline Investments (Pty) Ltd
124.	16758	ROELAND STREET INVESTMENT (PTY) LTD and HARLEQUIN DUCK PROPERTIES 95 CC INFOTEAM INVESTMENTS 87 CC D&M PADAANLEG TRANSVAAL CC SUPERSTRIKE INVESTMENTS 77 (PTY) LTD POLFIN CC FRIEDCORP 192 CC
125.	17087	ARCH PROPERTY FUND LIMITED and K2012089838 (SA) (PTY) LTD AND ARMANDI PROPERTIES (PTY) LTD
126.	17285	Newsshelf 1261 Proprietary Ltd and The Much Asphalt Business of Murray & Roberts
127.	16741	RUSTENBURG PLATINUM MINES LIMITED and CERTAIN RIGHTS AND ASSETS OF GA-PHASHA PLATINUM MINE (PTY) LTD AND BOIKGANTSHO PLATINUM MINE (PTY) LTD
128.	17608	Terris Mining Ltd and International Mineral Resources BV
129.	17178	Newsshelf 1261 (Pty) Ltd and The Construction Products Division of Murray and Roberts Ltd
130.	17145	SA Corp Real Estate Fund and A portfolio of the commercial property of Lushaka (Pty) Ltd

131.	16329	Industrial Development Corporation of South Africa Limited; Hebei Iron & Steel Group Co Limited; and Mauritius SPV and Rio Tinto South Africa Limited
132.	17590	Stefanutti Stocks (Pty) Ltd and Energotec (a division of First Strut) (Pty) Ltd
133.	16733	WBHO Industrial Holdings (Pty) Ltd and Capital Africa Steel (Pty) Ltd
134.	16873	Vukile Property Fund Limited and 5 Properties Owned by Encha Properties (Pty) Ltd
135.	17392	PSG Private Equity (Pty) Ltd and Precrete Holdings (Pty) Ltd
136.	16659	Sycom Property Fund Collective Investment Scheme in Property and AECI Pension Fund
137.	17103	Sasol Pension Fund and An undivided half share in property owned by the Elixir Trust
138.	16683	Hyprop Investments Limited and Sycom Property Fund Managers Limited
139.	16709	Grindrod Holdings South Africa (Pty) Ltd and RRL Grindrod Locomotives (Pty) Ltd
140.	16774	Volkswagen Financial Services South Africa (Pty) Ltd and Volkswagen Financial Services South Africa, A Division of Wesbank, A division of FirstRand Bank Ltd
141.	016592 and 016626	Land and Agricultural Bank of South Africa and The Performing Financial Products of the Lending Book of GWK Ltd and Statusfin Financial Services (Pty) Ltd
142.	16329	Industrial Development Corporation of South Africa Ltd, Hebei Iron and Steel Group CO Ltd and Maritius SPV (yet to be formed special purpose vehicle) owned by Smart Union Resource (Hong Kong) Co Ltd and Rio Tinto South Africa Ltd
143.	16410	The Corob Trust: The Palm Trust and Others Ltd and Longland Investments (Pty) Ltd and Tangmere Investment Corporation (Pty) Ltd
144.	16436	The Bidvest Group Ltd and Amalgamated Appliance Holdings Ltd
145.	16428	Pacorini Metals Europe B.V (Netherlands) and Access Freight (Pty) Ltd
146.	16311	CA Sale Holding (Pty) Ltd and Pack N Stack Investment Holding (Pty) Ltd
147.	16527	Presmooi (Pty) Ltd, Savyon Building (Pty) Ltd and IPS Investments (Pty) Ltd and Drystone Investments (Pty) Ltd, Odeon Investments (Pty) Ltd and Adamax Property Projects, Persequor (Pty) Ltd
148.	16519	Fortress Income 2 (Pty) Ltd and The Immovable proprietary and property letting enterprises of Pick 'n Pay Rustenburg, Central Park Bloemfontein, Neslpruit Plaza, New Redruth Alberton, Sterkspruit Plaza and Tzaneen Centre
149.	16634	Smei Projects Holdco (Pty) Ltd and Smei Projects (Pty) Ltd
150.	16576	Land and Agricultural Bank of South Africa and The Operating Lending Book Suidwes Agriculture (Pty) Ltd
151.	16394	ABSA Bank Ltd and Certian movable and immovable assets and claims (excluding any liabilities) of A Million Up 105 (Pty) Ltd
152.	16386	Newco (a newly incorporated special purpose vehicle) and Reatile Trimrite (Pty) Ltd
153.	16303	Opiconsivia Investments 265 (Pty) Ltd and Union Carriage and

		Wagon Company (Pty) Ltd
154.	112/LM/Dec12 - 016113	Capitau Investment Management Ltd and New Foodcorp Holdings (Pty) Ltd
155.	16196	Prestige Bullion (Pty) Ltd and Rand Refinery (Pty) Ltd
156.	87/LM/Dec12 - 015644	Business Venture Investments no. 1658 (Pty) Ltd and Afgri Operation Ltd and Senwes Capital (Pty) Ltd
157.	91/LM/Oct12 (015727)	Calulo Investments (PTY) LTD, Investec Bank Limited and FFS Refiners (PTY) LTD
158.	16253	Liberty Group Ltd and Liberty Active Ltd, Capital Alliance Life Ltd and Liberty Growth Ltd
159.	16170	Accelerate Property Fund Ltd and Fourways Precinct (Pty) Ltd
160.	108/LM/Dec12 (016063)	Super Group Holdings (Pty) Ltd and Safika Logistics Holdings (Pty) Ltd
161.	107/LM/Dec12 (016055)	Diageo Africa B.V. and Newshelf 1167 (Pty) Ltd
162.	115/LM/Dec12 (016147)	Professional Provident Society Insurance Company Ltd and The PPS Life and Disability Insurance Scheme
163.	16220	TP Hentiq 6132 (Pty) Ltd and Sectional Poles Business Division of Harrison & White Investments (Pty) Ltd
164.	16212	Redefine Properties Ltd and Rural Maintenance (Pty) Ltd
165.	65/LM/Jun12 (015248)	Nestle SA and The Nutrition Business of Pfizer Inc
166.	83/LM/Sep12 (015560)	Humulani Marketing (Pty) Ltd and High Power Equipment Africa (Pty) Ltd
167.	110/LM/Dec12 (016097)	Vukile Property Fund Limited and Redefine Retail (Pty) Ltd , in respect of an Undivided 50% Share in the Property Letting Enterprise Known as East Rand Mall
168.	16311	CA Sale Holding (Pty) Ltd and Pack N Stack Investment Holding (Pty) Ltd
169.	33/LM/Mar12 (014795)	Glencore International Plc and Xstrata Plc
170.	111/LM/Dec12 (016105)	Redefine Retail (Pty) Ltd and Sanlam Life Insurance Ltd, in respect of the property letting enterprise known as East Rand Mall
171.	16287	The Trustees For the Time Being of the Leaf Property Fund Trust and AMDEC Investments (Pty) Ltd and Hobbes Finance Property Ltd
172.	98/LM/Oct12 (015842)	Sasol Holdings USA (Pty) Ltd and Merichem Company
173.	16261	Holdco and Lanseria International Airport (Pty) Ltd and Execujet Airline Investments (Pty) Ltd
174.	95/LM/Oct12 (015768)	Steinhoff Doors and Building Material (Pty) Ltd and Hardware Warehouse Ltd
175.	70/LM/Jun12 (015321)	Absa Bank Ltd and The Private Label Store Card Portfolio of Edcon (Pty) Ltd

176.	93/LM/Oct12 (015743)	Barloworld Logistics (Pty) Ltd and Manline (Pty) Ltd
177.	16188	The Bidvest Group Ltd and Brandcorp Holdings (Pty) Ltd
178.	85/LM/Sep12 (015628)	Samancor Chrome Ltd and NST Ferrochrome (Pty) Ltd
179.	89/LM/Oct12 (015701)	Imperial Holdings Ltd and Imperial Group (Pty) Ltd and RTT Group (Pty) Ltd
180.	97/LM/Oct12 (015834)	Bonitas Medical Fund and Pro Sano Medical Scheme
181.	88/LM/Oct12 (015693)	Humulani Investments (Pty) Ltd and MacNeil (Pty) Ltd
182.	92/LM/Oct12 (015735)	Imperial Logistics, a division of Imperial Holdings Ltd and KWS Carriers CC
183.	76/LM/Jul12 - 015404	Mondi Ltd and Mondi Shanduka Newsprint (Pty) Ltd and Mondi Ltd and Mondi Shanduka Newsprint (Pty) Ltd
184.	80/LM/Aug12 (015511)	Super Group Trading (Pty) Ltd and Digistics (Pty) Ltd
185.	90/LM/Oct12 (015719)	Investec Property Fund Ltd and Certain properties owned by various companies forming part of the S Giuricich Holdings (Pty) Ltd
186.	84/LM/Aug12 (015610)	Fairvest Property Holdings Ltd and Portfolio of Commercial Properties of SA Corporate Real Estate Fund
187.	60/LM/Jun12 (015172)	Industrial Development Corporation of SA Ltd and Scaw SA (Pty) Ltd
188.	81/LM/Aug12 (015529)	Micawber 766 (Pty) Ltd and Pembani Group (Pty) Ltd
189.	82/LM/Sep12 (015552)	Sycom Property Fund Collective Investment Scheme and AECI Pension Fund
190.	86/LM/Sep12 (015636)	Unitrans Automotive (Pty) Ltd and Reeds Motor Group (Pty) Ltd and Reeds Motors Tableview (Pty) Ltd
191.	74/LM/SEP11 (013235)	Life Healthcare (Pty) Ltd and Joint Medical Holdings Ltd
192.	68/LM/Jun12 (015305)	Richtrau No 229 (Pty) Ltd and Avusa Ltd
193.	72/LM/Jul12 (015354)	Blue Falcon 188 (Pty) Ltd and Studio 88 Clothing (Pty) Ltd, Crystal Way Trade & Invest 1003 CC trading as Side Step and Frisbee Trade and Invest 1161 CC
194.	51/LM/May12 (015032)	Ferro Industrial Products (Pty) Ltd and NCS Resins (Pty) Ltd
195.	66/LM/Jun12 (015255)	Momentum Group Ltd and Momentum Short-Term Insurance Company Ltd
196.	58/LM/May12 (015115)	Avi Limited and Green Cross Manufacturers (Pty) Ltd, Green Cross Properties (Pty) Ltd and Green Cross Retail Holdings as (Pty) Ltd

197.	62/LM/Jun12 (015198)	MMI Holdings Ltd and Eris Property Group (Pty) Ltd
198.	75/LM/Jul12 (015396)	Oep East Balt Holdings LLC and East Balt Inc
199.	74/LM/Jul12 (015388)	Morbei Trade Invest 180 (Pty) Ltd and Metcash Trading Africa (Pty) Ltd
200.	71/LM/Jul12 (015347)	PSG Consult Ltd and Western Group Holdings Ltd
201.	100/LM/Nov11 (013672)	Steinhoff International Holdings Ltd and JD Group Ltd
202.	101/LM/Nov11 (013680)	Steinhoff International Holdings Ltd and KAP International Holdings Ltd
203.	61/LM/Jun12 (015180)	Redefine Properties Limited and Fountainhead Property Trust Management Limited, and Evening Star Trading 768 (Proprietary) Limited
204.	69/LM/Jun12 (015313)	Sanlam Private Equity, a division of Sanlam Life Insurance Ltd and Weldamax (Pty) Ltd
205.	64/LM/Jun12 (015230)	Super Group Dealerships, a division of Super Group Trading (Pty) Ltd and Zingaro Trade 112 (Pty) Ltd
206.	57/LM/May12 (015107)	DHN Drinks (Pty) Ltd and Sedibeng Brewery (Pty) Ltd
207.	54/LM/May12	Business Venture Investments no 1624 (Pty) Ltd and Waco Africa (Pty) Ltd
208.	47/LM/Apr12	Redefine Properties Ltd and Hyprop Investments Ltd in respect of a 50% undivided share of the business enterprise known as South Coast Mall
209.	40/LM/Apr12	Grindrod Holdings (South Africa) (Pty) Ltd and Ocean Africa Container Lines (Pty) Ltd
210.	55/LM/May12	The Petroleum Oil and Gas Corporation of SA (SOC) Ltd and Certain Offshore Oil and Gas Assets held by Pioneer Natural Sources SA (Pty) Ltd and Petroleum South Cape (Pty) Ltd
211.	27/LM/Mar12	Rio Tinto International Holdings Ltd and Richards Bay Titanium Holdings (Pty) Ltd and Richards Bay Mining Holdings (Pty) Ltd
212.	32/LM/Mar12	Boxer Super Stores (Pty) Ltd and The Targets Firms under the control of Metcash Trading Africa (Pty) Ltd
213.	86/LM/Oct11	Piruto B.V and Optimum Coal Holdings Limited and others
214.	49/LM/Apr12	Jay and Jayendra (Pty) Ltd and Lesedi Nuclear Services (Pty) Ltd
215.	44/LM/Apr12	Redefine Properties Limited and Amber Falcon Properties 6 (Pty) Ltd, known as Chris Hani Crossing
216.	20/LM/Mar12	Growthpoint Properties Limited and Liberty Group Limited
217.	39/LM/Apr12 and 29/LM/Mar12	Bucyrus Africa Underground (Proprietary) Limited and Barloworld South Africa (Pty) Limited and Bucyrus Mining Services and Mining Services Business Conducted by Eqstra NH (Pty) Ltd
218.	48/LM/Apr12	8115222 Canada Inc and Viterra Inc
219.	43/LM/Apr12	Land and Agricultural Bank of South Africa and The Performing Corporate Lending Book of Gro Capital Financial Services (Pty)

Ltd

220. 46/LM/Apr12 Reit Investments (Pty) Ltd and Copper Moon Trading 249 (Pty) Ltd and 6 Others
221. 52/LM/May12 Macsteel Services Centres SA (Pty) Ltd and Samson Property Investments SA (Pty) Ltd
222. 25/LM/Mar12 AngloGold Ashanti Ltd and First Uranium (Pty) Ltd
223. 15/LM/Mar11 Media 24 Limited and Paarl Coldset (Pty) Ltd and The Natal Witness Printing and Publishing Company (Pty) Ltd
224. 99/LM/Nov11 Government Employees Pension Fund represented by Public Investment Corporation Ltd and Afrisam Consortium (Pty) Ltd
225. 42/LM/Apr12 Gold One International Limited and First Uranium Limited and its wholly owned subsidiary, Ezulwini Mining Company (Pty) Ltd
226. 09/LM/Jan12 Zeder Financial Services Ltd and Agrico Machinery (Pty) Ltd in respect of Agricol Holdings Ltd
227. 02/LM/Jan12 Imperial Holdings Ltd and Probe Group
228. 109/LM/Dec11 Curro Holdings Limited and The Rudell Holdings Trust, in respect of sale of Woodhill College (Pty) Ltd and Woodhill College Property Holdings (Pty) Ltd
229. 18/LM/Feb12 Kagiso Media Ltd and Juta and Company Ltd, Imfundo Investments (Pty) Ltd and Juta Investments (Pty) Ltd
230. 103/LM/Nov11 Synergy Income Fund Ltd and SA Corporate Real Estate Fund
231. 07/LM/Jan12 Bytes Technology Group South Africa (Pty) Ltd and Unisys Africa (Pty) Ltd
232. 21/LM/Mar12 Wilru Investments One Hundred and Thirty Four (Pty) Ltd and Exxaro Base Metals Namibia (Pty) Ltd
233. 70/LM/Aug11 Actom (Pty) Ltd and Savcio Holdings (Pty) Ltd
234. 26/LM/Mar12 Oakleaf Investments Holdings 76 (Pty) Ltd and Opiconsivia Investments 230 (Pty) Ltd
235. 107/LM/Dec11 Shanduka Resources (Pty) Ltd and Shanduka Coal (Pty) Ltd
236. 17/LM/Feb12 Unitrans Supply Chain Solutions (Pty) Ltd and Tanzer Transport (Pty) Ltd
237. 104/LM/Nov11 Humulani Investments (Pty) Ltd and Equipment Spare Parts (Africa) (Pty) Ltd
238. 15/LM/Feb12 Pepkor Capital (Pty) Ltd and Flash Mobile Cash, Sharedphone International (Pty) Ltd and Take It Eazi Vending (Pty) Ltd
239. 16/LM/Feb12 Transnet Soc Limited and Certain portions of the Durban International Airport held by Airports Company South Africa Ltd
240. 106/LM/Dec11 Nedbank Ltd and Emergent Investments (Pty) Ltd
241. 12/LM/Feb12 Anglo American PLC and De Beers SA
242. 01/LM/Jan12 Lodestone Brands (Pty) Ltd and Dynamic Brands (Pty) Ltd
243. 28/LM/Mar12 The Buffshelf 18 Trust and The 921 properties situated in Burgersfort and Rustenburg (RSA) that are owned by subsidiaries of Impala Platinum Holdings Ltd
244. 108/LM/Dec11 Southern Sun Hotels (Pty) Ltd and Hotel Formula1 (Pty) Ltd
245. 04/LM/Jan12 Vukile Property Fund Ltd and Sanlam Life Insurance Ltd in respect of certain rental enterprises
246. 08/LM/Jan12 Super Group Dealerships, a division of Super Group Trading (Pty) Ltd and Auto Lux (Pty) Ltd

247.	06/LM/Jan12	Sycom Property Fund Collective Investment Scheme and Grapnel Property Investments (Pty) Ltd and Changing Tides 91 (Pty) Ltd
248.	35/LM/Apr11	Mystic Blue Trading 62 (Pty) Ltd and The Rhino Group
249.	03/LM/Jan12	Nampak Products Ltd and Nampak Wiegand Glass (Pty) Ltd
250.	105/LM/Dec11	First Rand Bank Limited and The property owned by Old Mutual Life Assurance Company (South Africa) Ltd, located at Erf number 173019 Cape Town
251.	81/LM/Sep11	Venfin Media Investments (Pty) Ltd and Main Street 754 (Pty) Ltd and Marc Group Ltd
252.	55/LM/Jul11	Opiconsivia Trading 99 (Pty) Ltd and The Fruitspot Group
253.	88/LM/Oct11	Hitachi Data Systems Europe Holdings BV and Shoden Data Systems (Pty) Ltd
254.	102/LM/Nov11	Municipal Employee Pension Fund and the letting enterprise known as Glen Village Shopping Centre North, Glen Village Shopping Centre South and Parkview Centre being sold by Takou Investments (Pty) Ltd, Chrisal Investments (Pty) Ltd and ProcProps 60 (Pty) Ltd
255.	51/LM/Jul11	Afgri Operations Limited and Pride Milling Company (Pty) Ltd
256.	78/LM/SEP11	Bid Industrial Holdings (Pty) Ltd and A&S Food Distributors (Pty) Ltd, A&S Food Distributors Gauteng (Pty) Ltd and Star Sea Wholesalers (Pty) Ltd
257.	90/LM/Oct11	Government Employees Pension Fund and Pareto Ltd and Business Venture Investment No. 1360 (Pty) Ltd
258.	87/LM/Oct11	Ethos Private Equity Fund VI and Kevro (Pty) Ltd
259.	94/LM/Nov11	Redefine Properties Ltd and Cool Ideas 208 (Pty) Ltd, Improvon Property Fund 1 (Pty) Ltd, Improvon Growth Fund (Pty) Ltd and Wavelengths 124 (Pty) Ltd, in respect of six property letting enterprises
260.	65/LM/Aug11	Stefanutti Stocks (Pty) Limited and Cycad Pipelines (Pty) Limited
261.	82/LM/Sep11	Lodestone Brands (Pty) Ltd and Mister Sweet (Pty) Ltd
262.	83/LM/Sep11	Capital Partners Group Holdings Ltd and Premier Group (Pty) Ltd
263.	89/LM/Oct11	Redefine Properties Limited and First National Bank Pension Fund in respect of the Letting Enterprise at 155 West Street, Sandown, Sandton
264.	38/LM/May11	Old Mutual Life Assurance Company (SA) Ltd and Momentum Group Ltd
265.	84/LM/Sep11	AngloGold Ashanti Ltd and First Uranium Corporation
266.	85/LM/Sep11	Redefine Properties Limited and Zenprop Property Holdings Limited in Respect of A Portfolio of Property Letting Enterprises
267.	50/LM/Jul11	Murray & Roberts Steel (Pty) Ltd and Alert Steel Polokwane (Pty) Ltd and Alert Steel Reinforcing (Pty) Ltd
268.	64/LM/Aug11	Investec Bank Limited and MB Technologies (Pty) Ltd
269.	67/LM/Aug11	Ethos Fund V and Universal Industries Ltd
270.	77/LM/Sep11	Resilient Properties (Pty) Ltd and Pangbourne Properties Ltd
271.	72/LM/Aug11	Land and Agricultural Bank of South Africa and The Performing Farmer Lending Book of Gro Capital Financial Service (Proprietary) Limited
272.	68/LM/Aug11	Resilient Properties (Pty) Ltd and Ilanga Lifestyle Centre (Pty) Ltd
273.	59/LM/Jul11	Volkswagen AG and Man SE

274.	54/LM/Jul11	Investec Bank Limited and Ferro Industrial Products (Pty) Ltd
275.	66/LM/Aug11	Zeder Financial Services Limited and Capespan Group Limited
276.	76/LM/Sep11	Business Venture Investment No 1542 (Pty) Ltd and Vox Telecom Limited
277.	71/LM/Aug11	Lodestone Brand (Pty) Ltd and National Pride Trading 4 (Pty) Ltd
278.	60/LM/Jul11	Sun International (SA) Ltd and Sunwest International Ltd and Worcester Casino (Pty) Ltd
279.	56/LM/Jul11	Redefine Properties Ltd and Fin Poperties 107 (Pty) Ltd in Respect of 50% Undivided Share in the Property Letting Enterprise known as Dawn Distribution Centre
280.	69/LM/Aug11	Total Energie Development S.A.S and Tenesol S.A.
281.	45/LM/Jun11	TP Hentiq 6159 (Pty) Ltd and Xeedan Property Portfolio
282.	58/LM/Jul11	Senwesbel Limited and Senwes Limited
283.	40/LM/May11	Mainstreet 872 (Pty) Ltd and Tracker Investment Holdings (Pty) Ltd
284.	61/LM/Jul11	Blue Falcon 134 Trading (Pty) Ltd and Denny Mushrooms (Pty) Ltd
285.	57/LM/Jul11	Old Mutual Life Assurance Company (SA) (Pty) Ltd and Liberty Star Consumer Holdings (Proprietary) Limited
286.	49/LM/Jun11	Aquarius Platinum South Africa (Pty) Ltd and Blue Ridge (Pty) Ltd
287.	52/LM/Jul11	Aquarius Platinum South Africa (Pty) Ltd and The Southern Booyesdal Mining Right
288.	30/LM/Apr11	Shoprite Checkers (Pty) Ltd and Metcash Seven Eleven (Pty) Ltd & a Portion of the Friendly Distribution Division of Metcash Trading Africa (Pty) Ltd
289.	48/LM/Jun11	RMB Investments and Advisory (Pty) Ltd and RMB Ventures Six (Pty) Ltd and RTT Holdings (Pty) Ltd
290.	09/LM/Feb11	Lexshell 826 Investments (Pty) Ltd and Umcebo Mining (Pty) Ltd and Mopani Coal (Pty) Ltd
291.	23/LM/Mar11	JD Group Limited and Steinhoff Doors and Building Materials (Pty) Ltd and Unitrans Motor Enterprises (Pty) Ltd
292.	46/LM/Jun11	Engine Holdings GMBH and Tognum AG and the Bergen Business currently operated by Rolls-Royce
293.	11/LM/Mar11	Rio Tinto Plc and Rio Tinto Ltd and Riversdale Mining Ltd
294.	41/LM/May11	Redefine Properties Ltd and Rowmoor Investments 567 (Pty) Ltd in respect of the property letting enterprise known as "Sammy Marks Portion 2"
295.	18/LM/Mar11	Tiger Brands Limited and Davita Trading (Pty) Ltd
296.	33/LM/Apr11	Newshelf 1093 (Pty) Ltd and Capital Partners Group Holdings and Pepkor Holdings Limited
297.	42/LM/May11	Dipula Property Fund (Pty) Ltd and Asakhe Realty Investment
298.	25/LM/Apr11	Reunert Limited and ECN Telecommunications (Pty) Ltd
299.	36/LM/Apr11	Shanike Investment No 137 (Pty) Ltd and Kagiso Trust Investments (Pty) Ltd and Tiso Group Investment
300.	73/LM/Nov10	Wal-Mart Stores Inc and Massmart Holdings Limited
301.	28/LM/Apr11	Resilient Properties (Pty) Ltd and Casadobe Props 75 (Pty) Ltd
302.	20/LM/Mar11	Investec Property Ltd and The Edgardale Properties
303.	11/LM/Feb11	RMB Ventures Six (Pty) Ltd and MCG Industries (Pty) Ltd

304.	29/LM/Apr11	Business Venture Investments No. 1473 (Pty) Ltd and McDonald's (S.A.) (Pty) Ltd
305.	68/LM/Oct10	JSE Limited and Momentum Managed Account Platform Holdings (Pty) Ltd and FirstRand Alternative Investment Management (Pty) Ltd
306.	73/LM/Nov10	Wal-Mart Stores Inc and Massmart Holdings Limited
307.	16/LM/Mar11	Government Employees Pension Fund and Growthpoint Properties and Lexshell 44 General Trading (Pty) Ltd
308.	26/LM/May10	Tsogo Sun Holdings (Pty) Ltd and Gold Reef Resorts Limited
309.	26/LM/Apr11	Hosken Consolidated Investments Limited and KWV Holdings Limited
310.	05/LM/Jan11	Hyprop Investment Limited and Atterbury Investment Holdings and Attfund Retail Limited and Mentrablox (Pty) Ltd
311.	01/LM/Jan11	Housing Impact South Africa and Rand Leases Securitisation
312.	02/LM/Jan11	Mainstreet 796 Ltd and FirstRand STI Ltd
313.	06/LM/Jan11	ProudAfrique Trading 267 (Pty) Ltd and S Buys (Pty) Ltd
314.	77/LM/Dec10	Unilever Plc and Alberto-Culver Company
315.	03/LM/Jan11	Retail Africa Consortium Holdings (Pty) Ltd and Rapfund Holdings (Pty) Ltd and Retail Africa Wingspan Investments (Pty) Ltd
316.	75/LM/Nov10	Growthpoint Properties Limited and Design Square (Pty) Ltd
317.	04/LM/Jan11	Imperial Holdings Limited and Fourway Holdings (Pty) Ltd
318.	07/LM/Jan11	Northam Platinum Limited and Mvelaphanda Resources Ltd
319.	78/LM/Dec10	Capital Property Fund and Pangbourne Properties Limited
320.	70/LM/Nov10	Media24 Limited and New Media Publishing
321.	76/LM/Nov10	Fountainhead Property Trust and All Top Properties (Pty) Ltd & Breeze Court Investments 33 (Pty) Ltd in respect of property letting enterprise known as Lefika
322.	67/LM/Oct10	AECI Limited and Qwemico Distributors (Pty) Ltd
323.	79/LM/Dec10	Redfine Properties Limited and Bakford Properties (Pty) Ltd and Fedhurst Properties (Pty) Ltd
324.	80/LM/Dec10	Standard Chartered Private Equity (Mauritius) III Limited and Afrifresh Group (Pty) Ltd
325.	17/LM/Apr10	Bidpaper Plus (Pty) Ltd ("BIDPAPER") and Sprint Packaging (Pty) Ltd ("Sprint")
326.	50/LM/Aug10	Absa Bank Ltd and Alexander Forbes Homeplan Joint Venture
327.	66/LM/Oct10	Standard Bank Group Limited and Credit Suisse Standard Bank Securities (Pty) Ltd
328.	41/LM/Jul10	Metropolitan Holdings Limited and Momentum Group Limited
329.	14/LM/Mar10	Unilever Plc and Unilever N.V and Sara Lee Corporation
330.	60/LM/Sep10	Swanvest 120 (Pty) Ltd and Indwe Broker Holdings Ltd
331.	57/LM/Sep10	Daybreak Farms (Pty) Ltd and Rossgro Chickens (Pty) Ltd
332.	58/LM/Sep10	Clidet No. 1003 (Pty) Ltd and ICC Mayibuye (Pty) Ltd trading as Savemoore Cash and Carry
333.	59/LM/Sep10	Spar Group Ltd and Fraqur 165 (Pty) Ltd and Northern Light Trading 128 (Pty)

Ltd

334. 63/LM/Oct10 Business Venture Investments No 1347 (Pty) Ltd
and DD's Cash and Carry (Pty) Ltd t/a JD's Cash and Carry (Pty)
Ltd
335. 53/LM/Aug10 Aveng (Africa) Limited
and Dynamic Fluid Control (Pty) Ltd
336. 39/LM/Jul10 South Africa Infrastructure Fund Trust and Infrastructure
Concessions South Africa (Pty) Ltd
337. 65/LM/Oct10 Atterbury Investment Holdings Limited
and Abacus Property Holdings (Pty) Ltd
338. 54/LM/Aug10 Mogs (Pty) Ltd
and Trident South Africa (Pty) Ltd
339. 61/LM/Sep10 Fountainhead Property Trust
and FHP Managers (Pty) Ltd, in respect of the Constantia Valley
Sale Property
340. 49/LM/Aug10 Imperial Holdings Ltd
and CIC Holdings Ltd
341. 64/LM/Oct10 Macquarie Investment Holdings No.2 (Pty) Ltd
and Macquarie Airfinance Limited
342. 30/LM/Jun10 Imperial Group (Pty) Ltd
and Imperial McCarthy (Pty) Ltd
343. 25/LM/May10 MB Technologies Investments (Pty) Ltd
and Ingram Micro (Pty) Ltd
344. 40/LM/Jul10 Imperial Holdings Limited
and Orcom Trading 35 (Pty) Ltd
345. 36/LM/Jul10 FirstRand Limited
and Barnard Jacobs Mellet Holdings Limited
346. 44/LM/Aug10 Depfin Investments (Pty) Ltd
and Ixia Coal Funding (Pty) Ltd
347. 47/LM/Aug10 Attfund Retail Ltd
and Parkdev (Pty) Ltd and Others
348. 55/LM/Aug10 Resilient Properties (Pty) Ltd
and Ilanga Lifestyle Centre (Pty) Ltd
349. 45/LM/Aug10 Lodestone Investment Holdings (Pty) Ltd
and Candy Tops (Pty) Ltd
350. 34/LM/Jun10 Total South Africa (Pty) Ltd
and Tosaco Commercial Services (Pty) Ltd
351. 19/LM/Apr10 Redefine Properties Limited
and Hyprop Investments Limited
352. 28/LM/Jun10 Newpark Towers (Pty) Ltd
and Ferox Investments (Pty) Ltd, in respect of the Property Letting
Enterprise known as "24 Central"
353. 22/LM/May10 Acucap Properties Limited
and Attfund Limited Respect of Shares and Claims in Tyger Hills
Investments (Pty) Ltd
354. 21/LM/May10 Acucap Properties Limited
and Parkdev (Pty) Ltd
355. 38/LM/Jul10 Brodsky Investments (Pty) Ltd & Others
and Murray and Roberts Limited

356.	29/LM/Jun10	Paladin Capital Limited and Curro Holdings (Pty) Ltd
357.	27/LM/May10	Lexshell 140 General Trading (Pty) Ltd and Incwala Resources (Pty) Ltd
358.	11/LM/Mar10	Life Healthcare Group (Pty) Ltd Amabubesi Hospitals (Pty) Ltd and Bayview Private Hospitals Ltd
359.	86/LM/Dec09	Optimum Koornfontein Investments (Pty)Ltd and Main Street 431 (Pty)Ltd
360.	69/LM/Oct09	Wispeco (Pty) Ltd and The Business of AGI Solutions (Pty) Ltd
361.	13/LM/Mar10	Associated Motor Holdings (Pty) Ltd and Goscor Cleaning Equipment (Pty) Ltd & Uvundlu Investments (Pty) Ltd
362.	34/LM/Apr09	Chlor-Alkali Holdings (Pty) Ltd and Botswana Ash (Pty) Ltd
363.	89/LM/Dec09	Investec Principal Investments, A Division of Investec Bank Limited and NCS Resins (Pty) Ltd
364.	03/LM/Jan10	Grindrod (South Africa) (Pty) Ltd and Fuelogic (Pty) Ltd
365.	12/LM/Mar10	SA Corporate Real Estate Trust Scheme and Old Mutual Life Assurance Company (SA) Ltd
366.	05/LM/Feb10	Investec Bank Limited and Clidet No.763 (Pty) Ltd
367.	79/LM/Dec09	WBHO Construction (Pty) LTD and Roadspan Holdings (Pty) Ltd
368.	75/LM/Nov09	Absa Bank Limited and Sanlam Home Loans (Pty) Ltd
369.	80/LM/Nov09	Friedshelf 1058 (Pty) Ltd ("NEWCO") and Mananga Sugar Packers (Pty) Ltd
370.	94/LM/Dec09	Firststrand Limited and Makalani Holdings Limited
371.	04/LM/Feb10	Sanlam Life Insurance Limited and Coris Capital Holdings (Pty)Ltd
372.	60/LM/Aug09	Reunert Limited and Siemens Enterprise Communications (Pty) Ltd
373.	93/LM/Dec09	Barclays Bank Plc and Dvwidag- Systems International Luxembourg
374.	66/LM/Oct09	RZT Zelpy 5508 (Pty) Ltd and INM Outdoor (Pty) Ltd
375.	71/LM/Oct09	Harmony Gold Mining Company Limited and Pamodzi Gold Free State (Pty) Ltd
376.	58/LM/Aug09	Tsogo Sun Gaming (Pty) Ltd and The Millennium Casino Ltd
377.	68/LM/Oct09	Shoprite Checkers (Pty) Ltd and Transfarm (Pty)Ltd and Others
378.	56/LM/Aug09	International Mineral Resources BV and Kermas South Africa (Pty) Ltd,Samancor Chrome Limited
379.	67/LM/Oct09	Pareto Limited and Old Mutual Life Assurance Company (South Africa) Limited
380.	57/LM/Aug09	Santam Limited and Emerald Insurance Company Limited and Emerald Risk Transfer (Pty) Ltd
381.	83/LM/Dec09	Business Venture Investments no. 1347 (Pty) Ltd and Astor Group (Pty) Ltd and Three others
382.	70/LM/Oct09	Nedbank Ltd and Imperial Bank Ltd
383.	31/LM/Mar09	Imperial Group (Pty) Ltd and Midas Group (Pty) Ltd
384.	74/LM/Oct09	TP Hentiq 6128 (Pty) Ltd and Partcorp Holdings Limited
385.	04/LM/Jan09	Masscash Holdings (Pty) Ltd and Finro Enterprises (Pty) Ltd T/A Finro Cash and Carry
386.	49/LM/Jun09	Masscash Holdings (Pty) Ltd and 13 Score Supermarkets (Trading) (Pty) Ltd

387.	62/LM/Sept09	Dip Holdco LLP and New Delphi
388.	33/LM/Mar09	Apexhi Properties Limited and Ambit Properties Limited
389.	52/LM/Jul09	Absa Capital Private Equity Fund and Parchment Trading 72 (Pty) Ltd
390.	53/LM/Jul09	RFS Holdings B.V. and ABN Amro Holdings N.V.
391.	51/LM/Jul09	ACUCAP Investments (Pty) Ltd and Old Mutual Life Assurance Company (SA) Ltd and Others
392.	40/LM/Apr09	Redefine Income Fund Limited and Apexhi Properties Limited and Madison Property Fund Managers Holdings Limited
393.	02/LM/Jan09	Clidet No 851 (Pty) Ltd and Sunshine Cash and Carry CC
394.	50/LM/Jun09	Tiger Consumer Brands Ltd & Tiger Food Brands Intellectual Property Holdings Company (Pty) and The Mayonnaise Business of Nestle (Pty) Ltd
395.	36/LM/Apr09	Sappi Papier Holdings GMBH and M-Real Corporation
396.	44/LM/May09	Clidet No.907 (Pty) Ltd and Boxmore Plastics International (Pty) Ltd
397.	22/LM/Feb09	JSE and Bond Exchange
398.	42/LM/May09	TSB Sugar RSA Limited and The Business of Illovo Sugar Limited's Pongola Mill
399.	45/LM/May09	Investec Bank Limited and Stella Group Holdings (Pty) Ltd, Stella Group Holdings (Pty) Ltd
400.	38/LM/Apr09	Royal Bafokeng Resources (Pty) Ltd and Bafokeng Rasimone Platinum Mines Joint Venture
401.	109/LM/Oct08	Lafarge South Africa Pty Ltd and Ash Resources (Pty) Ltd
402.	03/LM/Jan09	Bidpaper Plus (Pty) Ltd and Pretoria Wholesale Stationers (Pty) Ltd
403.	39/LM/Apr09	Aquarius Platinum Limited and Ridge Mining Plc
404.	01/LM/Jan09	Apexhi Properties Limited and Business Venture Investment no 1232 (Pty) Ltd
405.	126/LM/Dec08	Steinhoff Doors and Building Materials (Pty) Ltd and Steinbuild Properties (Pty) Ltd and Wierdapark Home Centre (Pty) Ltd, Centurion Home Centre (Pty) Ltd, Zambezi Home Centre (Pty) Ltd, and Home Centre Hartbeespoort (Pty) Ltd
406.	32/LM/Apr09	Mogs (Pty) Ltd and Elbroc Mining Products (Pty) Ltd, Stope Technology Services (Pty) Ltd
407.	136/LM/Dec08	BASF Handels-Und Exportgesellschaft mbH and Ciba Holding AG
408.	19/LM/Feb09	Main Street 581 (Pty) Ltd and Century Casinos Africa (Pty) Ltd
409.	20/LM/Feb09	Masscash Holdings (Pty) Ltd and Sherewa Investments (Pty) Ltd
410.	21/LM/Feb09	Federated Timbers (Pty)Ltd t/a Builders Trade Depot and The Buildrite Group
411.	28/LM/Feb09	PSG Konsult Limited and Tlotlisa Securities (Pty)Ltd
412.	17/LM/Feb09	MAN AG and Volkswagen Caminhoese E Onibus Industriai E Comercio DE Veiculo Comerciasis LTDA
413.	130/LM/Dec08	Business Venture Investments No 1311 (Pty) Ltd and Sea Harvest Corporation Ltd
414.	25/LM/Feb09	Pahana Investments 93 (Pty) Ltd and Pahana Investments 91 (Pty) Ltd
415.	128/LM/Dec08	African Revival Investments Holdings (Pty) Ltd and Siyahamba Engineering (Pty) Ltg

416.	127/LM/Dec08	Aspen Pharmacare Holdings Limited and Fine Chemicals Corporation (Pty) Ltd
417.	131/LM/Dec08	Crest Chemicals (Pty) Ltd No. 1311 and CH Chemicals (Pty) Ltd
418.	29/LM/Mar09	Aquarius Platinum (South Africa) (Pty) Ltd and Rustenburg Platinum Mines Ltd and First Platinum (Pty) Ltd
419.	121/LM/Nov08	Shanduka Coal (Pty) Ltd and Springlake Holdings (Pty) Ltd
420.	05/LM/Jan09	Rio Tinto Plc and Rio Tinto Limited and BHP Billiton SA Holdings BV
421.	108/LM/Oct08	DCD-Dorbyl (Pty) Ltd and Globe Engineering Works (Pty) Ltd
422.	27/LM/Feb09	RZT Zelpy 5506 (Pty) Ltd and Seesa Limited
423.	12/LM/Jan09	MTN Group Limited and Newshelf 664 (Pty) Ltd
424.	10/LM/Jan09	Old Mutual (South Africa) Limited and Medscheme Life Assurance Limited
425.	16/LM/Feb09	Premier Motor Holdings, a division of Imperial Group (Pty) Ltd and Key Truck and Car (Airport) (Pty) Ltd
426.	135/LM/Dec08	Vodafone Group Plc and Vodacom Group (Pty) Ltd
427.	09/LM/Jan09	Investec Bank Limited and Anglo-V3 Crane Hire (Pty) Ltd
428.	81/LM/Jul08	Mobile Telephone Network Holdings (Pty) Ltd and Verizon South Africa (Pty) Ltd
429.	113/LM/Oct08	Vodacom (Pty) Ltd and Storage Technology Services (Pty) Ltd
430.	132/LM/Dec08	Ukhamba Holdings (Pty) Ltd and Pragma Africa (Pty) Ltd
431.	11/LM/Jan09	Clidet No 817 (Pty) Ltd and Amalgamated Beverage Industries
432.	107/LM/Oct08	Mobile Telephone Networks Holdings (Pty) Ltd and Italk Cellular (Pty) Ltd
433.	122/LM/Nov08	Her Majesty's Treasury and The Royal Bank of Scotland Group Plc
434.	133/LM/Dec08	Absa Bank Limited and Culemborg Investment Properties (Pty) Ltd
435.	128/LM/Nov07	Investec Bank Limited and RJ Southey (Pty) Ltd
436.	116/LM/Oct08	The Government Employees Pension Fund and Certain properties in the Zenprop Portfolio
437.	114/LM/Oct08	Capital Property Fund and Monyelta Property Fund Limited
438.	106/LM/Oct08	New Clicks South Africa (Pty)Ltd And Sharp Move Trading 107 (Pty)Ltd and Direct Patient Support (Pty)Ltd
439.	123/LM/Nov08	The Firstrand Bank Limited and Unitrans Motors (Pty)Ltd
440.	120/LM/Nov08	The Industrial Development Corporation of South Africa Limited and WM Eachus and Company (Pty) Ltd
441.	124/LM/Nov08	Rustenburg Platinum Mines Limited and Changing Tides 166 (Pty) Ltd
442.	54/LM/Jul09	Remgro Limited and Venfin Limited
443.	94/LM/Aug08	Industrial Electronic Investments Limited and CIE Telecommunications (Pty) Ltd
444.	101/LM/Sep08	Hulamin Operations (Pty) Ltd and Hullet-Hydro Extrusions (Pty) Ltd
445.	111/LM/Oct08	JDG Trading (Pty) Ltd and Maravedi Group (Pty) Ltd
446.	71/LM/Jun08	Old Mutual Investment Group South Africa (Pty) Ltd and Futuregrowth Asset Management (Pty) Ltd
447.	115/LM/Oct08	Optimum Coal Holdings (Pty) Ltd and Aka Resources (Pty) Ltd

448.	93/LM/Aug08	Pareto Limited and B&B Eindomme (Pty) Ltd
449.	91/LM/Aug08	Masscash Holdings (Pty) Ltd and Brett Four (Pty) Ltd
450.	119/LM/Nov08	Bank of America Corporation and Merrill Lynch & Co. Inc
451.	118/LM/Nov08	Absa Bank Limited and Abseq Properties (Pty) Ltd and Certain Assets of Equity Estates (Pty) Ltd
452.	104/LM/Sep08	Vmedical Solution (Pty) Ltd and Neil Harvey & Associates (NHA) Trust
453.	117/LM/Oct08	Old Mutual Life Assurance Company (South Africa) Ltd and XDV Investments (Pty) Ltd
454.	112/LM/Oct08	Scarlet Sky Investments 36 (Pty) Ltd and Meletse Big Five Reserve and Golf Estate Development
455.	110/LM/Oct08	JDG Trading (Pty) Ltd and Blake and Associates Holdings (Pty) Ltd
456.	89/LM/Aug08	Channel Life Limited and Rentmeester Assurance Limited
457.	92/LM/Aug08	RZT Zelpy 5504 (Pty) Ltd and Dynamic Bedding (Pty) Ltd and Dyna Mattress (Pty) Ltd
458.	86/LM/Aug08	Pinnacle Point Holdings (Pty) Ltd and Four Others and Acc-Ross Holdings Limited
459.	99/LM/Sep08	Old Mutual Life Assurance Company SA Limited, Ethos Private Equity Fund V and Idwala Industrial Holdings (Pty) Ltd
460.	102/LM/Sep08	Moody Blue Trade and Invest 147 (Pty) Ltd and South African Roll Company (Pty) Ltd
461.	105/LM/Oct08	Kagiso Media Limited and Urban Brew Studio (Pty) Ltd
462.	54/LM/May08	Calulo Petrochemicals (Pty) Ltd and Automated Fuel Systems Group (Pty) Ltd
463.	90/LM/Aug08	Attacq Property Fund Limited and Waterfall Property Development
464.	96/LM/Aug08	Toyota Tsusho Corporation and Subaru Southern Africa (Pty) Ltd
465.	84/LM/Aug08	Absa Bank Limited, Grindrod Holdings SA (Pty) Ltd and Ballito Junction Development (Pty) Ltd
466.	83/LM/Jul08	Lexshell 38 General Trading (Pty) Ltd & Clidet No. 832 (Pty) Ltd and Richtrau No 123 (Pty) Ltd
467.	87/LM/Aug08	Absa Bank Limited and Retail Africa Wingspan Investments (Pty) Ltd
468.	98/LM/Sep08	Aveng (Africa) Ltd and Keyplan (Pty) Ltd
469.	79/LM/Jul08	Acucap Properties Limited and Parkdev (Pty) Ltd
470.	78/LM/Jul08	Shock Proof Investments 145 (Pty) Ltd and Intaka Manufactures (Pty) Ltd
471.	80/LM/Jul08	Lexshell 99 General trading (Pty) Ltd and Springboklaagte Mining (Pty) Ltd
472.	58/LM/May08	Adcorp Staffing Solutions (Pty) Ltd and Staff U Need (Pty) Ltd
473.	73/LM/Jun08	Masscash Holdings (Pty) Ltd and Franklin Geogr Larkins T/A Top Spot Supermarket
474.	69/LM/Jun08	Zungu Investments Company (Pty) Ltd and Africa Vanguard Resources (Pty) Ltd
475.	49/LM/Apr08	RZT Zelpy 4975 (Pty) Ltd and Davita Trading (Pty) Ltd
476.	53/LM/May08	Purple Moss 25 (Pty) Ltd and FI Funding and Investments Holdco (Pty) Ltd
477.	82/LM/Jul08	Hosken Consolidated Investments Ltd and Seardel Investment Corporation Limited

478.	67/LM/Jun08	Duferco Investment Partners Inc and Highveld Steel and Vanadium Corporation Limited
479.	66/LM/Jun08	Primetime Trading 6 (Pty) Ltd and Tourism Investments Corporation Limited
480.	68/LM/Jun08	Government Employees Pension Fund and Trevenna Precinct Office Development
481.	60/LM/May08	Media 24 Limited and Uppercase Media (Pty) Ltd
482.	48/LM/Apr08	Mainstreet 646 (Pty) Ltd and Alstom SA (Pty)Ltd
483.	72/LM/Jun08	Porsche Automobil Holding SE and Volkswagen AG
484.	70/LM/Jun08	Hewlett Packard Company and Electronic Data Systems Corporation
485.	35/LM/Apr08	Investec Bank Limited and Clidet No 808 (Pty) Ltd
486.	30/LM/Apr08	RCS Investment Holdings (Pty) Ltd and Massdiscounters, a division of Massstores (Pty) Ltd
487.	56/LM/May08	Macsteel Services Centres SA (Pty) Ltd and Harvey Roofing Products
488.	76/LM/Jun08	BAE Systems Land Systems SA (Pty) Ltd and IST Dynamics (Pty) Ltd
489.	31/LM/Apr08	Barloworld Investments (Pty) Ltd and NMI Durban South Motors (Pty) Ltd
490.	43/LM/Apr08	Stefanutti & Bressan Holdings Limited and Stocks Limited
491.	59/LM/May08	Absa Group Limited and Woolworths Financial Services (Pty) Ltd
492.	63/LM/May08	Grindrod Limited and Oreport Holdings (Pty) Ltd
493.	52/LM/May08	Georgia Avenue Investments 109 (Pty) Ltd and Mettle Holdco (Pty) Ltd
494.	64/LM/May08	Bytes Technology Group South Africa (Pty) Ltd and Nor Stationery Wholesalers (Pty) Ltd And Nor Paper (Pty) Ltd
495.	47/LM/Apr08	Volkswagen Aktiengesellschaft and Scania Aktiebolag
496.	13/LM/Jan08	Scaw South Africa (Pty) Ltd and Ozz Industrial (Pty) Ltd
497.	33/LM/Apr08	Altron Finance (Pty) Ltd and Aeromaritime International Management Services (Pty) Ltd
498.	45/LM/Apr08	PSG Financial Services Limited and ZS Rational (Pty)Ltd And Quince Scripfin (Pty)Ltd
499.	44/LM/Apr08	Reunert Limited and Quince Capital Holdings Limited
500.	26/LM/Mar08	Dairybelle (Pty) Ltd and Dairy World (Pty) Ltd & Dairy World Properties (Pty) Ltd
501.	41/LM/Apr08	Dubai World Africa Conservation FZE and Business Venture Investments No 1145 (Pty) Ltd
502.	34/LM/Apr08	Newshelf 926 (Pty) Ltd and Moepi Group (Pty) Ltd
503.	32/LM/Apr08	Aquarius Platinum (SA) Corporate Services (Pty) Ltd and Platinum Mine Resources (Pty) Ltd
504.	42/LM/Apr08	Chemical Service Limited and Chemfit Industrial Holdings (Pty) Ltd
505.	46/LM/Apr08	Tata Motors Limited and Jaguar Land Rover
506.	65/LM/May08	Resilient Property Income Fund Limited and Diversified Property Fund Limited
507.	39/LM/Apr08	Brandcorp (Pty) Ltd and Toolquip Business Ellies Putziger
508.	22/LM/Feb08	Newco and Squires Food (Pty) Ltd
509.	25/LM/Mar08	Pangbourne Properties Limited and Siyathenga Property Fund

		Limited
510.	27/LM/Mar08	Pangbourne Properties Limited and IFour Properties Limited
511.	28/LM/Mar08	Mvelaphanda Holdings (Pty) Ltd and Queensgate Leisure Holdings (Pty)Ltd
512.	07/LM/Jan08	Sherpa Trade and Invest 51 (Pty) Ltd and Tradebush Investments No 123 (Pty) Ltd
513.	11/LM/Jan08	Liberty Star Consumer Holdings (Pty) Ltd and Finlar Foods (Pty) Ltd
514.	14/LM/Jan08	Neotel (Pty) Ltd and Transtel Telecoms (a division of Transnet)
515.	16/LM/Feb08	Main Street 251 (Pty) Ltd and The House of Busby Limited
516.	17/LM/Feb08	Brandco Currently Heineken (Pty) Ltd and the Diageo South Africa (Pty) Ltd and Brandhouse Beverages (Pty) Ltd and the Amstel Licence
517.	05/LM/Jan08	Powertech Properties and Investments (Pty) Ltd and ABB Powertech Transformers (Pty) Ltd
518.	29/LM/Apr08	Saudi Telecom Company and Oger Telecom Ltd
519.	10/LM/Jan08	Alternative Channel Limited and m Cubed Life Limited
520.	19/LM/Feb08	Stocks Building Africa (Pty) Ltd and Housing Africa Development (Pty)Ltd
521.	124/LM/Nov07	Sabido Investments (Pty) Ltd and and Sasani Africa (Pty) Ltd
522.	12/LM/Jan08	Vodacom Service Provider Company (Pty) Ltd and Global Telematics SA (Pty) Ltd and Glocell Service Provider Company (Pty) Ltd
523.	08/LM/Jan08	Umlingo Trade and Invest 71 (Pty) Ltd and Mining Capital Equipment Business, a division of Longyear SA (Pty) Ltd
524.	126/LM/Nov07	Optimum Coal Investments (Pty) Ltd and Optimum Colliery, a business division of BHP Billiton Energy Coal SA Ltd & others
525.	03/LM/Jan08	Business Venture Investments No 1251(Pty) Ltd and Mantis Group Holdings (Pty) Ltd
526.	21/LM/Feb08	The Prepaid Company (Pty)Ltd and Clostrade 393 CC t/a Crown Cellular
527.	02/LM/Jan08	Imperial Holdings Limited and Engineparts (Pty) Ltd
528.	04/LM/Jan08	Homeplan (Pty) Ltd and Alexander Forbes Financial Services(Pty) Ltd and ABSA Bank Limited
529.	06/LM/Jan08	Imperial Group (Pty) Ltd and Roshcon (Pty) Ltd
530.	132/LM/Dec07	Lithotech Holdings Limited and Rotolabel (Transvaal) Pty
531.	15/LM/Feb08	Main Street 615 (Pty) Ltd and Tiger Automotive Limited
532.	130/LM/Nov07	Mergence Africa Property Investment Trust and 38 Property Letting Enterprises held by Apexhi Properties Limited
533.	131/LM/Nov07	Dipula Property Investment Trust and 66 Property Letting Enterprises held by Apexhi Properties Limited
534.	98/LM/Sep07	Mvelaphanda Resources Ltd and Northam Platinum Ltd
535.	105/LM/Sep07	African Bank Investments Limited and Ellerine Holding Limited
536.	125/LM/Nov07	Sasol Chemical Industries Limited and Sasol Dia Acrylates (Pty) Ltd
537.	23/LM/Feb07	Naspers Limited and Electronic Media Network Limited,Supersport International Holdings Limited
538.	51/LM/May07	Ferro Industrial Products (Pty) Ltd and Spectrum Ceramics CC
539.	120/LM/Nov07	Diamond 11 Acquisition Corp and 3 Com Cororation

540.	127/LM/Nov07	Blue Beacon Investments 190 (Pty) Ltd and Phamodzi Investment Holdings (Pty) Ltd
541.	90/LM/Aug07	Bayne Investments (Pty) Ltd and Clidet 451 (Pty) Ltd
542.	85/LM/Aug07	Protea Chemicals and Zetachem (Pty) Ltd
543.	115/LM/Nov07	Micros South Africa (Pty) Ltd and Micros- Fidelio South Africa (Pty) Ltd & 2 Others
544.	116/LM/Nov07	Kagiso Strategic Investments III (Pty) Ltd and Bell Sales SA Limited
545.	104/LM/Sep07	Clear Channel Communications Inc and BT Triple Crown Merger Co Inc
546.	121/LM/Nov07	Titan Premier Investments (Pty) Ltd and Western Crown Properties 64 (Pty) Ltd
547.	119/LM/Nov07	Fluxrab Investments No. 159 (Pty) Ltd and Gold Reef Resorts Limited
548.	122/LM/Nov07	Metropolitan Holdings Limited and Directfin Solutions (Pty) Ltd
549.	118/LM/Nov07	WBHO Construction (Pty) Ltd and Simbithi Eco- Estate (Pty) Ltd
550.	108/LM/Oct07	Calshelf Investments 152 (Pty) Ltd and Orley Foods (Pty) Ltd
551.	99/LM/Sep07	Pangbourne Properties Limited and Portion 118 of the farm Vogelfontein No. 84
552.	109/LM/Oct07	PSG Financial Services Limited and Alternative Channel Limited
553.	77/LM/Jul07	Realty Dynamix 73 (Pty) Ltd and Pangbourne Properties Ltd and Assetz Property Investment Fund
554.	107/LM/Oct07	Rickshaw Trade & Invest 41 (Pty) Ltd and Tsebo Outsourcing Group (Pty) Ltd
555.	97/LM/Sep07	Cameotree Investments (Pty) Ltd and Premier Foods Ltd
556.	70/LM/Jul07	Growthpoint Management Services (Pty) Ltd and Fund Management Business,Property Administrators Business,Buildman Managers (Pty) Ltd
557.	86/LM/Aug07	Rio Tinto Plc and Alcan Inc
558.	61/LM/Jun07	Platoon Trade and Invest 136 (Pty) Ltd and PG Bison Components (Pty) Ltd
559.	35/LM/Apr07	Steinhoff Africa Holdings (Pty) Ltd and BCM Holdings Ltd
560.	110/LM/Oct07	Pamodzi Gold Ltd and President Steyn Gold Mines (Free State) (Pty) Ltd
561.	100/LM/Sep07	Business Venture Investments no 1145 (Pty) Ltd,Competition Commission and Nkomazi Wilderness,Senwes Limited
562.	94/LM/Sep07	RTZ Zelpy and Diamonds Disc
563.	36/LM/Apr07	Premfood Joint Venture and Premier Fishing (Pty) Ltd and Foodcorp (Pty) Ltd
564.	68/LM/Aug06	Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd
565.	43/LM/Apr07	Johnnic Book Retail Limited T/A Exclusive Books and Van Schaik Bookstore , Being A Division Of Via Africa Limited
566.	72/LM/Jul07	The Prepaid Company (Pty) Ltd and Gold Label Investments and Others
567.	87/LM/Aug07	Xstrata South Africa (Pty) Ltd and Eland Platinum Holdings Limited
568.	95/LM/Sep07	Acucap Properties Limited and Intaprop Investments (Pty) Ltd
569.	93/LM/Sep07	Capital Alliance Life Limited and Investec Employee Benefits Limited

570.	66/LM/Jun07	Element Six Abrasives SA and Barat Carbide Holding GMBH
571.	88/LM/Aug07	Formex Industries (Pty) Ltd and Autotube Manufacturing (Pty) Ltd
572.	96/LM/Sep07	Investec Bank Limited and Calulo Petrochemicals (Pty) Ltd
573.	82/LM/Aug07	Red Pen 2 General Trading (Pty) Ltd and Primedia Limited
574.	67/LM/Jun07	Power Technologies (Pty) Ltd and IST Group (Pty) Ltd
575.	89/LM/Aug07	Barloworld (Pty) Ltd and Pretoria Oos Motors (Pty) Ltd
576.	63/LM/Jun07	Acucap Properties Limited and Atlas Properties Limited
577.	78/LM/Jul07	SA Corporate Real Estate Fund and the Buffcol Portfolio
578.	37/LM/Apr07	Mondi Packaging South Africa (Pty) Ltd and Lenco Holdings (Pty)Ltd
579.	65/LM/Jun07	The Bidvest Group Limited and Viamax (Pty) Ltd
580.	73/LM/Jul07	Firststrand Bank Limited and Transnet Housing Business Unit
581.	46/LM/May07	Public Investment Corporation Ltd and CBS Property Portfolio Ltd
582.	31/LM/Mar07	Firststrand Investment Holdings (Pty) Ltd and Rentworks Africa (Pty) Ltd
583.	62/LM/Jun07	Pamodzi Gold Limited and Orkney Business Owned By African Minerals Gold Ltd
584.	11/LM/Jan07	Corvest Holdings (Pty) Ltd and Fidelity Services Group Ltd
585.	55/LM/May07	Airports Company South Africa and Denel (Pty) Ltd and Aero Eiendomme (Pty) Ltd
586.	39/LM/Apr07	Clidet No 694 (Pty) Ltd and CJ Petrow Chemicals (Pty) Ltd
587.	74/LM/Jul07	Johannesburg Municipal Pension Fund and Erf 2860 Newton Park Township,Erf 2878 Mount Road Township
588.	79/LM/Jul07	Old Mutual Life Assurance Company (South Africa) Limited and Sweet Roses Investments 506 (Pty) Ltd
589.	76/LM/Jul07	Calshelf Investments 160 (Pty) Ltd and Rib World Two (Pty) Ltd
590.	58/LM/Jun07	Metropolitan Holdings Limited and HTG Life Limited
591.	33/LM/Mar07	Gold Reef Resorts Limited and Akani Leisure Goldfields Investments (Pty) Ltd & 10 Others
592.	41/LM/Apr07	Mergence Africa Property Investment Trust and Capital Property Fund Limited
593.	42/LM/Apr07	Foodcorp (Pty) Ltd and First Lifestyle (Pty) Ltd
594.	51/LM/Jun06	Telkom SA Ltd and Business Connexion Group Ltd
595.	59/LM/Jun07	Edgars Consolidated Stores Limited and New Clicks SA (Pty)Ltd
596.	60/LM/Jun07	Barclays PLC and ABN Amro Holdings N.V
597.	100/LM/Sep07	and
598.	82/LM/Oct06	Lexshell 668 Investments (Pty) Ltd and Wakefield Investments (Pty) Ltd
599.	54/LM/May07	Wilson Bayly Holmes-Ovcon Ltd and Let Construction (Pty) Ltd
600.	57/LM/Jun07	Apexhi Properties Ltd and 15 Residential Properties
601.	38/LM/Apr07	Xstrata Canada Acquisition Corp and Lionore Mining International Limited
602.	47/LM /May07	FBCF Nominees No. 1 (Pty) Ltd,Coronation Capital Ltd and SA Airlink (Pty) Ltd
603.	48/LM/May07	Newshelf 871 (Pty) Ltd and Britehouse Holdings (Pty) Ltd

604.	32/LM/Mar07	Circle Edu Investments (Pty) Ltd and Edu-Loan (Pty) Ltd
605.	40/LM/Apr07	Leisurecorp LLC and Novelway Mauritius Limited
606.	71/LM/Aug06	Nampak Products Limited and Burcap Plastics (Pty) Ltd
607.	63/LM/Jul06	Lafarge Roofing (Pty) Ltd and Kulu Concrete Products (Pty) Ltd
608.	29/LM/Mar07	Royal Bafokeng Capital (Pty) Ltd and Yomhlaba Resources Limited
609.	04/LM/Jan07	Evrax Group, SA and Highveld Steel and Vanadium Corporation Limited Corporation Limited
610.	10/LM/Feb07	Afrisam Consortium (Pty) Ltd and Afrisam (Pty) Ltd
611.	28/LM/Mar07	NACO Ltd and Nissan Diesel Motor Company Limited
612.	20/LM/Feb07	Siyathenga Properties Two (Pty) Ltd and ERF 38722
613.	19/LM/Feb07	SA Corporate Real Estate Fund and SA Retail Properties Limited
614.	30/LM/Mar07	ET Cayman Holdings Limited and The Emmission Technology Business Of Arvin Meritor Inc
615.	106/LM/Dec06	Tsebo Outsourcing Group (Pty) Ltd and Equality Foods Services (Pty) Ltd
616.	01/LM/Jan07	Opalton Investments (Pty) Ltd and Peermont Global Ltd,Marang East Rand Gaming Investments (Pty) Ltd
617.	13/LM/Jan07	Investec Bank Ltd and DCD Dorbyl (Pty) Ltd
618.	22/LM/Feb07	McCarthy Limited and Inyanga Motors (Pty) Ltd
619.	24/LM/Mar07	Main Street 522 (Pty) Ltd and Edgars Consolidated Stores Limited
620.	02/LM/Jan07	Emira Property Fund and Freestone Property Holdings Ltd
621.	26/LM/Mar07	Impala Platinum Holdings Limited and African Platinum plc
622.	18/LM/Feb07	KAP International Holdings Limited and Brenner Mills (Pty) Ltd
623.	25/LM/Mar07	Standard Bank Private Equity, A Division of the Standard Bank South African Ltd and DairyBelle, A Division of Tiger Food Brands Ltd
624.	21/LM/Feb07	Lereko Metier Capital Growth Fund and Liberty Star Consumer Holdings (Pty) Ltd
625.	07/LM/Jan07	Newshelf 809 (Pty) Ltd and Consol Limited
626.	105/LM/Dec06	Imperial Holdings Limited and Jurgens (Pty) Ltd
627.	06/LM/Jan07	Shoprite Holdings Limited and Parmtro Investments No 89 (Pty) Ltd
628.	107/LM/Dec06	Group Five Construction (Pty) Ltd and Quarry Cats (Pty) Ltd
629.	03/LM/Jan07	Impala Platinum Holdings Ltd and Islandsite Investments 225 (Pty) Ltd
630.	122/LM/Dec05	Phodiclinics (Pty) Ltd,DJF Defty (Pty) Ltd,Medi-Clinic Corporation Ltd,Phodiso Clinics (Pty) Ltd,Phodiso Holdings Ltd and Protector Group Medical Services (Pty) Ltd (in liquidation),President Pharmacy (Pty) Ltd,Capstone 177 (Pty) Ltd,Blue Dot Properties 446 (Pty) Ltd,Limosa Investments 93 (Pty) Ltd,Capensis Investments 403 (Pty) Ltd,New Protector Group Holdings (Pty) Ltd (in liquidation)
631.	70/LM/Aug06	Barmac Pty Ltd and ATC (Pty) Ltd,Aberdare Cables (Pty) Ltd
632.	108/LM/Dec06	CBW Holdings (Pty) Ltd and Kwambonambi Cash and Carry (Pty) Ltd
633.	85/LM/Oct06	Nokia Corporation and Siemens Aktiengesellschaft
634.	37/LM/May06	African Oxygen Limited and Refrigeration Investment Company

		(Pty) Ltd
635.	100/LM/Dec06	ABSA Capital and Thebe Investment Corporation (Pty) Ltd
636.	109/LM/Dec06	Cleansheet Investments (Pty) Ltd and Alexander Forbes Limited
637.	96/LM/Nov06	Murray & Roberts and Wade Walker (Pty) Ltd
638.	94/LM/Nov06	Growthpoint Properties Limited and Paramount Fund Limited
639.	97/LM/Nov06	Royal Bafokeng MB Technologies (Pty) Ltd and MB Technologies (Pty) Ltd
640.	95/LM/Nov06	Super Group Dealerships (a division of Super Group Trading (Pty) Ltd) and Van Wyk and Wolpe (Pty) Ltd
641.	88/LM/Oct06	Imperial Holdings Limited and Terex Africa (Pty) Ltd
642.	98/LM/Nov06	Titan Premier Investments (Pty) Ltd and Jeke Trading (Pty) Ltd
643.	104/LM/Dec06	TFMC Holdings (Pty) Ltd and LGM South Africa Facilities managers and Engineers (Pty) Ltd
644.	90/LM/Oct06	Cherry Moss Trade and Investment 119 (Pty) Ltd and Main Street 415 (Pty) Ltd
645.	99/LM/Nov06	Sygnia Investments Holdings (Pty) Ltd and African Harvest Life Assurance Company Ltd,African Harvest Alternative Investments (Pty) Ltd
646.	76/LM/Sep06	Redefine Income Fund Limited and Spearhead Property Holding Limited
647.	40/LM/May06	Linde Aktiengesellschaft and The BOC Group PLC
648.	78/LM/Sep06	Dipula Property Investment Trust and Outward Investments (Pty) Ltd
649.	89/LM/Oct06	Siemens Aktiengesellschaft and Bayer Diagnostics
650.	83/LM/Oct06	Gold Fields Limited and Barrick Gold South Africa (Pty) Ltd, Western Areas Limited
651.	66/LM/Aug06	Pamodzi Gold (Pty) Ltd and Bema Gold South Africa (Pty) Ltd
652.	48/LM/May05	A P Moller-Maersk and Royal P & O Nedlloyd N.V.
653.	87/LM/Oct06	Robor Proprietary Limited and The Steel Tube and Pipe Business of Barloworld Robor (Pty) Ltd
654.	91/LM/Oct06	Extreme Lifestyle Centre (Pty) Ltd and Mill and Mine Spares CC
655.	86/LM/Oct06	Lexshell 44 General Trading (Pty) and V&A Waterfront Holdings (Pty) Ltd
656.	73/LM/Aug06	Main Street 432 (Pty) Ltd and Koornfontein Mine
657.	93/LM/Nov06	Autumn Storm Investments 362 (Pty) Ltd and Outdoor Network
658.	53/LM/Jun06	Mittal Steel Company N.V. and Arcelor SA
659.	92/LM/Oct06	Royal Bafokeng Nation Development Trust and A Part of the Business of the Royal Bafokeng Nation
660.	46/LM/May06	Network Healthcare holdings Limited and Netpartner Investments Limited
661.	77/LM/Sep06	Tiger Food Brands (Pty) Ltd and Designer Group Holdings Limited
662.	52/LM/Jun06	PSG Group Ltd and Arch Equity, Jasmyn Corporate Holdings (Pty) Ltd
663.	61/LM/Jul06	SAAB AB and Aerostructures Business of Denel (Pty) Ltd

664.	101/LM/Oct05	Murray & Roberts Limited and Concor Limited
665.	65/LM/Aug06	Sandown Motor Holdings (PTY) LTD and Paarl Motors (PTY) LTD
666.	67/LM/Aug06	Pangbourne Properties (Pty) Ltd and Calulo Property Fund Ltd and Others
667.	62/LM/Jul06	Sasol Chemical Industries Ltd and Sasol Dyno Nobel (Pty) Ltd
668.	74/LM/Sep06	KWV LTD and NMK SCHULZ FINE WINE AND SPIRITS (PTY) LTD
669.	13/LM/Feb06	Exxaro Limited and Namakwa Sands (a division of Anglo Operations Limited)
670.	14/LM/Feb06	Main Street 333 (Pty) Ltd and Kumba Resources Limited
671.	56/LM/Jun06	Kunene Finance Company (Pty) Ltd and Scarlet Ibis Investments 3(Pty) Ltd
672.	54/LM/Jun06	Medi-Liberty Star Consumer Holdings (Pty) Ltd and Chet Industries Ltd
673.	48/LM/Jun06	Vodacom Services Provider Company (Pty) Ltd, Vodacom Properties No.2 (Pty) Ltd and Africell Cellular Services (Pty) Ltd
674.	55/LM/Jun06	Netcare Kwa-Zulu (PTY) LTD and Tresso Trading 119 (PTY) LTD
675.	41/LM/May06	Sun International (South Africa) Limited and Real Africa Holdings Limited
676.	57/LM/Jul06	Liberty Star Consumer Holdings (Pty) Ltd and Retailer Brands (Pty) Ltd
677.	30/LM/Apr06	Lexshell 676 Investment (Pty) Ltd and Xstrata South Africa (Pty) Ltd
678.	27/LM/Apr06	Prestasi Brokers (Pty) Ltd and Thebe Risk Services (Pty) Ltd
679.	59/LM/Jul06	Imperial Holdings Limited and Alert Engine Parts (Pty) Ltd
680.	121/LM/Dec05	Old Mutual Healthcare (Pty) Ltd and Kwacha (Pty) Ltd
681.	34/LM/Apr06	PEDAL TRADING 130 (PTY) LTD and MB TECHNOLOGIES (PTY) LTD
682.	33/LM/Apr06	TIGER FOOD BRANDS LTD and BROMOR FOODS (PTY) LTD
683.	28/LM/Apr06	FLAMINGO OAK TRADING 8 (PTY) LTD and IMPALA REFINING SERVICES LTD
684.	42/LM/May06	Government Employees Pension Fund represented by Public Investment Corporation Limited and Denel (Pty) Ltd
685.	50/LM/Jun06	Attfund Limited and CapeGate Regional (Pty) Ltd,CapeGate Lifestyle (Pty) Ltd,CapeGate Wholesale (Pty) Ltd,Boness Development Phase 3 (Pty) Ltd
686.	49/LM/Jun06	The Trustee for the time being of the Growthpoint Securitisation Warehouse Trust and Business Connexion Technology Holdings (Pty) Ltd
687.	36/LM/May06	Tiger Food Brands Ltd and Nestle SA (Pty) Ltd
688.	32/LM/Apr06	Samancor Manganese (Pty) Ltd and Advalloy (Pty) Ltd
689.	44/LM/May06	Bidvest Group Ltd and Versalec Cables (Pty) Ltd
690.	24/LM/Mar06	Growthpoint Properties Ltd and Metboard Properties Ltd
691.	35/LM/Apr06	Oosthuizen Transport SA (Pty) Ltd and Oosthuizen's Businesses Conducted, Under Eight Different Companies
692.	03/LM/Jan06	International Mineral Resources AG and Kermas South Africa

		(Pty) Ltd
693.	22/LM/Mar06	Pamodzi Investment Holdings (Pty) Ltd and Allied Production Industries Holdings (Pty) Ltd
694.	18/LM/Feb06	Growthpoint Properties Ltd and Tresso Trading 119 (Pty) Ltd
695.	20/LM/Mar06	Swiss Reinsurance Company and GE Insurance Solutions Corporation and its subsidiaries
696.	25/LM/Mar06	ApexHi Properties Ltd and MICC Properties (Pty) Ltd
697.	26/LM/Mar06	Fujitsu Siemens Computers (Holding) BV and Siemens Services Newco (Pty) Ltd
698.	21/LM/Mar06	Siemens Limited and Marqott Holdings (Pty) Ltd
699.	17/LM/Feb06	The Commercial Property Finance Division of ABSA Bank Limited and Equity Estates (Pty) Ltd
700.	113/LM/Nov05	Afgri Operations Ltd and Daybreak Farms (Pty) Ltd
701.	62/LM/Jul05	Massmart Holdings Limited and Moresport Limited
702.	15/LM/Feb06	Old Mutual Properties (Pty) Ltd and Marriott Property Services (Pty) Ltd, Marriott Asset Management (Pty) Ltd, Marriott Corporate Services (Pty) Ltd, Marriott Unit Trust Management Company Limited
703.	16/LM/Feb06	The Prepaid Company (Pty) Ltd and Matragon (Pty) Ltd
704.	04/LM/Jan06	Lexshell 668 Investments (Pty) Ltd and Graspan Colliery (Pty) Ltd
705.	08/LM/Feb06	Zelpy 4547 (Pty) Ltd and Chemical Specialities (Pty) Ltd
706.	52/LM/Jun05	Vodacom Group (Pty) Ltd and Cointel VAS (Pty) Ltd
707.	06/LM/Jan06	Pepkor Limited and Manrotrade Four (Pty) Ltd
708.	123/LM/Dec 05	Vusani Investments (Pty) Ltd and Immovable Properties owned by Sanlam Life Insurance Ltd
709.	19/LM/Feb06	BCE Foodservice Equipment (Pty) Ltd and Basfour 3018 (Pty) Ltd
710.	09/LM/Feb06	Friedshelf 649 (Pty) Ltd, Ellerine Brothers Limited and Wireless Business Solutions (Pty) Ltd
711.	98/LM/Oct05	General Motors South Africa (Pty) Limited and Midas Group (Pty) Ltd
712.	12/LM/Feb06	Ponahalo Investments (Pty) Ltd and De Beers Consolidated Mines Holdings (Pty) Ltd
713.	10/LM/Feb06	Calibre Private Equity Partnership No. 12 and Salvage Management and Disposals (Pty) Ltd
714.	118/LM/Dec05	Barrick Gold Corporation and Placer Dome Incorporated
715.	99/LM/Oct05	Barloworld Coatings (Pty) Ltd and Prostart Investments (Pty) Ltd t/a Marouns
716.	45/LM/May05	Imperial Group (Pty) Ltd and Magic Merkel (Pty) Ltd
717.	94/LM/Sep05	Sanlam Life Insurance Limited and Channel Life Limited
718.	01/LM/Jan06	Pangbourne Property Limited and Transnet Retirement Funds Property
719.	107/LM/Nov05	The Trustees for the Time Being of the CBS Property Trust and Growthpoint Properties Ltd
720.	07/LM/Feb06	Old Mutual Life Assurance Company (South Africa) Ltd and AFHCO Holdings (Pty) Ltd
721.	116/LM/Dec05	Mananga Sugar Packers (Pty) Ltd and Sunshine Sugar Specialities (Pty) Ltd, MSASA Sugar (Pty) Ltd

722.	101/LM/Dec04	SASOL LIMITED, ENGEN LIMITED, PETRONAS INTERNATIONAL CORPORATION LIMITED and SASOL OIL (PTY) LTD, ENGEN LTD
723.	110/LM/Nov05	Vodafone Group PLC and Venfin Limited
724.	109/LM/Nov05	Chemical Services Limited and Leochem (Pty) Ltd
725.	92/LM/Sep05	Industrial Partnership Investments Limited and Kagiso Trust Investments (Pty) Limited
726.	106/LM/Nov05	Liberty Group Limited and Investec Employee Benefits Limited
727.	102/LM/Oct05	NUMSA Investment Company (Pty) Ltd and Doves Group Holdings (Pty) Ltd
728.	56/LM/Jun05	Merafe Ferrochrome and Mining (Pty) Ltd, Xstrata South Africa (Pty) Ltd and The Xstrata – Samancor Production Joint Venture, Samancor Ltd
729.	82/LM/Sep05	Rustenburg Platinum Mines Ltd and Aquarius Platinum (South Africa) (Pty) Ltd
730.	104/LM/Oct05	Imperial Holdings Ltd and TFD Network Africa (Pty) Ltd
731.	93/LM/Sep05	Steinhoff Africa Holdings (Pty) Ltd and North Eastern Cape Forest Joint Venture, Goeiehoop Farming (Pty) Ltd
732.	114/LM/Dec05	Combined Motor Holdings (Pty) Ltd and Craig Park Motors (Pty) Ltd
733.	103/LM/Oct05	Evening Star Trading 431 (Pty) Ltd and Fraser Alexander Holdings (Pty) Ltd
734.	78/LM/Aug05	Mercanto Investments (Pty) Ltd and Johnnic Holdings Ltd
735.	87/LM/Sep05	Momentum Group Limited and African Life Health (Pty) Ltd
736.	108/LM/Nov05	The Public Investment Corporation Limited and ADR International Airports South Africa (Pty) Ltd
737.	97/LM/Oct05	SC-Beteiligungsgesellschaft MBH and Sud Chemie AG
738.	83/LM/Sep05	MTN Service Provider (Pty) Ltd and Cell Place (Pty) Ltd
739.	54/LM/Jun05	Business Venture Investments No. 976 (Pty) Limited and SAGE Group (Pty) Limited
740.	90/LM/Sep05	Standard Bank of South Africa Ltd and RCS Investment Holdings (Pty) Ltd
741.	91/LM/Oct05	JD Group Limited and Connection Group Holdings Limited
742.	96/LM/Oct05	Imperial Holdings and MCC Contracts (Pty) Ltd, MCC Plant Hire (Pty) Ltd
743.	89/LM/Sep05	ApexHi Properties Ltd and Sasol Pension Fund
744.	47/LM/Jun05	Shoprite Checkers (Pty) Ltd and Foodworld Group Investment Holdings (Pty) Ltd, Foodworld Stores Holdings (Pty) Ltd
745.	71/LM/Aug05	Corvest 6 (Pty) Ltd and FCMS BEE Cash Management (Pty) Ltd
746.	46/LM/May05	Tiger Brands Ltd, Ashton Canning Company (Pty) Ltd, Newco and Langeberg Foods International, Ashton Canning Company (Pty) Ltd
747.	68/LM/Jul05	ApexHi Properties Limited and Prima Property Trust
748.	86/LM/Sep05	Navigator Property Investments (Pty) Ltd and Galleria Property Opportunities (Pty) Ltd
749.	72/LM/Aug05	Corvest 6 (Pty) Ltd and Fidelity Supercare Services Group (Pty) Ltd
750.	85/LM/Sep05	Super Group Dealerships – A division of Super Group Trading (Pty) Ltd and LM Wolfsohn Motors (Pty) Ltd

751.	70/LM/Aug05	Adcock Ingram Critical Care (Pty) Ltd and The Scientific Group (Pty) Ltd, Scientific Group Investments (Pty) Ltd
752.	75/LM/Aug05	Medi-Clinic Investment (Pty) Ltd and Wits University Donald Gordon Medical Centre (Pty) Ltd
753.	51/LM/Jun05	Murray & Roberts Limited and Oconbrick Manufacturing (Pty) Ltd, Purple Rain Properties No. 421 (Pty) Ltd, P.S.P Transport (Pty) Ltd
754.	69/LM/Jul05	Standard Bank Group Ltd and Andisa Capital (Pty) Ltd
755.	77/LM/Aug05	Unitrans Motors (Pty) Ltd and Weiss Motors (Pty) Ltd
756.	81/LM/Aug05	Sanlam Limited and African Life Assurance Company Limited
757.	88/LM/Sep05	Investec Bank Limited and BCE Foodservice Equipment (Pty) Ltd
758.	66/LM/Jul05	Pangbourne Property (Pty) Ltd and The Rental Enterprise conducted by Paramount Property (Pty) Ltd
759.	102/LM/Dec04	Media 24 Limited, Lexshell 496 Investments (Pty) Ltd and The Natal Witness Printing, Publishing Company (Pty) Ltd
760.	11/LM/Mar05	Medicross Healthcare Group (Pty) Ltd and Prime Cure Holdings (Pty) Ltd
761.	60/LM/Jun05	Unitrans Motors (Pty) Ltd and Alisa Holdings Ltd
762.	59/LM/Jul05	Theta Investments (Pty) Ltd and Teba Credit (Pty) Ltd
763.	43/LM/May05	Kumnandi Food Company (Pty) Ltd and Republiek Voedsel (Pty) Ltd
764.	76/LM/Aug05	Spar Group Ltd and Sparit Family Supermarkets (Pty) Ltd
765.	63/LM/Jul05	Medicine Management Services (Pty) Ltd and Gerard Augustine t/a Direct Medicines Pharmacy
766.	64/LM/Jul05	Combined Motor Holdings Limited and Forza (Pty) Ltd
767.	53/LM/Jun05	Hyprop Investment Limited and South African Retail Properties Limited
768.	61/LM/Jul05	Imperial Group (Pty) Ltd and Bulktrans (Pty) Ltd
769.	49/LM/Jun05	Siemens Aktiengesellschaft Österreich and VA Technologie AG
770.	25/LM/Mar05	Massmart Holdings Limited and Thabile Trade 22 (Pty) Limited, Nabuild (Pty) Limited, Servistar (Pty) Limited
771.	50/LM/Jun05	Siemens Aktiengesellschaft and Flender Holding GMBH
772.	32/LM/May05	Santam Ltd, Kagiso Newco and Nova Group Holdings Ltd
773.	41/LM/May05	Lonmin Plc and Southern Platinum Corp
774.	100/LM/Dec04	Chemical Services Limited and Chemiphos S.A (Pty) Ltd
775.	44/LM/May05	Anglo South Africa Capital (Pty) Ltd, Eyesizwe Coal (Pty) Ltd, Mafube Coal Mining (Pty) Ltd and Arnot North Mining Business and Additional Reserves
776.	37/LM/May05	South African Gas Development Company (Pty) Ltd, Companhia Mocambicana de Gasodudo S.A.R.L. and Republic of Mozambique Pipeline Investments Company (Pty) Ltd
777.	56/LM/Aug04	Ellerine Holdings Ltd and Relyant Retail Ltd
778.	21/LM/Mar05	Edgars Consolidated Stores (Pty) Ltd and Rapid Dawn 123 (Pty) Ltd
779.	38/LM/May05	Dunns Stores (Pty) Limited and Shoe City Holdings (Pty) Limited
780.	23/LM/Mar05	Community Investment Ventures Holdings (Pty) Ltd, Community Investment Ventures (Pty) Ltd and Community Investment Holdings (Pty) Ltd, CIE Group (Pty) Ltd

781.	92/LM/Nov04	Clover Fonterra Ingredients (Pty) Ltd and New Zealand Milk Products
782.	16/ LM/Mar05	Channel Life Ltd and mCubed Investment Life Ltd
783.	22/LM/Mar05	Kermas South Africa (Pty) Ltd and Samancor Ltd
784.	40/LM/May05	Liberty Group Limited and Wedelin Investments (Pty) Ltd
785.	27/LM/Apr05	Growthpoint Properties Limited and Tresso 119 (Pty) Ltd
786.	84/LM/Oct04	Momentum Group Ltd and Bonheur 94 General Trading (Pty) Ltd
787.	34/LM/May05	Lanum Securities SA and 3C Telecommunications (Pty) Ltd
788.	10/LM/Mar05	Clidet 526 (Pty) Ltd and Pamodzi Investment Holdings (Pty) Ltd
789.	12/LM/Mar05	Hosken Consolidated Investments Ltd and Fabvest Investment Holdings (Pty) Ltd
790.	29/LM/Apr05	Clidet 546 (Pty) Ltd and Fast Track Liquors CC
791.	15/LM/Mar05	Investec Bank Ltd and Main Street 57 (Pty) Ltd, Corobrik (Pty) Ltd, Corovest (Pty) Ltd
792.	30/LM/May05	The Standard Bank of South Africa Limited and Safika Holdings (Pty) Ltd
793.	33/LM/May05	AVI Limited and A&D Spitz (Pty) Ltd
794.	93/LM/Nov04	HARMONY GOLD MINING COMPANY LIMITED and GOLD FIELDS LIMITED
795.	105/LM/Dec04	Business Venture Investments 790 (Pty) Ltd and Afrox Healthcare Limited
796.	13/LM/Mar05	Bytes Technology Group South Africa (Pty) Ltd and Digital Health Solutions (Pty) Ltd
797.	14/LM/Mar05	SA Leisure (Pty) Limited and SA Leisure - a Division of First Lifestyle (Pty) Ltd
798.	04/LM/Jan05	Liberty Group Ltd and Capital Alliance Holdings Ltd
799.	72/LM/Sep04	Multichoice Subscriber Management (Pty) Ltd and Tiscali (Pty) Ltd
800.	03/LM/Jan05	Sanlam Limited and Safrican Insurance Company and Newshelf 503 (Pty) Ltd
801.	09/LM/Feb05	Standard Bank of South Africa Limited and Worldwide African Investment Holdings (Pty) Ltd
802.	87/LM/Oct04	Vodacom Service Provider Company (Pty) Ltd and
803.	107/LM/Dec04	Afgri Operations Ltd and Nedan Oil Mills (Pty) Ltd
804.	103/LM/Dec04	Capital Alliance Life Limited and Rentmeester Assurance Limited
805.	02/LM/Jan05	Masstores (Pty) Limited and The business conducted by Cell-Shack Communications (Pty) Limited
806.	01/LM/Jan05	Johnnic Holdings Limited and Fabcos Investment Holding Company Limited
807.	67/LM/Sep04	Venfin Media Investments (Pty) Limited and Sail Group Ltd
808.	95/LM/Nov04	Steinhoff Africa Holdings (Pty) Ltd and Unitrans Ltd
809.	96/LM/Nov04	JP Morgan Securities South Africa (Pty) Ltd and Cazenove South Africa (Pty) Ltd
810.	85/LM/Oct04	Business Venture Investments 904 (Pty) Limited and Certain Businesses of Momentum Group Ltd, m Cubed Holdings Ltd
811.	73/LM/Sep04	Clidet 517 (Pty) Limited and Giostra Investments (Pty) Limited
812.	66/LM/Sep04	Bytes Technology Group SA (Pty) Ltd and CS Computer Services Holdings Ltd

813.	88/LM/Oct04	Clidet No. 533 (Pty) Limited and Defy Appliances Ltd
814.	91/LM/Nov04	Citibank NA South Africa Branch and Mercantile Bank Limited
815.	78/LM/Oct04	Plaaskem (Pty) Ltd and UAP Agrochemicals KZN (Pty) Ltd, UAP Crop Care (Pty) Ltd
816.	75/LM/Oct04	Momentum Property Investments (Pty) Ltd and Arnold Property Fund Limited
817.	76/LM/Oct04	Vukile Property Fund Limited and MICC Property Income Fund Limited
818.	54/LM/Jul04	Xstrata South Africa (Pty) Ltd and Egalite (Pty) Ltd, International Carbon Holdings (Proprietary) Limited
819.	69/LM/Sep04	Mvelaphanda Holdings (Pty) Limited and Rebserve Holdings Limited
820.	74/LM/Sep04	Rainbow Farms (Pty) Ltd and Vector Logistics (Pty) Ltd
821.	79/LM/Oct04	Gauteng Provincial Government and ApexHi Properties Ltd
822.	64/LM/Aug04	Nedbank Ltd, Investec Ltd, Hosken Consolidated Investment Ltd and The IQ Business Group (Pty) Ltd
823.	27/LM/Jun03	Alpha (Pty) Ltd and Slagment (Pty) Ltd
824.	52/LM/Jul04	Cherry Creek Trading 14 (Pty) Ltd and Northwest Star (Pty) Ltd
825.	60/LM/Aug04	Pioneer Foods (Pty) Ltd and Golden Lay Farms Ltd, Golden Lay Farms KZN (Pty) Ltd, Golden Lay Foods(Pty) Ltd
826.	58/LM/Aug04	Bid Industrial Holdings (Pty) Limited and G. Fox & Company (Pty) Limited
827.	70/LM/Sep04	Manupont 198 (Pty) Limited and IST Group Limited
828.	55/LM/Aug04	Pioneer Foods (Pty) Ltd and Accolade Trading Company (Pty) Ltd
829.	57/LM/Aug04	Astral Operations Ltd and Earlybird Farm (Pty) Ltd
830.	61/LM/Aug04	Established Investments (Pty) Limited and National Cereal Holdings (Pty) Limited
831.	49/LM/Jun04	Fluxrab Investments no. 90 (Pty) Ltd and Metcash Trading Africa Ltd and Metcash Aviation (Pty) Ltd
832.	59/LM/Aug04	Reunert Ltd and African Cables Ltd
833.	46/LM/Jun04	Pioneer Foods (Pty) Ltd and John Moir's, a division of Bromor Foods (Pty) Ltd
834.	12/LM/FEB04	Inzuzo Furniture Manufacturers (Pty) Ltd and PG Bison Holdings (Pty) Ltd
835.	47/LM/Jun04	AVI Limited and Denny Mushrooms (Pty) Limited
836.	37/LM/Apr04	Wesbank, a division of FirstRand Bank Ltd and The Industrial Machinery Finance Book
837.	51/LM/Jul04	Clidet 500 (Pty) Limited and Ferro Enamels (Pty) Ltd, Ferro Plastics (Pty) Ltd, Ferro Industrial Products (Pty) Limited
838.	53/LM/Jul04	Masstores (Pty) Limited and Hentiq 2869 (Pty) Ltd, Rivonia Produce & Hardware (Pty) Limited
839.	42/LM/Jun04	BOE Holdings Limited and Company Unique Finance (Pty) Limited
840.	32/LM/Apr04	Xstrata SA (Pty) Ltd and South African Chrome & Alloys Ltd
841.	36/LM/Apr04	Johnnic Publishing Ltd and New Africa Publications Ltd
842.	02/LM/Jan04	Murray & Roberts Limited and The Cementation Company (Africa) Limited
843.	44/LM/Jun04	Growthpoint Properties Limited and Lyons Corporate Lease Fund (Pty) Ltd

844.	45/LM/Jun04	Lonmin Plc and Eastern Platinum Limited and Western Platinum Limited
845.	27/LM/Apr04	Selcovest 23 (Pty) Ltd and Basfour 2776 (Pty) Ltd
846.	28/LM/Apr04	The Industrial Development Corporation of South Africa and Prilla 2000 (Pty) Ltd
847.	17/LM/Mar04	Afgri Operations Ltd and Natal Agricultural Co-Operative Ltd
848.	08/LM/Feb04	LNM Holdings N V and Iscor Ltd
849.	30/LM/Apr04	Kagiso Financial Services and Infrastructure Finance Corporation
850.	26/LM/Apr04	VenFin Limited and Intervid Limited
851.	10/LM/Feb04	ABSA Bank Limited and Avena Leaseplan South Africa (Pty) Limited
852.	06/LM/Feb04	Ubuntu-Ubuntu Commercial Enterprises (Pty) Ltd and Anglovaal Mining Ltd, Avgold Ltd, Harmony Gold Mining Company Ltd
853.	25/LM/Apr04	Tsebo Outsourcing Group (Pty) Ltd and Drake & Scull FM (SA) (Pty) Ltd
854.	22/LM/Apr04	Main Street No 188 (Pty) Ltd and Mondi Limited's Newsprint Business
855.	18/LM/Mar04	Standard Bank of South Africa Limited and Global Resorts South Africa (Pty) Ltd
856.	14/LM/Mar04	Engen Petroleum Limited and ExxonMobil South Africa (Pty) Limited
857.	21/LM/Apr04	JP Morgan Chase & Co and Bank One Corporation
858.	05/LM/Feb04	Edgars Consolidated Stores Ltd and Pick n Pay Retailers (Pty) Ltd
859.	09/LM/Feb04	Clidet no.485 (Pty) Ltd and Pamodzi Foods (Pty) Ltd
860.	68/LM/Dec03	Vodacom Group (Pty) Ltd and Smartphone SP (Pty) Ltd, trading as Smartcall
861.	37/LM/Jul03	Allied Technologies (Pty) Ltd and NamITech Holdings Limited
862.	07/LM/FEB04	Zelpy 1734 (Pty) Ltd and Metallurg South Africa (Pty) Ltd
863.	59/LM/Oct03	Tiso Consortium and NAIL
864.	56/LM/Oct03	Imperial Group (Pty) Ltd and Clover SA (Pty) Ltd
865.	04/LM/Jan04	Bidvest Group Limited and McCarthy Limited
866.	69/LM/Dec03	Castellina Investments (Pty) Ltd and Pepkor Ltd
867.	70/LM/Dec03	General Motors LAAM Holdings and Boco (Pty) Ltd
868.	78/LM/Dec03	Housing Solutions no. 39 (Pty) Ltd and Stock Buildings Africa (Pty) Ltd
869.	79/LM/Dec03	Barloworld Motor (Pty) Ltd and Avis Southern Africa Limited
870.	80/LM/DEC03	Growthpoint Properties Limited and 100 Grayston Drive Property (Pty) Ltd, Block E Power Station Properties (Pty) Ltd
871.	66/LM/Nov03	Anglogold Limited and Driefontein Consolidated (Proprietary) Limited
872.	73/LM/Dec03	Cool Ideas 262 (Pty) Limited and Crossroads (Pty) Ltd and others
873.	57/LM/Oct03	Sasol Oil (Pty) Ltd and Exel Petroleum (Pty) Ltd
874.	77/LM/Dec03	Investec Property Group Limited and Nestlé (South Africa) (Pty) Ltd
875.	71/LM/Dec03	Nedbank Limited and Retail Brands Interafrica (Pty) Ltd and Continental Beverages (Pty) Ltd, Retail Brands Interafrica (Pty) Ltd
876.	89/LM/Dec02	Nedbank Limited and Fasic Africa (Pty) Limited

877.	41/LM/Aug03	Boart Longyear (a division of Anglo Operations Limited) and Huddy (Pty) Ltd, Huddy Rock Tools (Pty) Ltd
878.	60/LM/Oct03	Pioneer Foods (Pty) Ltd and Ceres Investment Company Ltd
879.	44/LM/Aug03	Fluxrab Investments no. 58 (Pty) Ltd and Seven Eleven Africa (Pty) Ltd
880.	55/LM/Oct03	Main Street 150 (Pty) Ltd and Profert (Pty) Ltd & Rowan Tree 16 (Pty) Ltd
881.	36/LM/Jul03	Chemical Services Limited and Ondeo Nalco SA (Pty) Limited
882.	35/LM/Jul03	Aquarius platinum (South Africa) (Proprietary) Limited, Rustenburg Platinum Mines Limited and Aquarius Platinum (South Africa) (Proprietary) Limited, Rustenburg Platinum Mines Limited
883.	38/LM/Jul03	Super Group Trading (Proprietary) Limited and Businesses of DNA Supply Chain Investments Limited
884.	42/LM/Aug03	Heinz Foods South Africa (Pty) Ltd and Today Frozen Foods (a business unit of Pioneer Foods (Pty) Ltd),John West (a division of Heinz SA (Pty) Ltd),Heinz Wellington (Pty) Ltd
885.	30/LM/Jun03	Ethos Private Equity Fund IV and The Tsebo Outsourcing Group (Pty) Ltd
886.	34/LM/Jul03	Momentum Property Investments (Pty) Ltd and Bonatla Property Holdings Limited
887.	10/LM/Mar03	Daun et Cie AG and Kolosus Holdings Limited
888.	29/LM/Jun03	Primegro Properties Ltd and Growthpoint Properties Ltd
889.	39/LM/Jul03	Mettle Operations Limited and Clidet 433 (Proprietary) Limited
890.	24/LM/May03	The Clicks Organisation (Pty) Ltd and Purchase Milton and Associates (Pty) Ltd,Milton & Associates (Pty) Limited, J&G Purchase (Pty) Limited, Leon Katz (Pty) Limited
891.	31/LM/Jul03	Sun Air Limited & Kersaf Investments Limited and Sun International (SA) Holdings (Pty) Ltd, Sun International (SA) Ltd
892.	32/LM/Jun03	Liberty Group Limited and Investec Employee Benefits Limited
893.	26/LM/May03	Sasol Mining (Pty) Ltd and Anglo Operations Ltd (acting through its Anglo Coal division)
894.	28/LM/Jun03	Xstrata South Africa (Pty) Ltd and Char Technology (Pty) Ltd
895.	08/LM/Feb/02	DISTILLERS CORPORATION (SA) LIMITED and STELLENBOSCH FARMERS WINERY LIMITED
896.	17/LM/Apr03	Trufit (Pty) Ltd and Cobra Group (Pty) Ltd
897.	07/LM/Feb03	Chemical Services Limited and Senmin and Alkylates business of the Karbochem Division of Sentrachim Limited
898.	12/LM/Mar03	Tiger Brands Limited and Enterprise Foods (Pty) Ltd
899.	16/LM/Apr03	Bytes Technology Group Ltd and Xerox South Africa (Pty) Ltd
900.	13/LM/Mar03	Kulungile Metals (Pty) Ltd and Abkins Steel Corporation (Pty) Ltd and Abkins Steel Services (Pty) Ltd
901.	22/LM/May03	Main Street 112 (Pty) Ltd and Harvey Fibreglass Holdings (Pty) Ltd
902.	20/LM/Apr03	The Used Equipment Company (Pty) Ltd and Barloworld Equipment (Pty) Ltd and BLC Plant Company (Pty) Ltd
903.	15/LM/Apr03	Clidet No. 441 (Pty) Ltd and Global Roofing Solutions, a Division of Dorbyl Limited
904.	18/LM/Apr03	Main Street 87 (Pty) Ltd, Tosaco Commercial Services (Pty) Ltd and Total South Africa (Pty) Ltd,Total Petroleum Renaissance

(Pty) Ltd

905.	09/LM/Feb03	Corpcapital Investments (Pty) Ltd and CICL Investment Holdings (Pty) Ltd
906.	02/LM/Jan03	Pepkor Limited and Fashaf (Pty) Ltd
907.	60/LM/Aug02	JD Group Limited and Profurn Limited
908.	14/LM/Mar03	ABSA Group Limited and Meeg Bank Limited
909.	92/LM/Dec02	Wesbank, a division of FirstRand Bank Ltd and Barloworld Leasing, a division of Barloworld Capital
910.	46/LM/Jun02	Anglo American Holdings Ltd and Kumba Resources Ltd, with the Industrial Development Corporation intervening
911.	93/LM/Dec02	Masstores (Pty) Ltd and Masana Limited & MGS Handy House (Pty) Ltd
912.	08/LM/Feb02	Distillers Corporation (SA) Ltd and Stellenbosch Farmers Winery Group Ltd
913.	25/LM/May03	Harmony Gold Mining Company Limited and African Rainbow Minerals Gold Limited
914.	96/LM/DEC02	New Tsogo Sun Holdings (Pty) Ltd and Southern Sun Holdings Ltd/Tsogo Sun Holdings (Pty) Ltd
915.	04/LM/Jan03	Compagnie Gervais Danone, Clover Beverages and Clover SA (Pty) Ltd, Danone-Clover (Pty) Ltd
916.	74/LM/Oct02	Medi-Clinic Corporation Limited and Curamed Holdings Limited
917.	03/LM/Jan03	Friedshelf 243 (Pty) Ltd and Gillette South Africa (Pty) Ltd
918.	88/LM/DEC02	Clidet No. 409 (Pty) Ltd and Dorbyl Engineering – a Division of Dorbyl
919.	75/LM/Oct02	Coleus Packaging (Pty) Ltd and Rheem Crown Plant, a division of Highveld Steel and Vanadium Corporation Limited
920.	84/LM/Dec02	Old Mutual South Africa Limited and BoE Life Assurance Company Limited
921.	86&87/LM/Dec02	Old Mutual [South Africa] Limited, Nedcor Investment Bank Holdings Limited and Franklin Templeton Nib Asset Management [Proprietary] Limited
922.	63/LM/Sep02	Silicon Technology (Pty) Ltd and Calcium Carbide Division of Sentrachem Limited
923.	78/LM/Oct02	Rustenburg Platinum Mines Ltd, The royal Bafokeng Nation and Rustenburg Platinum Mines Ltd, the Royal Bafokeng Nation
924.	71/LM/Sep02	Afgri Operations Ltd and Laeveld Korporatiewe Beleggings Beperk
925.	45/LM/Jun02	Industrial Development Corporation of South Africa Ltd and Anglo-American Holdings Ltd
926.	85/LM/Dec02	Reutech Engineering Services (Pty) Ltd and ATC (Pty) Ltd
927.	82/LM/Nov02	ABSA Group Limited and PSG Investment Bank Holdings
928.	69/LM/SEP02	Clicks Pharmaceutical Wholesale (Pty) Ltd and New United Pharmaceutical Distributors (Pty) Ltd
929.	73/LM/Oct02	Datatec Limited and Affinity Logic Holdings (Pty) Ltd
930.	55/LM/AUG02	Rustenburg Platinum Mines, Eastern Platinum Mines Ltd, “Pandora Joint Venture” and Rustenburg Platinum Mines Ltd
931.	68/LM/Sep02	Prochem (Pty) Ltd and Duravin Chemicals (Pty) Ltd
932.	66/LM/Sep02	Clidet No. 408 (Pty) Ltd and MB Technologies Limited

933.	33/LM/May02	Sandown Motor Holdings (Pty) Ltd and McCarthy Limited, Others
934.	81/LM/Nov02	Edgars Consolidated Stores Limited and Central News Agency (Pty) Ltd, Consolidated News Agency (Pty) Ltd
935.	79/LM/Oct02	Adcock Ingram Holdings (Pty) Ltd, Adcock Ingram Intellectual Property (Pty) Ltd and Robertsons (Pty) Ltd, Robertsons Homecare (Pty) Ltd
936.	77/LM/Oct02	South African Airways (Pty) Ltd and Air Chefs (Pty) Ltd
937.	70/LM/Sep02	Edgars Consolidated Stores Limited and Elixir Marketing (Pty) Ltd
938.	76/LM/Oct 02	Corvest (Pty) Ltd and Merchant Commercial Finance (Pty) Ltd
939.	62/LM/Aug02	Capital Alliance Life Limited and Saambou Life Assurers Limited
940.	51/LM/Jul02	Standard Bank of South Africa, Real Equity Trust and Stellenbosch Vineyards Limited
941.	54/LM/Aug02	Armgold/ Harmony Freegold Joint Venture Company (Pty) Ltd and St Helena Gold Mines Limited
942.	61/LM/Aug02	Toyota Motor Corporation (Japan) and Toyota South Africa (Pty) Ltd
943.	53/LM/Aug02	Edgars Consolidated Stores Limited and Retail Apparel Group (Pty) Ltd
944.	50/LM/Jul02	Safmarine Container Lines N.V. and Unicorn Lines Division of Unicorn Freight Services (Pty) Ltd
945.	73/LM/Oct02	Datec Limited and Affinity Logic Holdings (Pty) Ltd
946.	56/LM/Aug02	Foodcorp (Pty) Ltd and Boksborg Oil Mill an asset of Unilever South Africa
947.	39/LM/May02	Genbel Securities Limited and Genbel South Africa Limited
948.	47/LM/Jul02	Clidet no. 403 (Pty) Ltd and Midas Ltd
949.	23/LM/Apr02	Pioneer Foods (Pty) Ltd and SAD Holdings Limited
950.	29/LM/May02	Nampak Limited and Malbak Limited, Namakwa Sands (a division of Anglo Operations Limited)
951.	30/LM/May02	HfSA Investment BV and Hernic Ferrochrome (Pty) Ltd
952.	26/LM/Apr02	Sasol Holding in Germany GMBH and Schumann Sasol International AG
953.	06/LM/Jan02	Mondi Limited and Kohler Cores and Tubes a division of Kohler Packaging Limited
954.	28/LM/May02	Santam Limited and Allianz Risk Transfer Limited
955.	31/LM/May02	Crown Gold Recoveries (Pty) Ltd and Industrial Development Corporation of South Africa Limited, Khumo Bathong Holdings (Pty) Ltd
956.	27/LM/May02	Clidet No. 390 (Pty) Ltd and Unihold Limited
957.	21/LM/Apr02	V&A Waterfront Holdings (Pty) Ltd and V&A Waterfront Properties Ltd, V&A Waterfront Marina (Pty) Ltd, Victoria & Alfred Waterfront (Pty) Ltd
958.	32/LM/May02	Firststrand Bank Limited and Profurn Limited
959.	09/LM/Feb02	Sociedad Investments (Pty) Ltd and Furnex Stores (Pty) Ltd
960.	22/LM/Apr02	Imperial Holdings Limited and Imperilog Limited
961.	18/LM/Mar02	Cape of Good Hope Bank Limited and A division of Nedcor Investment Bank Limited

962.	52/LM/Jul02	Pick 'n Pay Retailers (Pty) Ltd and Boxer Holdings (Pty) Ltd
963.	17/LM/Mar02	Islandsite Investments 149 (Pty) Ltd and Chlorchem, a division of Sentrachem Limited
964.	15/LM/Feb02	Afrox Healthcare Ltd and Wilgers Hospital Ltd
965.	12/LM/Feb02	Xstrata Ltd and Xstrata SA (Pty) Ltd, Duiker Mining (Pty) Ltd
966.	19/LM/Mar02	Clidet No. 366 (Pty) Ltd and Dorbyl Metals Trading, a division of Dorbyl Limited
967.	10/LM/Feb02	Bidvest Group Limited and Voltex Holdings Limited
968.	16/LM/Mar02	Imperial Holdings Limited and Murnau Holdings (Pty) Ltd
969.	03/LM/Jan02	Old Mutual Bank Limited and Permanent Division of Nedbank Limited, a division of Nedcor Bank Limited
970.	11/LM/Feb02	OTK Agri Products Trading, a division of OTK Limited and Farm Feed Services, a division of Afribrand Trading (Pty) Limited
971.	67/LM/Dec01	ISCOR Limited and Saldanha Steel (Pty) Ltd
972.	02/LM/Jan02	Cray Valley Resins SA (Pty) Ltd and Coates Bros SA (Pty) Ltd
973.	55/LM/Sep01	Unilever Plc, Unifoods, a division of Unilever South Africa (Pty) Ltd, Hudson & Knight, a division of Unilever South Africa (Pty) Ltd, Robertsons Foods (Pty) Ltd, Robertsons Food Service (Pty) Ltd and The Competition Commission of South Africa, CEPPWAWU, FAWU, NUFBWSAW
974.	05/LM/Jan02	Clidet No. 383 (Pty) Ltd (being a joint venture between Harmony Gold Mining Company Limited and African Rainbow Minerals (Pty) Ltd) and The Free State Operations of AngloGold Limited
975.	66/LM/Oct01	Shell South Africa (Pty) Ltd and Tepco Petroleum (Pty) Ltd
976.	07/LM/Jan02	Caixa Geral de Depositos S. A. and Mercantile Lisbon Bank Holdings Ltd
977.	01/LM/Jan02	ABN AMRO BANK N.V. and PAMODZI FOODS (PTY) LIMITED
978.	65/LM/Nov01	Bid Industrial Holdings (Pty) Ltd and Magnum Security (Pty) Ltd
979.	61/LM/Nov01	Nestlé (South Africa) (Pty) Ltd and Dairymaid-Nestlé (Pty)(Ltd)
980.	68/LM/Dec01	Unitrans Motors (Pty) Ltd and The Motor Division of Senwes Ltd
981.	63/LM/Nov01	Imperial Holdings Limited and Magnis Pretoria (Pty) Ltd
982.	58/LM/Oct01	Acerinox S.A and Newco
983.	56/LM/Oct01	Bidvest Group Limited and Paragon Business Communications Limited
984.	59/LM/Oct01	Clidet 323 (Pty) Ltd and MCG Industries (Pty) Ltd
985.	49/LM/Sep01	AMB Holdings Ltd and AMB Private Equity Partners Ltd
986.	53/LM/Sep01	AFROX Healthcare Limited and AMALGAMATED Hospitals Limited
987.	54/LM/Sep01	Two Rivers Platinum Limited and ASSMANG Limited
988.	44/LM/Jul01	DaimlerChrysler South Africa (Pty) Ltd and Sandown Motor Holdings (Pty) Ltd
989.	39/LM/Jul01	Massmart Holdings Ltd, Jumbo Cash and Carry (Pty) Ltd and Massmart Holdings Ltd, Picardi Liquors (Pty) Ltd - Sip 'n Save division
990.	43/LM/Jul01	Siemens Business Services (Pty) Ltd and Unihold Business Solutions Division of Unihold Group Ltd
991.	40/LM/Jul01	BoE Bank Limited and Cashbank Limited

992.	42/LM/Jul01	New Republic Bank Limited, a subsidiary of Saambou Holdings Limited and FBC Fidelity Bank Limited, a subsidiary of Nedcor Bank Limited
993.	35/LM/Jun01	Imperial Holdings Limited and Megafreight Investments (Pty) Ltd, Megafreight Services (Pty) Ltd, J.H.Bachmann & Company (Pty) Ltd
994.	38/LM/Jun01	WesBank, a division of First Rand Bank Limited and BoE Bank Limited
995.	34/LM/Jun01	Standard Corporate and Merchant Bank, a division of the Standard Bank of South Africa Limited and PROCHEM (Pty) Ltd
996.	23/LM/May01	Schumann Sasol (South Africa) (Pty) Ltd and Price's Daelite (Pty) Ltd
997.	30/LM/May01	Comparex Holdings Limited and Persetel Q Data Africa (Pty) Ltd
998.	31/LM/May01	PSG Investment Bank Holdings Ltd and Real Africa Durolink Holdings Ltd
999.	33/LM/Jun01	Imperial Holdings Limited and Tourism Investment Corporation Limited
1000.	27/LM/May01	BoE Bank Limited and Credcor Limited
1001.	32/LM/Jun01	BHP Steel Southern Africa (Pty) Ltd, BHP Minerals International Exploration Inc., BHP World Exploration Inc. and Billiton SA Limited and Mine & Smelter Investments (Pty) Ltd
1002.	21/LM/Apr/01	Nestle (SA) (PTY) Limited, Pets Products (PTY) Limited, Heinz South Africa (PTY) Limited, Tiger Foods Limited
1003.	19/LM/Mar01	Investec Group Ltd and Fedsure Investments Ltd, Fedsure International Ltd
1004.	20/LM/Mar01	DB Investments SA and De Beers Consolidated Mines Ltd, De Beers Centenary AG
1005.	07/LM/Feb01	Chevron Corporation and Texaco Inc.
1006.	03/LM/Jan01	Randfontein Estates Ltd and AngloGold Ltd
1007.	06/LM/Feb01	Siemens Aktiengesellschaft AG and Atecs Mannesmann AG
1008.	04/LM/Jan01	Framatome Societe Anonyme and Siemens AG
1009.	09/LM/Feb01	Fabvest Investment Holding Limited and National Cereal Holdings (Pty) Ltd
1010.	89/LM/Oct00	Trident Steel (Proprietary) Limited ("Trident Steel") and Dorbyl Limited ("Dorbyl")
1011.	96/LM/Nov00	Sasol Chemical Industries Ltd and Fedmis Joint Venture Ltd
1012.	99/LM/Dec00	The Chase Manhattan Corporation and JP Morgan and Company Incorporated
1013.	91/LM/Oct00	Sasol Chemical Industries Ltd and Polyfos (Pty) Ltd
1014.	90/LM/Oct00	Roadway Logistics (Pty) Ltd and Roadway Transport (Pty) Ltd
1015.	83/LM/Jul00	The Tongaat-Hulett Group Limited and Transvaal Suiker Beperk, Middenen Ontwikkeling (Pty) Ltd, Senteeko (Edms)Bpk, New Komati Sugar Miller's Partnership, TSB Bestuursdienste
1016.	84/LM/Aug00	Aveng Limited and LTA Limited
1017.	81/LM/Aug00	Telkom SA Ltd, TPI Investments and Praysa Trade 1062 (Pty) Ltd
1018.	77/LM/Jul00	Franco-Nevada Mining Corporation Ltd and Gold Fields Ltd
1019.	86/LM/Aug00	Investec Group Ltd and Frame Group Ltd
1020.	82/LM/Jul00	Ford Motor Company and Land Rover Group Ltd
1021.	75/LM/Jul00	The Bidvest Group Ltd and I-Fusion Holdings Ltd

1022.	72/LM/Jun00	BP Amoco Plc and Burmah Castrol Plc
1023.	78/LM/Jul00	JD Group Limited and Ellerine Holdings Limited
1024.	65/LM/May00	Nasmedia and Paarl Post Web Printers (Pty) Ltd
1025.	73/LM/Jun00	De Beers Consolidated Holdings Group Limited and Industrial and Commercial Holdings Group Limited
1026.	45/LM/Apr00	Nasionale Pers Limited and Educational Investment Corporation Limited
1027.	71/LM/Jun00	Grayston Prop Number 005 (Pty) Limited and The Gateway Partnership
1028.	46/LM/Apr00	Secotrade 72 (Pty) Ltd, Imperial Holdings Ltd and Hyundai Motor Distributors (Pty) Ltd
1029.	48/LM/Apr00	Aerospatiale Matra SA and Daimlerchrysler Aerospace AG
1030.	41/LM/Mar00	Imperial Holdings Limited and The Cold Chain (Pty) Ltd
1031.	50/LM/Apr00	The Dow Chemical Company and Union Carbide Corporation
1032.	40/LM/Mar00	Anglo American plc, Billiton plc, Pechiney Electrometallurgie (France) and Silicon Smelters (Pty) Ltd and Samancor Ltd
1033.	36/LM/Mar00	De Beers Consolidated Mines Limited and Anglovaal Mining Limited
1034.	18/LM/Feb00	Ceramic Industries Ltd and The Vitro Punched Tile Business of Anglo Operations Ltd
1035.	12/LM/Feb00	Pioneer Foods (Pty) Ltd and The cereal breakfast division of National Brands Ltd
1036.	14/LM/Feb00	Santam Limited and Guardian National Insurance Company Limited
1037.	19/LM/Feb00	Bromor Foods (Pty) Ltd and National Brands Ltd
1038.	23/LM/Feb00	Ford Motor Company and South African Motor Corporation (Pty) Ltd
1039.	16/LM/Feb00	Harmony Gold Mining Company Ltd and Randfontein Estates Limited
1040.	37/LM/Mar00	Alexander Forbes Group (Pty) Ltd and Persetel Q Data Trading (Pty) Ltd
1041.	29/LM/Mar00	Distillers Corporation (SA) Ltd and Hygrace Holdings (Pty) Ltd
1042.	10/LM/Feb00	Fraser Fyfe (Pty) Ltd and Anglo Operations Ltd
1043.	08/LM/Jan00	Imperial Holdings Ltd and Safair (Pty) Ltd
1044.	17/LM/Feb00	AECI Coatings, PPG Securities Industries and AECI
1045.	24/LM/Feb00	Finance Corp Ltd and National Airways, Finance Corp Ltd
1046.	13/LM/Feb00	Ford Motor Company (USA) and Volvo Cars Corporation (Sweden)
1047.	17/LM/Dec99	The Bidvest Group Ltd and Island View Storage Ltd
1048.	26/LM/Dec99	Engen Petroleum Ltd and Zenex Oil (Pty) Ltd
1049.	19/LM/Dec99	Ensemble Trading 184 (Pty) Ltd and
1050.	10/LM/Nov99	Vodacom, GSM and Vodacom, Teljoy Holdings
1051.	11/LM/Nov99	Quadrant Container Lines Ltd and Tiger Foods Industries Ltd
1052.	06/LM/Oct99	Highveld Steel, Vanadium Corp and Steelbank Merchants
1053.	04/LM/Jan00	Lexshell 296 Investment Holdings and Molope Group Ltd

BOTSWANA

1. Decision on the Proposed Acquisition of Supasave and Megasave by Choppies Enterprises.
2. Merger Decision No 15 2015 - Khoemacau And Discovery Copper Botswana.
3. AON Botswana (Pty) Ltd and AON Holdings Botswana (Pty), MER/034/2012
4. Mer/023/2014 Transport Holding Ltd and Mulbridge Holding Ltd
5. Mer/032/2012 AON Holdings Botswana (Pty) Ltd and Glenrand MIB
6. Mer/022/2012 Vivo Energy Holdings and Shell Botswana
7. MER/016/2012 Clover SA and Clover Botswana
8. Merger Decision No. 1 2015 - Mulbridge Transport And Transport Holdings.
9. MER/033/2012 Botswana Medical Aid Society (BOMAID) and Medical Rescue International Botswana (MRI Botswana)
10. MER/007/2014 Tsetseng Retail Group (Pty) Ltd trading as Spar Supermarket and Mojanaga (Pty) Ltd Investments Trading as Tutume Spar.
11. MER/004/2012 Easigas and Puma merger
12. MER/002/2013 ECH Management Solutions Botswana (ECH Botswana) and Servest (Pty) Limited (Servest).
13. MER/005/2011 Defy Botswana and Defy South Africa merger.
14. MER/003/2013 Tosas Botswana and Raubex Group Limited (Raubex)
15. Merger Decision No 3 2015 - Steinhoff International And Pepkor Holdings
16. Merger Decision No 2 2015 - Ethos And Nampak
17. Merger Decision Bcl Investments and Tati Nickel Mining 12-12-14

KENYA

1. British American Investments Company Limited (Britam) and Real Insurance Company Limited
2. Premier Food Industries Limited and Trufoods Limited and Kabazi Cannery Limited

NAMIBIA

1. The Namibian Supreme Court, Namibian Competition Commission, Minister of Trade and Industry and Wal-Mart Stores Inc., SA 41/2011, (2011).
2. Wal-Mart Stores Inc. v Chairperson of Namibian Competition Commission and Others (A 61/2011) (2011) NAHC 126.
3. Navachab gold mine by Guinea Fowl Investments (2013).
Namox Namibia (Pty) Ltd // Lpg Business Of Puma Energy Namibia (Pty), 2013apr0019mer.

OTHER JURISDICTIONS:

EU

1. Case C-209/10 Post Danmark A/S v Konkurrencerådet [2012]
2. Case T-168/01 GlaxoSmithKline Services Unlimited v Commission of the European Communities [2006] ECR II-02969
3. T-Mobile Netherlands BV v. Raad van bestuur van de Nederlandse Mededingingsautoriteit. Case C-8/08, 2009 E.C.R. I-4529
4. Konkursverket v. TeliaSonera Sverige AB Case C-52/09, 2011 E.C.R. I-00527

UK

1. British Sky Broadcasting Group plc / ITV plc (2007)
1. Lloyds TSB/HBOS (2008)

USA

1. Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 447 (1977).
2. Illinois Brick Co. v. Illinois 431 U.S. 720 (1977).

ANNEXES

Annex I NATIONAL COMPETITION LAW (BY REGION / PERIOD OF ADOPTION)

Period	North America	Europe	Asia	Africa	Latin American and the Caribbean	Oceania	Total
1881- 1890	Canada USA						2
1891-1900							
1901-1910							
1911-1920							
1921-1930			Philippines*		Argentina*		2
1931-1940							
1941-1950		UK	Japan				2
1951-1960		Finland Sweden Norway France Ireland Germany Netherlands Israel Belgium		South Africa	Colombia Chile		12
1961-1970		Switzerland Spain Luxembourg	Pakistan India	Senegal	Brazil		7

Period	North America	Europe	Asia	Africa	Latin American and the Caribbean	Oceania	Total
1971-1980		Greece	Thailand			Australia	
		1	1			1	3
1981-1990		Portugal Poland Austria Cyprus Italy Denmark	South Korea Sri Lanka	Kenya Gabon Algeria		New Zealand	
		6	2	3		1	12
1991-2000		Russia Czech Republic Bulgaria Greenland Belarus Moldova Iceland Estonia Ukraine Slovakia Malta Turkey Albania Liechtenstein Croatia Romania Hungary Latvia Lithuania Slovenia	Taiwan Tajikistan Azerbaijan Mongolia Kyrgyzstan Uzbekistan Georgia Yemen Indonesia Armenia	Tunisia Cote d'Ivoire Mali Tanzania Burkina Faso Zambia Zimbabwe Malawi Cameroon	Peru Mexico Costa Rica Panama Venezuela Uruguay Jamaica Saint Vincent and the Grenadines	Fiji	
		20	10	9	8	1	48

Period	North America	Europe	Asia	Africa	Latin American and the Caribbean	Oceania	Total
2001-2010		Bosnia & Herzegovina	Kazakhstan	Morocco	Honduras	Papua New Guinea	
		Kosovo	Lao, PDR	Togo	El Salvador		
		Macedonia	Singapore	Mauritius	Nicaragua		
		Serbia	Vietnam	Ethiopia	Guyana		
		Jersey	Jordan	Namibia	Bolivia		
		Montenegro	Saudi Arabia	Egypt	Barbados		
		Faroe Island	Qatar	Madagascar	Trinidad and Tobago		
			Nepal	Swaziland	Dominican Republic		
			Kuwait	Gambia			
			China	Seychelles			
			Syria	Botswana			
			Malaysia	Burundi			
			Iraq				
			7	13	12	8	1
2011-2015		Andorra	Hong Kong	Rwanda	Ecuador		
		Guernsey	UAE	Mozambique	Paraguay		
			Bangladesh				
		2	3	2	2		9
Total	2	49	34	28	22	4	138

Source: Based on review by author of a wide variety of resources including, national competition laws, competition authorities' websites, peer review reports of the UNCTAD, the OECD and the CUTS, the database of the ICN and various academic work.

*It should be noted that Argentina's first competition law was enacted in 1923 following, to a great extent the Sherman Act. However, Argentina adopted a modern competition law as of 19980. Also, same thing applies to Philippines, which initially adopted an antitrust law in 1925, and a modern competition law in 2015.

We have consulted with the UN Department of Economic and Social Affairs country database to obtain a list of countries of the world. Available here <http://unstats.un.org/unsd/methods/m49/m49regin.htm>.

ANNEX II COMPETITION LAWS IN AFRICA

Region	Country	Year law was Adopted /Revised	Functioning Competition Authority*
North Africa	Algeria	1989, 1995	X
	Egypt	2005, 2014	X
	Libya	N/A	N/A
	Morocco	2001	X
	Sudan	N/A	N/A
	Tunisia	1991, 2015	X
	Western Sahara	N/A	N/A
West Africa	Benin++	N/A	N/A
	Burkina Faso++	1994	X
	Cape Verde	N/A	N/A
	Gambia	2007	X
	Guinea	N/A	N/A
	Guinea-Bissau++	N/A	N/A
	Ivory Coast++	1991	X
	Liberia	N/A	N/A
	Mali++	1992	X
	Mauritania	N/A	N/A
	Niger++	N/A	N/A
	Nigeria	N/A	N/A
	Saint Helena	N/A	N/A
	Senegal+/++	1994	X
	Sierra Leone	N/A	N/A
Togo++	1999, 2002	X	

Region	Country	Year law was Adopted /Revised	Functioning Competition Authority*
East Africa	Burundi	2010	Non information available
	Comoros	N/A	N/A
	Djibouti	N/A	N/A
	Eritrea	N/A	N/A
	Ethiopia	2003	X
	Kenya	1988, 2010	X
	Madagascar	2005	X +++
	Malawi	1998	X
	Mauritius	2003	X
	Mayotte	N/A	N/A
	Mozambique	2013	X+++
	Reunion	N/A	N/A
	Rwanda	2012	X +++
	Seychelles	2009	X
	Somalia	N/A	N/A
	South Sudan	N/A	N/A
	Tanzania	1994, 2003	X
	Uganda	N/A	N/A
	Zambia	1994, 2010	X
Zimbabwe	1996	X	
Central Africa	Angola	N/A	N/A
	Cameroon	1998	X
	Central African Republic	N/A	N/A

Region	Country	Year law was Adopted /Revised	Functioning Competition Authority*
	Chad	N/A	N/A
	Congo	N/A	N/A
	Democratic Republic of the Congo (DRC)	N/A	N/A
	Equatorial Guinea	N/A	N/A
	Gabon	1989,1998	No information available
	Sao Tome and Principe	N/A	N/A
Southern Africa	Botswana	2009	X
	Lesotho	N/A	N/A
	Namibia	2003	X
	South Africa	1955, 1998	X
	Swaziland	2007	X

Source: Compilation by author. Country list based on UN Stats of countries and regions. Available at

<http://unstats.un.org/unsd/methods/m49/m49regin.htm#developed>

*Competition enforcement bodies - no specific institutional structure.

+ In 1965, Senegal adopted a business practices and price regulation law pursuant to which a cartel commission was to be established to examine whether or not business agreements that may restrict competition in the market can be authorized. However since Senegal was following a planned economy at the time what was adopted was not competition law, as we know it today. This remained law on the books until the country adopted market economy in 1994.

++ WAEMU Competition Regulations

+++ Not fully functional / at set-up stage

ANNEX III INTERNATIONAL AND REGIONAL RELATIONS - COMPETITION LAW IN AFRICA

Region	Country	Year law was adopted	International Finance Institutions (Structural Loans)	EU Agreements			Regional Trade Agreements (competition law provisions)
				Bilateral Agreements	Association Agreement	Interregional Agreement	
North Africa	Algeria	1989, 1995	X		X	Agadir	Agadir
	Egypt	2005			X	Agadir	COMESA Agadir
	Morocco	2001	X		X	Agadir	COMESA
	Tunisia	1991	X		X	Agadir	Agadir
West Africa	Burkina Faso	1994				EU - West Africa: ECOWAS - WAEMU	WAEMU ECOWAS
	Gambia	2007	X			EU - West Africa: ECOWAS - WAEMU	ECOWAS
	Ivory Coast	1991	X			EU - West Africa: ECOWAS - WAEMU	WAEMU ECOWAS
	Mali	1992				EU - West Africa: ECOWAS - WAEMU	WAEMU ECOWAS
	Senegal	1994	X			EU - West Africa: ECOWAS - WAEMU	WAEMU ECOWAS
	Togo	1999, 2002				EU - West Africa: ECOWAS - WAEMU	WAEMU ECOWAS
East Africa	Burundi	2010	X			EU - EAC	COMESA ECA

Region	Country	Year law was adopted	International Finance Institutions (Structural Loans)	EU Agreements			Regional Trade Agreements (competition law provisions)
				Bilateral Agreements	Association Agreement	Interregional Agreement	
	Ethiopia	2003	X				COMESA
	Kenya	1988, 2010	X			EU – EAC	COMESA EAC
	Madagascar	2005				SADC - EU EPA Interim EPA	COMESA SADC
	Malawi	1998	X			SADC - EU EPA	COMESA SADC
	Mauritius	2003	X			SADC - EU EPA Interim EPA	COMESA SADC
	Mozambique	2013	X			SADC - EU EPA	SADC
	Rwanda	2012				EU – EAC	COMESA EAC
	Seychelles	2009	X			SADC - EU EPA Interim EPA	COMESA SADC
	Tanzania	1994, 2003	X			EU – EAC	EAC SADC
	Zambia	1994, 2010	X			SADC - EU EPA	COMESA SADC
	Zimbabwe	1996	X			SADC - EU EPA Interim EPA	COMESA SADC
Central Africa	Cameroon	1998	X			Interim EPA	CEMAC
	Gabon	1989/1998	X				CEMAC

Region	Country	Year law was adopted	International Finance Institutions (Structural Loans)	EU Agreements			Regional Trade Agreements (competition law provisions)
				Bilateral Agreements	Association Agreement	Interregional Agreement	
Southern Africa	Botswana	2009				SADC - EU EPA	SADC SACU
	Namibia	2003				SADC - EU EPA	SADC SACU
	South Africa	1955, 1979, 1998		X		SADC - EU EPA	SADC SACU
	Swaziland	2007				SADC - EU EPA	COMESA SADC SACU

Source: Compilation by author based on review of WBG database for operations in countries and other international financial institutions and various regional trade agreements

ANNEX IV ECONOMIC WELFARE OBJECTIVES AND NON ECONOMIC WELFARE OBJECTIVES IN COMPETITION LAWS IN AFRICA

Region	Country	Economic Welfare Objectives						Non-economic Welfare Objectives					
								Industrial Policy / Grey Zone Objectives		Public Interest Objectives			
		Consumer welfare	Competitive / lower prices	Consumer choice	Competition	RBP's	Economic Efficiency	Protect SMEs	Export/ Int. comp.	Public interest / benefit	Progress & Development	Fairness & Equity	Other (non-economic welfare)
North Africa	Algeria	X			X	X	X	X		X			Employment Price liberalization
	Egypt				X	X	X	X		X			
	Morocco	X			X		X	X	X	X		X	Employment Industrial development Price liberalization Hoarding
	Tunisia	X				X	X		X			X	Price liberalization
West Africa	Gambia		X	X	X	X		X		X	X		

Region	Country	Economic Welfare Objectives						Non-economic Welfare Objectives					
								Industrial Policy / Grey Zone Objectives		Public Interest Objectives			
		Consumer welfare	Competitive / lower prices	Consumer choice	Competition	RBPs	Economic Efficiency	Protect SMEs	Export/ Int. comp.	Public interest / benefit	Progress & Development	Fairness & Equity	Other (non-economic welfare)
	WAEMU						X		X				Integration in regional and globalized economies Combat Inflation
East Africa	Ethiopia				X						X	X	Consumer protection Hoarding
	Kenya	X			X		X	X	X	X		X	Creating a business-friendly environment to attract investments Consumer Protection / Welfare Reconcile the national obligations regarding competition under the regional integration initiatives and international best practices Employment Particular industrial sector or regions' ability to compete

Region	Country	Economic Welfare Objectives						Non-economic Welfare Objectives					
								Industrial Policy / Grey Zone Objectives		Public Interest Objectives			
		Consumer welfare	Competitive / lower prices	Consumer choice	Competition	RBPs	Economic Efficiency	Protect SMEs	Export/ Int. comp.	Public interest / benefit	Progress & Development	Fairness & Equity	Other (non-economic welfare)
	Malawi		X		X	X	X		X	X	X	X	Freedom of trade Facilitate the expansion of the base of entrepreneurship Employment
East Africa	Mauritius				X								Safety of goods & services
	Seychelles				X					X		X	Safety of goods & services
	Tanzania				X		X						Protect consumer Protect the environment
	Zambia		X	X	X			X	X	X		X	Employment
	Zimbabwe		X	X	X	X			X	X		X	Employment Tariffs
Central Africa	Cameroon				X		X				X		

Region	Country	Economic Welfare Objectives						Non-economic Welfare Objectives					
								Industrial Policy / Grey Zone Objectives		Public Interest Objectives			
		Consumer welfare	Competitive / lower prices	Consumer choice	Competition	RBPs	Economic Efficiency	Protect SMEs	Export/ Int. comp.	Public interest / benefit	Progress & Development	Fairness & Equity	Other (non-economic welfare)
Southern Africa	Botswana	X	X	X	X		X	X	X	X	X	X	Employment Non-commercial socio-economic objective National strategic interest Social benefit Particular industrial sector or regions' ability to compete
	Namibia		X	X	X		X	X	X	X	X	X	Employment Social and economic welfare of Namibians Non-commercial socio-economic objective Particular industrial sector or regions' ability to compete

Region	Country	Economic Welfare Objectives						Non-economic Welfare Objectives					
								Industrial Policy / Grey Zone Objectives		Public Interest Objectives			
		Consumer welfare	Competitive / lower prices	Consumer choice	Competition	RBPs	Economic Efficiency	Protect SMEs	Export/ Int. comp.	Public interest / benefit	Progress & Development	Fairness & Equity	Other (non-economic welfare)
	South Africa		X	X	X	X	X	X	X	X	X	X	Employment Social and economic welfare) Conduct designed to achieve a non-commercial socio-economic objective Particular industrial sector or regions' ability to compete
Southern Africa	Swaziland	X			X	X		X	X		X	X	Particular industrial sector or regions' ability to compete

Source: Based on classification of objectives in Barnes (1989) and OECD (2003) and data from ICN Survey (2007), Waked (2015) as well as data collected by author after review of national competition laws, relevant policy documents and IOs reports

ANNEX V MERGER CONTROL REGIMES IN SELECT SUB-SAHARAN AFRICAN COUNTRIES

Country	Merger test	PICs analysis	PICs List	PICs Categories					
				Industrial sector /region	Employment	SMEs/ Citizens' empowerment /BEE	International competitiveness /Export promotion	National plans/ socio-eco. development	Other
Botswana	Hybrid	Balancing	Non-exhaustive	X	X	X	X	☐	☐
Burundi	SLC	Lexical order	Non-exhaustive	☐	☐	☐	X	X	☐
Cameroon	SLC	Lexical order	Non-exhaustive	☐	☐	☐	☐	X	☐
Gabon	Hybrid	Lexical order	Non-exhaustive	☐	☐	☐	☐	X	☐
Gambia	SLC	Lexical order	Non-exhaustive	☐	☐	☐	☐	X	☐
Kenya	Hybrid	Balancing	Non-exhaustive	X	X	X	X	☐	☐
Madagascar	[SIEC]	Lexical order	Exhaustive	☐	☐	☐	X	☐	☐
Malawi	SLC	Balancing	Non-exhaustive	☐	X	☐	X	X	☐
Mauritius	SLC	Lexical order	Non-exhaustive	☐	☐	☐	☐	☐	X
Mozambique	SIEC	Lexical order	Non-exhaustive	☐	☐	X	X	X	☐
Namibia	Hybrid	Balancing	Non-exhaustive	X	X	X	X	☐	☐
Nigeria	SLC	Balancing	Exhaustive	X	X	X	X	☐	☐
Rwanda	SLC	Lexical order	Exhaustive	☐	X	X	X	☐	☐
Seychelles	SLC	Lexical order	Non-exhaustive	☐	☐	☐	☐	☐	X
South Africa	SLC	Balancing	Exhaustive	X	X	X	X	☐	☐
Swaziland	Hybrid	Lexical order	Non-exhaustive	X	☐	X	X	☐	☐
Tanzania	Dominance	Lexical order	Exhaustive	☐	☐	☐	☐	X	X

Country	Merger test	PICs analysis	PICs List	PICs Categories					
				Industrial sector /region	Employment	SMEs/ Citizens' empowerment /BEE	International competitiveness /Export promotion	National plans/ socio-eco. development	Other
Zambia	Hybrid	Balancing	Non-exhaustive	X	X	X	X	X	□
Zimbabwe	SLC	Lexical order	Non-exhaustive	□	X	X	X	□	□

Source: Based on data collected by author after review of national competition laws.

- Lexical order represents a model that allows PICs weighing only if the merger is anti-competitive.
- Balancing represents that a merger may be prohibited or conditioned even if there is no anti-competitive effects pursuant to balancing the different considerations.
- Non-exhaustive includes also very broad objectives such as socio-economic development and national development plans such as in the case of Malawi, Cameroon, Gambia and Botswana.

ANNEX VI REGIONAL TRADE AGREEMENT IN AFRICA - COMPETITION LAWS / REGULATIONS

No.	Agreement	Countries	Comments
1.	Economic and Monetary Community of Central Africa (CEMAC)	Cameroon, Central African Republic, Chad, Republic of the Congo, Equatorial Guinea and Gabon.	In 1999, the Council of Ministers of CEMAC adopted Regulations on Competition to regulate anticompetitive business practices within the CEMAC region and to prevent undue competition from non-members as well as Regulations on state practices affecting trade between member states.
2.	West African Economic and Monetary Union (WAEMU)	Benin, Burkina Faso, Cote d'Ivoire, Guinea Bissau, Mali, Niger, Senegal and Togo.	A number of regulations/directives were introduced in 2002/2003 addressing anticompetitive practices, state aid and procedural aspects. (Order No. 2013-662 of 20 September 2013, Rule No.02/2002 relating to anti-competition practices in the WAEMU, Rule No.03/2002 of WAEMU relating to procedures applicable to concerted practices and abuse of dominant position inside the WAEMU).
3.	The Common Market of Eastern and Southern Africa (COMESA)	Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.	Competition Regulations and Rules adopted in December 2004. The COMESA Competition Commission became operational on 14 January 2013.

No.	Agreement	Countries	Comments
4.	East African Community (EAC)	Burundi, Kenya, Rwanda, Tanzania and Uganda. [South Sudan acceded in 2016]	The Competition Act was introduced in 2007 and Competition Regulations were introduced in 2010.
5.	Economic Community Of West African States (ECOWAS)	Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.	ECOWAS Competition Law was adopted in 2008
6.	Agadir	Egypt, Jordan, Morocco and Tunisia.	A free trade agreements, part of the Barcelona Process, that requires harmonization of competition laws and co-operation between member countries.
7.	Southern African Development Community (SADC)	Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.	In 2007, SADC established a committee for consultation and cooperation on competition and consumer protection issues. SADC members signed a Declaration on Regional Cooperation on Competition and Consumer Policies in 2009.
8.	Southern African Customs Union (SACU)	Botswana, Lesotho, Namibia, South Africa and Swaziland.	The new SACU agreement was signed in 2002. It included provisions on cooperation in competition enforcement and on unfair trade practices.

No.	Agreement	Countries	Comments
9.	COMESA, SADC and EAC Tripartite	Member states of the three Communities/Common Market.	An agreement between COMESA, SADC and EAC to set up Tripartite Framework was reached in 2008. In 2011, negotiations for the establishment of a free trade area commenced. The Tripartite Free Trade Agreement has an annex addressing matters of competition law and policy. It is still under negotiation.

Source: Based on review of relevant treaties, information available on the relevant websites of these regional trade blocks (when available) and IOs reports and academic papers on the topic

ANNEX VII REGIONAL TRADE AGREEMENT IN AFRICA – OVERLAPPING MEMBERSHIP

No.	Country	CEMAC	WAEMU	COMESA	EAC	ECOWAS	SADC	SACU	Agadir
1.	Algeria								
2.	Angola			X			X		
3.	Benin		X			X			
4.	Botswana						X	X	
5.	Burkina Faso		X			X			
6.	Burundi			X	X				
7.	Cameroon	X							
8.	Cape Verde					X			
9.	Central African Republic	X							
10.	Chad	X							
11.	Comoros			X					
12.	The Republic of Congo	X							
13.	Cote d'Ivoire		X			X			
14.	Democratic Republic of the Congo (DRC)			X			X		
15.	Djibouti			X					
16.	Egypt			X					X
17.	Eritrea			X					
18.	Equatorial Guinea	X							

No.	Country	CEMAC	WAEMU	COMESA	EAC	ECOWAS	SADC	SACU	Agadir
19.	Ethiopia			X					
20.	Gabon	X							
21.	Gambia					X			
22.	Ghana					X			
23.	Guinea					X			
24.	Guinea Bissau		X			X			
25.	Kenya			X	X				
26.	Lesotho			X			X	X	
27.	Liberia					X			
28.	Libya			X					
29.	Madagascar			X			X		
30.	Malawi			X			X		
31.	Mali		X			X			
32.	Mauritius			X			X		
33.	Morocco								X
34.	Mozambique			X			X		
35.	Namibia			X			X	X	
36.	Niger		X			X			
37.	Nigeria					X			
38.	Rwanda			X	X				
39.	Senegal		X			X			
40.	Sierra Leone					X			
41.	Seychelles			X			X		

No.	Country	CEMAC	WAEMU	COMESA	EAC	ECOWAS	SADC	SACU	Agadir
42.	South Africa						X	X	
43.	South Sudan			X	X				
44.	Sudan			X					
45.	Swaziland			X			X	X	
46.	Tanzania			X	X		X		
47.	Togo		X			X			
48.	Tunisia								X
49.	Uganda			X	X				
50.	Zambia			X			X		
51.	Zimbabwe			X			X		

Source: Based on review of relevant treaties, information available on the relevant websites of these regional trade blocks (when available) and IOs reports and academic papers on the topic

ANNEX VIII NOTE ON COMPETITION PROVISIONS UNDER RTAs IN AFRICA (INTEGRATION MODEL)

a. The CEMAC

With the hope of overcoming severe economic crisis and the growing ambition of more integration, the CEMAC was formed to replace the UDEAC in 1994.¹⁰⁸⁶ The ultimate goal is to create a common market comprising of the six member states.¹⁰⁸⁷ The CEMAC project is quite ambitious, providing for economic and monetary union in addition to common financial, legal and economic institutions and policies. The treaty is considered to be superior to the national laws of the member states.¹⁰⁸⁸ To complement its economic and fiscal union with a political one, CEMAC also established a Community Parliament and a Regional Court of Justice in 2000.

The CEMAC was the first among the sub-regional trade agreements in Africa to adopt a regional competition law in 1999.¹⁰⁸⁹ Similar to the EU system, the law targets anticompetitive practices affecting trade between member states. Provisions on cartels, merger control, abuse of dominance and state aid are included in the law.¹⁰⁹⁰ Mergers significantly detrimental to the regional economy are blocked. The existence of community legislation does not preclude the existence of national competition laws, since both are expected to play different roles addressing competition issues arising on the two different levels: the national and the regional.¹⁰⁹¹ Out of its six member countries, only Gabon and Cameroon have adopted competition laws.

The CEMAC Competition Regulations establish three CEMAC institutions to regulate and enforce competition law in the regional market. These are: the CEMAC Commission, the Court of Justice, and the CEMAC Competition Council (CCC).¹⁰⁹² The Commission has jurisdiction to decide on all matters relating to competition.¹⁰⁹³ It can also adopt decisions of

¹⁰⁸⁶ The treaty came into force in 1999. Member states are Cameroon, Central African Republic, Chad, Republic of the Congo, Equatorial Guinea and Gabon. About CEMAC. Available at <http://www.cemac.int/apropos>. Last visited 1 September 2016. See also *Traite Instaurant la Communauté Économique et Monétaire de l'Afrique Centrale (CEMAC Treaty)*. Available at http://www.wipo.int/wipolex/en/other_treaties/text.jsp?file_id=201451. Last visited 1 September 2016.

¹⁰⁸⁷ *Id.*

¹⁰⁸⁸ The CEMAC Treaty expressly states that community laws are directly applicable to states. Ali Zafar & Keiko Kubota, *Regional Integration in Central Africa: Key Issues*, AFRICA REGION WORKING PAPER SERIES NO. 52 (2003).

¹⁰⁸⁹ Règlement n°1/99/UEAC-CM-639 du 25 juin 1999 (CEMAC Competition Regulations). Available at <http://www.droit-afrique.com/upload/doc/cemac/CEMAC-Reglement-1999-01-pratiques-commerciales-anticoncurrentielles.pdf>. Last visited 1 September 2016.

¹⁰⁹⁰ Articles 24 & 25 of the CEMAC Treaty.

¹⁰⁹¹ "The implementation of Community competition law is a joint responsibility of a Community competition authority, a Community Court of Justice, and national regulatory bodies." Report by the Secretariat. Trade Policy Review: The Central African Economic and Monetary Community (CEMAC). (2013), p. 47.

¹⁰⁹² Articles 6-8 of the CEMAC Competition Regulations.

¹⁰⁹³ *Id.*

the CCC relating to offences of anticompetitive behaviour, and common rules of competition, and can stop abuse dominance.¹⁰⁹⁴ It also ensures the prevention of state subsidies.¹⁰⁹⁵ Article 9 accords competence to evaluate mergers with a community dimension to the CCC. Nonetheless, member states may evaluate mergers of national interest in public health, trade on weapons and financial stability.¹⁰⁹⁶ According to Article 72 of the above law, the CEMAC Court of Justice is the final decision making body of any matter relating to anticompetitive behaviour. In this regard, Article 9 provides that national courts dealing with competition issues can request clarity either from the CCC or the Court of Justice.

The CEMAC Competition Council has not yet been set up and accordingly there are very few developments to report.¹⁰⁹⁷

b. The EAC

“*One people one destiny*” is the principle on which the East African Community (EAC) was created.¹⁰⁹⁸ The EAC also has grand plans for economic and political integration of the community with a three-step plan to set up a common market for goods, labour and capital, have a common currency, and establish a federation between its members in 2015.¹⁰⁹⁹ The EAC functions through a Council of Ministers and various committees. It has its own legislative assembly and a court of justice.

The EAC agreements stipulate provisions for adopting a common protocol on competition.¹¹⁰⁰ The Protocol on the Establishment of the EAC prohibits any practice that “*adversely affects free trade...which has as its objective or effect, the prevention, restriction or distortion of competition within the Community*”.¹¹⁰¹ The EAC Legislative Assembly adopted a competition law in 2006.¹¹⁰² Similar to COMESA, it tackles economic activities which have

¹⁰⁹⁴ *Id.*

¹⁰⁹⁵ Secretariat. 2013. P. 47 Except for With the exception of socio-cultural aid such as social assistance, aid for the victims of natural disasters, aid for underdeveloped regions and aid intended to promote culture, the preservation of the heritage or the protection of the environment.

¹⁰⁹⁶ Article 14 the CEMAC Competition Regulations.

¹⁰⁹⁷ In CEMAC institutional limitations arise, inter alia, from the fact that the competition council is a temporary rather than permanent body. This, in turn, creates instability and lack of confidence in the new regional institutions. Gal, UNIVERSITY OF TORONTO LAW JOURNAL, (2010) p.16.

¹⁰⁹⁸ Member states are: Burundi, Kenya, Rwanda, Tanzania and Uganda. South Sudan acceded in 2016. See Quick Facts About EAC. Available at <http://www.eac.int/about/EAC-quick-facts>. Last visited 1 September 2016.

¹⁰⁹⁹ The East African Community After Ten Years Deepening Integration. (2012).

¹¹⁰⁰ Article 75 provides for the establishment of a Customs Union For purposes of this Chapter, the Partner States agree to establish a Customs Union details of which shall be contained in a Protocol which including competition matters. See 1 The Treaty for the Establishment of the East African Community http://www.eac.int/sites/default/files/docs/treaty_eac_amended-2006_1999.pdf. Last visited 1 September 2016.

¹¹⁰¹ See Article 21 of the EAC Protocol.

¹¹⁰² It aims to “promote and protect fair competition in the Community, to provide for consumer welfare, to establish the East African Community Competition Authority and for related matters. See The EAC Competition Act 2006 and EAC Competition Regulations 2009. Available at <http://www.eac.int/about/key-documents>. Last visited 1 September 2016.

an effect on the common market and, in this regard, has supremacy over national laws. Out of its five members, only Uganda has yet not adopted a national competition law. The objective of the EAC competition policy and law is to maintain and promote competition and consumer welfare.¹¹⁰³ The prohibited acts under the law include restraints by enterprises such as cartels, market or customer allocation, bid rigging, abuse of dominance, merger control and state aid.¹¹⁰⁴ It also provides for an EAC Competition Authority, which has not yet materialized.¹¹⁰⁵ There is a merger control regime under the EAC competition law. Mergers or acquisitions will not come into effect before their notification to, and approval of, the authority.¹¹⁰⁶ The Council of Ministers may override the authority's objection to a merger or acquisition if the Council is satisfied that the merger fulfils an overriding public interest. Out of the five member states of the EAC, Uganda does not yet have competition law enacted.¹¹⁰⁷

To date there is no EAC competition authority in place and accordingly no enforcement of the law.¹¹⁰⁸

c. The ECOWAS

The Economic Community of West African States (ECOWAS) aims to achieve “*collective self-sufficiency*” for its member states by creating a single large trading bloc.¹¹⁰⁹ The main four bodies that carry the work of the community are the Commission, Community Parliament, Court of Justice and the ECOWAS bank for Investment and Development.¹¹¹⁰ It also serves as a peacekeeping force in the region, and this is one of its most successful functions.¹¹¹¹

Pursuant to recommendations of the EPA Ministerial Monitoring Committee, ECOWAS adopted a community competition policy in 2007 and a competition act in 2008.¹¹¹² Among

¹¹⁰³ Article 3 EAC Competition Act 2006.

¹¹⁰⁴ Parts II,II and VI of the EAC Competition Act 2006.

¹¹⁰⁵ The authority should be formed of five commissioners each representing a member state. Part IX of the EAC Competition Act 2006.

¹¹⁰⁶ If Authority doesn't notify the person within 45 days parties may proceed with the merger. Article 12 (2) of the EAC Competition Act 2006.

¹¹⁰⁷ Kenya ,Tanzania, Burundi and Rwanda adopted competition laws. See Annex II above.

¹¹⁰⁸ About ECOWAS: Basic Information. Available at <http://www.ecowas.int/about-ecowas/basic-information/>. Last visited 1 September 2016.

¹¹⁰⁹ Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. Mauritania was a member until 2000. *Id.*

¹¹¹⁰ See Economic Community of West African States (ECOWAS) revised Treaty. Available at <http://www.ecowas.int/wp-content/uploads/2015/01/Revised-treaty.pdf>. Last visited 1 September 2016.

¹¹¹¹ Hanink & Owusu, JOURNAL OF AFRICAN ECONOMIES, (1998).

¹¹¹² The Regional Competition Policy Framework of 2007 and Supplementary Act No/SA.2/12/08 (as amended by Supplementary Act No/SA.4/7/13. Available at www.ecowas.int/publications/en/actes_add_commerce/1.Regional_competition_policy_Framework-final-P.pdf. Last visited 1 September 2016. Ngom argues that the ECOWAS did not concern itself with the elaboration of competition policy until recently because of the diversity of the legal systems of member states (communists, socialists and capitalists). He also criticized the policy for giving too much focus to attracting FDI rather than answering development needs of the community. Mbissane Ngom,

the main purposes of the act is economic integration and consumer welfare.¹¹¹³ The act tackles agreements, practices, mergers, and distortions caused by member states likely to have an effect on trade within ECOWAS.¹¹¹⁴ It prohibits concerted agreements and practices restricting competition and the abuse of dominant position, while allowing exemptions by category and on an individual basis. It also addresses state aid in specific sectors.¹¹¹⁵

The Act envisages the creation of a competition enforcement body that will have the power to investigate and issue decisions. The act capitalises on the expertise of its member states, which have a degree of knowledge of competition law by setting up a “Consultative Competition Committee” to supervise the activities of the authority.¹¹¹⁶ Currently, nine out of the fifteen member states do not have competition law.¹¹¹⁷ The act sets out the authority’s duties and powers, as well as sanctions and procedures. An appeal against the acts of the authority may be lodged at the Community Court of Justice which will hear the matter as an appellate court. Its decisions are final.

The progress of the ECOWAS regional competition law and institutions appears to be slow and information on its development is scarce.

Regional Integration and Competition Policy in the Economic Community of West African States (ECOWAS) Region in DREXL, Competition Policy and Regional Integration in Developing Countries. 2012, p122-125.

¹¹¹³ Article 3 of Supplementary Act No/SA.2/12/08.

¹¹¹⁴ Article 4 Supplementary Act No/SA.2/12/08.

¹¹¹⁵ Article 88 of the WAEMU Treaty. A fourth category of violations known as “anti-competitive practices attributable to government” was introduced on the basis of the provisions of Articles 4(a), 7 and 76 (c) of the UEMOA Treaty.

¹¹¹⁶ The ECOWAS Competition Authority was established in December 2008 by the “Supplementary Act A/SA.2/06/08 on the Establishment, Function of the Regional Competition Authority for ECOWAS.

¹¹¹⁷ These are: Benin, Cape Verde, Ghana, Guinea, Guinea Bissau, Liberia, Niger, Nigeria and Sierra Leon.