**LLM (International Trade, Investment and Business Law in Africa)**

# The importance of competition policy and law in managing foreign direct investment in the Tripartite Free Trade Area – lessons to be learnt from South Africa and the European Union

Submitted to the Faculty of Law, Department of Labour and Mercantile Law, University of Western Cape, in partial fulfilment of the requirements of the Master of Laws (LLM) degree in International Trade, Investment and Business Law in Africa

**By**

**Marilyn Heather Whale**

**Student No. 3481272**



**Prepared under the supervision of**

**Prof Riekie Wandrag**

**of the Faculty of Law,**

**University of Western Cape**

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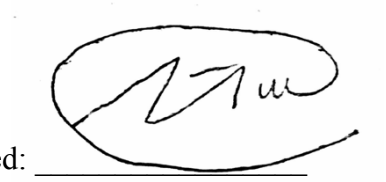
## DECLARATION

I, Marilyn Heather Whale, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

Signed: 

Marilyn Heather Whale

Date: 14 March 2018

This dissertation has been submitted for examination with my approval as University supervisor.



Signed: _____

Prof Riekie Wandrag

University of Western Cape

Date:

## DEDICATION

To my husband, Stephan, I dedicate this to you. Thank you for your support, love and encouragement throughout this endeavour.

**ACKNOWLEDGEMENT**

A special thank you to my family, I am truly grateful to each one of you for all your love and support.

I thank my supervisor Prof Wandrag for her valuable input and patience.

To each of my fellow classmates, you know who you are, this journey was made ever more worthwhile having had the opportunity to get to know each of you.

## LIST OF ABBREVIATIONS

| | |
|---|---|
| BTA | Bilateral Trade Agreements |
| CARICOM | Caribbean Community and Common Market |
| CAT | Competition Appeal Court |
| CLP | Competition Law and Policy Committee |
| COMESA | Common Market for Eastern and Southern Africa |
| COMESA CC | COMESA Competition Commission |
| CRR | Competition Rules and Regulations |
| CM | Common Market |
| CT | Competition Tribunal |
| CU | Customs Union |
| CUTS | Centre for Competition, Investment and Economic Regulation |
| DTI | Department of Trade and Industry |
| EC | European Council |
| EAC | East African Community |
| ECC | European Economic Community |
| EU | European Union |
| FDI | Foreign Direct investment |
| FTA | Free Trade Agreement |
| GATS | General Agreement on Trade in Services |

| | |
|---|---|
| GATT | General Agreement on Tariffs and Trade |
| GDP | Gross Domestic Product |
| ICER | International Centre for Economic Research |
| ICN | International Cooperation Network |
| IMF | International Monetary Fund |
| M&A | Merger and Acquisition |
| MERCOSUR | Mercado Comun del Cono Sur |
| MPCA | Maintenance and promotion of Competition Act of 1979 |
| MOU | Memorandum of Understanding |
| NAFTA | North American Free Trade Agreement |
| NCA | National Competition Authority |
| NTB | Non-tariff barriers |
| OECD | Organisation for Economic Cooperation and Development |
| PTA | Preferential Trade Agreement |
| REC | Regional Economic Community |
| RoO | Rules of Origin |
| SACU | Southern African Customs Union |
| SADC | South African Development Community |
| SAIIA | South African Institute of International Affairs |
| TFEU | Treaty on the Functioning of the European Union |

| | |
|---|---|
| TFTA | Tripartite Free Trade Area |
| TRIMs | Trade Related Investment Measures |
| TRIPs | Trade Related Aspects of Intellectual Property Rights |
| TTNF | Tripartite Trade Negotiation Forum |
| UNCTAD | United Nations Conference on Trade and Development |
| US | United States of America |
| WGTI | Working Group on the Relationship Between Trade and Investment |
| WTO | World Trade Organisation |

## KEYWORDS

Competition policy

Competition law

Foreign direct investment

Greenfield investments

Mergers and acquisitions

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## EXECUTIVE SUMMARY

With the coming into force of the Tripartite Free Trade Area (TFTA) and the anticipated increase in trade between TFTA members, the need to regulate multijurisdictional business transactions will likely create an anomaly, namely that transactions will necessarily fall outside of the ambit of TFTA members' national competition laws, alternatively, result in a duplication of efforts by several competition agencies, followed by conflicting outcomes.

This paper considers the relationship between competition policy and law and FDI and the options available for developing a regional competition regulatory framework within the TFTA. The paper reflects on both the benefits of developing a regional competition regulatory framework as well as the possible challenges that underscore such an approach.

The primary recommendation made is that the TFTA members should work collaboratively in order to draw on the experiences of both the European Union and South Africa in order to establish a regional competition policy and law framework that adequately enhances FDI within the region as well as provides sufficient cooperation and enforcement when dealing with anticompetitive practices.

# CHAPTER ONE

# INTRODUCTION

## 1.1 Background

Liberalising market access for foreign goods and services lies at the heart of international trade policy. Thus, in an era of ever increasing interactions of economies, cooperation around competition principles is necessary.[1] The rationale for this is that competition is of overwhelming importance for the functioning of market economies. However, the beneficial functioning of competition is not secured spontaneously and must be supported by domestic, regional and international action, in the form of competition policies (CP) and laws, which are enforced by properly skilled and resourced agencies and authorities.[2]

FDI is considered to be a primary driver of globalisation within Africa.[3] However, increased cross-border FDI has also internationalised anti-competitive behaviour and created competition-related spill overs beyond national boundaries, which has highlighted certain deficiencies in state and regional policies concerned with regulating cross-border transactions.[4] In addition, national laws and regulations often discriminate against FDI which in turn distorts international trade in much the same way as tariffs and other non-tariff barriers (NTBs) do.[5]



Although a multilateral agreement on CP and law has not come to fruition, bilateral (BTAs) and regional trade agreements (RTAs), and increased commitments at the WTO level, have lead to changes in domestic policies regarding the free flow of FDI.[6] Thus, governments are particularly

[1] Ehlermann C-D 'The International Dimension of Competition Policy' (1994) 17 *Fordham International Law Journal* 833.
[2] Voigt S 'The Economic Effects of Competition Policy: Cross-Country Evidence Using Four New Indicators' Working Paper No. 20/2006 (2006) 2 available at ftp://ftp.repec.org/opt/ReDIF/RePEc/icr/wp2006/ICERwp20-06.pdf (accessed 6 November 2016).
[3] United Nations Economic and Social Council Economic Commission for Africa Committee on Regional Cooperation and Integration Report *Investment agreements landscape in Africa* (October 2015).
[4] Nicholson, M, Sokol, D & Stiegert, K Assessing the efficiency of antitrust/competition policy technical assistance programs ICN Working Subgroup on Technical Assistance Implementation (2006) 3 available at http://internationalcompetitionnetwork.org/uploads/library/doc428.pdf (accessed 1 October 2016).
[5] Kennedy KC 'Foreign Direct Investment and Competition Policy at the World Trade Organization' (2000-2001) 33 *The George Washington International Law Review* 587.
[6] Nicholson M, Sokol D & Stiegert K Assessing the efficiency of antitrust/competition policy technical assistance programs ICN Working Subgroup on Technical Assistance Implementation (2006) 2 available at http://internationalcompetitionnetwork.org/uploads/library/doc428.pdff (accessed 1 October 2016).

motivated to conclude BTAs and RTAs aimed at facilitating economic growth between markets, as well as to adopt policies and regulations aimed at reducing barriers to FDI.[7]

In October 2008 the Heads of State of members of the Common Market for Eastern and Southern Africa (COMESA), the Eastern African Community (EAC) and Southern African Development Community (SADC) agreed to negotiate a Tripartite Free Trade Area (TFTA). The overarching objective of the TFTA is to address the challenges posed by multiple membership, to advance the ongoing harmonisation and coordination of initiatives of the three organisations, [8] as well as to secure the establishment of a larger market, with a single economic space, that boosts intra-regional trade.[9] As such, the TFTA will be a major stimulus to economic growth and an important investment channel which will facilitate FDI both from TFTA members as well as investors from outside of the TFTA. This is important, particularly since FDI is seen as a means to deal with major obstacles such as shortages of financial resources, technological constraints and skill shortages within the region.[10]

However, countries have struggled to address cross-border anticompetitive practices since they generally require regional and global collaboration to set and enforce competition rules.[11] This is because national competition laws and policies, or lack thereof entirely, are often insufficient to adequately protect competition within a free market. Considering that several of the TFTA members have already adopted domestic CP and laws and that competition frameworks exist within COMESA, EAC and SADC, there is a potential that FDI inflows into the region may be hampered by conflicting competition regulation and the lack of harmonisation. In addition, national competition authorities (NCAs)[12] may be ill equipped to prevent cross-border anti-



[7] Fournier J *The negative effect of regulatory divergence on foreign direct investment* (2015) 5 OECD Economics Department Working Paper, No. 1268 available at http://dx.doi.org/10.1787/5jrqgvg0dw27-en (accessed 12 November 2016).
[8] Dlagnekova P 'The Need to Harmonise Trade-Related Laws Within Countries of the African Union: An Introduction to the Problems Posed by Legal Divergence' (2009) *Fundamina* 1 1.
[9] Marawa Chair of the COMESA-EAC-SADC Tripartite Task Force *COMESA-EAC-SADC Tripartite Frameworks: State of Play* (February 2011) available at http://www.eac.int/index.php?option=com_content&id=581&Itemid=201 (accessed October 2017).
[10] Mwilima N *Foreign Direct Investment in Africa* (2003) 32 available at https://sarpn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pdf (accessed 24 October 2017).
[11] Bakhoum M 'A Dual Language in Modern Competition Law? Efficiency Approach versus Development Approach and Implications for Developing Countries' *World Competition: Law and Economics Review* 3 527.
[12] An NCA is any non-judicial authority which is responsible for the enforcement of CP and law.

competitive activities arising from such transactions.[13] As such, with the coming into force of the TFTA, CP and law amongst the members should be able to respond adequately to the anticipated increase in FDI, bearing in mind that the way in which the TFTA members address competition problems, will set the tone for business activities and economic development within the region for many years to come.[14]

Outside of the TFTA, significant efforts have been made to ensure that jurisdictions adopt common principles and tools for the analysis of anti-competitive conduct and mergers. Today, despite the different wording in national competition statutes, there are many authorities that agree on the goals of competition law, the principles underpinning a sound CP, and on the appropriate tools to investigate and assess business conduct and transactions.[15] Thus, because an increasing number of competition law cases have a cross-border dimension, effective co-operation between NCAs is increasingly important. Cooperation has also improved because of the increasing number of co-operation agreements between NCAs or the inclusion of competition related commitments within RECs. Although these agreements are typically BTAs, the most significant exception and most successful example of an REC that includes extensive CP and law commitments is that of the European Union (EU). Furthermore, South Africa (SA), which is a TFTA member as well as a member of COMESA and SADC, is a top investor within Africa as well as the top receiver of FDI.[16] SA is thus an important trading partner of other African countries and has an important role to play within the TFTA.[17]



### 1.2 Problem Statement

With the coming into force of the TFTA and the intended focus on encouraging FDI within the region, the lack of cooperation and harmonisation on CP and law or a region wide competition

[13] Bakhoum M 'A Dual Language in Modern Competition Law? Efficiency Approach versus Development Approach and Implications for Developing Countries' *World Competition: Law and Economics Review* 3 527.
[14] Nicholson, M, Sokol, D & Stiegert, K Assessing the efficiency of antitrust/competition policy technical assistance programs ICN Working Subgroup on Technical Assistance Implementation (2006) 3 available at http://internationalcompetitionnetwork.org/uploads/library/doc428.pdf (accessed 1 October 2016).
[15] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 374 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[16] Clark V 'Investment governance in the Tripartite Free Trade Area' in Hartzenberg T, Erasmus G, Grinsted Jensen H et al *Cape to Cairo: Exploring the Tripartite FTA Agenda* (2013) 77.
[17] Drexl J *Competition Policy and Regional Integration in Developing Countries* (2012) 241.

framework to regulate cross-border transactions, could create an anomaly, namely that transactions will be beyond the reach of TFTA members' national competition laws, alternatively, result in a duplication of efforts by several NCAs and conflicting outcomes.

Thus, the increasingly cross-border dimension of business activities, together with the increase in the number of NCAs in the region, creates complexities for cases with multi-jurisdictional elements. Importantly, businesses seek certainty and the predictable application of competition law, which can only be achieved through some form of cooperation within a regional setting.[18]

As such, it is clear that in the process of negotiating the TFTA, members need to consider how they are going to co-operate in order to address anticompetitive practices resulting from cross-border FDI transactions, to ensure that the interests of the host countries and foreign investors are achieved. Simply put, there is no effective economic community without a robust competition regime in place to regulate FDI and while investment and competition policies, are distinct and separate, have an increasing international dimension, are intertwined and would both benefit from enhanced regional cooperation.[19]

### 1.3 Research hypothesis

The research examines the assumption that CP and law have an important role in regulating FDI within the TFTA and further assumes that the EU and SA will provide valuable insight for developing a suitable regional CP and law framework for regulating FDI within the TFTA.

### 1.4 Aim of research

This study aims to evaluate the relationship between FDI and CP and law within the TFTA with a view to identifying crucial lessons from the EU and SA that are vital for the development of a regional CP and law framework for application in the TFTA.

[18] Bakhoum M 'A Dual Language in Modern Competition Law? Efficiency Approach versus Development Approach and Implications for Developing Countries' *World Competition: Law and Economics Review* 3 499.
[19] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) 14.

## 1.5 Research Questions

The overarching question that this paper seeks to address is how best to construct a regional CP and law framework that takes into consideration the important role that CP and law has in regulating FDI within the TFTA. In order to answer this question, the following sub-questions will be addressed:

1. What is the relationship between CP and law in regulating FDI?
2. What mechanisms and models for a regional competition regime exist?
3. What are the existing legal frameworks governing CP and law within the TFTA, COMESA, EAC and SADC?
4. What are the challenges for CP and law within the legal frameworks of the TFTA, COMESA, EAC and SADC?
5. What lessons for developing a regional CP and law framework within the TFTA can be taken from the approach taken in the EU and SA?

## 1.6 Scope of study



The study will focus on determining what the relationship is between FDI and CP and law and what models exist for developing a regional competition framework within a REC. The study predominantly considers the mechanisms for CP and law regulation within the COMESA, EAC and SADC on an individual basis as well as collectively under the TFTA and whether the EU and SA models for CP and law regulation can provide lessons for developing a regional CP and law framework within the TFTA.

## 1.7 Research methodology

The research methodology used for this study is based on computer and library study. The primary sources of information will be case law, treaties, legislation, protocols, memorandum of understandings, journal articles and books written by experts and organisations within the field of

study. The secondary sources will include information obtained from additional electronic resources and databases.

A comparative study approach will be applied to determine the experiences of other regions in order to obtain insight into the development of a regional CP and law framework for the TFTA. The comparison is limited to the EU, as the most successful regional competition regime in the world, and SA which is identified as the top host and investor of FDI within Africa.

### 1.8 Significance of study

This paper will provide a useful evaluation of the relationship between CP, law and FDI and models for developing cooperation in RECs. Furthermore, the study will consider the frameworks for regulating CP and law within COMESA, EAC and SADC and what lessons can be taken from the EU and SA experience for developing a sound CP and law framework within the TFTA. In addition, the study will contribute towards the existing literature on the prospective benefits and challenges of developing a regional competition regulatory framework and fill the gap in this regard insofar as the TFTA is concerned.

### 1.9 Sequence of chapters

The topic under examination will be discussed in five chapters.



**Chapter One**

Chapter one provides background to the research. In addition, it sets out the contextual nature of the research insofar as it identifies the problem and outlines the methodology and approach used.

**Chapter Two**

This chapter provides in general terms a conceptual and theoretical framework for the paper, by discussing the concepts of FDI, CP, competition law, the relationship between these concepts within the context of international trade, globalisation and regionalism as well as models for CP and law within RECs.

**Chapter Three**

Chapter three will consider CP and law governance within the context of the TFTA currently under negotiation. The chapter analyses the CP and law frameworks within COMESA, EAC and SADC and identifies the challenges with these frameworks.

**Chapter Four**

This chapter examines both the EU and SA's approach to CP and law and seeks to verify whether there are specific lessons to be learned from the experiences of the EU and SA which can be applied to developing a regional competition framework within the TFTA.

**Chapter Five**

Chapter five concludes the research and makes recommendations that the TFTA should consider when developing a regional competition framework.

## 1.10 Conclusion

As cross-border FDI intensifies within the TFTA, the importance of cooperation on CP and law at the regional level is of increasing importance. Research shows that while FDI and CP and law are distinct and separate, CP and law have a vital role to play in regulating FDI and therefore need to be considered when negotiating the TFTA.

Thus, although CP and law has traditionally been encapsulated within the realm of domestic law, the TFTA members need to consider how they are going to co-operate in order to address anticompetitive practices, to ensure that the interests of the host countries and foreign investors are achieved.

## CHAPTER TWO

## COMPETITION POLICY, COMPETITION LAW AND FDI

### 2.1 Introduction

It is recognised that appropriate and predictable competition policies are necessary to control FDI inflows into markets.[20] It is equally recognised that in the absence of an effective CP and law framework, the rewards from trade may be hampered by private restraints and non-tariff barriers.[21] Thus, CP and law have an important role both to support positive inward FDI and for providing sufficient safeguards for markets. However, since national competition policies are often poorly equipped to deal with the potential negative impact of cross-border anti-competitive practices, and in the absence of a binding multilateral framework on CP, the importance of regional CP and law becomes apparent in regulating FDI.

The chapter first broadly defines the concepts of FDI, competition, CP and competition law. The chapter goes on to evaluate the role of CP and law in regulating and encouraging FDI. The chapter then reflects on the development of CP and law on a multilateral level and lastly, considers regional CP and law and models for a regional competition framework within the TFTA.



### 2.2 FDI

#### 2.2.1 The nature of FDI

FDI generally refers to an investment which is made by a public or private investor to acquire a long term management interest,[22] in a firm which operates within a foreign jurisdiction.[23] The two

[20] Hoekman B & Holmes P 'Competition Policy, Developing Countries, and the World Trade Organization' 1 available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.8474&rep=rep1&type=pdff (accessed on 15 June 2016).
[21] Kennedy KC 'Foreign Direct Investment and Competition Policy at the World Trade Organization' (2000-2001) 33 *The George Washington International Law Review* 589.
[22] In this submission, a management interest is classified as a shareholding equivalent to at least 10 percent of the shares of the firm which have voting rights and represent ownership in the firm.
[23] Africa Labour Research Network Labour Resource and Research Institute *Foreign Direct Investment in Africa* (2003) 38 available at https://sarpn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pf (accessed 20 October 2016).

main types of FDI are greenfield investments and mergers and acquisitions (M&A).[24] From the perspective of an investor, the merger and acquisition process is a popular mode of investment typically for those investors who want to protect, consolidate and advance their positions by acquiring other companies that will enhance their competitiveness. [25] FDI commonly also takes the form of either a greenfield investment which in this submission refers to a transaction where a foreign firm enters a host market and starts an entirely new business.[26] An example of a greenfield investment within the TFTA is the building of a new brewery in Kisumu, Western Kenya, by East African Breweries Limited, which is a subsidiary of the Diageo group of companies, which has its holding company, Diageo plc registered in England and Wales.[27] An example of an M&A within the TFTA is the acquisition by the multinational Walmart, which is registered in the United States, of more than half of the shareholding in Massmart, a South African registered company.[28] From the perspective of an investor, the M&A process is a popular mode of foreign investment.[29] In Africa, most FDI investments have been through a M&A type process.[30] In sub-Saharan Africa, almost all FDI is in the form of M&As.[31]

### 2.2.2 The aim of FDI

FDI is a key economic flow in the global economy and generally has positive effects on domestic economies.[32] According to the Organisation for Economic Co-operation and Development



[24] Marinescu N *Greenfields and acquisitions: a comparative analysis* (2016) 9 1 available at http://webbut.unitbv.ro/BU2015/Series%20V/2016/BULETIN%20I%20PDF/33_Marinescu_BUT.pdf (accessed 22 November 2017).
[25] Africa Labour Research Network Labour Resource and Research Institute *Foreign Direct Investment in Africa* (2003) 38 available at https://sarpn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pf (accessed 20 October 2016).
[26] Africa Labour Research Network Labour Resource and Research Institute *Foreign Direct Investment in Africa* (2003) 38 available at https://sarpn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pf (accessed 20 October 2016).
[27] https://www.diageo.com/en/news-and-media/features/we-re-building-a-new-brewery-in-kenya-and-generating-thousands-of-new-jobs/
[28] Bonakele T, Beaty D, Rasool F and Kriek D *Examining the entry of Walmart into South Africa: A stakeholder management perspective* (2014) 38 *South African Journal of Labour Relations* 80.
[29] Elikplimi K & Agbloyer JA *Domestic Banking Sector Development and Cross Border Mergers and Acquisitons in Africa. Review of Development Finance* (2012) *Africa Growth Institute* 32 available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1028.6707&rep=rep1&type=pf (accessed 22 November 2016).
[30] UNCTAD World Investment Report 2015: Reforming International Investment Governance (2015).
[31] Nocke V & Yeaple S 'Cross-border mergers and acquisitions vs greenfield foreign direct investment: The role of firm heterogeneity' (2007) 72 *Journal of International Economics* 337.
[32] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997).

(OECD) FDI is:

> '[…] central to growth and sustainable development. It expands an economy's productive capacity and drives job creation and income growth [...]. It can serve as a conduit for the local diffusion of technology and expertise.'[33]

The International Monetary Fund (IMF) asserts that the benefits of FDI for a host country can be significant and may include enhanced productivity, technology and skills transfer to companies, amongst other benefits.[34] For investors, FDI equates to global growth and for host countries, FDI paves the way to internationalisation of resources and output, as well as development.[35] FDI has also been found to increase competition in host countries.[36] Pollen nevertheless contends that the effect of FDI on an economy will depend on a number of variables most importantly the quality of the host state's government and the coherence of a host states government policies.[37] The quality of a host states government is determined by considering a broad range of factors including government processes for making and implementing decisions; the quality of public administration by government departments; the provision and quality of public services within the state; the existence and quality of internal control and review mechanisms, the existence of mechanisms to prevent corruption, collusion and nepotism; and the presence of performance accountability measures for government institutions.[38]



FDI has become increasingly attractive for developing countries, as grants and other funding have decreased.[39] The South African Institute of International Affairs (SAIIA) analyses of FDI's

[33] OECD *Policy Framework for Investment 2015* (2015) 12.
[34] IMF *Foreign Direct Investment Trends* and Statistics (2003) 29 available at https://www.imf.org/external/np/sta/fdi/eng/2003/102803.pdf (accessed 12 September 2017).
[35] Murad M *The Role of Competition Policy and Law in Foreign Direct Investment: Issues and Future Developments* 247 available at http://slconf.uaeu.ac.ae/images/%D9%85%D8%A4%D8%AA%D9%85%D8%B1%2019%20%20%D8%A7%D9%84%D8%A7%D8%B3%D8%AA%D8%AB%D9%85%D8%A7%D8%B1/part%204%20E/10.pdf (accessed 22 September 2017).
[36] The World Bank *Guidelines on the Treatment of Foreign Direct Investment* (1992) available at http://www.italaw.com/documents/WorldBank.pdf (accessed on 12 September 2017).
[37] Pollan T *Legal Framework for the Admission of FDI* (2006) 2.
[38] Nofianti L and Susanti Suseno N *Factors affecting implementation of good government governance (GGG) and their implications towards performance accountability* 2014 100 available at https://ac.els-cdn.com/S1877042814058765/1-s2.0-S1877042814058765-main.pdf?_tid=8429df3e-8b09-44be-98fa-528827769519&acdnat=1521014913_f654cb7620d5f50c137fcf839b721c55 (accessed 14 March 2018).
[39] Singh A 'FDI, Globalization and Economic Development: Towards Reforming National and International Rules of The Game' (March 2005) Working Paper No. 304 4 ESRC Centre for Business Research, University of Cambridge:

importance to developing countries is aptly summarised as being 'a crucial factor in promoting and sustaining economic growth and development'.[40] Hailu confirms this view and holds that FDI 'is a potent instrument of economic development'.[41] Overall the liberalisation of investment opportunities, is seen as central to increasing competition and growth of economies.[42] However, the main trade-related benefit of FDI for developing countries, including those in the TFTA, lies in its ability to integrate the host economy with regional partners as well into the world economy.[43] The latter is an overarching goal of the TFTA and explains the important role attributed to FDI within the region.

As such, FDI flows between TFTA states as well as from foreign investors is extremely important for economic growth within the TFTA and will drive deeper integration within the region. FDI will also assist members in the TFTA to deal with major obstacles they face such as shortages of financial resources, technological constraints and skill shortages. However, the benefits for the TFTA to be derived from FDI cannot be achieved unless, as contended by Pollen, TFTA member's governments are of a sufficient quality and that coherent and adequately robust policies, including CP exist both on a national and regional level.

### 2.3 Competition

There is no single uniform definition given to the concept of competition. Competition can be described as the process by which cost efficient production is achieved in a structure where entry and exit are easy, a reasonable number of producers and consumers are present, and close substitution between products of different producers in a given industry, exists.[44]



Cambridge England available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.126.4498&rep=rep1&type=pdf (accessed 1 October 2016).

[40] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' Occasional Paper No. 111 (March 2012) 10 SAIIA: Cape Town available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).

[41] Hailu ZA 'Impact of Foreign Direct Investment on Trade of African Countries' (2010) 2 *International Journal of Economics and Finance* 122.

[42] WGTI *Communication from the European Community and its Members States: The Relationship between investment and competition policy* (12 November 1998) WT/WGTI/W/63 2.

[43] OECD *Foreign Direct Investment for Development: Maximising Benefits, Minimising Cost* (2002) 10 available at https://www.oecd.org/investment/investmentfordevelopment/1959815.pdf (accessed 1 October 2016).

[44] Dabbah MM *International and Comparative Competition Law* (2010).

According to Qaqaya and Lilimile, two elements are required to maintain competition in an economy, namely, a CP and law.[45] Competition is also identified as a fundamental element of an open market economy which encourages better products, competitiveness, efficiency, economic growth, employment, innovation, lower prices, and wider choice.[46] Competition also increases a country's attractiveness as a business location and is a trigger for national and foreign investments.[47] It is thus clear that competition can stimulate economic reforms and has a number of positive benefits, that if present, can accrue to TFTA members.

## 2.4 Competition policy

Although CP and law are linked they are not synonymous terms.[48] CP is broader than competition law and generally refers to government policies that inform the conditions of competition within a domestic market, preserve or promote competition among market players and promote other government policies and processes that enable a competitive environment to develop.[49] Thus, CP is a collective term that encompasses competition law as well as government policies relating to the implementation of laws, such as those relating to FDI.[50]

### 2.4.1 Nature of competition policy

There are two components of a comprehensive CP.[51] The first component is a set of policies that enhance competition or competitive outcomes in markets, such as relaxed industrial policy, liberalised trade policy, and market entry and exit conditions.[52] The other component of CP is a



[45] Qaqaya H & Lilimile (eds) *The effects of anti-competitive business practices on developing countries and their development prospects* (2008) UNCTAD 9 available at http://unctad.org/en/docs/ditcclp20082_en.pdf (accessed 25 September 2017).
[46]European Parliamentary Research Service Report *EU competition policy: key to a fair Single Market* (2014) 2 available at http://www.europarl.europa.eu/EPRS/140814REV1-EU-Competition-Policy-FINAL.pdf (accessed 12 January 2017).
[47] http://ec.europa.eu/competition/antitrust/overview_en.html.
[48] Hoekman B & Holmes P 'Competition Policy, Developing Countries, and the World Trade Organization' 2 available at: http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.8474&rep=rep1&type=pdf (accessed on 15 June 2016).
[49] UNCTAD *The Importance of Coherence between Competition Policies and Government Policies* (July 2011) TD/B/C.I/CLP/9 available at: http://unctad.org/en/Docs/ciclpd9_en.pdf (accessed on: 18 October 2016).
[50] Sweeney B 'Globalisation of Competition Policy and Law: Some Aspects of the Interface between Trade and Competition' (2004) 5 *Melbourne Journal of International Law* 5.
[51] Report of the Working Group on Competition Policy Planning Commission Government of India (2007) 2 available at http://planningcommission.nic.in/aboutus/committee/wrkgrp11/wg11_cpolicy.pdf (accessed 19 October 2016).
[52] Planning Commission Government of India Report of the Working Group on Competition Policy (2007) 2.

law and its effective implementation.[53]

However, while CP is an increasingly accepted concept at the international level, nations still have different levels of CP development and implementation.[54] The situation is no different within the TFTA and although many TFTA members have CP, there are a number who are yet to develop CP, alternatively are not as advanced as compared to more developed states.

### 2.4.2 The aim of competition policy

The primary aim of CP is to safeguard the competitive process, to promote the efficient allocation of resources by ensuring that markets are open and competitive,[55] to prevent anti-competitive private conduct, regulatory capture by governments and to maximise social welfare.[56]

CP also has an important role to play in the process of liberalising markets, by ensuring that markets are as open as possible to new entrants, and that firms do not frustrate this by engaging in anticompetitive practices.[57] CP is thus said to be linked with the goals of freer trade and regulatory reform and is an important tool for the TFTA to achieve its goals. CP is able to increase market competition, improve a country's economic performance, and increase business opportunities and firm productivity.[58]



OECD asserts that CP is seen to attain or preserve a number of other objectives including de-centralisation of economic decision-making, preventing abuses of economic power, promoting

[53] Planning Commission Government of India Report of the Working Group on Competition Policy (2007) 2.
[54] Mwalwanda C *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA) UNCTAD/ITCD/CLP/Misc18* 73 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed 10 October 2017).
[55] Centre for Competition, Investment & Economic Regulation *Competition Policy & Pro-Poor Development – A report of the Symposium on Competition Policy & Pro-poor Development* (2003) 19 available at http://www.cuts-ccier.org/pdf/Competition_Policy_Pro-poor_Development-A_report_of_the_Symposium_on_Competition_Policy_Pro-poor_Development.pdf (accessed 15 August 2016).
[56] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' (March 2012) SAIIA Occasional Paper No. 111 8 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).
[57] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) xxxii.
[58] Kitzmuller M & Martinez Licetti M *Competition Policy: Encouraging Thriving Markets for Development (September 2012)* Viewpoint Note No. 331 available at http://siteresources.worldbank.org/EXTFINANCIALSECTOR/Resources/282884-1303327122200/VP331-Competition-Policy.pdf (accessed 14 April 2017).

small business, fairness and equity and other socio-political values.[59] Ultimately, CP aims to prevent businesses from acting to the detriment of the common good by reducing or eliminating competition.[60]

The main objectives of CP and law in Africa appear to be similar and relate to the need to promote free and fair markets and economic efficiency, to maximise consumer welfare, and to encourage transparency in trade practices.[61] According to UNCTAD, the effective application of CP would put African countries in a better position to fulfil their trading obligations under various BTAs and multilateral agreements.[62] Schwarz agrees that CP is essential to encourage growth and development across Africa.[63]

As such, CP is of extreme importance within the TFTA and should be placed high on the list of policy priorities if the region is to achieve its objectives. Beyond developing a suitable CP within the region, of equal importance will be successfully implementing the CP and developing and enforcing competition law within the region.

### 2.5 Competition law

Hoekman and Holmes define national competition law as the set of domestic rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or the abuse of a dominant position.[64] UNCTAD asserts that competition laws address two areas



[59] OECD *The Objectives of Competition Law and Policy* (2003) CCNM/GF/COMP(2003)3 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 October 2017).
[60] Mwalwanda, C *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA) UNCTAD/ITCD/CLP/Misc18* 73 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed 10 October 2017).
[61] Mwalwanda, C *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA) UNCTAD/ITCD/CLP/Misc18* 73 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed on October 2017).
[62] Mwalwanda, C *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA) UNCTAD/ITCD/CLP/Misc18* 73 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed 10 October 2017).
[63] Schwarz D *The Internationalization of Competition Law in Africa* (August 2017) Competition Policy International available at https://www.competitionpolicyinternational.com/wp-content/uploads/2017/08/Africa-Column-August-Full.pdf (accessed 12 September 2017).
[64] Hoekman B & Holmes P 'Competition Policy, Developing Countries, and the World Trade Organization' 2 available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.196.8474&rep=rep1&type=pdf (accessed 15 June 2016).

namely, the conduct of businesses and the structure of economic markets.[65] Competition law is recognised as an important part of a market's domestic regulatory framework which ensures that the benefits of competition within a market can be realised.[66]

Sweeney has identified certain core provisions that underpin nearly all competition law regimes.[67] These include prohibitions on anti-competitive cartel activities (for example price fixing), anticompetitive conduct by dominant firms, and M&As that substantially reduce competition.

Notably, the different competition laws that have been enacted by African states generally reflect the objectives as well as the legal traditions of the countries concerned.[68] As such, when developing a regional competition regime within the TFTA, it will be important to ensure that the regime also reflects the objectives and traditions of the region as a whole as well as those of members and is not merely a replica of another regions regime or the regime of a specific TFTA member.

At the time of developing a regional competition regime, rather than maintain different national laws, Dewar and Holmes assert that members of FTAs should harmonise national laws.[69] Nicholson, Sokol and Stiegert support this view and argue that the adoption of similar laws in many jurisdictions has advantages, particularly in that emerging NCAs can benefit from the experience of more mature institutions.[70] Thus as the time of developing a regional competition regime within the TFTA, a model for the regional regime that requires that the national competition laws of members be harmonised, will enable the region to achieve synergy in respect of the application of CP and laws.



[65] Mwalwanda, C *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA) UNCTAD/ITCD/CLP/Misc18 7*5 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed 10 October 2017).
[66] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) XXX.
[67] Sweeney, B 'Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition' *Melbourne Journal of International Law* 5 (2004) 4.
[68] Mwalwanda, C *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA) UNCTAD/ITCD/CLP/Misc18 7*3 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed 10 October 2017).
[69] Dawar K & Holmes P 'Competition Policy' in Chauffour JP & Maur JC (eds) *Preferential Trade Agreements: Policies for Development – A Handbook* (2011) 354.
[70]Nicholson M, Sokol D & Stiegert K 'Assessing the efficiency of antitrust/competition policy technical assistance programs' (2006) ICN Working Subgroup on Technical Assistance Implementation 10 – 11 available at http://internationalcompetitionnetwork.org/uploads/library/doc428.pdf (accessed 1 October 2016).

### 2.5.1 The nature of competition law

Most competition law regimes seek to increase economic efficiency, enhance consumer welfare, ensure fair trading, and prevent abuse of market power within a domestic market. [71] In addition, competition law also seeks to promote fairness and equality, facilitate market liberalisation, promote competitiveness in international markets and prevent inefficiencies stemming from agreements designed to lessen trade or investment.[72]

Competition laws are largely based on domestic legal principles, intended to maximise economic efficiencies, and enforced by judicial branches of government and not through international bodies.[73] The enforcement of competition law, however, often comes with problems which is particularly true for developing countries due to financial and human resource scarcity and political and economic constraints.[74] This is true for a number of TFTA members, such as Burundi and Rwanda who have encountered difficulties in developing and enforcing domestic competition laws.[75]

### 2.5.2 The aim of competition law

Competition law is recognised as an important part of a markets domestic regulatory framework which ensures that the benefits of competition within a market can be realised.[76] Although consumer welfare is considered to be of central importance when applying competition law there are many other objectives of competition law which focus on allocative and technical efficiency.[77] Competition law is thus intended to counter a number of anticompetitive behaviours and also plays



[71] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) XXX.
[72] Moisejevas R & Novosad A *Some Thoughts Concerning the Main Goals of Competition Law* (2013) Jurisprudence Mykonos Romerio University, Greece available at https://www.mruni.eu/upload/iblock/b0c/JUR-13-20-2-14.pdf (accessed 30 November 2016).
[73] Epstein J 'The Other Side of Harmony: Can Trade and Competition Laws work Together in the International Marketplace' (2002) *American University Law Review* 345.
[74] Gal MS 'Regional Competition Law Agreements: An Important Step for Anti-Trust Enforcement' (2010) 60 *University of Toronto Law Journal* 239.
[75] http://unctad.org/sections/ditc_ccpb/docs/ditc_ccpb0027_en.pdf.
[76] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) xxx.
[77] Whish R & Bailey D *Competition Law* 20.

a significant role in alleviating poverty.[78]

The main kinds of anticompetitive behaviours include certain conduct undertaken by businesses as well as governments. Such conduct includes the creation of international cartels or collusion among producers and sellers of the same product. In addition, exclusionary vertical practices or horizontal restraints undertaken by firms, and the monopolisation of M&As by firms are also major forms of anticompetitive behaviours. In addition, the use of restrictive licensing regimes or inducements granted to foreign investors by governments and protectionist measures are also considered anti-competitive behaviour.[79]

According to UNCTAD, developing economies are particularly vulnerable to anticompetitive practices given their often poor business infrastructure, insufficient policies, laws and regulations, and lack of enforcement agencies and thus competition law become an imperative regulatory tool in developing economies. [80]

As such, the existence of robust national competition laws and properly skilled and resourced NCAs will be important for TFTA members if they are to safeguard their economies against anti-competitive practices as well as for the region as a whole, if it is to attain its overarching goals, amongst them deeper integration and economic growth.



## 2.6 The role of competition policy and law in regulating FDI

According to the World Investment Report (1997):

> 'FDI liberalisation needs to be complemented by an equally worldwide and pervasive culture of competition. Clearly formulated competition policies and their effective enforcement can contribute significantly to the growth of

[78] Drexl J, Bakhoum M & Fox EM et al (eds) *Competition Policy and Regional Integration in Developing Countries* 249.

[79] UNCTAD *Why competition and consumer protection matter* available at http://unctad.org/en/Pages/DITC/CompetitionLaw/why-competition-matters.aspx (accessed 15 October 2016).

[80] *Poor Development A report of the Symposium on Competition Policy & Pro-poor Development* (2003) 19 available at http://www.cuts-ccier.org/pdf/Competition_Policy_Pro-poor_Development-A_report_of_the_Symposium_on_Competition_Policy_Pro-poor_Development.pdf (accessed on 15 August 2016).

competition culture.'[81]

Mehta and Nanda agree that investment liberalisation and CP play a complementary role in promoting efficiency, consumer welfare, economic growth, and development.[82] The World Bank has identified that CP has an important role to play in developing countries.[83] In addition, it suggests that liberal trade and investment policies are a key element of a good CP, and priority should be given to eliminating barriers to trade and encouraging FDI.[84]

Geradin asserts that the adoption of a competition law regime and setting up of an enforcement authority will be beneficial to investments and that competition rules may be a useful tool to protect foreign investors against anti-competitive practices.[85] Clarke found there to be a positive relationship between the existence and enforcement of a competition law and FDI.[86] SAIIA contends that because of the negative economic effects that can flow from FDI, host countries must support the liberalisation of FDI policies through institutional measures aimed at ensuring the proper functioning of markets, including the control of anti-competitive commercial practices.[87] According to the Centre for Competition, Investment and Economic Regulation (CUTS) a lack of competition law, or of merger review provisions in competition law, can reduce the investor-friendliness of the environment by allowing concentration to rise.[88]



[81] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) xxxii.

[82] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' (March 2012) SAIIA Occasional Paper No. 111 12 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).

[83] OECD *A Policy Framework for Investment: Competition Policy* (2005) 2 available at https://www.oecd.org/investment/investmentfordevelopment/35488898.pdf (accessed 22 October 2016).

[84] OECD *A Policy Framework for Investment: Competition Policy* (2005) 2 available at https://www.oecd.org/investment/investmentfordevelopment/35488898.pdf (accessed 22 October 2016).

[85] Geradin D Competition law and regional economic integration (2004) World Bank Working Paper No. 35 23 available at https://openknowledge.worldbank.org/bitstream/handle/10986/14940/297020PAPER0Competition0law.pdf;sequence=1 (accessed 1 October 2017).

[86] Clarke JL *Competition Policy and Foreign Direct Investment* (2003) 17 available at https://www.researchgate.net/publication/227356925_Competition_Policy_and_Foreign_Direct_Investment (accessed 21 October 2016).

[87] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' (March 2012) SAIIA Occasional Paper No. 111 10 - 11 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).

[88] Centre for Competition, Investment and Economic Regulation *Briefing Paper: Foreign Direct Investment and Competition Policy* No.2/2005 available at: http://www.cuts-international.org/pdf/C-CIER-2-2005.pdf (accessed 16 October 2016).

The importance and role of CP and law in relation to FDI has also been considered extensively by the World Trade Organisation (WTO), UNCTAD and various other investment and competition organisations. The Working Group on the Relationship Between Trade and Investment (WGTI) found that a:

> '[...] stable, non-discriminatory and transparent legal framework for business, of which competition law is an essential component, is increasingly seen as essential for attracting investment, ensuring the benefits of trade liberalization, as well as to address anticompetitive practices.'[89]

The CUTS also supports the view that the proper application of CP or law is vital for ensuring that the potential benefits of FDI for a host country are maximised.[90]

In the World Investment Report 2000,[91] UNCTAD revealed that FDI through M&A's do not necessarily lead to positive outcomes for the host economy and local firms.[92] Thus, in circumstances where competition law is not employed actively to review FDI transactions there is a risk that the foreign investment results in the denationalisation of domestic firms, a reduction in employment, and the loss of technological assets through the externalisation of intellectual property.[93] Thus, while the liberalisation of FDI and trade regimes may promote competition and enhance the host market, the possibility of anticompetitive practices by firms requires the



[89] WTO Working Group on the Relationship between Trade and Investment *Foreign Direct investment and Economic Development* (23 March 1998) WT/WGTI/W/26 5 available at https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(%40Symbol%3d+wt%2fwgti%2fw%2f*+)+and+(+%40DocumentDate+%3E%3d+1998%2f01%2f01+00%3a00%3a00+)+and+(+%40DocumentDate+%3C%3d+1998%2f12%2f31+23%3a59%3a59+)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true (accessed 26 November 2016).

[90] Centre for Competition, Investment and Economic Regulation *Briefing Paper: Foreign Direct Investment and Competition Policy* No.2/2005 available at http://www.cuts-international.org/pdf/C-CIER-2-2005.pdf (accessed 16 October 2016).

[91] UNCTAD *World Investment Report 2000: Cross-border Mergers and Acquisitions and Development* (2000).

[92] Africa Labour Research Network Labour Resource and Research Institute *Foreign Direct Investment in Africa* (2003) 32 available at https://sarpn.org/documents/d0000883/P994-African_Social_Observatory_PilotProject_FDI.pdf (accessed 20 October 2016).

[93] Elikplimi K & Agbloyer JA *Domestic Banking Sector Development and Cross Border Mergers and Acquisitons in Africa. Review of Development Finance* (2012) *Africa Growth Institute* 35 available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.1028.6707&rep=rep1&type=pdf (accessed 22 November 2016).

continuous attention of NCAs and robust enforcement of competition laws.[94]

CUTS suggests that the regulation of the business practices of investors through competition law is less restrictive and distortive than other policy instruments can be.[95] UNCTAD supports this view and asserts that CP is '*primus inter pares'* among other policy measures that can maximise the benefits of FDI.[96] CUTS proposes that a properly implemented competition law can help to ensure FDI is development-friendly, and that the benefits are maximised for host countries.[97]

Thus, there is a clear relationship between FDI and CP and law however the extent to which that relationship can yield positive outcomes both for investors and host countries will depend largely on the existence of suitable CP and law regime coupled with the robust enforcement of competition laws by properly resourced and skilled NCAs.

## 2.7 Competition policy and law within the multilateral trading system

At the end of World War II, CP and law was placed on the international trade agenda as part of the negotiations that resulted in the conclusion of the General Agreement on Tariffs and Trade (GATT).[98] Although the GATT does not contain any express provisions regulating competition law, competition has been discussed and deliberated in numerous international fora.[99]



At the Doha Ministerial Conference in 2001, it was agreed that negotiations regarding multilateral cooperation on CP would take place after the Fifth Session of the Ministerial Conference. [100] However, the 2003 Ministerial Conference of the WTO closed without any agreement. The main reasons for the lack of agreement were the 'Singapore issues' which included negotiations relating

[94] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) XXXI.
[95] Centre for Competition, Investment and Economic Regulation *Briefing Paper: Foreign Direct Investment and Competition Policy* No.2/2005 available at http://www.cuts-international.org/pdf/C-CIER-2-2005.pdf (accessed 16 October 2016).
[96] Mwalwanda C *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA) UNCTAD/ITCD/CLP/Misc18* 83 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed 10 October 2017).
[97] Centre for Competition, Investment and Economic Regulation *Briefing Paper: Foreign Direct Investment and Competition Policy* No.2/2005 2 available at http://www.cuts-international.org/pdf/C-CIER-2-2005.pdf (accessed 16 October 2016).
[98] GATT.
[99] Sweeney B *Globalisation of Competition Law and Policy: Some Aspects of the Interface between Trade and Competition* Melbourne Journal of International Law 5 (2004) 2.
[100] Doha Ministerial Declaration, WTO Doc WT/MIN(01)/DEC/1 (2001) (23).

to CP.[101] As such, the inclusion of an agreement on CP within the WTO system has to date not come to fruition.

The current post-WTO investment regime is nevertheless still shaped by the Uruguay Round Agreements.[102] First, the General Agreement on Trade in Services (GATS) considers the supply of services through commercial presence of a foreign supplier as a form of trade. Articles VIII and IX of the GATS prohibits monopoly service suppliers from discriminating against foreign firms when supplying their services and obligates WTO members to enter into consultations with other members on restrictive business practices of service suppliers. Similarly, Trade Related Investment Measures (TRIMs) has also liberalised the investment environment.[103] Article 9 of TRIMs directs the Council for Trade in Goods to consider whether the TRIMs Agreement should be complemented with provisions on investment and CP. Articles 8, 31, and 40 of the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS) address issues of anticompetitive practices in licensing agreements, the abuse of intellectual property rights, and restrictions on compulsory licensing business practices.[104]

## 2.8 The inception of regional competition policy and law

Until the mid-1980s, only a few jurisdictions had competition regulation. With the exception of the European Community, competition regulation was dealt with in terms of domestic laws and there was no framework for cross-border cooperation. However, after the 1980s competition regimes proliferated, many of which stemmed from the US and EU models. Through this process more friction and a host of new challenges for the regulation of competition were created. The main issue was that national competition laws were poorly equipped to deal with the potential

[101] WTO Working Group on the Relationship Between Trade and Investment Communication from the European Community and its Members States *The relationship between investment and competition policy* (12 November 1998) WT/WGTI/W/63 5.
[102] Singh A 'FDI, Globalization and Economic Development: Towards Reforming National and International Rules of The Game' Working Paper No. 304 (March 2005) 7-8 ESRC available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.126.4498&rep=rep1&type=pdf (accessed 1 October 2016).
[103] Centre for Competition, Investment and Economic Regulation *Briefing Paper: Foreign Direct Investment and CP* No.2/2005 Available at: http://www.cuts-international.org/pdf/C-CIER-2-2005.pdf (accessed 16 October 2016).
[104] UNCTAD The United Nations Set of Principles and Rules on Competition (2000) UNCTAD/RBP/CONF/10/Rev.2 part 1, para E.

negative effects of cross-border anti-competitive practices.[105] Thus, in the absence of a binding multilateral framework on CP, the importance of regional competition polices became apparent.[106]

There seems to be a view that regionalising competition policies is necessary for developing countries to overcome their lack of efficient institutional settings and enforcement challenges, as well as ensure better control over competition within RECs.[107] Gal suggests that regional competition law agreements have an important role to play in solving some of the enforcement problems that developing jurisdictions face.[108]

The trend has been dubbed the 'new wave of regionalism' and is evidence that more and more regional groupings are looking for ways to develop regional competition rules and encourage their members to enact domestic laws. Although there appears to be consensus on the benefits of regionalising competition policies, the issue of the suitable design of CP and law remains unclear.

### 2.9 Mechanisms for achieving coordination on competition policy and law

Generally consensus is that cooperation among NCAs around the world facilitates the effective and efficient enforcement of competition laws and therefore helps to better maintain competition in markets.[109] Thus, for much of the last two decades, initiatives aimed at promoting cooperation in the field of CP have expanded.[110] Efforts to achieve cooperation on CP and law have taken



[105] Djelic M-L *Globalization, Competition regulation in Africa between global and local: A Bayan Tree Story* in Gili S Drori, Markus A. Höllerer & Peter Walgenbach (eds) *Global Themes and Local Variations in Organization and Management: Perspectives (*24 July 2013) 93.
[106] Brusick P, Alvarez AM & Cernat L *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* UNCTAD (2005) 2 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 12 November 2016).
[107] Drexl, J *Competition policy and Regional Integration in Developing Countries* 1.
[108] Gal MS & Wassmer IF 'Regional Agreements of Developing Jurisdictions: Unleashing the Potential in Competition Policy and Regional Integration in Developing Countries' in *Competition Policy and Regional Integration in Developing Countries* (2012) Bakhoum M, Drexl J, Gal M et al (eds) 243.
[109] UNCTAD *Review of the experience gained so far in enforcement cooperation, including at the regional level document* (2011) TD/B/C.I/CLP/10 3-4 available at http://unctad.org/en/Docs/ciclpd10_en.pdf (accessed 19 October 2016).
[110] UNCTAD *The Attribution of Competition to Community and National Competition Authorities in the Application of Competition Rules (2008)* UNCTAD/TD TD/B/COM.2/CLP/69 3.

numerous forms, from formal BTAs and multilateral agreements, to informal interactions, exchanges of information and best practices.[111]

In a report prepared by UNCTAD,[112] it is noted that cooperation tools for dealing with cross-border anticompetitive cases have evolved, establishing the basis for the introduction of a variety of systems.[113] Such systems include informal cooperation based on the Unites Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set). [114] There are also informal cooperation models developed by OECD. [115] In addition, principles of positive comity, the effects doctrine,[116] and other similar soft law instruments which have no specific legal basis also exist. Thus, there are various informal and formal mechanisms for achieving regional convergence and cooperation in CP and law.

However, this paper focuses on cooperation on competition through FTAs and briefly considers informal cooperation models posited by UNCTAD and OECD, the effects doctrine and the comity principle.

### 2.9.1 The contribution of UNCTAD and OECD to regional cooperation on CP and law

(a) UNCTAD



The move towards having competition provisions in regional agreements is said to be rooted in the Set produced by UNCTAD.[117] The Set is encompassed in a resolution adopted by the UN General Assembly in 1980 and is a list of recommendations to states, multinational corporations,

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[111] OECD *Working Party No. 3 on Cooperation and Enforcement* (2013) DAF/COMP/WP3 2 available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2013)4&doclanguage=en (accessed 31 March 2017).

[112] Secretariat Report on the OECD/ICN Survey on international enforcement cooperation DAF/COMP/WP3(2013)2/FINAL available at http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf (accessed 31 March 2017).

[113] UNCTAD *Modalities and procedures for international cooperation in competition cases involving more than one country* (26 April 2013) TD/B/C.I/CLP/21 4 available at www.unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed 25 November 2016).

[114] UNCTAD The United Nations Set of Principles and Rules on Competition (2000) UNCTAD/RBP/CONF/10/Rev.2.

[115] http://www.oecd.org/competition/international-coop-competition-2014-recommendation.htm.

[116] OECD *Regulatory Provisions in Regional Trade Agreements: The "Singapore" Issues* (19 - 20 June 2002) available at https://www.oecd.org/trade/tradedev/1840564.pdf (accessed 20 June 2017).

[117] United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980).

and regional institutions which establishes general principles for the control of anti-competitive business practices, institutional mechanisms for a consultation procedure, as well as the exchange of expertise and information regarding anti-competitive business practices.[118]

The Set recognises: [119]

> '[...] the need to ensure that restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting international trade, particularly those affecting the trade and development of developing countries'.

The Set also encourages States at the national, regional or sub-regional levels:

> '[...] to adopt, improve and effectively enforce appropriate legislation and implement judicial and administrative procedures for the control of restrictive business practices.'

Thus, the Set recognises that anti-competitive practices can impact negatively on international trade, especially for developing countries and aims to encourage states and RECs to adopt mechanisms to regulate anti-competitive practices.



In 2003 and based on the Set, UNCTAD issued a 'Model Law' on competition that was reviewed in 2010 and could be used by states as a guideline when developing national or regional competition regimes.[120] The Model Law is made up of two parts namely Part 1 which contains the Substantive Possible Elements for Competition Law and is a permanent guide which is not subject to revision and Part 2 which contains Commentaries on Chapters of the Model Law and proposes alternative approaches to legislating for competition law and is revised regularly.[121]

Although the Set and Model Law constitute generic templates for developing a competition law regime, certain of the general principles and guidelines can serve as a useful starting point when

[118] http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1969&context=gjicl.
[119] United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980).
[120] 1995 OECD Recommendations (27 July 1995) Doc. No. C (95) 130.
[121] http://unctad.org/en/Pages/DITC/CompetitionLaw/The-Model-Law-on-Competition.aspx.

TFTA members develop or potentially reform their national competition laws. In addition, these documents can be referred to by the TFTA, as a neutral starting point, considering that the competition regimes of the TFTA members are at varying degrees of development. However, as is discussed further on in this chapter, the TFTA should apply caution when merely adopting an existing competition regime as certain parts will be relevant to the TFTA, whereas other aspects will not. In addition, the TFTA faces its own set of unique issues and obstacles that will need to be taken into account.

(b) OECD

In the OECD, efforts to cooperate on anti-competitive practices are also not new. In 1986, again in 1995, and recently in 2014, the OECD revised its 1967 Recommendations which initially called for mutual notification between competition regulators.[122] On 16 September 2014, the OECD Council adopted the 2014 Recommendation (replacing the former 1995 OECD Council Recommendation) that calls for governments to foster their competition laws and practices so as to promote further international co-operation among NCAs and to reduce the harm arising from anticompetitive practices.[123]

The 2014 Recommendation notes that anticompetitive practices and mergers may create obstacles to economic growth, trade expansion and other economic goals while recognising (amongst other things) the important role that co-operation between participating states has to play in ensuring the effective and efficient enforcement against anticompetitive practices. Based on the aforementioned premise and considering that adherents to the 2014 Recommendation are committed to working to adopt national or international co-operation instruments to effectively address anticompetitive practices, the 2014 Recommendation recommends that states should, amongst other recommendations commit to effective international co-operation and take appropriate steps to

[122] Damro C *Cooperating on Competition in Transatlantic Economic Relations: The Politics of Dispute Prevention* (2006) 58.
[123] OECD *Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings* available at http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf (accessed 10 October 2017).

minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between NCAs. [124]

The extent to which the TFTA members can refer to the 2014 Recommendations for guidance or as a tool for developing a regional competition regime, will largely depend on the model adopted by the region and the degree of cooperation envisaged. However, since the guidelines aim to deepen cooperation between states, the general premise underlying the 2014 Recommendations, namely developing suitable mechanisms to effectively address anticompetitive practices, is of value to the TFTA as well.

### 2.9.2 The effects doctrine

According to Papadopoulos, when cross-border transactions give rise to competition law problems that affect multiple countries, one option for how such problems can be dispensed with is through the objective territoriality principle, often referred to as the effects doctrine.[125] In terms of the effects doctrine, a country can apply its national competition laws to foreign persons or firms when their conduct has an effect within its domestic jurisdiction.[126]

This doctrine thus broadens the application of domestic laws to acts performed outside a country's territorial boundaries, if the conduct in question influences competition within the country.[127] A number of countries adopt this method, for example the US, which uses its national laws to address problems caused by anticompetitive practices that have an international effect.[128]

This mechanism does not establish any regional competition regime and thus since it is suggested that the TFTA should strive to develop a regional competition regime this approach is not considered in further detail in this paper.

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[124] OECD *Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings* available at http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf (accessed 10 October 2017).
[125] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 48.
[126] Daujotas R 'Extraterritorial Application of Competition Law: Different Angles – Same Conclusion' (April 2011) *SSRN Electronic Journal* available at https://www.researchgate.net/publication/228250194_Extraterritorial_Application_of_Competition_Law_Different_Angles_-_Same_Conclusion (accessed 30 March 2017).
[127] Guzman AT *Cooperation, Comity, and Competition Policy* Oxford University Press, Inc. 2011 10.
[128] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 48.

### 2.9.3 Comity

Through the years positive comity has been used in various BTAs, including the US-Germany Friendship, Commerce and Navigation Treaty.[129] Comity is described as the use of moderation and restraint by a jurisdiction in the extraterritorial application of domestic laws, having due regard both for international duty, convenience and for the rights of citizens. [130] Comity therefore recognises certain circumstances in which the interests of another state are sufficient so that the exercise of jurisdiction should be restrained.[131] Thus, rather than avoiding conflicts, positive comity requires the parties to conduct acts of positive cooperation.

The most important comity principles were incorporated in the 1995 Recommendations of the Council of the OECD Concerning Cooperation Between Member Countries Practices Affecting International Trade.[132] These recommendations recognise the need for states to give effect to the principles of international law and comity and to use self-restraint in the interest of co-operation in the field of anticompetitive practices.[133]

According to UNCTAD, while comity provisions are included in many national, BTAs and multilateral agreements, their application has however been limited to a few countries who are either large trading powers, for example the US and EU, or where countries have relatively integrated economies, for example as between the US and Canada.[134]



According to Zanettin, the study of bilateral agreements and positive comity provisions shows that their effective use relies on certain essential elements namely, confidence in the other party's commitment to antitrust principles and their various enforcement, knowledge of the other party's competition legislation and personal and regular contracts between the officials of the authorities involved. [135] Thus, Zanettin proposes that it is only when a sufficient level of trust exists that a

[129] US-Germany Friendship, Commerce and Navigation Treaty.
[130] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 73-74.
[131] Guzman AT *Cooperation, Comity, and Competition Policy* Oxford University Press, Inc. 2011 107.
[132] 1995 OECD Recommendations (27 July 1995) Doc. No. C (95) 130.
[133] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 73-74.
[134] UNCTAD *Modalities and procedures for international cooperation in competition cases involving more than one country* (26 April 2013) TD/B/C.I/CLP/21 5 available at www.unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed 25 November 2016).
[135] Zanettin B *Cooperation Between Antitrust Agencies at the International Level* (2002) 229.

competition agency will begin to rely on its counterpart's ability to handle positive comity requests or to maintain the confidentiality of shared sensitive information.[136]

Since positive comity is a mechanism for cooperation incorporated in BTAs and since this paper argues that the TFTA should strive to develop a regional competition regime, this approach is not considered in further detail in this paper.

### 2.10 Competition policy and law in FTAs

CP and law cooperation efforts at the regional level often take place in the context of FTAs and RECs.[137] This suggests a broad consensus on the value and appropriateness of having competition-related provisions in trading agreements.[138] There are however a number of different models employed to achieve regional cooperation on CP and law including through an overriding authority, either with exclusive competence or having parallel powers with NCAs.[139] There are also less formalised or centralised regional arrangements which provide for less detailed cooperation mechanisms, but many include ways for members to share information.

The OECD found that in order to achieve a more integrated competition system enforcement needs to be standardised in one of two ways, namely with a decentralised, alternatively, centralised enforcement model.[140] An alternative to a purely centralised or decentralised model, is a 'mixed' harmonisation model which is seen in newer free-trade area plans.



[136] Zanettin B *Cooperation Between Antitrust Agencies at the International Level* (2002) 229.
[137] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) xxxiv.
[138] OECD *Regulatory Provisions in Regional Trade Agreements: The "Singapore" Issues* (19 - 20 June 2002) available at https://www.oecd.org/trade/tradedev/1840564.pdf (accessed 20 June 2017).
[139] UNCTAD *Modalities and procedures for international cooperation in competition cases involving more than one country* (26 April 2013) TD/B/C.I/CLP/21 available at www.unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed 25 November 2016) 7.
[140] Drexl J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 22 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).

In exploring which legal and institutional designs would best promote effectiveness and efficiency of competition systems of countries at different levels of development, Gal and Fox conclude that states should devise their own laws, drawing from existing models as appropriate.[141]

As such, at the time when the TFTA develops a regional competition regime it should draw from the experiences of other regions and best practices posited by international organisations such as UNCTAD and the OECD, but should ultimately develop a regime that has been tailored to the needs of the TFTA as a region.

### 2.10.1 Models for regional competition regimes within FTAs

Despite the difficulty in categorising the types of FTAs that include competition related systems with various enforcement mechanisms, four models for CP in FTAs are identifiable, which are discussed in detail below.

The models for regional competition regimes range from partially centralised, partially decentralised, decentralised to centralised approaches.

(a) Partially centralised approach

This model establishes a regional competition law which is supported by a partially centralised agency. In this model, an independent regional law is established which has elements of direct applicability and superiority, and a central authority is also created. As with the fully centralised regime, the independent regional law takes precedence over national laws and judgments that are inconsistent with it. Although the central agency has a mandate to receive complaints and initiate independent investigations, it must work with the members' NCAs and national courts to process case actions.[142]

An example of this model is the North American Free Trade Agreement (NAFTA).[143] In terms of

[141] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 374 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[142] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 357 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[143] North American Free Trade Agreement.

Chapter 15 of the NAFTA Treaty, member countries are required to 'adopt or maintain measures to proscribe anticompetitive business conduct and to take appropriate action with respect thereto', without prescribing specific competition rules.[144]

The Caribbean Community (CARICOM) arrangement follows a similar approach. CARICOM has a clear regional law which is set out in Chapter 8 of the Revised Treaty of Chaguaramas.[145] The Revised Treaty established the CARICOM Competition Commission (CARICOM Commission) which has jurisdiction over all cases of cross-border anticompetitive conduct. In terms of Article 30(b) members are required to enact competition policy legislation and to establish competition enforcement bodies. In addition, members are required to cooperate in the determination of competition legislation, to take necessary legislative measures to ensure consistency and compliance with the rules of competition, and to set penalties for anticompetitive practices.[146]

The Revised Treaty also provides for cooperation between NCAs and the CARICOM Commission and under Articles 173(e) to (h) the Commission is required to cooperate with NCAs, provide support, and facilitate the exchange of information and expertise. According to Beckford, this provision establishes a positive obligation with respect to determinations by the CARICOM Commission and ensures that the CARICOM regional competition law and policy is harmonised within the region.[147] The Commission is also responsible for ensuring that members have access to competition enforcement authorities, including the courts, on an equitable, transparent, and non-discriminatory basis.[148]



[144] OECD *Regulatory Provisions in Regional Trade Agreements: The "Singapore" Issues* (19 - 20 June 2002) 9 available at https://www.oecd.org/trade/tradedev/1840564.pdf (accessed 20 June 2017).
[145] Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single Market and Economy (2001).
[146] Qaqaya H & Lilimile (eds) *The effects of anti-competitive business practices on developing countries and their development prospects* (2008) UNCTAD 376 available at http://unctad.org/en/docs/ditcclp20082_en.pdf (accessed 25 September 2017).
[147] Beckford DS 'Enforcement of Competition Law in CARICOM: Perspectives on Domestic, Regional , and Multilateral Obligations' 27 available at http://www.samuelbeckford.com/wp-content/uploads/2012/05/ENFORCEMENT-OF-COMETITION-LAW-IN-CARICOM-WILJ.pdf (accessed 10 December 2017).
[148] Dawar K & Holmes P 'Competition Policy' in Chauffour JP & Maur JC (eds) *Preferential Trade Agreements: Policies for Development – A Handbook* (2011) 357.

There are two overarching requirements that the TFTA will need to meet if it is to adopt this approach to developing a regional competition regime. First, this model will require the TFTA to develop a clear regional competition law, providing that agreement between all 26 members is possible, and to establish a regional authority which has jurisdiction over cross-border anticompetitive conduct. This model presupposes that the regional authority will have exclusive jurisdiction over cross-border anticompetitive conduct. However, considering that African states typically apply a conservative approach when relinquishing their sovereignty, there may be some reluctance to transfer exclusive jurisdiction to a regional authority.

Secondly, this model requires the existence of proper skilled and resourced NCAs who will be required to cooperate in the determination of competition legislation, to take necessary legislative measures to ensure consistency and compliance with the rules of competition, and to set penalties for anticompetitive practices. Thus this successful adoption of this model will require TFTA members to have adequate resources, skills and capacity to either develop or reform existing NCAs. However, the TFTA members are at varying levels of development both generally and more specifically in respect of their CP and law which will likely hamper the successful adoption of this two-pronged approach.



(b) Partially decentralised approach

A partially decentralised approach is one where a region has a regional law but no independent regional body with powers of investigation and enforcement. Thus, the application of the law is left entirely to the members. NCAs have the jurisdiction to bring cases, and they are also the recipients of complaints of any violation of the regional competition law.[149]

In terms of this model, an independent regional law is expressed by treaty or protocol, which may detail common principles, minimum requirements for the domestic laws and procedures, and may also prescribe some conditions for encouraging cooperation between the members, but the application of the law is left entirely to the members. Cases can be brought by NCAs who also

[149] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 357 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).

receive complaints dealing with regional law violations. The national courts may also receive private complaints for violations of regional law. There may also be an intergovernmental committee formed to assist the cooperation and attempt to allocate investigations and cases among members.[150]

The Mercado Común del Sur (MERCOSUR) competition protocol[151] is a possible example of this which provides for a regional competition framework without any central agency.[152] MERCOSUR's competition provisions set out common principles to establish the minimum requirements for its members' domestic laws and procedures and an intergovernmental committee assists with cooperation, allotment of investigations and cases among members.[153]

Although this model may not require members to relinquish their authority to regulate cross-border anti-competitive conduct to a central authority, as with the partially centralised approach, it still requires the NCAs to be adequately resourced, experienced and skilled to investigate and enforce regional and national competition issues but unlike the partially centralised model, this will be in the absence of a supporting central agency.

Since several of the TFTA members do not have national competition regimes or NCAs alternatively have less than adequate resources and skills to investigate and enforce national competition issues let alone regional issues, the success of such a model seems improbable given the diverse levels of development and competition experience between members. Even if all members have adequate NCAs, issues around whether the regional law will be applied consistently throughout the region will likely occur. There may be instances where some NCAs are seen to apply the law more leniently which could lead to problems associated with forum-shopping. Additionally, there will be no central agency to reinforce the goal of regional integration and ensure the consistent and fair application of the regional law, to review decisions, to offer guidance or

[150] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 357 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[151] MERCOSUR Fortaleza Protocol for the Defence of Competition proceedings (1996).
[152] Qaqaya H & Lilimile (eds) *The effects of anti-competitive business practices on developing countries and their development prospects* (2008) UNCTAD 376 available at http://unctad.org/en/docs/ditcclp20082_en.pdf (accessed 25 September 2017).
[153] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 357 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).

resource assistance or to act as an impartial conduit for cooperation between states in investigations.

(c) Decentralised or mixed harmonisation approach

In the least centralised regional competition regime members do not create a regional law, instead, the role of an independent regional law is replaced with additional provisions on the functioning of domestic laws and they agree on cooperation principles for national laws to address anticompetitive practices that are harmful to the functioning of the FTA.

The provisions formalise existing consultations and cooperation between the parties on the effectiveness of their national competition laws, as well as cooperation on the enforcement of those laws via mutual legal assistance, notification, consultation, and exchange of information.[154] In some cases this explicitly requires the establishment of national competition laws that can treat cross-border anti-competitive practices according to certain standards.[155] Several FTAs describe the practices that are detrimental to the functioning of the REC and then call upon members to implement effective national laws to address these practices as they affect trade between the members. [156] This approach does not establish a separate regional law.

This approach is identified in a number of newer FTAs, particularly in North-South arrangements. An example is the Canada-Costa Rica Free FTA, in terms of which the substantive practices to be covered by a domestic law are set out, including procedural matters around transparency, due process and national treatment requirements. Thus, although cooperation is recommended, no cooperation mechanism is specifically created.

A further example is the Southern African Customs Union (SACU) Treaty. In terms of Article 40 of the SACU treaty members shall have competition policies and cooperate in the enforcement of

[154] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 357 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[155] Qaqaya H & Lilimile (eds) *The effects of anti-competitive business practices on developing countries and their development prospects* (2008) UNCTAD 374 available at http://unctad.org/en/docs/ditcclp20082_en.pdf (accessed 25 September 2017).
[156] Qaqaya H & Lilimile (eds) *The effects of anti-competitive business practices on developing countries and their development prospects* (2008) UNCTAD 377 available at http://unctad.org/en/docs/ditcclp20082_en.pdf (accessed 25 September 2017).

competition laws and regulations.[157] Although this approach does not create an independent regional law or authority, it does create an avenue whereby members can engage with one another or even cooperate on competition matters and does not preclude the SACU Secretariat from assisting in this process.

Based on the overarching objectives of the TFTA, namely deeper economic integration, increased trade between members, supported by the harmonisation of policies and laws, this model would be a step in the opposite direction since it does not foresee the creation of regional law or authority or create any formal obligations on members to cooperate with one another.

(d) Centralised approach

The most comprehensive regional competition regime is the fully centralised system with supporting regional institutions.[158] Under this model, a regional jurisdiction is established and supranational law addresses anticompetitive practices that affect trade between the members or occur within the region.[159]

Competition laws in the fully centralised model are directly applicable within the territory of a member and are superior to any national law or judgment that is inconsistent with the regional law. Regional competition laws may also have direct effect in members' jurisdictions, giving firms or citizens the right to invoke the regional law in the domestic courts of the member countries. [160]

Fully centralising regional competition law requires the creation of a complementary regional institutional mechanism to conduct investigations, enforce actions, and assess and levy penalties. In addition, the uniformity of court rulings needs to be guaranteed, through a superior regional

[157] Article 40 of the SACU Treaty.
[158] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 356 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[159] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 356 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[160] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 356 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).

court, a process of binding preliminary opinions, or both. [161] UNCTAD asserts that in a centralised approach there will be economies of scale and transaction cost savings due to uniform application of common competition rules by supranational authorities acting as one-stop shops in dealing with anticompetitive cases.[162]

The Treaty on the Functioning of the European Union (TFEU) is the leading example of a centralised regime. The competition provisions cover, among other things, agreements or concerted practices and abuses of dominance.[163] COMESA has also adopted a centralised regional competition regime which is operational. These regimes will be discussed in further detail in Chapter 3.

Considering that the TFTA intended to build on the existing models within COMESA, EAC and SADC, and given the objectives of the TFTA, this model is the most suitable option available for developing the TFTA's competition regime. On the one hand members will be required to relinquish their authority to adjudicate cross-border anticompetitive conduct, but on the other, there are numerous benefits to be derived from this model both for the region and for members specifically.

First, members will participate directly in the development of the laws and as with the COMESA regime, the regional competition authority will likely use personnel from the members. Those members who do not have competition regimes or adequate regimes, alternatively face resource, skill or capacity constrains will be able to benefit from the joint development of a regime. This sharing and pooling of resources will enable development within the region and within individual members that would otherwise take years to achieve. The existence of a centralised agency will also ensure that NCAs aren't overburdened by regional competition investigations, although as with the EU model, certain cross-border competition issues may eventually fall within purview of NCAs. Additionally, a centralised agency is likely to ensure the consistent and fair application of

[161] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 356 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[162] UNCTAD *The attribution of competence to community and national competition authorities in the application of competition rules* (2008) TD/B/COM.2/CLP/69 3 available http://unctad.org/en/Docs/c2clpd69_en.pdf (accessed on 19 October 2016).
[163] Article 101 & 102 of the TFEU.

the regional competition law and enforcement thereof as well as the achievement of economies of scale and transaction costs savings for businesses.

### 2.10.2 Advantages and disadvantages of including competition policy in FTAs

There are proponents that support including competition provisions in FTAs and there are those who have concerns about doing so. The outcome of the review of literature and a case study by UNCTAD, broadly supports the view that regional CP and law is good for development. [164] Dewar and Holmes agree and posit that competition provisions can produce regional public goods, enhance integration and would be less subject to capture than purely national ones.[165] Since CP and law are included on the negotiating agenda for the TFTA, clearly it is viewed as important within the region as well.

Gal asserts that once a regional framework is agreed upon, it is much more difficult to change than a domestic law and can create binding commitments that will be enforced beyond the term of the government that signed the commitments.[166] Especially within the African context, where political will and corruption often drive specific agendas, although a regional competition regime within the TFTA may take time to agree on, it will serve the region for years to come.

Dewar and Holmes also contend that there will be certain positive spill-overs resulting from regional competition provisions.[167] For example, regional agencies would be able to achieve greater impact over a broader region and there could also be cost benefits as institutions could be shared among states. Guzman asserts that joining forces to prevent anticompetitive behaviour will have benefits for various stakeholders as a result of stronger deterrence effects.[168] Gal finds that a regional competition authority may be a way to overcome deep rooted limitations of existing



[164] Brusick P, Alvarez AM & Cernat L *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* UNCTAD (2005) 1 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 12 November 2016).
[165] Dawar K & Holmes P 'Competition Policy' in Chauffour JP & Maur JC (eds) *Preferential Trade Agreements: Policies for Development – A Handbook* (2011) 351.
[166] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 374 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[167] Dawar K & Holmes P 'Competition Policy' in Chauffour JP & Maur JC (eds) *Preferential Trade Agreements: Policies for Development – A Handbook* (2011) 354.
[168] Guzman AT *Cooperation, Comity, and competition Policy* 118.

authorities, including corruption, inefficiency and bureaucratic obstacles.[169] In a region like the TFTA, where members are at varying degrees of development, a regional approach will have invaluable advantages especially for less developed members who can benefit from the expertise, skills, knowledge and resources that more developed members will be able to provide.

As a compliment to a regional CP, Drexl asserts that a well established domestic competition law will go a long way in creating a competition culture.[170] As such, the TFTA will not only need to develop a robust regional competition regime, but also capacity building and technical assistance programs to facilitate those members who have inadequate domestic competition laws and NCAs.

Gal posits that regional competition law agreements have an important potential for solving at least some of the enforcement problems experience by developing jurisdictions.[171] However, Reimavuno and Handelin suggest that developing countries are reluctant to adopt regional competition rules because of similar challenges that occur at the domestic level, including high costs and low returns as compared to other policies and the fact that governments usually politicise the administration of NCAs.[172] Within the TFTA, there may be members who are reluctant to support a regional competition regime. With this in mind, the TFTA will need to develop initiatives to assure these members and encourage a competition culture.

A regional approach to competition is not supported by everyone and there are those who argue that regionalism creates trade diversion and preferentialism.[173] Notably, Brusick highlights that there is very little experience concerning the implementation and effectiveness of CPs in FTAs

[169]Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 360 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[170] Drexl J, Bakhoum M & Fox EM et al (eds) *Competition Policy and Regional Integration in Developing Countries* 252.
[171] Gal MS & Fox EM 'Drafting competition law for developing jurisdictions: learning from experience' (2014) New York University Law and Economics Working Paper 360 available at http://lsr.nellco.org/nyu_lewp/374 (accessed 6 November 2016).
[172] Reimavuno S & Handelin M *Establishing a Credible Competition Authority –The Egyptian Case* (March 2005) Trade Enhancement Programme, Egypt European Association Agreement 40 available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=daf/comp/ar(2015)35&doclanguage=en (accessed on 10 October 2017)
[173] Dawar K & Holmes P 'Competition Policy' in Chauffour JP & Maur JC (eds) *Preferential Trade Agreements: Policies for Development – A Handbook* (2011) 350.

with regards to improving competition.[174] Notably, UNCTAD found that many jurisdictions that have included competition provisions in regional RTAs have not managed to enforce such provisions.[175] With this in mind, the TFTA should carefully consider the potential issues that could occur, and from the outset, develop ways to overcome such challenges.

There are those who take a softer approach however, and contend that a regional competition system could be suitable but only if certain factors have been taken into consideration.[176] For example, Drexl does not believe that all countries should participate in a regional integration arrangement and cautions that careful consideration should be given to the design of a regional competition system to ensure that dominant markets don't bully smaller ones.[177]

It is clear that the advantages of a regional competition regime outweigh the potential negative effects that may accrue. Not only does regional approach enable the sharing of costs and resources, the ease of exchange of information and cooperation, but particularly in the TFTA which is comprised of developing and less developed countries only, the opportunity to enhance integration and avoid state capture and distortion outweigh the benefits that may accrue from a purely domestic approach.

## 2.11 Conclusion



While the liberalisation of FDI and trade regimes may promote competition and enhance markets, the possibility of anticompetitive practices by firms requires the continuous attention of NCAs and robust enforcement of competition laws. Thus it is clear that CP and law can maximise the benefits of FDI as well as ensure the negative effects of anticompetitive conduct that could result from such transactions are regulated.

Although there are a number of different models employed to achieve regional cooperation on CP

[174] Brusick P, Alvarez AM & Cernat L *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* UNCTAD (2005) x available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed on 12 November 2016).
[175] UNCTAD *Modalities and procedures for international cooperation in competition cases involving more than one country* (26 April 2013) TD/B/C.I/CLP/21 6 available at www.unctad.org/meetings/en/SessionalDocuments/ciclpd21_en.pdf (accessed 25 November 2016).
[176] Guzman AT *Cooperation, Comity, and competition Policy* 118.
[177] Drexl J, Bakhoum M & Fox EM et al (eds) *Competition Policy and Regional Integration in Developing Countries* 241.

and law including through a supranational law and authority, either with exclusive competence or which have parallel powers with NCAs the most appropriate model for the TFTA is the centralised model. However, the requirements and objectives of the TFTA are unique and therefore, although the centralised model used by the EU, in particular, may provide valuable insight, it is important for the TFTA to develop a competition regime based on the specific needs of the region and members. Various aspects of the EU model which should be considered by the TFTA when developing a regional competition model will be discussed in further detail in Chapter 4.

Although not everyone supports including competition provisions in FTAs, based on the goals of the TFTA and the objectives and structures of COMESA, EAC and SADC as considered in the following chapter, it is not only appropriate, but in fact, envisaged that competition provisions be included in the TFTA.

## CHAPTER 3

## OVERVIEW AND ANALYSIS OF COMPETITION POLICY AND LAW IN THE TFTA, COMESA, EAC AND SADC

### 3.1 Introduction

COMESA, EAC and SADC have formed the TFTA, which came into force in 2016 and is a collective representing 26 African states all with varied social, economic and political considerations. Notwithstanding these differences, integration is an overarching goal of the TFTA.

The TFTA is intended to help with the problem of overlapping membership between COMESA, EAC and SADC by harmonising regulations and processes across a number of policy areas including CP and law.[178] It is also anticipated that as integration deepens, investment will follow in the form of FDI.[179] Thus, considering strong arguments that CP and law creates an enabling environment for achieving FDI,[180] and further that harmonious regional CP and laws are an important tool for thwarting non-tariff barriers to FDI,[181] consideration needs to be given to the existing CP and law frameworks within COMESA, EAC and SADC.

This chapter sets out the background for the establishment of the TFTA and CP and law framework. The chapter then considers the existing CP and law frameworks within COMESA, EAC and SADC with aim of drawing out salient obstacles to the successful implementation of CP and law in the region.

[178] Adeleke O *International Investment Law and Policy in Africa: Exploring a Human Rights Based approach to Investment Regulation and Dispute Settlement* (2017).
[179] David JG *Global Competition: Law, Markets and Globalization* (2010) 249 – 252.
[180] International Centre for Trade and Sustainable Development Bridges Africa *The Tripartite Free Trade Africa Agreement: A Milestone for Africa's Regional Integration Process* Vol. 4/6 (23 June 2015) available at http://www.ictsd.org/bridges-news/bridges-africa/news/the-tripartite-free-trade-area-agreement-a-milestone-for-africa's (accessed 20 October 2016).
[181] Angwenyi V *Competition Law and Regional Integration: The Common Market for Eastern and Southern Africa (COMESA)* (unpublished Masters thesis, Ludwig-Maximilians-Universitat, Munich Intellectual Property Law Center, 2012/2013) 38.

### 3.2 The TFTA legal framework

The members of COMESA, EAC and SADC agreed in October 2008 to negotiate a Tripartite Free Trade Area (TFTA) and signed the Declaration Launching the Negotiations for the Establishment of the Tripartite Free Trade Area on 12 June 2011.[182]

The TFTA represents an integrated market with a combined population of 625 million people and a total gross domestic product (GDP) of almost two billion US Dollars.[183] Once the agreement enters into force it is intended to reduce the tariffs on goods traded between the TFTA members and create new opportunities for FDI. An important reason for negotiating the TFTA was the growing awareness of problems arising from the overlapping of membership between COMESA, EAC and SADC.[184]

#### 3.2.1 TFTA framework documents

The COMESA-EAC-SADC Memorandum of Understanding (MOU)[185] underpins the legal and institutional framework for the TFTA process. A Draft Agreement and Annexes were finalised in December 2010, with the text of the Agreement and an Annex on Negotiating Principles further revised in June 2011.

According to the Roadmap adopted in June 2011,[186] negotiations for the TFTA are to be conducted in three phases.[187] The preparatory phase undertaken by the Tripartite Trade Negotiation Forum (TTNF) began in December 2011 and lasted approximately twelve months. This phase involved the exchange of relevant information and agreement on measures aimed at ensuring the adoption of the terms of reference and rules of procedure for the establishment of the TTNF.

[182] Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area (2015).
[183] https://www.thedti.gov.za/editmedia.jsp?id=4122.
[184] Othien L & Shinyeka I *Prospects and Challenges in the formation of the COMESA-EAC and SADC Tripartite Free Trade Area (November 2011)* 2 available at https://www.africaportal.org/publications/prospects-and-challenges-in-the-formation-of-the-comesa-eac-and-sadc-tripartite-free-trade-area/ (accessed 13 September 2017).
[185] Memorandum of Understanding on inter-regional cooperation and integration between COMESA, EAC and SADC available at https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (accessed 10 November 2016).
[186] Roadmap for Establishing the Tripartite FTA 2011-2016 available at https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (accessed 10 July 2017).
[187] Communiqué of the Third COMESA-EAC-SADC Tripartite Summit: Towards a Single Market available at https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (accessed 10 July 2017).

Phase one, covers core FTA issues of tariff liberalisation, rules of origin (RoO), customs procedures, transit procedures, non-tariff barriers, trade remedies and other technical barriers to trade and dispute resolution.[188] The first phase of negotiations (which was supposed to be completed in June 2016) focuses on three main pillars, namely market integration, infrastructure development, and industrial development.[189]

The scoping of the issues for negotiations under the second phase has been delayed pending the conclusion of Phase I issues but is intended to cover rules on CP, intellectual property rights and investment, which are seen as important reforms that contribute not only to strengthening capacities in these areas but also to enhancing transparency in the business environment.[190] To this extent, the prospects for Phase II are good although the time-frame of twenty four months for the negotiations may be challenging. The TFTA Heads of State have nevertheless specified that the COMESA, EAC and SADC should speed up the development of joint programmes in competition policies.[191]

The TFTA was officially launched on 10 June 2015 in Sharm El Sheikh, Egypt at the Third Tripartite Summit.[192] At the time, there was still outstanding work on some of the annexures to the agreement and many members did not sign the agreement. However, all the annexures have been completed and adopted and at the time of this study 24 members have signed the Declaration[193] and the TFTA Agreement has been signed by 21 of the 26 members. The agreement will enter into force once 14 countries have submitted their instrument of rectification. Thus far only Egypt and Uganda have both signed and ratified the agreement.[194]

[188] https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html.
[189] https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html.
[190] International Centre for Trade and Sustainable Development Bridges Africa *The Tripartite Free Trade Africa Agreement: A Milestone for Africa's Regional Integration Process* Vol. 4/6 (23 June 2015) available at http://www.ictsd.org/bridges-news/bridges-africa/news/the-tripartite-free-trade-area-agreement-a-milestone-for-africa's (accessed 20 October 2016).
[191] TRALAC Trade Law Centre *Cape to Cairo: Exploring the Tripartite FTA Agenda* (2013) 5.
[192] Communiqué of the Third COMESA-EAC-SADC Tripartite Summit: Towards a Single Market available at https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html (accessed 10 July 2017).
[193] Sharm El Sheikh Declaration Launching the COMESA-EAC-SADC Tripartite Free Trade Area (2015).
[194] https://www.tralac.org/resources/by-region/comesa-eac-sadc-tripartite-fta.html.

### 3.2.2 The aim of the TFTA

The TFTA is said to represent the new wave of regionalism which is characterised by more ambitious and deeper levels of integration, and taking steps beyond information sharing and comity. In addition to the broader goals of the TFTA, it is also seen as a means to rationalise the problem of overlapping memberships of the RECs in the region. In addition, the TFTA will usher in a set of binding legal obligations to be implemented by all members, which will impact positively on the business environment in the region.[195]

However, opinions are divided on the TFTA and it is impossible to know at this point whether the negotiations will serve to be fruitful. Although it does not appear that negotiations will fail, there is a feeling that steps are being taken merely to satisfy political decisions.[196] However, even if the TFTA does not achieve its formal objectives, negotiations can still be a starting point towards harmonising regional trading rules and removing certain tariffs and NTBs within the region.

## 3.3 Analyses of competition policy and law in the TFTA

The same problems created by the internationalisation of markets, where states are increasingly subject to harm from anticompetitive conduct, affects the TFTA. The reason being is that there are jurisdictional limits placed on NCAs, meaning that in the absence of cooperation or coordination between NCAs, it is often impossible for individual NCAs to remedy cross-border anticompetitive conduct. The OECD asserts that there can also be situations in which no NCA in any injured state is able on its own to remedy such conduct, which is an additional argument in support of developing a regional competition framework.[197] In addition, efficiency considerations alone provide a powerful reason for TFTA members to co-operate with each other in investigating and remedying anticompetitive conduct.[198]



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[195] https://www.tralac.org/news/article/11626-leveraging-trade-facilitation-to-drive-africa-s-regional-integration-agenda.html.

[196] European Centre for Development Policy Management *Advancing Regional Integration in Southern Africa Final Report* (April 2014) 52 available at http://ecdpm.org/wp-content/uploads/2014-DFID-Advancing-Regional-Integration-in-Southern-Africa-Final-Report.pdf (accessed 10 October 2017).

[197] OECD *Positive Comity Report* (1999) available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf (accessed 12 September 2017).

[198] OECD *Positive Comity Report* (1999) available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf (accessed 12 September 2017).

Based on the negotiating documentation and recorded commitments towards the finalisation of the TFTA, it is evident that the members do intend to negotiate commitments relating to CP and competition law in the future.[199] The inclusion of competition law in such agreements is intended to prevent attempts to frustrate competition, which could diminish the benefits expected from liberalisation and integration.[200] The goal of the TFTA in this regard is first to examine how best to harmonise the various existing initiatives and secondly, to determine what needs to be done to develop a CP and regulatory framework that can be applicable to the TFTA. This will also require determining whether any of the existing CP and law structures within COMESA, EAC and SADC are capable of harmonisation or possibly even assuming the supra-regional position in relation to CP and law for the entire TFTA.

For the TFTA, negotiating for regional CP should be easier since both the EAC and COMESA have been through a similar process in order to establish regional CP and law frameworks. Strik asserts that a task force was established to devise programmes to harmonise the trade related initiatives of COMESA, EAC and SADC. Although the task force's mandate did not include the harmonisation of CP and law, the activities did include streamlining trade and transport instruments through harmonising certain issues relevant to market access.[201] The RECs are also cooperating on RoO, FTA tariff elimination timeframes, common tariff nomenclature, and non-tariff barriers.[202] The aforementioned demonstrates that working towards harmonising various trade-related issues within the TFTA region, is not overly ambitious and a positive sign that the goals of the TFTA can be reached.

Outside of the intended general commitments of the TFTA, the negotiating documents reveal little as to the content of any commitments that may be agreed between the TFTA members regarding CP and law. However, there are already a number of protocols and declarations within the TFTA, which seek to promote regional convergence of competition enforcement and case-specific cooperation. For example, COMESA and the EAC have taken steps towards developing regional

[199] UNCTAD *Building the African Continental Free Trade Area: Some Suggestions on the Way* (2005) UNCTAD/DITC/2015/1 6 available at: http://unctad.org/en/PublicationsLibrary/ditc2015misc1_en.pdf (accessed 20 October 2016).
[200] Gal MS 'Regional Competition Law Agreements: An Important Step for Anti-Trust Enforcement' (2010) 60 *University of Toronto Law Journal*.
[201] Strik P *Shaping the Single European Market in the Field of Foreign Direct Investment* (2014) 17.
[202] Strik P *Shaping the Single European Market in the Field of Foreign Direct Investment* (2014) 17.

competition regulations and oversight bodies which will be examined in further detail in the following paragraphs.[203] What is clear is that considering that the principle of *acquis*[204] is one of the agreed upon Negotiating Principles,[205] it means that negotiations in respect of CP and law should start from the point which the COMESA, EAC and SADC trade negotiations have reached.[206]

In the following paragraphs, the current regional competition regimes of COMESA, EAC and SADC are considered in more detailed.

### 3.4 Background and formation of COMESA

The 1994 COMESA Treaty replaced the former Preferential Trade Area for Eastern and Southern Africa Treaty of 1981.[207] COMESA was created to fulfil the requirements contained in Article 29 of the PTA, which provides for the creation of a FTA, followed by a Common Market (CM) and eventually an Economic Community for Eastern and Southern African States. The purpose of COMESA, as contained in the Preamble to the Treaty Establishing a Common Market for Eastern and Southern Africa (COMESA Treaty)[208] is:

> 'to mark a new stage in the process of economic integration with the establishment of a Common Market for Eastern and Southern Africa and the consolidation of their economic co-operation through the implementation of common policies and programmes aimed at achieving sustainable growth and development'.[209]



Thus, the 21 COMESA members have agreed to promote regional integration through trade development as well as to develop their natural and human resources for the mutual benefit of all their people. COMESA is said to be one of the more successful regional economic co-operation

[203] African Union Commission *Status of Integration in Africa (SIA IV)* (2013) 34 available at http://www.au.int/ar/sites/default/files/SIA%202013(latest)_En.pdf (accessed12 August 2016).
[204] *Acquis* is a French term meaning "that which has been agreed".
[205] The Negotiating Principles are intended to guide the negotiation process.
[206] Cape to Cairo: Exploring the Tripartite FTA agenda: Erasmus, G The Agreement preceding the Agreement: how the Negotiating Principles decided the Tripartite FTA game plan 7 (2013) Trade Law Centre and the Swedish Embassy, Nairobi
[207] Article 4(4) of the PTAES.
[208] Treaty Establishing a Common Market for Eastern and Southern Africa (COMESA Treaty) (1994).
[209] Preamble to the COMESA Treaty.

and integration groups in Africa, which is supported by several specialised financial institutions and has assisted members in a positive way to develop and grow their economies.[210]

## 3.5 Overview of competition policy and law within COMESA

### 3.5.1 COMESA Treaty

The COMESA Treaty has one of the most comprehensive competition-related provisions and institutional frameworks of all African RECs.[211] Article 55(1) of the COMESA Treaty states that:

> 'the Members agree that any practice which negates the objective of free and liberalised trade shall be prohibited. To this end, the Members 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.'

Article 55(3) also obligates the COMESA Council to develop regulations to regulate competition within the members.

### 3.5.2 COMESA Competition Rules and Regulations



In 2004 the COMESA Competition Rules and Regulations (CRRs)[212] was established. The overarching aim of the CRRs is to ensure the efficient operation of the markets with the view to enhancing free and liberalised trade as a prerequisite to safeguarding the welfare of consumers.[213]

The CRRs are said to provide a comprehensive cooperation tool with detailed provisions on institutional arrangements, anticompetitive business practices, abuse of dominant position,

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[210] Musonda J 'Regional Competition Policy for COMESA countries and implications of an FTA in 2000' in UNCTAD *Competition Policy, Trade and Development in the Common Market for Eastern and Southern Africa (COMESA)* UNCTAD/ITCD/CLP/Misc18 103 available at http://unctad.org/en/Docs/poitcdclpm18.en.pdf (accessed 10 October 2017).

[211] Lipimile G & Gachuiri E 'Allocation of competences between national and regional competition authorities: The case of COMESA' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD/DITC/CLP/2005/1 UNCTAD 362 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 12 November 2016).

[212] COMESA Competition Regulations and Rules.

[213] COMESA Competition Commission *Background* available at http://www.comesacompetition.org/?page_id=375 (accessed 20 February 2015).

mergers and acquisitions, and consumer protection.[214] Furthermore, Article 16 of the CRRs prohibits restrictive business practices which affect trade between members and have as their object or effect the prevention, restriction and distortion of competition within the CM. Article 18 of the CRRs addresses any abuse by one or more undertakings of a dominant position within the CM or in a substantial part thereof.

The CRRS could be a valuable resource to which the TFTA members could refer when developing the TFTA's regional competition rules and regulations particularly because they have already been agreed to by the 21 COMESA members who are also TFTA members and are largely modelled on the EU model, which is a centralised regional competition regime. However, that is not to say that the COMESA CRRs are entirely adequate for the purposes of the TFTA since the overarching objectives of the the TFTA is to deepen integration between not only COMESA members but also those who are in the EAC and SADC. Thus, in developing rules and regulations, the specific needs of the TFTA as a region need to be taken into account.

### 3.5.3 COMESA Competition Commission

The COMESA Competition Commission (COMESA CC)[215] was established in 2012 and began operating in early 2013. The COMESA CC is a body corporate that is responsible for promoting fair competition and penalising uncompetitive practices in COMESA.



Specifically, the statutory functions of the COMESA CC include (amongst others) monitoring and investigating anti-competitive practices within COMESA, mediating disputes between members concerning anti-competitive conduct, and helping members promote national competition laws.[216]

It has been suggested that the COMESA CC could become the centralised authority within the TFTA. Although this is a possibility, there will no doubt be those members who feel that the TFTA agency should be an entirely independent and impartial agency that is created anew. Although the COMESA CC could serve to provide valuable insights and resources for the development of a TFTA central agency as well as to inform the structure and ambit of its role, to avoid potential

[214] COMESA Competition Commission *A Guide to Anti-Competitive Business Practices* 98 available at http://www.comesacompetition.org/?page_id=498 (accessed 20 February 2015).
[215] Part 2 of the CRRS provides for the establishment of this institution.
[216] Article 7(2)(a-j) of the CRRs.

issues, a new agency should be established under the auspices of the TFTA.

### 3.5.4 Enforcement mechanisms

The implementation and enforcement of the CRRs is achieved by four institutions, namely the COMESA CC, the Board of Commissioners (Board), the Council of Ministers (Council) and the COMESA Court of Justice (Court).

The COMESA CC is responsible for the application of the CRRS between members.[217] The Board is the supreme policy body of the COMESA CC and has the power to issue determinations in respect of anti-competitive business practices and to adjudicate and make orders on matters arising out of the CRRs.[218] The Court deals with disputes arising from the application of the CRRS and hears appeals against decisions of the Board on matters of law. The Courts decisions are binding to all members and it has unlimited jurisdiction to review the Board's decisions.

The COMESA CC has a supranational position in relation to the NCAs in competition cases and has the power to resolve cases in various ways. [219] The COMESA CC may also apply to the relevant national court for an appropriate order if the business fails to comply with its order within a specific time period. [220] In addition, Article 24(7) on merger control provides members with the opportunity to request the COMESA CC to refer the merger for consideration under the member's national competition law if the member is satisfied that the merger will have negative impact on competition in its territory. The COMESA CC has the final determination on whether to pass the merger for review to the relevant NCA or to deal with it at the regional level. Article 23 provides that if one or both businesses involved in the merger proposal operate in two or more members, the COMESA CC has jurisdiction.



[217] Article 6 of the CRRS.
[218] Article 12 of the CRRs.
[219] Article 21 of the CRRs.
[220] Article 21(13) of the CRRs.

COMESA also encourages its members to enact domestic competition laws since the regional law addresses cross-border competition issues.[221] In this respect, the COMESA competition regime is similar to that of the EU.

The TFTA can also refer to the structure of the COMESA institutions and the scope of their power and reasonability when developing a regional competition regime under the TFTA. In the same way as COMESA encourages the establishment of domestic competition laws, the TFTA should consider also encouraging its members to adopt well skilled and resourced NCAs and to develop coherent competition legislation that aligns with the requirements for a national competition regime as determined TFTA members.

### 3.5.5 Challenges facing competition policy and law in COMESA

(a) Deficiency in the framework

While the CRRs may appear comprehensive enough in sharing jurisdiction between the COMESA CC and NCAs, there are a number of issues that UNCTAD have highlighted.[222] First, it is not clear what the process is when a case affects more than one member, but where the degree of impact may differ between states. Secondly, the CRRs do not adequately regulate cases in which one or more of the effected members do not have national competition law and/or a competition agency. Thirdly, the CRRs do not adequately deal with cases that are not easily identifiable in terms of their geographic coverage. Lastly, UNCTAD highlights that the CRRs do not adequately account for ways and means of exchange of information, advocacy and joint training opportunities.[223]



[221] UNCTAD *The attribution of competence to community and national competition authorities in the application of competition rules* (2008) TD/B/COM.2/CLP/69 5 available http://unctad.org/en/Docs/c2clpd69_en.pdf (accessed 19 October 2016).
[222] UNCTAD *The Attribution of Competition to Community and National Competition Authorities in the Application of Competition Rules* (23 May 2008) UNCTAD/TD TD/B/COM.2/CLP/69 7 available at http://unctad.org/en/Docs/c2clpd69_en.pdf (accessed 19 October 2016).
[223] Lipimile G & Gachuiri E 'Allocation of competences between national and regional competition authorities: The case of COMESA' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD/DITC/CLP/2005/1 UNCTAD 362 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 12 November 2016).

(b) Uncertainty

While the new regime is already in force, there is significant uncertainty as to its interpretation and how it will operate in practice. It is also unclear to what extent the members have ceded sovereignty over transactions that affect their economies, and whether the COMESA CC and the members will cooperate sufficiently with one another in this regard.[224]

(c) Applicability and enforcement

The COMESA Treaty has been closely modelled on the EU structure. With this in mind, the fact that a particular EU member follows a monist or dualist system has a limited affect on the applicability of EU law in that member.[225] However, the same cannot be said for COMESA and its members, which are not as developed as those of the EU. In this regard, the COMESA Treaty expressly provides that:

> '[...] each Member shall take steps to secure the enactment of and the continuation of such legislation to give effect to this Treaty and in particular […]
>
> (b) to confer upon the regulations of the Council the force of law and the necessary legal effect within its territory'.[226]



Accordingly, the fact that COMESA members follow a monist or a dualist system will substantially impact on the applicability and enforcement of COMESA law at a national level.[227] Within COMESA, it appears that some members, such as Swaziland follow a dualist systems, which means that the CRRs must first be incorporated into national law before they can be applied

[224] Webber Wentzel *COMESA – A New Regional Competition Law Regime for Eastern and Southern Africa* available at http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF (accessed 25 April 2017).
[225] Webber Wentzel *COMESA – A New Regional Competition Law Regime for Eastern and Southern Africa* available at http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF (accessed 25 April 2017).
[226] Article 5(2)(b) of the COMESA Treaty.
[227] Webber Wentzel *COMESA – A New Regional Competition Law Regime for Eastern and Southern Africa* available at http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF (accessed 25 April 2017).

by national courts and enforced by the COMESA CC.[228] Other members follow the monist system, such as Kenya, but still require publication of the treaty in the national official gazette.

Thus, because the COMESA Treaty provides that members must make every effort not to take any actions that may prejudice the achievement of the goals of COMESA or the implementation of the provisions of the COMESA Treaty, should a member not take the necessary steps to ensure that the CRRs have the force of law and the necessary legal effect, such member would be in violation of the COMESA Treaty.[229] Although the COMESA Treaty contains sanctions that may be imposed if members default in performing obligations under it,[230] it is unlikely that these sanctions will be imposed on a member that fails to incorporate the CRRs into national law or which denies the jurisdiction of the COMESA CC over mergers with a regional dimension.[231]

COMESA's experience with developing and implementing a centralised regional competition regime can provide valuable insight for TFTA members when developing a regional competition regime if it adopts a centralised model as is proposed. Although there are certain challenges facing the implementation of the COMESA competition regime, the experience of the COMESA CC could serve to provide valuable insights and resources for the development of a TFTA competition regime, as well as to inform the structure and ambit of the role of a central agency within the region.



### 3.6 Background and formation of the EAC

The East African Community (EAC) is an intergovernmental organisation that brings together five East African countries, namely Burundi, Kenya, Rwanda, Tanzania, and Uganda. Originally created in 1967, it was dissolved in 1977 due to lack of unity on a political, economic, institutional

[228] Webber Wentzel *COMESA – A New Regional Competition Law Regime for Eastern and Southern Africa* available at http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF (accessed 25 April 2017).
[229] Webber Wentzel *COMESA – A New Regional Competition Law Regime for Eastern and Southern Africa* available at http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF (accessed 25 April 2017).
[230] The sanction may include the suspension of a member's rights and privileges off membership in the COMESA, a financial penalty, suspension or expulsion from COMESA.
[231] Webber Wentzel *COMESA – A New Regional Competition Law Regime for Eastern and Southern Africa* available at http://www.eavca.org/Webber%20Wentzel%20COMESA%20Merger%20Control.PDF (accessed 25 April 2017).

and structural concerns. It was not until 1996 that Kenya, Tanzania and Uganda began the process of reviving the earlier EAC. [232]

In 1999 the East African Community Treaty the EAC (EAC Treaty) entered into force on 7th of July 2000 after its ratification by the members. According to the EAC Treaty, the EAC was to first form a CU, followed by a CM, then a monetary union, and finally a political union.[233] The Treaty provides that the objectives of the EAC shall be to develop policies and programmes aimed at widening and deepening co-operation among the members in political, economic, social and cultural fields for their mutual benefit.[234] However it is important to note that the regional integration objectives of EAC, like most RECs in practice use the economic goal to achieve political objectives.[235]

The Common Market Protocol (Protocol),[236] which set up a CU and comprised of the planning for an EAC CP was finally launched in 2010 and took effect one year later.[237]

## 3.7 Overview of competition policy and law within the EAC

### 3.7.1 EAC Treaty and Protocol

Article 75(1)(i) of the EAC Treaty identifies competition as one of the priority targets.[238] Article 33 of the Protocol deals with prohibited business practices and fulfils the obligations regarding competition as set out in Article 75(1)(i) of the EAC Treaty.



[232] Adar KG 'The Democratisation of International Organisations – East African Community in Finizio G, Levi L & Vallinoto N (eds) International Democracy Report 2011 by Centre for Studies on Federalism (2011) 3 – 4 available at http://www.internationaldemocracywatch.org/attachments/458_EAC-adar.pdf (accessed 12 November 2016).
[233] Adar KG 'The Democratisation of International Organisations – East African Community in Finizio G, Levi L & Vallinoto N (eds) International Democracy Report 2011 by Centre for Studies on Federalism (2011) 3 – 4 available at http://www.internationaldemocracywatch.org/attachments/458_EAC-adar.pdf (accessed 12 November 2016).
[234] Article 5 of the Treaty Establishing the EAC.
[235] Adar KG 'The Democratisation of International Organisations – East African Community in Finizio G, Levi L & Vallinoto N (eds) International Democracy Report 2011 by Centre for Studies on Federalism (2011) 3 – 4 available at http://www.internationaldemocracywatch.org/attachments/458_EAC-adar.pdf (accessed 12 November 2016).
[236] EAC Protocol on the Establishment of the East African Community Common Market.
[237] Djelic M-L 'Competition regulation in Africa between global and local: A Bayan Tree Story' in Drori GS, Höllerer MA & Walgenbach P (eds) *Global Themes and Local Variations in Organization and Management: Perspectives on Globalization (*2014) 95.
[238] Durevall D *EAC Preconditions for an effective Monetary Union* (2011) Working Papers in Economic No 520 2 available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.661.4279&rep=rep1&type=pdf (accessed 20 April 2015)

Article 33(1) of the Protocol prohibits any practice that adversely affects free trade. Article 33(2) states that Article 33(1) shall apply to:

> '(a) all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Partner States and which have as their objective or effect the prevention, restriction or distortion of competition within the Community;
>
> (b) concentrations which create or strengthen a dominant position and as a result of which effective competition would be significantly impeded within the Community or in a substantial part of the Community; and
>
> (c) any abuse by one or more undertakings of a dominant position within the Community or in a substantial part of the Community.'

### 3.7.2 EAC Competition Act

In 2004, the EAC Council of Ministers guided by the second East African Development Strategy adopted the EAC CP and subsequently the East African Legislative Assembly enacted the East African Community Competition Act (EAC Act) in 2006.[239]



The EAC Act follows the EU model and is a comprehensive piece of legislation, since it includes provisions on anticompetitive agreements, abuse of dominance, mergers as well as subsidies.[240] The broad objectives of the EAC Act puts focus on both economic and political goals of the region.[241] The EAC Act seeks to promote and protect fair competition within the EAC, to provide for consumer welfare, and to establish the East African Community Competition Committee (EAC Committee) and an East African Competition Authority (EAC Authority).

Importantly, article 5(1) of the EAC Act states that:

[239] The East African Community Competition Act (EAC Competition Act).
[240] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 74.
[241] Article 3 of the EAC Act.

> '[...] a person shall not engage in concerted practice if that practice has, or is intended to have, an anti-competitive effect in the relevant market.'

Article 2 defines "concerted practices" as:

> '[...] any agreement, arrangement or understanding, formal or informal, written or oral, open or clandestine, between competitors;'

Although an in-depth analysis of the the concept of 'concerted practices' is beyond the scope of this submission, it is important to note that the concept has its origins in American competition law and initially appeared in section 1 of the Sherman Antitrust Act[242] which used the concept "conspiracy", which then became known as "concerted actions".[243] The EU then adopted the concept, albeit without defining it, and included it in article 101 of the TFEU which states that:

> 'The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market.'[244]

The scope of 'concerted practices' has been established in the EU overtime through case law. In the two leading cases on the matter, the Dyestuff Matter case[245] and EU Sugar Industry case,[246] concerted practices are defined as representing a form of coordination between undertakings that, without reaching the level at which a proper agreement would have been concluded, knowingly substitutes the practical cooperation to the risks of competition.[247]



[242] The Sherman Antitrust Act.
[243] Cucu C *"Agreements", "Decisions" and "Concerted Practices": Key Concepts in the Analysis of Anticipative Agreements* 222 available at https://scholar.google.ae/scholar?q=%E2%80%9CAgreements%E2%80%9D,+%E2%80%9CDecisions%E2%80%9D+and+%E2%80%9CConcerted+Practices%E2%80%9D:+Key+Concepts+in+the+Analysis+of+Anticipative+Agreements&hl=en&as_sdt=0&as_vis=1&oi=scholart&sa=X&ved=0ahUKEwj70fyW9OvZAhXPC-wKHXhyC_kQgQMIIzAA (accessed on 14 March 2018).
[244] Article 101 of the TFEU.
[245] Dyestuffs.
[246] EU Sugar Industry Case.
[247] Cucu C *"Agreements", "Decisions" and "Concerted Practices": Key Concepts in the Analysis of Anticipative Agreements* 222 available at https://scholar.google.ae/scholar?q=%E2%80%9CAgreements%E2%80%9D,+%E2%80%9CDecisions%E2%80%9D+and+%E2%80%9CConcerted+Practices%E2%80%9D:+Key+Concepts+in+the+Analysis+of+Anticipative+Agre

The definition given to concerted practices in the EAC Act differs from the definition under EU law, in that it seems to include any agreement or arrangement or understanding, not just forms of coordination between undertakings that don't create proper agreements. Presumably the reference to "understanding" in article 2 is intended to cover the forms of coordination classified as "concerted practices" under EU law. However, the scope of concerted practices under the EAC Act will surely also become more apparent once the EAC is fully operational and cases start to come before the EAC Authority.

Article 5(2) of the EAC Act identifies prohibited practices which includes cartels of all kinds which are clearly associated with punitive provisions. Although abuse of dominance in itself is not illegal in terms of the EAC Act,[248] firms can commit an offence if they violate Article 8.[249]

The EAC Act also prohibits unconscionable conduct in consumer and business transactions.[250] Unconscionable conduct is not defined but article 29(2) includes a non-exhaustive list of factors that the EAC Authority could consider in determining whether there has been a contravention of article 29(1).[251]

### 3.7.3 Enforcement Mechanism

The EAC Act is based on principles of supra-nationality, in terms of which members voluntarily cede their supremacy in matters which have an EAC dimension to the EAC and matters which fall outside of the ambit of the EAC are to be dealt with in accordance with the members' national competition laws. [252]



ements&hl=en&as_sdt=0&as_vis=1&oi=scholart&sa=X&ved=0ahUKEwj70fyW9OvZAhXPC-wKHXhyC_kQgQMIIzAA (accessed on 14 March 2018).

[248] Article 8(1) of the EAC Act states that an undertaking holding a dominant position in the relevant market shall not: (a) directly or indirectly impose unfairly high selling or unfairly low purchasing prices or other unfair trading conditions; (b) limit production or technical development and innovation to the prejudice of consumers; (c) discriminate between consumers or suppliers according to non-commercial criteria such as nationality or residence. Article 8(2) states that subsection (1) shall apply to any undertaking on which small or medium sized undertakings are dependent.

[249] Article 8(3) of the EAC Act states that any person who contravenes the provisions of this section commits an offence.

[250] Article 29(1) of the EAC Act.

[251] Article 29(2) of the EAC Act.

[252] Article 37 od the EAC Competition Act.

The EAC has consistently been entertaining highly ambitious ideas for creating an almost fully fledged regional competition law regime.[253] To achieve this, the existence of autonomous and fully functional NCAs is thought to be fundamental to the success of the EAC authority as NCAs will enforce the decisions of the EAC authority.[254] This model is a partially centralised model.

As provided for under Article 3 of the EAC Competition Act, the EAC Authority is to be created which shall consist of one commissioner from each member.[255] It shall have the power to collect information, to investigate and compel the provision of evidence, to hold hearings, to issue legally binding decisions, to impose sanctions and remedies, to refer matters to a court for adjudication, to develop appropriate procedures for advocacy, and to pursue a research program. The EAC Authority was intended to be set up by July 2015, after confirmation of the members' nominees for the posts of commissioners. At the 33rd Meeting of the Council of Ministers held on 29th February 2016, five commissioners were finally appointed, based on the nominations provided by the EAC members.[256] The appointment of the EAC commissioners is an important step towards operationalising the EAC authority which has yet to be fully operational.

### 3.7.4 Information exchange and cooperation

Article 32 of the EAC Act specifically addresses the issue of information exchange and dissemination by prohibiting false and misleading representations by persons engaged in trade or commerce in respect of their goods or services.



### 3.7.5 Challenges facing competition policy and law in EAC

(a) Failure to operationalise

Although the EAC Act was enacted in 2006, it has not been fully operationalised although the newly appointed commissioners were sworn in at the EAC headquarters in November 2016. The main challenges facing the EAC identified by the EAC's Secretariat is firstly, the implementation

[253] Article 37 od the EAC Competition Act.
[254] Dabbah MM *International and Comparative Competition Law* (2010) 390.
[255] Article 38 of the EAC Competition Act.
[256] http://www.eac.int/news-and-media/press-releases/20161103/five-commissioners-eac-competitionauthority-sworn-eac.

of national competition regulatory frameworks in all members and secondly, the enhancement of public awareness and political will.[257]

(b) Lack of harmonisation

The first undertaking was the adoption of competition laws and the establishment of competition institutions at a national level, by all members.[258] The failure of all members to enact national competition laws is seen to be the biggest argument advanced hindering the implementation of the EAC Act. Apart from Uganda, all EAC members have enacted a competition act, although with important discrepancies as to their level of implementation at a national level.

Thus, inconsistencies among national competition regimes within the EAC are an important impediment to the installation of a harmonised regional enforcement. Burundi has a competition law in force but is yet to put in place a competition authority.[259] The process of getting competition legislation in place in Uganda and Rwanda has been slow, primarily because competition law is not seen as a priority, given the serious socio-economic problems faced by the states. Uganda has had a draft bill since 2004 but has not yet been passed into law.[260] Burundi is in the process of establishing a competition commission.[261]

(c) Deadlock



The second step in the EAC competition project was the setting up of the regional competition authority, which was to be funded by all members of the EAC, under the supervision of the EAC

[257] Vangliasind M 'Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants (December 2001) 68 European Bank for Reconstruction and Development Working Paper 68 available at http://www.ebrd.com/downloads/research/economics/workingpapers/wp0068.pdf (accessed 12 September 2017).
[258] Vangliasind M 'Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants (December 2001) 68 European Bank for Reconstruction and Development Working Paper 68 available at http://www.ebrd.com/downloads/research/economics/workingpapers/wp0068.pdf (accessed 12 September 2017).
[259] Vangliasind M 'Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants (December 2001) 68 European Bank for Reconstruction and Development Working Paper 68 available at http://www.ebrd.com/downloads/research/economics/workingpapers/wp0068.pdf (accessed 12 September 2017).
[260] http://www.bowmanslaw.com/wp-content/uploads/2016/12/Guide-Competition-3.pdf 148.
[261] http://www.bowmanslaw.com/wp-content/uploads/2016/12/Guide-Competition-3.pdf 18.

Secretariat. Although an interim structure has been approved by members, the final measures appear to be at a deadlock.[262]

(d) Political will and competition culture

In addition, in East Africa, governments play an active role in regulating and setting bureaucratic measures to be followed by firms to enter or exit the market resulting in rigid barriers. Most companies are government monopolies. The wave of privatisation and liberalisation only meant that these companies were sold to private entities which maintain the monopoly status of formerly government run enterprises.[263] With extremely limited education in the field, it therefore comes as no surprise that there is very little research work on competition-related issues and very little comprehension of the subject among policy makers and law enforcers in the region.[264]

(e) Merger notification

From a framework point of view, the EAC does not stipulate a threshold for those M&As that need to be notified. In addition, the lack of a stipulated threshold creates a problem when it comes to enforcement because the CRRs also have a requirement for notification of mergers with a regional effect.



(f) Disparate economic strength

Although the creation of a CM was to be completed by 2015, there have been significant obstacles to the successful functioning of the EAC CM. A major obstacle is that trade relations between its

[262] Vangliasind M 'Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants (December 2001) 68 European Bank for Reconstruction and Development Working Paper 68 available at http://www.ebrd.com/downloads/research/economics/workingpapers/wp0068.pdf (accessed 12 September 2017).
[263] Vangliasind M 'Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants (December 2001) 68 European Bank for Reconstruction and Development Working Paper 68 available at http://www.ebrd.com/downloads/research/economics/workingpapers/wp0068.pdf (accessed 12 September 2017).
[264] Vangliasind M 'Competition across transition economies: an enterprise-level analysis of the main policy and structural determinants (December 2001) 68 European Bank for Reconstruction and Development Working Paper 68 available at http://www.ebrd.com/downloads/research/economics/workingpapers/wp0068.pdf (accessed 12 September 2017).

members are largely influenced by economic strengths, which are disparate and therefore undermine the objectives of the EAC. [265]

The model applied by the EAC is a partially centralised model which requires that the EAC regional competition laws are enforced by adequately resourced and skilled NCAs. Although the substantive content of the EAC regime may provide valuable insight to the TFTA, the centralised model used by COMESA is a more favourable approach especially given that not all TFTA members have the resources, skills or capacity to develop adequate NCAs.

It is also evident from the the EAC's experience with developing and implementing the regional competition regime that if the TFTA is to be successful in its endeavours to develop its own competition regime it will come up against the same challenges specifically from EAC members. The most significant challenges in the EAC is first, the lack of political will and vested interest by governments to ensure that the regional regime is effective, and secondly, the need for capacity building at the national and regional level in support of the EAC competition regime. Thus, the TFTA should bear these challenges in mind and seek to develop a regime that aims to overcome, counter or address these existing challenges.

### 3.8 Background and formation of SADC



SADC was established in August 1992 with the signing of the declaration and treaty which transformed it from a loose alliance of nine states known as the Southern African Development Coordinating Conference of 1980.[266] In 2003, SADC members approved the Regional Indicative Strategic Development Plan (RISDP), SADC's integration agenda. This agenda included the launch of an FTA by 2008 (took place in 2010), the creation of a CU by 2010 (currently officially postponed), as well as the launch of a CM by 2015 and a single currency by 2016.[267]

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[265] IMF *The East African Community After Ten Years: Deepening Integration* Davoodi HR (ed) (2012) 41 available at https://www.imf.org/external/np/afr/2012/121712.pdf (accessed 20 April 2015).
[266] UNCTAD *The Attribution of Competition to Community and National Competition Authorities in the Application of Competition Rules* (23 May 2008) UNCTAD/TD TD/B/COM.2/CLP/69 7 available at http://unctad.org/en/Docs/c2clpd69_en.pdf (accessed 19 October 2016).
[267] European Centre for Development Policy Management *Advancing Regional Integration in Southern Africa Final Report* (April 2014) 50 available at http://ecdpm.org/wp-content/uploads/2014-DFID-Advancing-Regional-Integration-in-Southern-Africa-Final-Report.pdf (accessed 10 October 2017).

### 3.9 Overview of competition policy and law within SADC

#### 3.9.1 SADC Treaty and protocol

The SADC Treaty does not have provisions on competition. However, Article 25 of the SADC Trade Protocol requires members to adopt comprehensive trade development measures within the community which prohibit unfair trade practices and promote competition. The procedure of how to implement Article 25 is not provided. It is envisaged that SADC would issue guidance to members on how to proceed in this aspect. Discussions within SADC membership during a ministerial conference in April 2007 and a follow-up meeting during the SADC Special Trade Negotiating Forum Meeting in September 2007, revealed that the intention was to move towards developing a cooperating mechanism as opposed to supranational structure.[268]

A proper understanding of SADC requires recognition of the fact that the implementation formula for obligations in the SADC legal instruments is a decentralised one. The members have to give effect to their obligations through their own efforts and in this regard, they are often hampered by bottlenecks in technical capacity and resources.[269]

#### 3.9.2 SADC Declaration

To prohibit unfair business practices and to promote competition and cooperation in the region, SADC signed a Declaration on Regional Cooperation in Competition and Consumer Policies (Declaration) in September 2009.[270] This declaration sets out a cooperation framework on CP for SADC that helps streamline international trade and support economic growth. Notably, article 16 of the SADC Protocol on Finance and Investment states that parties undertake through co-operation to advance a competition policy in the region. [271]

The Declaration is derived from Article 25 of the Protocol on Trade.[272] The Declaration provides

[268] UNCTAD *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) 93 available at http://unctad.org/en/PublicationsLibrary/ditctab2014d5_en.pdf (accessed 20 October 2016).
[269] UNCTAD *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) 5 available at http://unctad.org/en/PublicationsLibrary/ditctab2014d5_en.pdf (accessed 20 October 2016).
[270] SADC Declaration on Regional Cooperation in Competition and Consumer Policies (2009).
[271] Article 16 of the SADC Protocol on Finance and Investment 2006.
[272] Protocol on Trade in the Southern African Development Community (SADC) Region (1996) available at http://www.sadc.int/files/4613/5292/8370/Protocol_on_Trade1996.pdf (accessed 23 October 2016).

a cooperation framework in the implementation of members' respective laws. The Declaration encourages members to establish a transparent framework that contains appropriate safeguards to protect confidential information of the parties, and appropriate national judicial review.

Through the Declaration, members officially recognise that regional integration creates markets that cross national boundaries subject to varying trade policies and members have agreed to converge their policies in order to preserve equity in trade and fair competition throughout the region, with the ultimate aim of regional policy harmonisation.

### 3.9.3 SADC Secretariat

The SADC Secretariat strives to facilitate the establishment of NCAs in those members that have no such institutions, and competition and consumer protection advocacy programmes. The Declaration also states that the SADC Secretariat will establish a Competition and Consumer Policy and Law Committee to oversee cooperation on competition policies.[273] The Secretariat aids members in establishing NCAs, facilitating studies and programmes on competition and consumer policy, and building capacity throughout the region.[274]

### 3.9.4 SADC MOU



In May 2016, representatives of the NCAs from nine SADC members signed a MOU on Inter-Agency Cooperation in CP, Law and Enforcement.[275] This was a landmark development, a culmination of a consultative process which commenced in July 2015 following the resolution of the SADC Technical Committee on Competition and Consumer Policy and Law made in July 2015 to develop an MOU on Inter - Agency cooperation.[276]

The MOU deals with cooperation between authorities on competition law enforcement and policy.[277] In terms of the substantive provisions of the MOU, it builds on commitments contained

[273] UNCTAD *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) 5 available at http://unctad.org/en/PublicationsLibrary/ditctab2014d5_en.pdf (accessed 20 October 2016).
[274] SADC Declaration on Regional Cooperation in Competition and Consumer Policies (2009).
[275] https://www.sadc.int/news-events/news/competition-authorities-sadc-member-states-signed-memorandum/.
[276] https://www.sadc.int/news-events/news/competition-authorities-sadc-member-states-signed-memorandum/.
[277] Centre for Competition Regulation and Economic Development *Quarterly Competition Review* (June 2016) available at https://static1.squarespace.com/static/52246331e4b0a46e5f1b8ce5/t/57d026cfcd0f68488e3c226e/1473259221034/CCRED+Quarterly+Review_June+2016.pdf (accessed 10 October 2017).

in the SADC Declaration. The NCAs have committed themselves to cooperate by, among other things, sharing information on cases, coordinating investigation of cases, harmonising the rules and procedures for handling cases, and undertaking joint capacity building activities.

The MOU will go a long way in strengthening competition law enforcement and add value to the national implementation efforts of SADC members.[278] NCAs will now be expected to play a pivotal role by ensuring that a conducive business environment for cross border investments exists. The aim of the MOU is to enhance enforcement of the members' competition laws by creating a framework that provides for cooperation between the respective NCAs. The MOU further recognises the role of competition in the effective development of the economy and the role of sound and effective enforcement of competition law and policy in the efficient and effective functioning of markets.[279] Article 2.3 of the MOU states that members states will cooperate and coordinate with one another in the investigation of mergers ad complaints and the prosecution of matters of common interest. Article 2.4 of the MOU states that members will exchange information on investigation of mergers and complaints and prosecution of cases to the fullest extent possible in terms of their domestic laws, and to the extent possible harmonising the rules and procedures for merger filings, applying for leniency and immunity. The MOU will remain in force for three years from the date of signature by two-thirds of members.



### 3.9.5 Challenges facing competition policy and law in SADC

(a) Overlapping membership

Notably, most SADC members are also members of other RECs. This results in legal uncertainty and difficulties with regard to the implementation of obligations and programmes and thus creates conflicts, particularly in the harmonisation of policies.[280]

[278] https://www.sadc.int/news-events/news/competition-authorities-sadc-member-states-signed-memorandum/.
[279] Memorandum of Understanding amongst Competition Authorities of the Members States of the Southern African Development Community on Cooperation in the Field of Competition Policy, Law and Enforcement (2016) SADC/CCOPOLC/7/2016/6 2-3 available at https://www.tralac.org/images/Resources/SADC/SADC%20MOU%20on%20Cooperation%20in%20the%20field%20of%20Competition%20Policy,%20Law%20and%20Enforcement%20signed%2026%20May%202016.pdf (accessed 10 November 2016).
[280] UNCTAD *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) 5 available at http://unctad.org/en/PublicationsLibrary/ditctab2014d5_en.pdf (accessed 20 October 2016).

(b) No domestication

Furthermore, the SADC agreements do not contain a binding obligation to 'domesticate' the relevant SADC instruments and to make them part of members' national laws.[281] Thus, there are no firm obligations placed on SADC members to comply and it is essentially left to national governments to adopt adequate measures to promote the achievement of the objectives of SADC.[282]

(c) No joint enforcement

Since SADC does not have the equivalent of the EU Commission with its supranational powers, the danger is, of course, that such a decentralised approach can easily become uncoordinated, fragmented and ineffective.[283] While some SADC members have enacted their own laws on competition, others are yet to do so. This situation may lead to inconsistencies and uncertainties when businesses trading with several members expect similar practices throughout the FTA.[284]

(d) Domestic competition law

In addition, in order for cooperation to be effective, all participating members need to have competition laws and effective enforcement mechanisms.[285] However, the recent MOU may assist in overcoming this challenge.



Considering that the SADC competition regime is a decentralised model it would not serve as a template for the development of a centralised competition regime within the TFTA. However, certain of the commitments contained in the Declaration and MOU could serve to be useful for the TFTA purposes. For example, the requirement that members develop competition laws and effective enforcement mechanisms is one which the TFTA could also adopt. In addition, like the MOU the TFTA could require NCAs to play a pivotal role by ensuring that a conducive business

[281] UNCTAD *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) 5 available at http://unctad.org/en/PublicationsLibrary/ditctab2014d5_en.pdf (accessed 20 October 2016).
[282] Article 6 of the SADC Treaty.
[283] UNCTAD *Non-tariff Measures and Regional Integration in the Southern African Development Community* (2015) 5 available at http://unctad.org/en/PublicationsLibrary/ditctab2014d5_en.pdf (accessed 20 October 2016).
[284] http://www.sadc.int/themes/economic-development/trade/competition-policy/.
[285] UNCTAD *The attribution of competence to community and national competition authorities in the application of competition rules* (2008) TD/B/COM.2/CLP/69 available http://unctad.org/en/Docs/c2clpd69_en.pdf (accessed 19 October 2016).

environment for cross-border investments exists within members. The TFTA could also give the central authority the role of facilitating the establishment of NCAs in those members that have no such institutions as well as to oversee competition and consumer protection advocacy programmes as the SADC Secretariat is required to do.

### 3.10 Conclusion

The TFTA represents an ambitious plan to achieve deeper integration within the region. Notwithstanding that opinions are divided on whether the TFTA negotiations will be successful, the process is said to nevertheless facilitate closer coordination and harmonisation in crucial areas effecting FDI and trade in general, within the region. Thus, fair competition in the proposed TFTA is important if the region is to attain its goals of increasing and properly regulating FDI in the region and the TFTA agreement should therefore, cover this important trade-related area.

In terms of the negotiating principles of the TFTA, the existing frameworks for competition and policy within COMESA, EAC and SADC must be the starting point from which a TFTA competition regime is developed. COMESA has adopted a competition regime based on a centralised model and although COMESA has encountered a number of challenges, which will no doubt be similar for the TFTA, certain aspects of the COMESA model will be valuable for the TFTA when developing a regional competition regime. As far as the EAC and SADC models are concerned, although it is not recommended that the TFTA pursue a partially centralised model, as is the case with the EAC, or a decentralised model, as is the case of SADC, each of these regions have faced challenges which are likely to hamper coordination efforts within the TFTA. Thus careful thought will need to be given on how the TFTA can overcome these challenges which include the lack of competition culture, varying levels of development within the members, jurisdictional uncertainty regarding which institution has authority over which cases, lack of political will and reluctance to part with sovereignty in favour of a regional authority to decide on competition cases, when developing the TFTA's regional competition regime.

The following chapter will consider whether the experiences of the EU and SA can provide solutions to some of the challenges faced by COMESA, EAC and SADC in developing and implementing their regional competition regimes which in turn can be applied within the TFTA context.

## CHAPTER FOUR

## COMPETITION POLICY, LAW AND INVESTMENT FRAMEWORKS WITHIN THE EUROPEAN UNION AND SOUTH AFRICA

### 4.1 Introduction

The development and enforcement of CP and law within the TFTA raises several challenges. From a domestic point of view, the content of and approaches taken by markets to CP and law varies greatly and depends on social, political and economical factors. From a regional perspective, certain governments may not see it in its country's interest to create consensus on a regional level. For example, closer competition-enforcement cooperation is often impeded by basic substantive and procedural differences between the competition-law regimes of different countries or simply the lack of consensus in relation to cross-border transactions.[286]

This chapter examines both the EU and SA's approach to competition CP and law with a view to determining whether there are specific lessons for the TFTA in developing a regional competition regime. The chapter first considers the background and formation of EU CP and law and existing framework for the cooperation and enforcement thereof. The chapter proceeds to consider lessons for the TFTA for developing cohesion on CP and law from the EU experience. The chapter then considers the background and formation of SA CP and law and existing framework for the cooperation and enforcement thereof. Lastly, the chapter draws out lessons for the TFTA members in developing or reforming domestic CP and law based on the SA experience.



### 4.2 Competition policy and law within the EU

The EU's efforts to develop a comprehensive CP dates back to 1957 and is undoubtedly one of the strongest systems of CP worldwide.[287] It is the only competition regime in the world that has a

[286] UNCTAD World Investment Report: Transnational Corporations, Market Structure and Competition Policy (1997) xxxiv.
[287] Epstein J 'The Other Side of Harmony: Can Trade and Competition Laws work Together in the International Marketplace' (2002) *American University Law Review* 343.

functioning regional model with a supranational competition authority.[288]

In the EU, most countries introduced competition laws after the Second World War with a view to promoting not only economic efficiency, but also economic freedom, separation and diffusion of private and political power, and deregulation of their traditionally more protected economies.[289]

### 4.2.1 Background and formation of the EU

The earliest EU competition rules were introduced in Articles 65 and 66 of the Treaty Establishing the European Coal and Steel Community (Treaty of Paris).[290] However, these were specialised rules which had limited application. The inclusion of CP within the EU regulatory regime officially commenced with the Treaty Establishing the European Economic Community in 1957 (ECC Treaty).[291]

The ECC Treaty established a system safeguarding free competition in the CM and has three main goals, namely, that competition rules are designed to prevent economic operators erecting new barriers to trade. This essentially prohibits exclusionary abuses of dominance. Secondly, the rules are designed to ensure that operators within the EU do not abuse their individual or collective market power and that the benefits derived from competition flows to consumers.[292] Lastly, that the rules are designed to ensure that EU members' governments do no pervert the EU market mechanism by providing certain national firms with subsidies that give them an unfair advantage over their competitors.[293]



[288] Valockova B *EU Competition Law: A Roadmap for ASEAN? EU Centre in Singapore* (November 2015) Working Paper No. 25 2 available at http://www.eucentre.sg/wp-content/uploads/2015/11/WP25-EU-Competition-Law.pdf (accessed 29 October 2016)
[289] UNCTAD *The role of competition policy for development in globalizing world markets* (1999) UNCTAD/ITCD/CLP/Misc.60 available at http://unctad.org/en/Docs/poitcdclpm14.en.pdf (accessed 12 November 2016).
[290] Treaty Establishing the European Coal and Steel Community (1951).
[291] Treaty Establishing the European Economic Community (1957).
[292] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 283 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[293] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 283 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).

Since the 1950s EU CP and law has undergone manifest changes as market integration has deepened. The heavily centralised system gradually created a number of problems including that it was overwhelmed with a large number of applications for exemptions,[294] it was unable to proactively enforce rules due to resource constraints,[295] and it was criticised for failing to provide companies with legal certainty.[296]

In light of the challenges, in 1999 the EC system was modernised such that the competition enforcement system was partially decentralised. The result was that multi-jurisdictional conflicts and excessive costs were avoided, there was more effective regional law enforcement, and increased cooperation amongst regional and NCAs.[297] The adoption of Regulation 1/2003 replaced the authorisation system with a directly applicable exemption system which meant that the EC was no longer solely responsible for the interpretation of Article 81(3) and that NCAs and courts were included in this process which led to the development of a cooperation framework between NCAs and the EC.[298]

Another major change was that NCAs and national courts of the EU members had to apply Articles 101 and 102 of the TFEU[299] when they reviewed cases that might have an effect on trade between members.[300] To avoid jurisdictional overlap between the EC and NCAs, Council Regulation (EC) No. 1/2003 codified the ruling of the Masterfoods case,[301] which held that NCAs are bound by decisions of the EC.[302] Whilst a number of experts criticised the extensive powers that were granted to the EC, it is argued that such centralisation of enforcement is the key behind the success of the EU competition system.

The extensive jurisprudence gained at the regional level was gradually transposed into national legal systems which also ultimately led to the convergence of national laws.[303] However,

[294] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 169
[295] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 170.
[296] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 170.
[297] Siragusa M 'A Critical Review of the White Paper on the Reform of the EC Competition Law Enforcement Rules' (1999) 23 4 *Fordham International Law Journal* 1094.
[298] Craig P & De Burca G P (eds) *The Evolution of EU Law* (2011) 2 ed 731.
[299] Articles 101 to 109 of the TFEU (2008).
[300] Craig P & De Burca G P (eds) *The Evolution of EU Law* (2011) 2 ed 1-13.
[301] *Masterfoods Ltd v. HB Ice Cream Ltd Case* C-344/98.
[302] Council Regulation (EC) No. 1/2003 of 16 December 2002.
[303] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 170.

decentralisation of enforcement of regional rules only came after years of experience and after a considerable convergence of competition laws.

### 4.2.2 Goals of EU competition policy and law

Even though the debate is not fully settled when it comes to the goals of EU competition law,[304] authors have mostly discussed four, namely, fairness, economic freedom (plurality and consumer choice), economic efficiency and consumer welfare.[305] The integration of the EU is regarded as one of the main aims of EU law in general and competition law particularly.[306] Thus, EU CP aims to protect the efficient functioning of markets from competition distortions whether originating from EU members, market players, or mergers.[307]

### 4.2.3 The legal framework of EU competition policy and law

The TFEU contains competition laws aimed predominantly at encouraging market integration facilitated by a centralised enforcement authority. The principles contained in the TFEU are supported by a number of regulations and directives intended to be observed by EU members.

Articles 101 and 102 of TFEU contain the two main pillars upon which EU CP and law are based.[308] Article 101 TFEU covers the restrictions of competition by prohibiting agreements between two or more independent market operators that restrict competition. This provision applies to both vertical and horizontal agreements. Subject to certain exemptions, Article 101 also prohibits agreements which have as their object or effect the prevention, restriction or distraction

[304] Valockova B *EU Competition Law: A Roadmap for ASEAN? EU Centre in Singapore* (November 2015) Working Paper No. 25 3 available at http://www.eucentre.sg/wp-content/uploads/2015/11/WP25-EU-Competition-Law.pdf (accessed 29 October 2016).
[305] Ioannis L 'Some Reflections on the Question of the Goals of EU Competition Law' (2013) Centre for Law, Economics and Society, Faculty of Laws, UCL Working Paper Series 3/2013 13 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2235875 (accessed 29 November 2016).
[306] Moisejevas R & Novosad A 'Some Thoughts Concerning the Main Goals of Competition Law' (2013) Jurisprudence Mykonos Romerio University, Greece 629 available at https://www.mruni.eu/upload/iblock/b0c/JUR-13-20-2-14.pdf (accessed 30 November 2016).
[307] European Commission *European competition policy in action* (2016) 7 available at https://www.google.ae/url?sa=t&rct=j&q=&esrc=s&source=web&cd=9&cad=rja&uact=8&ved=0ahUKEwiZ19Oh3dLQAhVJchQKHURtBe8QFghOMAg&url=http%3A%2F%2Fec.europa.eu%2Fcompetition%2Fpublications%2Fkd0216250enn.pdf&usg=AFQjCNELxdf9zmjVqOnlrQgPKwJZMmfvKA&sig2=vUqyCITgRD6lTa-WJHaAyA (accessed 25 November 2016).
[308] Article 101 and 102 of the TFEU.

of competition within the internal market.[309] Article 102 prohibits the abuse of a dominant market position.

The EU also has highly complex merger control provisions which cover both legal reasoning and economic analysis.[310] The main legal texts on merger decision are EC Merger Regulation 139/2004[311] and the complimentary implementing regulation 1268/2013,[312] which are supplemented by notices and guidelines.

### 4.2.4 Enforcement of EU competition law

The EC is entrusted with the oversight of EU competition law and enforces competition laws through its powers of investigation and sanction.[313] The EC's policy with regards to competition law infringements is one of prevention as it exercises its power to implement articles 81 to 86 under the ECC Treaty.[314]

Article 81 of the ECC Treaty sets out the rules applicable to restrictive agreements, decisions and concerted practices. It prohibits all agreements which may affect trade between EU members and which have as their object or effect the prevention, restriction or distortion of competition within the EC.[315] Article 82 of the ECC Treaty prohibits abuses by one or more undertakings of a dominant position within the CM or in a substantial part of it in so far as it may affect trade between EU members.[316]



The EC has three possible courses of action in case of a violation, namely, it can launch an infringement procedure, give clearance to the agreement after examination, or issue an exemption

[309] Article 101 of the TFEU.
[310] European Parliamentary Research Service Report *EU competition policy: key to a fair Single Market* (2014) 11 available at http://www.europarl.europa.eu/EPRS/140814REV1-EU-Competition-Policy-FINAL.pdf (accessed 12 January 2017).
[311] European Union Council Regulation No 139/2004.
[312] European Union Council Regulation No 1268/2013.
[313] Article 105 of the TFEU.
[314] EU Commission *Fines for breaking EU Competition Law* 1 available at http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf (accessed 29 November 2016).
[315] Article 81 of the ECC Treaty.
[316] Article 82 of the ECC Treaty.

or a block exemption for a whole sector.[317] The EC also monitors planned M&As of companies if their combined businesses exceed specified revenue thresholds. The EC also has the right to assess mergers between non-EU companies if they carry out a significant part of their business in the EU.

In terms of Article 103 of the TFEU the EC has the power to put in place an enforcement system, including the imposition of fines.[318] Article 23 of Council Regulation 1/2003,[319] which is based on Article 103 TFEU, gives the EC powers to enforce these rules and fine companies for infringements.[320]

Article 17 of Regulation 1/2003 gives powers to the EC to conduct inquiries and inspections into a specific sector of the economy or into a particular type of agreements across various sectors when circumstances suggest that competition may be restricted or distorted within a specific sector or industry.[321]

### 4.2.5 Relationship between the EC and NCAs

The EU has a decentralised arrangement for competition law and policy, in terms of which NCAs also have jurisdiction to enforce Articles 81 and 82 of the TFEU. However, the EC will deal with agreements or practices that have effects on competition in more than three members, or with cases closely linked to other EU provisions that may be exclusively or more effectively applied by the EC, or with cases raising new competition issues, or to ensure effective enforcement.[322]



NCAs are entitled to terminate an infringement, order interim measures and accept commitments or impose fines.[323] This arrangement means that NCAs and courts have been empowered to apply

[317] European Parliamentary Research Service Report *EU competition policy: key to a fair Single Market* (2014) 6 available at http://www.europarl.europa.eu/EPRS/140814REV1-EU-Competition-Policy-FINAL.pdf (accessed 12 January 2017).
[318] Article 103 of the TFEU.
[319] Article 23 of Council Regulation (EC) No 1/2003.
[320] EU Commission *Fines for breaking EU Competition Law* 2 available at http://ec.europa.eu/competition/cartels/overview/factsheet_fines_en.pdf (accessed 29 November 2016).
[321] Article 17 of Council Regulation (EC) No 1/2003.
[322] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 293 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[323] Fournier J 'The negative effect of regulatory divergence on foreign direct investment' (2015) Working Paper No. 1268 OECD 21-22 available at http://dx.doi.org/10.1787/5jrqgvg0dw27-en (accessed 12 November 2016).

EU law, including in cases which have an effect outside domestic borders.[324] Regulation 1/2003 provides for close cooperation and consultation between the EC, NCAs and national courts to ensure uniform application of competition laws.[325] Furthermore, NCAs and national courts can consult the EC on cases involving the application of community law and the EC and NCAs share information[326] and evidence pertaining to cases involving article 81 and 82.[327]

Importantly, EC Regulation 1/2003 further states that neither national courts nor NCAs can take decisions conflicting with the decision adopted or being considered by the EC.[328] Article 11 of Council Regulation 1/2003 provides that when applying EU competition rules, national courts are bound by the case law of the EU courts as well as by EC regulations applying Article 81(3) to certain categories of agreements, decisions or concerted practices. Furthermore, the application of Articles 81 and 82 by the EC in a specific case binds the national courts when they apply EU competition rules in the same case in parallel with or subsequent to the EC. In addition, national courts must also avoid giving decisions that would conflict with a decision contemplated by the EC. If a national court wants to take a decision that runs counter to that of the EC, it must refer the question to the Court of Justice for a decision.[329]

### 4.3 Difference between EU and TFTA

It is important to note that there are significant differences between the EU and the TFTA. These differences include:



(a) Levels of development

Firstly, the TFTA and EU are at vastly different levels of development. The TFTA comprises predominantly developing or least-developed countries, characterised by high-levels of poverty

[324] Briguglio L *'Competition Law and Policy in the European Union – Some Lessons for South East Asia'* (2012) 3 available at https://www.um.edu.mt/__data/assets/pdf_file/0007/177163/ASEAN_competition_law_and_policy_of_the_EU_031102.pdf (accessed 30 November 2016).
[325] Council Regulation (EC) No 1/2003.
[326] Article 12 of Council Regulation 1/2003 (EC) No 1/2003 states that 'for the purpose of applying Articles 81 and 82 of the Treaty the Commission and the competition authorities of the Members shall have the power to provide one another with and use in evidence any matter of fact or of law, including confidential information'.
[327] Fournier J 'The negative effect of regulatory divergence on foreign direct investment' (2015) Working Paper No. 1268 OECD 21-22 available at http://dx.doi.org/10.1787/5jrqgvg0dw27-en (accessed 12 November 2016).
[328] Article 16 of Council Regulation No 1/2003.
[329] Article 234 of Council Regulation No 1/2003.

and unemployment where the majority of the populace are uneducated and in some instances without access to basic necessities. On the other hand the EU comprises predominantly developed countries, who have access to financial resources. [330]

(b) Historical viewpoint

From a historical viewpoint, competition law has developed differently in the TFTA than in the EU. In relation to the EU, competition law has always been at the heart of EU integration and was deemed necessary for the EU because it was considered that the governance could not be achieved simply through the enforcement of national competition laws.

The reasons for this are first, because most countries did not have a national competition laws at the time the EU was founded.[331] Secondly, even if a country had a competition law, its competition authority or courts would be powerless to prevent or sanction transactional anti-competitive practices.[332] Lastly, there was concern that NCAs, if they existed, would be influenced by the widespread appeal of industrial policy measures and as a result, would be tempted to exempt some anti-competitive practices.[333]

(c) Models of integration



The EU and TFTA have articulated their models of integration differently. The TFTA 'single market' should not be equated with the EU 'internal market'. Although both concepts aim for economic integration and liberalisation the TFTA's project is somewhat less ambitious. It does not

[330] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 284 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[331] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 284 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[332] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 284 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[333]Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 284 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017)..

include a CU and it allows its members, according to the principle of open regionalism, to negotiate trade agreements with third countries.

Although similar concerns may exist in relation to the TFTA the development and objectives of the TFTA differ. In the TFTA the relationship between the single market and the regional CP is not as tightly related. For instance, CP is not listed as a Phase One objective and instead falls to be negotiated during phase two of the negotiations.[334]

(d) Objectives

An argument could also be made that integration in the TFTA does not pursue further political goals beyond economic integration. In contrast, economic integration in the EU was always intended to further political goals of peace and political unification.[335] However, the goals of the TFTA are not purely economic either. The three pillars of the TFTA reflect that infrastructural and real social concerns play a major part in the integration project.

(e) Sovereignty

The most important difference between the TFTA and EU, is the supranational character of the EU system versus the importance placed on national sovereignty of the TFTA members in the field of competition law.[336] From the very beginning the EU competition law model was premised on supranational law and institutions in order to guarantee the uniform application of competition laws across the region. However, EU members are still able to adopt and apply competition law to cases that fall beyond the scope of the regional law. Moreover, through the decentralisation of the EU regime, NCAs and courts play an important role in the enforcement of EU competition law.[337]

Thus, if the decision is made to create a supranational competition regime within the TFTA this will likely require the establishment of a central enforcement authority and a supranational court,

[334] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 15 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).
[335] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 15 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).
[336] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 5 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).
[337] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 14 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).

as the highest judicial authority for enforcing that law. However, in light of the experience of COMESA, EAC and SADC, members are reluctant to part with the authority to regulate competition and therefore the members' sovereignty.

(a) National competition laws

National competition laws also differ between the EU and TFTA. In the EU, all members have enacted national competition law whereas not all TFTA members have done so. In addition, the fundamental legal approaches taken in each member of the TFTA vary considerably.[338]

### 4.4 Specific Lessons for the TFTA from the EU

To learn from the EU implies taking into account both the EU experience and the socio-economic and political circumstances in the region. Accordingly, the EU experience demonstrates that certain decisions need to be made, such as on the scope of application of the regional competition law, its relationship with the national competition law systems, its institutional design and its enforcement mechanisms.[339]

#### 4.4.1 Harmonisation of national competition policy and law

The existence of competition law provisions in the EU Treaty undoubtedly contributed to raising awareness of the members that did not have a competition law and encouraged them to adopt competition law consistent with EU law or to adapt their domestic competition law to align more closely with that of the EU.[340] This process was facilitated by the principle of supremacy of EU law over national law and over national constitutions. Thus, the existence of a supranational competition law at regional level has contributed to the dissemination of a competition culture in EU members and to soft harmonisation of national laws between members.

[338] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 11 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).
[339] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).
[340] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 284 available at http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017)..

Similar concerns are relevant and have been iterated in relation to the governance of the TFTA or at the very least the goals of integration that it intends to achieve in coming years. Within COMESA, EAC and SADC there is considerable divergence on national competition laws as well as the regional frameworks under COMESA, EAC and SADC. Some states are yet to implement competition law and others have weak NCAs and competition laws. Also, the harmonisation of national competition laws would remove any flexibility the national legislatures have enjoyed so far.

However, the EU example demonstrates that these challenges can be overcome. For example, in order to ensure that national legislatures retain flexibility, the TFTA regional competition regime could have a centralised supranational system and law that only had authority in relation to specific cases. At the same time, as the EU model demonstrates, it would be possible to allow members to apply national law also to specific cases within the scope of application of the supranational regional law.[341]

### 4.4.2 Centralised and supranational enforcement system

Given the propensity of members to protect their own national champions, the EU's founders early on deemed a supranational CP necessary.[342] Irrespective of the fact that the EU Competition system is far from perfect, the EU project has demonstrated that a centralised enforcement system, where a supranational body and well established regional court have the competence to apply the regional rules, may be adequate for the development of an efficient competition regime, even in cases where competition law is scarce or non-existent in the members.[343]

Notwithstanding, the EU experience shows that if competition law is to be uniformly applied throughout the region, it must be suitably enforced.[344] This requires that each member state surrenders a portion of its sovereignty to a central enforcement agency, something that is not likely

[341] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 22 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).
[342] Drexl, J *The Transplant ability of the EU's Competition Law Framework into the ASEAN Region* (2016) 236 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).
[343] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 174.
[344] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 174.

to happen in the TFTA in the coming years. However, some members, such as those of COMESA, are prepared to relinquish sovereignty in favour of a regional competition law and authority.

The EU experience has also shown that it is only when the supranational body has gained enough experience in the application of the regional rules, that the members have adopted EU compatible competition laws and established NCAs and even more importantly, a certain level of common understanding has been developed among their competition agencies, that the central enforcement agency can be ready to decentralise the enforcement of regional rules.[345]

As regards the design of the supranational enforcement system (assuming this is the model eventually adopted by the TFTA), the TFTA should not use the EU system as a binding template. However, the TFTA can learn from the EU experience in order to design a supranational competition law that fits its own context. Certain principles that the TFTA could employ include:[346]

(a) Developing a centralised system of merger control, which does or doesn't exclude national merger control systems.
(b) Designing a supranational competition law that addresses restrictive agreements and unilateral conduct, though only with regard to cross-border cases.
(c) Allowing enforcement duties to be shared among a regional competition authority and NCAs.
(d) Developing mechanisms for the regional authority and the NCAs to coordinate their enforcement activities.
(e) Ensuring that the regional authority has the power to institute its own proceedings at any time with the effect of setting aside the jurisdiction of the NCAs.
(f) The supranational law should also allow for the parallel application of national laws on certain agreements.



### 4.4.3 Institutional framework

[345] Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 174.
[346] Drexl, J *The Transplantability of the EU's Competition Law Framework into the ASEAN Region* (2016) 24 - 25 available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2841161 (accessed 12 September 2017).

It can be argued that successful competition law and policy that strengthens the CM requires a strong institutional framework supported by appropriate legislative frameworks. [347]Thus, while the creation of an efficient centralised entity with the power of enforcement is highly improbable for the time being, TFTA members could seek inspiration in the European Competition Network.

The latter significantly facilitates the work of national NCAs on cross-border issues while promoting a culture of information-sharing. Such a role can be carried out by a supranational institution, but the TFTA members will first need to accept a centralised entity with the power of enforcement. If anything, the ECN can serve as an inspiration for deepening cooperation among NCAs of different TFTA members or between COMESA, EAC and SADC.[348]

### 4.4.4 Removal of state monopolies

It is well known that in some TFTA members, state enterprises enjoy monopoly powers and often restrict market access.[349] According to the Article 106(1) TFEU, government authorities and state enterprises in the EU are subject to the same legal provisions as private undertakings. The logic behind this is that public undertakings may negatively affect competition and thus the same legal provisions apply to private and public undertakings. There are some exceptions, for instance if the state undertaking is providing a service of general economic interest, but the EC applies the case by case analysis in order to prevent abuses by public companies that may distort competition within the EU.[350]



### 4.4.5 Competition culture

[347] Briguglio L *'Competition Law and Policy in the European Union – Some Lessons for South East Asia'* (2012) 7 available at https://www.um.edu.mt/__data/assets/pdf_file/0007/177163/ASEAN_competition_law_and_policy_of_the_EU_031102.pdf (accessed 30 November 2016).
[348] Briguglio L *'Competition Law and Policy in the European Union – Some Lessons for South East Asia'* (2012) 7 available at https://www.um.edu.mt/__data/assets/pdf_file/0007/177163/ASEAN_competition_law_and_policy_of_the_EU_031102.pdf (accessed 30 November 2016).
[349] Valockova B *EU Competition Law: A Roadmap for ASEAN? EU Centre in Singapore* (November 2015) Working Paper No. 25 13 available at http://www.eucentre.sg/wp-content/uploads/2015/11/WP25-EU-Competition-Law.pdf (accessed 29 October 2016).
[350] Valockova B *EU Competition Law: A Roadmap for ASEAN? EU Centre in Singapore* (November 2015) Working Paper No. 25 13 available at http://www.eucentre.sg/wp-content/uploads/2015/11/WP25-EU-Competition-Law.pdf (accessed 29 October 2016).

The TFTA could learn from the EU that laws and regulations must be supported by strong advocacy and empowerment of civil society, which is not the case in all TFTA members, especially those with no or only recently created overarching competition laws. In addition, civil society is important as it can offer countervailing pressure to business interests. Consequently, it is important to work on the advocacy and empowerment of civil society.[351]

The EU has promoted an ingrained competition culture and put in place strong enforcement arrangements to reduce possible business vested interest, such as leniency policy in the case of cartels. [352] In addition, consumer organisations are generally well-organised in most EU members and, this, together with the advocacy activities of the EC have entrenched a competition culture in the EU. This is yet another lesson for the TFTA, that it should ensure that the regional competition regime enjoins assistance and support by strong advocacy programmes and a concerted empowerment of civil society, in particular consumer associations. [353]

### 4.4.6 Merger review

The development of competition law at the level of the EU members has also occurred in the area of merger control. Unlike the case of anticompetitive practices for which there is concurrent jurisdiction of NCAs and the EC, the EC has exclusive jurisdiction over the control of mergers having a community dimension. [354] Thus, members do not directly enforce EU merger control law and are under no obligation to control mergers that fall below the thresholds for EU control.[355]



[351]Valockova B *EU Competition Law: A Roadmap for ASEAN? EU Centre in Singapore* (November 2015) Working Paper No. 25 13 available at http://www.eucentre.sg/wp-content/uploads/2015/11/WP25-EU-Competition-Law.pdf (accessed 29 October 2016).
[352]Valockova B *EU Competition Law: A Roadmap for ASEAN? EU Centre in Singapore* (November 2015) Working Paper No. 25 13 available at http://www.eucentre.sg/wp-content/uploads/2015/11/WP25-EU-Competition-Law.pdf (accessed 29 October 2016).
[353] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 299-300 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[354] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 287 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[355] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 287 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).

For the TFTA this approach would ensure that a merger that has an effect on the region as a whole is considered by an autonomous agency that has no direct interest in the outcome of the transaction, as might be the case if the merger was reviewed by one or more host states NCAs.

### 4.4.7 General lessons

According to Jenna and Horna, there are four general lessons that the TFTA can learn from the EU experience:

(a) First, that regional trade agreements are powerful, natural instruments for promoting competition law enforcement.

(b) Secondly, that the existence of a supranational competition law in a regional grouping, which does not preclude members from having national competition laws, can be a useful tool, both to promote a level playing field and to promote the soft harmonisation of national laws over time.[356]

(c) Thirdly, that when there is a body in charge of enforcing the supranational law, the relationship between this body and the NCAs of the members of the regional grouping share, is bound to evolve over time. Strong input and control by the regional body at the beginning of the process would be useful to the extent that members of the grouping may not initially have the required resources or understanding of competition law enforcement. However, there is a need to involve the NCAs of the members of the regional grouping more closely over time and even shifting enforcement as case law develops.[357]

(d) Lastly, that cooperation between NCAs on transnational issues does not come spontaneously but requires a framework, including procedures to share information on cases of mutual interest, on the kind of information that NCAs need and a mechanism of case allocation.

[356] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 299-300 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).

[357] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 299-300 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).

However, Jenny and Horna assert that the development of such a framework does not require the existence of a supranational competition law. Once this framework exists both formal and informal cooperation between NCAs can develop.[358]

### 4.5 Competition policy and law in South Africa

According to the Africa Investment Report 2015, SA is the top destination for FDI in Africa.[359] It is also the 4th largest investing country into Africa.[360] After the general election of 1994, trade policy was a key component for economic transformation and reintegration into the world economy, which included a review and substantial amendment of CP.[361] According to the SA Trade Policy Report 2014,[362] SA champions 'developmental integration' in the TFTA amongst other regions and

> '[...] concludes that integration processes must be complemented and preceded by advances in cooperation and coordination programmes to address real economy constraints.'[363]

Although it is suggested that SA's trade policy still lacks clarity on trade in services, including on investment and competition,[364] the process that SA has been through insofar as transforming its competition and investment policies to date, as a developing African nation and a member of the TFTA, could provide valuable insight for the development of a CP and law framework within the TFTA.



[358] Jenny F & Horna PM 'Modernisation of the European system of competition law enforcement: Lessons for other regional groupings' in Brusick P, Alvarez AM & Cernat L (eds) *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) UNCTAD UNCTAD/DITC/CLP/2005/1 available at 299-300 http://unctad.org/en/docs/ditcclp20051_en.pdf (accessed 10 January 2017).
[359] The Africa Investment Report 2015 2 http://www.africanbusinesscentral.com/wp-content/uploads/2016/01/The-Africa-Investment-Report-2015-fDi-Intelligence-Report.pdf (accessed 1 December 2016).
[360] The Africa Investment Report 2015 6 http://www.africanbusinesscentral.com/wp-content/uploads/2016/01/The-Africa-Investment-Report-2015-fDi-Intelligence-Report.pdf (accessed 1 December 2016).
[361] Clark V 'Investment governance in the Tripartite Free Trade Area' in Hartzenberg T, Erasmus G, Grinsted Jensen H et al *Cape to Cairo: Exploring the Tripartite FTA Agenda* (2013) 77.
[362] https://www.thedti.gov.za/parliament/2014/TPSF.pdf 7.
[363] https://www.thedti.gov.za/parliament/2014/TPSF.pdf 7.
[364] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' Occasional Paper No 111 (March 2012) SAIIA 5 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).

### 4.5.1 Background and formation of competition policy and law in SA

SA has a long history of competition legislation which dates back as far as 1949. Prior to the national election in 1994, the Maintenance and Promotion of Competition Act of 1979 (MPCA)[365] was the legislative tool used to regulate competition within SA. However, it did not provide for a robust competition regime.[366] In addition, the Competition Board, which operated under the MPCA, was not independent nor did it have the power to in fact regulate competition matters.

Following the national elections in 1994, SA's CP and laws were reviewed. During the review, effective implementation of a strong CP was seen as an important tool to regulate private enterprise. Specific goals of CP included diluting the concentration of economic power and the promotion of greater private sector efficiency.[367] In 1999, the Competition Act No 89 of 1998 (Competition Act) was promulgated and came into force.[368]

### 4.5.2 The goals of SA competition policy and law

The overarching goals of the Competition Act are to provide all South Africans equal opportunity to participate fairly in the national economy, achieve a more effective and efficient economy in SA, provide for markets in which consumers have access to, and can freely select the quality and variety of goods and services they desire, create greater capability and an environment for South Africans to compete effectively in international markets, restrain particular trade practices which undermine a competitive economy, regulate the transfer of economic ownership, establish independent institutions to monitor economic competition, and give effect to the international law obligations of SA.[369]



[365] The Maintenance and Promotion of Competition Act of 1979.
[366] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' Occasional Paper No 111 (March 2012) SAIIA 8 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).
[367] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' Occasional Paper No 111 (March 2012) SAIIA 8 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).
[368] Competition Act No 89 of 1998.
[369] Preamble to the Competition Act No 89 of 1998.

### 4.5.3 The legal framework of SA competition policy and law

The Competition Act incorporates familiar elements that are found in competition laws and concepts in many other jurisdictions.[370] The Competition Act also authorises the consideration of foreign and international law in its interpretation and application.[371] The Competition Act's rules about restrictive agreements uses some of the language from the EU competition law, its merger standards are similar to those of Canada, and its rule about price discrimination looks similar to the US Robinson-Patman Act.[372]

A number of practices are prohibited out right, however, proving a violation in terms of the Competition Act requires showing a net anticompetitive effect. The prohibitions of restrictive horizontal and vertical practices are set out in Chapter 2 of the Act and are fairly prescriptive.[373]

Procedures for merger control are elaborate, and except for merger review, where the Competition Commission (CC) and the Competition Tribunal (CT) have been very active, there has been little enforcement action, producing only a few decisions.[374] Confidentiality is an overarching undertaking to ensure that both business and government rights are protected.[375]

The Competition Act's system of prohibitions is balanced by a scheme for exemptions that incorporate policy considerations other than competition. The exemptions are broad and the CC also has the power to grant exemptions against restrictive agreements or abuse of dominance on grounds including maintenance or promotion of exports, promotion of small businesses or firms controlled by historically disadvantaged persons, and changing capacity to stop the decline in an industry designated by the Minister of Trade and Industry.[376]



[370] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 21 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[371] Section 1 (3) of the Competition Act No 89 of 1998.
[372] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 21 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[373] Sections 4 and 5 of the Competition Act No 89 of 1998.
[374] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 21 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[374] Sections 4 and 5 of the Competition Act. No 89 of 1998
[375] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 42 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[376] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 22 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).

### 4.5.4 Enforcement

The application of competition law in SA combines a quasi-judicial and administrative approach. As far as enforcement is concerned, the principal innovation was the creation of independent enforcement bodies.[377] The Competition Act provides for three agencies to enforce competition regulations in the SA. They are the CC, the CT and the Competition Appeal Court (CAT). Together, the aforementioned bodies have exclusive jurisdiction over competition matters within SA.

The CC is the investigative arm of the three agencies. It is an autonomous statutory body that monitors competition and market transparency by investigating anti-competitive conduct.[378] The CC is independent of the Department of Trade and Industry (DTI) and its decisions are subject to appeal through the CT and CAT.

The CT is the adjudicatory body or court of first instance, adjudicating matters referred to it by the CC or by complainants under section 51(3) and (4) of the Competition Act.[379] The key functions of the CT are to grant exemptions, authorise or prohibit large mergers and adjudicate prohibited practices and mergers under Chapters 2 and 3 of the Competition Act respectively.[380]

The CAT's primary role is to consider any appeal against, or review of, a decision of the CT. It may confirm, amend or set aside any decision or order and give any judgment or make any order that circumstances may require.[381]

In addition, the Competition Act applies to 'all economic activity within, or having an effect within, the Republic', and thus applies extra-territorially.[382]



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[377] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 25 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[378] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' Occasional Paper No 111 (March 2012) SAIIA 8 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).
[379] Section 51(3) and (40 of the Competition Act No 89 of 1998.
[380] Chapter 2 and 3 of the Competition Act No 89 of 1998.
[381] Hartzenberg T 'Perspectives on Trade, Investment and Competition Policy in South Africa' Occasional Paper No 111 (March 2012) SAIIA 9 available at http://www.saiia.org.za/occasional-papers/36-perspectives-on-trade-investment-and-competition-policy-in-south-africa/file (accessed 29 November 2016).
[382] Section 3(I) of the Competition Act No 89 of 1998.

### 4.6 Specific Lessons for the TFTA from SA

#### 4.6.1 Effective domestic competition regulation and enforcement

SA shows that on a national level, effective competition and regulatory enforcement requires very specific capacities, not only within the enforcement agencies, but also within the private sector, the legal and economics profession, and among consumers.[383] Limited capacity can lead to challenges of regulatory capture by a small number of experts, weak enforcement and monitoring of decisions, and can hamper the development of competition culture.[384]

#### 4.6.2 Ongoing assessment and modification

SA's competition regime has gone through a process of modification over the years aimed at strengthening the regime so that it responds adequately to anti-competitive practices. The most recent amendment is section 73A(1) to (4) of the Competition Act (amended by section 12 of the Competition Amendment Act, 1 of 2009) which came into force on 1 May 2016. In terms of this amendment, directors of firms or anyone 'engaged by a firm in a position having management authority', can be criminally liable for causing a company to engage in, or 'knowingly acquiescing' to a company's involvement in price-fixing, market division or collusive tendering.[385]

Ongoing assessment and modification is important and the approach shown by SA, in amending the Competition Act is a valuable lesson for other members in the TFTA.

#### 4.6.3 Public interest dimension and competition advocacy

SA's competition law and policy includes a unique focus on specific dimensions of public interest, which makes it possible to take into account matters such as employment, specific industry

[383] Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *North Western Journal of International Law & Business* 678.
[384] Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *North Western Journal of International Law & Business* 678.
[385] https://www.tralac.org/news/article/9556-competition-law-tightens-up-across-africa.html.

development, and small business development, as well as Black Economic Empowerment.[386] All of these play a significant role in the long term process of developing SA's economy. Making markets work better with appropriate intervention to guide market forces to support broader development priorities, is absolutely essential to developing countries.

SA's fairly recent focus on restrictive business practices, including CP and law, is crucial in creating a competition culture by focusing on competition advocacy.[387] Notably, interest groups such as unions have a formal role in the merger review process, where they can directly raise their concerns about job losses. Small and medium-sized enterprises (SMEs) are recognised not only in the potential for exemptions from statutory prohibitions, but also in some detailed provisions about abuse of dominance and price discrimination.[388] The most distinctive public interest policy is empowering previously disadvantaged persons.[389] The Competition Act's reference to both economic efficiency and consumer benefits leave room for flexibility.[390]

The approach adopted by SA shows that a competition regime can successfully incorporate market specific factors. Whether these factors are capable of harmonisation across the TFTA is unlikely, but there are similarities between the TFTA markets which could drive harmonisation.

### 4.6.4 Promotion of ownership



The development of SMEs lies at the core of economic growth worldwide including in SA and across the TFTA.[391] Research has revealed that across the world the SME sector employs one-half

[386] Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *North Western Journal of International Law & Business* 685.
[387] Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *North Western Journal of International Law & Business* 685.
[388] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 19 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[389] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 19 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[390] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 20 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[391] Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *North Western Journal of International Law & Business* 669.

to two thirds of the labour force in developing countries and that the sector contributes significantly towards national incomes.[392]

The conglomerate structure of business in SA, which is also mirrored across the TFTA and the strong vertical linkages that exist in many industries can create barriers to entry for smaller enterprises.

Although OECD asserts that there is a need in SA, as is the case in many of the TFTA members 'to reform long-standing habits of central ownership and control in order to improve efficiency',[393] the Competition Act does aim to promote a broader spread of ownership, especially amongst historically disadvantaged persons.[394] SA views a more even spread of ownership and SME promotion as important to ensure long-term, balanced and sustainable development within the country, and are articulated in the public interest issues included in the Competition Act.[395] Similarly, the TFTA should consider the importance of SMEs in the region when developing a regional competition regime or cooperation mechanism.

### 4.6.5 Membership to RTAs

SA is also party to several RTAs which include commitments relating to CP.[396] Although SA has no formal co-operation agreements with other competition agencies, the CC has worked with the European Commission, Canada, Australia, and the US on merger matters which is evidence of its commitment to cooperating with other CAs.[397]



### 4.6.6 Recognition that reforms are needed

[392] http://www.sadc-dfrc.org/sme-support-and-development.
[393] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 19 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).
[394] Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *North Western Journal of International Law & Business* 669.
[395] Hartzenberg T 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' (2006) 26 *North Western Journal of International Law & Business* 670.
[396] South Africa implements the Southern African Custom Union (SACU) common external tariff as well as SADC.
[397] OECD *Competition Law and Policy in South Africa: An OECD Peer Review* (2003) 47 available at http://www.oecd.org/daf/competition/prosecutionandlawenforcement/2958714.pdf (accessed 25 November 2016).

There is a widely shared apprehension that unless SA gives some ground on issues such as RoOs, the benefits of regionalism to other members will be limited, thus leading to partial implementation and an incomplete TFTA. The reason for this is that SAs industrial policies respond to global pressures for competitiveness in a socio-political context of high unemployment and strong expectations on the state to deliver a wide range of services and public goods on an equal footing. This has resulted in SA taking a strong defensive position in terms of RoOs and being seen as a bully by neighbouring states. [398]

However, SA's Treasury is open to more progressive positions, and the National Planning Commission within the President's Office launched a broad consultation on regional integration within the context of developing the National Development Plan. [399] The National Planning Commission, has undertaken efforts to engage with counterpart national planning agencies in the region to improve policy dialogue and coordination and consider how regional development planning can be improved.[400]

### 4.7 Conclusion

There are a number of important considerations that the TFTA and its members can learn from the EU regional regime and SA's approach to CP and law. In particular, the overhaul of CP in SA resulted in CP and law being seen as imperative tools to promoting efficiency within SA and addressing anti-competitive behaviour. In addition, CP and law were identified as tools to address broader development priorities and public interest questions. In the end the new competition law puts economic efficiency front and centre, with public interest considerations standing along side it, with evolution ongoing. The Competition Act attempts to balance efficiency concerns and broader development priorities within the competition framework.

[398] European Centre for Development Policy Management *Advancing Regional Integration in Southern Africa Final Report* (April 2014) 32 – 33 available at http://ecdpm.org/wp-content/uploads/2014-DFID-Advancing-Regional-Integration-in-Southern-Africa-Final-Report.pdf (accessed 10 October 2017).

[399] [399] European Centre for Development Policy Management *Advancing Regional Integration in Southern Africa Final Report* (April 2014) 32 – 33 available at http://ecdpm.org/wp-content/uploads/2014-DFID-Advancing-Regional-Integration-in-Southern-Africa-Final-Report.pdf (accessed 10 October 2017).

[400] European Centre for Development Policy Management *Advancing Regional Integration in Southern Africa Final Report* (April 2014) 32 – 33 available at http://ecdpm.org/wp-content/uploads/2014-DFID-Advancing-Regional-Integration-in-Southern-Africa-Final-Report.pdf (accessed 10 October 2017).

The EU represents a model of success for a supra-regional competition regime. The TFTA can refer to the EU model and draw aspects from the EU experience that are capable of transplantation within the TFTA. However, the fundamental concepts of regional economic integration, the legislative framework, the institutional structure and the socio-economic context differ considerably between the EU and the TFTA. A such, it will be important for the TFTA to develop a framework for cooperation and harmonisation on CP and law by taking into account the specific factors that impact the region.

The following chapter contains the conclusions to drawn from this paper and recommendations relevant to developing and implementing a centralised regional competition regime within the TFTA.

# CHAPTER 5

# CONCLUSION AND RECOMMENDATIONS

## 5.1 Conclusion

The relationship between FDI and competition within markets is well documented, as is the beneficial effects of FDI on the efficiency and growth of markets. It is also accepted that coherent and harmonious CP and laws are an important tool for thwarting non-tariff barriers that result from FDI transactions and promoting competition within RECs. In addition, it is recognised that CP can play an important part in creating a robust policy environment for attracting FDI and maximising its benefits.

As TFTA members increasingly recognise that FDI can play a positive role in promoting their economic growth, productivity, and development, national and regional policies become crucial to attract FDI and increase developmental gains made as a result. What seems clear is that the further deepening of regional integration in the area of CP and law is essential if the TFTA is to be more attractive for investors. It is also evident that there are several positive results for FDI and competition regulation within the TFTA region that can flow from a regional competition regime or cooperation in this area.



In particular, a regional competition regime could mitigate the difficulties flowing from the overlapping memberships in the COMESA, EAC and SADC, which is a contributing factor to the failure to fully operationalise the RECs as well as to achieve the objectives of deeper integration within the region. It will also be necessary to overcome the institutional and behavioural shortcomings and challenges within COMESA, EAC and SADC, including the lack of a competition culture, the political will to promote domestic implementation of competition policies, protection of specific industries, protection of sovereignty, poor laws and support which contribute to the poor implementation of regional competition provisions, and the varying degrees of development across the region, if a regional competition regime within the TFTA is to be achieved.

In addition, the existing disjointed markets, small market sizes, resource and budgetary constraints and diverse regulatory environments which make the region an unattractive investment destination

can be overcome by developing a regional competition regime building on the existing regimes within COMESA, EAC and SADC.

Since there is no one-size-fits-all model for a regional CP and law regime, the TFTA will need to develop a solution that takes into account the important role that FDI plays in Africa, and work to link competition regulation with the TFTAs objectives in relation to attracting, maintaining and adequately regulating FDI in the region. Therefore, a pertinent consideration from the outset is whether the TFTA members will adopt a formal or informal cooperation model.

Many argue that the EU example of adopting a hard law approach, where investigative and enforcement powers are extended to a central entity as opposed to being bestowed on domestic NCAs, is the most effective approach. However, while recognising that the supranational EU model of competition regime may not be entirely suitable for the TFTA, the EU's experience in trying to create a more level playing field through harmonising regulations offers a worthy template for the TFTA's own experimentation with a competition regime that can serve the region well.

It is also strongly argued that regional competition regimes must be supported by properly functioning and enforced domestic CP and laws. In this regard, the approach taken by SA to modifying its competition regime can provide valuable insight for developing and enhancing CP and law in other TFTA members. The two-fold approach adopted by SA's competition regime places economic efficiency front and centre, with public interest considerations standing along side it, with evolution ongoing. This approach could be used to regulate the unique political, social and economic environments of the TFTA members.

However, the TFTA is manifestly different from the EU and in many respects SA is very different from the other TFTA members. As such, in designing a regional competition framework, whether it is merely an informal cooperative model or a fully centralised and harmonised regime with a supranational law and authority as argued in this paper, it is imperative that factors specific to the TFTA region and its members are considered. Additionally, even if the objectives of the TFTA are not fully met, the TFTA negotiations may nonetheless remain a useful long term framework, representing aspirations that will allow those states that are ready and willing to accelerate regional integration to do so.

A possible area for further research is to determine whether there are any other models that may provide additional insight for the development of a regional competition framework within the TFTA. Additionally, further study might consider the investment framework within COMESA, EAC and SADC to determine whether these frameworks adequately serve to encourage FDI, in light of its importance to the TFTA region as a whole.

The primary recommendation is that the TFTA members should draw on the experiences of both the EU and SA in order to establish a regional CP and law framework supported by harmonised domestic CP and law, that adequately enhance FDI within the region as well as provides sufficient cooperation and enforcement when dealing with cross-border anticompetitive practices.

## 5.2 Recommendations

The following is a summary of recommendations that the TFTA can use to develop a regional CP and law policy:

- To strengthen competition in the TFTA and encourage FDI CP and law should be prioritised, even though Phase I negotiations are not complete.
- The TFTA members should be concerned with ensuring that the reduction of regulatory barriers to FDI are not accompanied by the emergence of anti-competitive conduct.
- The TFTA should seek guidance in the experiences of other RECs provided that additional factors specific to TFTA members and the region as a whole are taken into account when developing regional competition regime.
- Strong national competition laws and an effective NCAs should be established across the TFTA and for those members with non-existent competition regimes, technical assistance programmes can be introduced which aim to impart the required expertise and experience over the long term.
- The lack of resources and fears of regulatory capture within the TFTA members can be overcome by establishing a formal centralised regional model for CP and law within the TFTA which has specific competition rules steered by supranational institutions.
- The success of a regional competition regime within the TFTA will depend on the presence of necessary legal and institutional frameworks (either domestic or regional) to enforce the regional competition rules which are independent, transparent, accountable, well funded and

staffed by well educated, trained and non-corrupt persons, and adequate financial and human resources for the enforcement of regional competition rules.

- Whatever the approach, it should be inherently neutral and non-discriminatory, and have as its priority increasing the free flow of trade and FDI.
- The approach should also seek to ensure that domestic (or regional) CP and laws and related regulations aim at safeguarding the competitive process and pursue broad-based CP which encourage FDI.
- In the absence of comprehensive and effective regional CP and law model the TFTA should explore and identify functional, cross border cooperation initiatives that help build trust, strengthen institutions and capabilities for cross-border cooperation and partnerships, and test policies on feasibility and scalability.
- Technical assistance and capacity building in shaping and applying competition laws in TFTA members should be introduced to aid in developing members' institutional capabilities to develop and enforce competition laws.
- The EU and SA experience suggests that as regional integration deepens, whatever the model, it must be capable of adapting to changing circumstances.

Considering that CP and law have an important role in regulating FDI, the TFTA should develop a regional competition regime that adequately enhances FDI within the region as well as provides sufficient cooperation and enforcement when dealing with cross-border anticompetitive practices. In order to achieve this, the TFTA should develop a regional competition framework which is fundamentally based on a centralised model, supported by harmonised domestic competition laws across the region. However, the requirements and objectives of the TFTA are unique and therefore, although the centralised model used by the EU, in particular, may provide valuable insight, it is important for the TFTA to develop a competition regime based on the specific needs of the region and members.

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