



Faculty of Law

**The Role of Digital Platforms in Promoting Cartel Competition Law
Enforcement within the AfCFTA:
A Focus on Data Privacy**

A mini-thesis submitted in partial fulfillment

of the requirements for the degree of

LLM in International Trade, Investment, and Business Law in Africa

By

Meron Girma Woldeyohannise

Student No: 4004807

Supervisor:

Dr Tinashe Kondo

October 2022

DECLARATION

I declare that *The Role of Digital Platforms in Promoting Cartel Competition Law Enforcement within the AfCFTA: A Focus on Data Privacy* is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Meron Girma Woldeyohannise Date: 21 May 2022

Signed



UNIVERSITY *of the*
WESTERN CAPE

ACKNOWLEDGMENTS

First, I would like to express my profound gratitude and sincere thanks to God for my good health, strength, and protection throughout my LLM studies. I would also like to give special thanks to my family, Ermias, Christian, and Shitaye, for their love, support, and motivation all through my research journey. I extend my heartfelt gratitude to Prof. Riekie Wandrag for her tremendous support, both as a lovable mother and a professional advisor during my studies. She rendered useful support during the development of my research proposal and assisted me in finding the best supervisor. I would also like to thank my advisor, Dr Tinashe Kondo, who has assisted and given me valuable mentorship. Finally, I would like to express my gratitude to my friends, Dr Tadesse and Mr Mulusew, who provided me with relevant materials and advice, especially during the initial drafting stages of this mini-thesis.



ABSTRACT

Competition law preserves market competitiveness by regulating anti-competitive conduct. Competition law enforcement requires high levels of data transparency and traceability. The traditional method of competition law enforcement, which is based on document review, testimony and economic analysis, is faced with many challenges in the contemporary environment. This is particularly true in the case of cartels, which use many methods to cloak their activities. Similarly, cross-border detection of anti-competitive conduct has also proved elusive. A major reason for this is that large multinational companies use their significant resources to evade detection of their anti-competitive conduct.

The result of this is that local economies suffer harm from the conduct of these parties. Undetected cartel behaviour can cause significant damage to consumers and the economy. As a result, there is a need to bolster mechanisms.

Against this backdrop, this mini-thesis explores the role of digital platforms in promoting cartel competition law enforcement. It considers the different tools that have been employed in regulating cartel conduct by competition authorities in Africa. Specifically, the mini-thesis focuses its analysis on the work that has been done in the Common Market for Eastern and Southern Africa (COMESA). The use of these tools is also assessed in other jurisdictions, such as the European Union (EU) and the United States of America (USA).

The thesis finds that both the EU and the USA have used various tools with some degree of success. The most successful tool has been the leniency programme and the effects doctrine for cross-border law enforcement. As a result, cartel detection in the digital era has improved in these jurisdictions. Nonetheless, there is still more work to be done. Detection levels are still far from ideal. Furthermore, the mini-thesis finds that COMESA has not succeeded in cartel detection. A key reason for this has been the failure to properly apply tools used in the EU and the USA. This was as a result of numerous factors such as under-experienced competition authorities and limited resources to finance activities.

Accordingly, the study recommends that, in order to improve cartel detection in Africa, particularly in the digital era, there is a need to move away from the traditional enforcement mechanisms. This requires out-of-the box thinking in the design of new creative tools to target cartel behavior, particularly regarding online platforms and cross-border activities.

The use of digital platforms as a tool for cartel conduct detection promotes cartel law enforcement. However, in attempting to resolve this issue, it is important to find a balance because of the possibility that such an approach will interfere with the right to data privacy. The findings of this thesis are particularly important given the ongoing work on the Protocol of Competition in the African Continental Free Trade Area (AfCFTA). With the creation of a single market for goods and services, cartel conduct will become even more pervasive across multiple jurisdictions.



KEYWORDS AND PHRASES

AfCFTA

Cartels

COMESA

Enforcement

Cross-border effect

Data privacy

Digital platform

Effects doctrine

Leniency programme

Market power



ABBREVIATIONS

4IR	Fourth Industrial Revolution
ACC	AfCFTA Competition Commission
AfCFTA	African Continental Free Trade Area
AI	Artificial Intelligence
AU	African Union
CA	Competition Authority
CCC	COMESA Competition Commission
CEMAC	Central Africa Economic and Monetary Community
CMA	Comparative Market Analysis
COMESA	Common Market of Eastern and Southern Africa
DSM	Digital Single Market
EAC	East African Community
EC	European Community
ECCAS	Economic Community of Central African State
ECJ	European Court of Justice
ECN	European Competition Network
ECOWAS	Economic Community of West African States
EEC	European Economic Community
EU	European Union
FTA	Free Trade Area
FTC	Federal Trade Commission
GDP	Growth Domestic Product
GNI	Gross National Income
ICT	Information and Communications Technology
IGAD	Inter-governmental Authority on Development
IOC	Indian Ocean Commission
MENA	Middle East North Africa
NAFTA	North American Free Trade Area
NPT	Neo-classical Price Theory
OECD	Organisation for Economic Co-operation Development
PTA	Preferential Trade Area

RBP network	Restrictive Business Practice Network
RECs	Regional Economic Communities
SACU	South African Customs Union
SADC	Southern African Development Community
SCP	Structure Conduct Performance
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of European Union
UK	United Kingdom
UNCTAD	United National Conference on Trade and Development
USA	United States of America
WTO	World Trade Organisation
WWII	Second World War



TABLE OF CONTENTS

DECLARATION	I
ACKNOWLEDGMENTS	II
ABSTRACT	III
KEYWORDS AND PHRASES	V
ABBREVIATIONS	VI
CHAPTER ONE: INTRODUCTION AND OVERVIEW OF THE STUDY	1
1.1 INTRODUCTION.....	1
1.2 BACKGROUND TO THE STUDY.....	3
1.2.1 <i>Implications of the digital platform for the AfCFTA competition commission</i>	7
1.3 RESEARCH QUESTION.....	8
1.4 RESEARCH OBJECTIVES.....	8
1.5 SIGNIFICANCE OF THE STUDY.....	8
1.6 RESEARCH METHODOLOGY.....	9
1.7 OVERVIEW OF CHAPTERS.....	9
CHAPTER TWO: CONCEPTUAL FRAMEWORK	10
2.1 INTRODUCTION.....	10
2.2 FOUNDATIONAL ISSUES.....	10
2.2.1 <i>The classical theory</i>	11
2.2.2 <i>The neo-classical theory</i>	13
2.2.3 <i>The Harvard School</i>	13
2.2.4 <i>The Chicago School</i>	14
2.2.5 <i>The Post-Chicago School</i>	15
2.3 COMPETITION THEORIES.....	16
2.4 DEFINITION OF KEY CONCEPTS.....	17
2.4.1 <i>Perfect market structure</i>	18
2.4.2 <i>Imperfect market structure</i>	18
2.5 CONCLUSION.....	19
CHAPTER THREE: HISTORICAL OVERVIEW OF COMPETITION LAW	20
3.1 INTRODUCTION.....	20
3.2 EARLY DEVELOPMENT.....	20

3.3 THE USA AS A PIONEER	21
3.4 COMPETITION LAW IN THE EU	22
3.5 COMPETITION LAW IN AFRICA.....	24
3.5.1 Regional competition law in Africa.....	25
3.6 CONCLUSION	27
CHAPTER FOUR: A COMPARATIVE ANALYSIS OF THE COMESA, THE EU, AND THE US COMPETITION REGIMES	28
4.1 INTRODUCTION	28
4.2 COMESA COMPETITION COMMISSION	28
4.2.1 Key cartel provisions and detection tools.....	29
4.2.2 Cartel enforcement process	30
4.2.3 Experience of cross-border conduct.....	30
4.2.4. The experience of digital platform cartel detection and law enforcement.....	32
4.2.5 Challenges and cases.....	32
4.3 EU COMMISSION	33
4.3.1 Key cartel provisions and detection tools.....	34
4.3.2. Cartel enforcement process	35
4.3.3 Experience of cross-border conduct.....	35
4.3.4 The experience of digital platform cartel detection and law enforcement.....	36
4.3.5 Challenges and cases.....	37
4.4 THE USA ANTITRUST DIVISION	39
4.4.1 Key cartel provisions and detection tools.....	39
4.4.2. Cartel enforcement process	40
4.4.3 Experience of cross-border conduct.....	41
4.4.4 The experience of digital platform cartel detection and law enforcement.....	41
4.4.5 Challenges and cases.....	42
4.5 COMPARATIVE ANALYSIS OF THE COMESA, EU AND US COMPETITION REGIMES	43
4.6 CONCLUSION	44
CHAPTER FIVE: POSSIBLE TYPES OF DIGITAL PLATFORMS FOR CARTEL DETECTION AND DATA PRIVACY	45
5.1 INTRODUCTION	45

5.2 THE ROLE OF THE DIGITAL PLATFORM IN PROMOTING CARTEL COMPETITION LAW ENFORCEMENT	45
5.3 POSSIBLE WAYS OF A DIGITAL-PLATFORM ESTABLISHMENT	48
5.3.1 Option one: case-specific manner	48
5.3.2 Option two: harmonised data	49
5.3.3 Option three: as a cross-cutting issue	50
5.4 INTERPRETATION OF THE THREE OPTIONS IN THE JURISDICTION OF THE EU, THE USA, AND COMESA	51
5.5 THE DIGITAL PLATFORM AND DATA PRIVACY	53
5.6 CONCLUSION	55
CHAPTER SIX: THE IMPLICATION OF THE DIGITAL PLATFORM FOR THE AFCFTA COMPETITION COMMISSION	57
6.1 INTRODUCTION	57
6.2 SNAPSHOT OF AFCFTA	57
6.3 SUMMARY OF COMPARATIVE ANALYSIS OF CCC, EU AND US COMPETITION REGIMES	59
6.4 SUMMARY OF THE WAYS OF ESTABLISHING DIGITAL PLATFORMS.....	60
6.5 THE IMPLICATION OF THE DIGITAL PLATFORM FOR THE FUTURE ACC ...	60
6.6 CONCLUSION	62
CHAPTER SEVEN: CONCLUSION AND RECOMMENDATIONS.....	63
7.1 INTRODUCTION	63
7.2 RECAP OF THE STUDY FINDINGS	63
7.3 CONCLUSION	66
7.4 RECOMMENDATIONS	67
7.4.1 An African perspective.....	67
7.4.2 In the EU environment.....	68
7.4.3 In the USA environment.....	68
7.4.4 The digital platform vs data privacy.....	68
BIBLIOGRAPHY	69

CHAPTER ONE:

INTRODUCTION AND OVERVIEW OF THE STUDY

1.1 INTRODUCTION

Competition law is described differently in various jurisdictions. For example, in the United States of America (USA), competition law is referred to as antitrust law.¹ In countries such as China and Russia, it is termed anti-monopoly law. In others such as South Africa and COMESA, it is known as competition law.² Other countries such as the United Kingdom (UK) and Australia call it trade practices law.

The aim of competition law is to prevent anti-competitive practices and unethical market behaviour.³ By and large, this is done by ensuring free and fair markets based on the principles of a free market system.⁴ This is equally important in promoting free trade, a cornerstone principle in the multilateral trading system.⁵

The regulation of anti-competitive conduct within markets is of the utmost importance.⁶ Cartels evade the risk of competition by cooperating with each other.⁷ Independent action within the market which fosters competition is then replaced with coordinated and collaborative conduct.⁸ As a result, the producer injures customers by raising prices and restricting supply, making goods and services unavailable to some purchasers while making product prices unnecessarily expensive for others.⁹ The detection of cartels' anti-competitive conduct using traditional tools of investigation is very difficult because of the secrecy surrounding cartel operations.¹⁰

¹ Rita Y and Lut L 'The role of competition law: an Asian perspective' (2013) 47-50

² For example COMESA competition regulations of 2012 and South Africa competition Act of 1998

³ Taylor M *International Competition law: A New Dimension for WTO* (2006) 2

⁴ For instance EU competition policy and US anti-competitive Practice Act

⁵ Taylor M *International Competition law: A New Dimension for WTO* (2006) 1 – 5.

⁶ The Ivaldi M, Jenny F, and Khimich 'A Cartel damages to the economy: an assessment for developing countries' (2017) 2

⁷ Organisation for Economic Co-operation Development (OECD) 'Cartels and Anticompetitive Agreements' (accessed 28 May 2020)

⁸ See, for example, *Competition Commission vs Pioneer Foods (Pty) Ltd* 15/CR/Feb07/

⁹ COMESA Competition Regulation, Part 3

¹⁰ Wachs J & Kertesz J 'A Network Approach to Cartel Detection in Public Auction Markets' (2019) 9 *Scientific Report* 1

Traditionally, competition enforcement is based on document review, testimony, and economic analysis, and faces obstacles due to insufficient means of evidence-gathering.¹¹ Specifically, the traditional means of economic analysis are insufficient for unmasking cartel conduct. The situation is worse in digital cartel conduct detection, given that the collusion is in an algorithmic price setting.¹² As a result, competition law enforcers are unable to provide efficient and effective trade remedies. The digital platform could, however, be an important asset for competition authorities during an investigation. This is because it provides relevant and sufficient data for competition authorities. Accordingly, the digital platform has the right tools to remedy the distortion of competition caused by market power.¹³ The digital platform also offers an opportunity for cross-border cartel conduct detection.

Most African countries have not put systems in place to promote international cooperation regarding cross-border anti-competitive conduct, particularly when it comes to cartel conduct.¹⁴ Due to this non-cooperation, jurisdictions often lack relevant and sufficient information. Also, some African countries, such as Sierra Leone, Eritrea, Ghana and Guinea, still do not have competition regimes in place at all.¹⁵ As a result, it is difficult to provide effective cooperation between states, even those in regional economic communities (RECs). The prospective African Continental Free Trade Area (AfCFTA) Competition Commission (ACC) needs to work on cooperation strategies in order to improve cartel conduct detection.¹⁶ The digital platform might be the best cooperation platform for the prospective ACC if it is used as a tool for cartel conduct detection.

It is against this backdrop that this mini-thesis analyses the potential role of the digital platform in promoting cartel competition law enforcement within the AfCFTA. In

¹¹ See competition and market Authority discussion on ‘Understanding of digital market: implication for future competition policy and practice’ available at https://www.youtube.com/watch?v=T6wBP_Cs9K4 (accessed 25 June 2020)

¹² OECD Digital Screening Cartel Tools in Developing Countries (2020) 2

¹³ Market power is defined as the ability of a firm or group of firms to raise the price above the level that would prevail under competitive conditions, thereby enjoying increased profits from the action, without losing market share.

¹⁴ United Nations Conference on Trade and Development (UNCTAD) Enhancing International Cooperation in the Investigation of Cross-border Competition Cases: Tools and Procedures (2017) 3

¹⁵ Büthe T and Kigwiru V ‘The spread of competition law and policy in Africa: a research agenda’ (2020) 46

¹⁶ Vellah K ‘The cooperation on competition policy under the African Continental Free Trade Area’ (2020) 108

attempting to dissect the issue, this mini-thesis also considers the potential tension between such an approach and the right to data privacy.

1.2 BACKGROUND TO THE STUDY

Cartel conduct has been detected using various methods such as consultation with firms or consumers, on-site visits, circumstantial evidence-gathering, dawn raids, and leniency programmes. To date, leniency programmes have been the most effective investigative tool for cartel conduct detection.¹⁷ The proliferation of leniency programmes increases the number of cartel participants that are charged with anti-competitive conduct.¹⁸ One of the most significant issues is that there is a lack of cooperation in the parallel application of leniency programmes with various competition authorities in cross-border cartel cases.¹⁹ The USA's effects doctrine serves as a tool of cross-border conduct law enforcement for most jurisdictions.

In order to address these extra-territoriality challenges, one of the options that has been adopted is that of the 'effects doctrine'.²⁰ This was introduced by the USA for the first time in the international banana cartel case between the USA and Panama in 1973.²¹ The concept is that activities conducted abroad are to be regulated according to their impact on interests within the territorial state's domain.²² Hence, rules of competition law for activities under one competition authority are extended to apply within the jurisdiction of another competition authority, where they would not typically apply.²³

The EU introduced the single-economic-entity doctrine and the implementation doctrine to reconcile cross-border conduct. The single-economic-entity doctrine holds that a single

¹⁷ United Nations Conference on Trade and Development 'Enhancing International Cooperation in the Investigation of Cross-border Competition Cases: Tools and Procedures' available at https://unctad.org/system/files/official-document/ciclpd44_en.pdf (accessed 27 October 2020).

¹⁸ The leniency programmes aim to drive trust, with mutual benefit, by providing incentives for cartel members to confess their participation in anti-competitive conduct to the competition law enforcer, in exchange for immunity from prosecution.

¹⁹ Organisation for Economic Co-operation Development (OECD) 'Challenges and co-ordination of leniency programmes' available at <https://www.oecd.org/competition/challenges-and-coordination-of-leniency-programmes.htm> (accessed 28 October 2021)

²⁰ Friedberg JJ 'The Convergence of Law in an era of Political Integration: The Wood Pulp Case and the ALCOA Effects Doctrine' (1991) 52 *University of Pittsburgh Law Review* 291.

²¹ Peter Behrens, 'The Extraterritorial reach of EU Competition Law revisited: The "effects doctrine" before the ECJ' (2016) 8

²² Samie N 'The doctrine of "effects" and the extraterritorial application of antitrust laws' (1982) 23

²³ Celen A and Eralp EA 'The Effects Doctrine in Accordance with the Turkish Competition Law Legislation' (2018) 11

economic entity is regarded as anti-competitive conduct, since it is a form of business collusion between the parent and subsidiary companies.²⁴ The implementation doctrine is that agreements, concerted practices, and abuses of dominant positions conceived abroad by foreign undertakings fall under the EU's jurisdiction if the practice is implemented in the EU.²⁵ However, the EU has been applying the effects doctrine to cross-border anti-competitive conduct since the Intel case,²⁶ as both the single economic doctrine and the implementation doctrines were unable to regulate agreements concluded outside the EU.

The COMESA Competition Commission (CCC), however, has relatively little experience in regulating anti-competitive conduct. The CCC has limited competency and power in cartel detection and cross-border law enforcement.²⁷ In addition, the lack of a leniency programme, and the different skills levels across the member state jurisdictions, affect the efficiency and effectiveness of cross-border cartel conduct regulation.²⁸ Due to such challenges, to date the effects doctrine is not utilised by the CCC and no international cartel conduct is fined by the CCC.²⁹ However, some member states of the CCC have been utilising different tools to detect cartel conduct, such as the dawn raid, as a means for spontaneous inspection of company premises.³⁰

Generally, cartel cross-border anti-competitive conduct detection and law enforcement by the CCC remain relatively weak.³¹ The EU and USA have been battling with the issue of cartel cross-border detection and prosecution until now, although they have done much better than COMESA. The success of the effects doctrine in dealing with extraterritorial cartel conduct has, however, been questioned. As a result, there have been growing calls to find other ways to resolve cross-jurisdictional problems involving cartels. The digital platform has been proffered as a potential tool for regulating the multi-jurisdictional conduct

²⁴ Peter Behrens, 'The extraterritorial reach of EU competition law revisited: The "effects doctrine" before the ECJ' (2016) 9

²⁵ Peter B The extraterritorial reach of EU competition law revisited: The "effects doctrine" before the ECJ, (2016) 4

²⁶ *Intel vs EU Commission* Case C- 413/14

²⁷ Mwemba W, 'International experiences and best practices in competition law enforcement, the COMESA experience' (2021) 3

²⁸ Mwemba W, 'International experiences and best practices in competition law enforcement, the COMESA experience' (2021) 5

²⁹ Willard M, COMESA: 'Tug of War on Extraterritoriality and the Saving Grace of Regional Law' (2021) 5

³⁰ Mwemba W, 'International experiences and best practices in competition law enforcement, the COMESA experience' (2021) 7

³¹ World Bank 'Unlocking Africa's Potential through Vigorous Competition Policy' (2016) 5

of cartels. It allows competition authorities to gain access to important information on cartels' conduct by attempting to uncloak cross-jurisdictional anti-competitive conduct.³² This is even more true in the case of cartel conduct over the internet. This is vital because of the growing importance of internet businesses in the fourth industrial revolution (4IR). The introduction of economic regional groupings, where trade takes place without restrictions over many borders, necessitates this approach all the more.

In the regional context in Africa, member states have recently concluded the AfCFTA. The AfCFTA's aim is a regional economic community (REC) that creates a single market on the continent via a free trade area (FTA).³³ The agreement which came into effect includes 54 states on the continent.³⁴ It is envisaged that, when fully implemented, the AfCFTA will create the largest FTA in the world, as measured by participating states.³⁵

Member states in this trading bloc seek to cooperate in competition policy, intellectual property, services and foreign investment. This includes 'dialogue, information exchange, partnerships, recognition, networks negotiated agreements, joint rule-making, and integration and harmonisation through supra-national authorities'.³⁶ Joint rule-making for competition law was included on the agenda because of the important of competition in promoting free trade. Where anti-competitive practices continue to prevail, trade, particularly in other markets, becomes difficult. Hence it is vital to ensure that markets are free and fair, to mitigate the risk of eroding the benefits of regional integration.³⁷

Accordingly, article 4(c) of the Agreement establishing the AfCFTA provides that member states shall cooperate on competition issues. These issues are still being negotiated in Phase II of the negotiations on the drafting of Protocols. Initially it had been hoped that the draft

³² For example, the Russian "Big Digital Cat" digital platform can be leveraged at the Eurasian level in order to gain access to important information about the cartel conduct

³³ The Preamble of AfCFTA Article 2

³⁴ Tralac 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (accessed 27 October 2020).

³⁵ The World Bank 'The African Continental Free Trade Area' available at <https://www.worldbank.org/en/topic/trade/publication/the-african-continental-free-trade-area> (accessed 27 October 2020).

³⁶ See Hope A 'Cooperation on Financial Services Regulation Under the AfCFTA' available at <https://www.tralac.org/blog/article/14453-cooperation-on-financial-services-regulation-under-the-afcfta.html> (accessed 27 October 2020).

³⁷ See Hartzenberg T 'Cooperation in Competition under the AfCFTA' available at <https://www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html> (accessed 27 October 2020).

legal texts would have been ready for adoption by January 2021, but delays caused by the coronavirus pandemic (Covid-19) have slowed the process.³⁸ The exact contents of the Protocol, and whether it will be applicable to only member states or to all investors, are not yet known.

It has also been suggested that the AfCFTA should leverage the digital platform to provide for cross-cutting rules, including the regulation of cross-border anti-competitive practices.³⁹ Matsinhe and Bernstein argue as follows:

At the negotiating table, African countries must seek to develop and harmonise the regulatory and institutional framework required to integrate their digital economies. A sophisticated legal and regulatory framework that enables digital transactions is vital for full participation in global digital trade. Further and adequate legal frameworks could tackle the issues of trust, which acts as a barrier to the participation of both consumers and suppliers in e-commerce transitions. So far, only a few African countries have implemented legislation to regulate data and consumer protection, data transfer, cybersecurity, and electronic transaction. Regulations that allow for the secure cross-border transfer of data, the protection of personal data and consumer rights on digital platform, the policing of cybercrime and the recognition of electronic transactions are essential for the digital economy.⁴⁰

It is imperative therefore for the final Competition Protocol of the AfCFTA to include the use of digital data as a means of unravelling cross-border cartel practices across the continent. The use of the effects doctrine as a sole remedy to multi-jurisdictional challenges is no longer adequate. Equally, other traditional investigative tools, despite their successes, fail to capture the economy as a whole, particularly in the case of digital cartel conduct.⁴¹ However, the establishment of digital platforms for the purpose of anti-competitive conduct

³⁸ See Hartzenberg T 'Cooperation in Competition under the AfCFTA' available at <https://www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html> (accessed 27 October 2020).

³⁹ See Hope A 'Cooperation on Financial Services Regulation Under the AfCFTA' available at <https://www.tralac.org/blog/article/14453-cooperation-on-financial-services-regulation-under-the-afcfta.html> (accessed 27 October 2020).

⁴⁰ See Matsinhe S & Bernstein D 'Leveraging AfCFTA to Drive Digital Trade in Africa' available at <https://www.mondaq.com/southafrica/international-trade-investment/853026/leveraging-afcfta-to-drive-digital-trade-in-africa> (accessed 23 October 2020).

⁴¹ Jenny F 'Competition Law Enforcement and Regulation for Digital Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward'(2021) 1

detection might raise the issue of the right to privacy. Hence, the concept of ‘privacy’ needs to be defined if the ACC plans to establish the digital platform as a tool for anti-competitive conduct detection.⁴²

1.2.1 Implications of the digital platform for the AfCFTA competition commission

The idea of using digital platforms as a cartel conduct detection tool sounds good if it could be adopted by the prospective ACC. This is because, in Africa, the utilisation of different cartel conduct detection tools is poor. For instance, the application of the leniency programme is weaker due to the non-immunisation of leniency programmes and the risk of commercial retaliation against leniency applicants.⁴³ Additionally, African countries rely on imported goods from big industries involved in international cartels. As a result, cartel conduct affects the economy of Africa more than that of developed countries. Moreover, the rapid digitalisation of African countries’ economies requires some tool that regulates digital cartel conduct, particularly in the case of cross-border conduct.

Furthermore, the creation of a single continental market will boost international cartel conduct. Accordingly, it would be beneficial if the AfCFTA discusses the establishment of the digital platform as a tool of cartel detection in ongoing competition protocol negotiations. The negotiation protocol could rely on the current COMESA competition regime. The competition policy of the ACC should build on what exists already within the current RECs.⁴⁴ Hence, the Competition Protocol negotiations will have a unique opportunity to discuss the implications of the suggested digital platform by drawing on lessons from COMESA.

The discussion on digital platform execution as a tool of cartel conduct detection will also need to cover data management issues. This is because only a few African countries have implemented legislation to regulate data and consumer protection, data transfer, and cybersecurity.⁴⁵ In such an environment, the implementation of the digital platform will be

⁴² Wolfgang K ‘Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection’ (2016) 1

⁴³ Interview with George Lipimile, Director of the COMESA Competition Commission available at *w . a n t i t r u s t s o u r c e . c o m* (accessed 23 October 2021)

⁴⁴ Agreement Establishing the African Continental Free Trade Area, Article 5

⁴⁵ See Matsinhe S and Bernstein D ‘Leveraging AfCFTA to Drive Digital Trade in Africa’ available at <https://www.mondaq.com/southafrica/international-trade-investment/853026/leveraging-afcfta-to-drive>

challenging. So, member states need to discuss and negotiate on issues such as the balance between access to digital platforms and questions of data privacy.

1.3 RESEARCH QUESTION

The main question posed by this mini-thesis is: Does the digital platform have a potential role in advancing cross-jurisdictional cartel competition law enforcement under the AfCFTA, without the probable data privacy issues arising from such an approach?

1.4 RESEARCH OBJECTIVES

The overall objective of the research is to analyse the role of the digital platform in promoting cartel competition law enforcement in the AfCFTA. This is, however, weighed against data privacy concerns. The specific objectives are to:

- Assess the conceptual and historical development of modern competition law, and trace cross-jurisdictional development.
- Analyse the COMESA competition regime in comparison to the EU and USA, focusing on cartel cross-border detection and law enforcement.
- Discuss the potential usage of digitally based tools for cartel detection and their potential tensions with data privacy.
- Adopt lessons from the EU, COMESA, and the USA for the prospective AfCFTA competition commission.

1.5 SIGNIFICANCE OF THE STUDY

Digital technology has the potential to benefit competition law enforcement.⁴⁶ The digital platform provides competition authorities with an opportunity for an in-depth analysis of cartel conduct. It gives competition authorities the power to unmask the conduct of the cartels. As is often said, nothing is ever permanently deleted from the internet.⁴⁷ A digital approach to cross-jurisdictional cartel conduct promises remarkable rewards for enforcement authorities. This research has significance in terms of both theory and practice, as it will benefit both researchers and policy-makers. It is particularly useful for government

digital-trade-in-africa (accessed 23 October 2020).

⁴⁶ Crémer J, de Montjoye YA & Schweitzer H 'Competition Policy for the Digital Era' (2019) 3

⁴⁷ Michael F 'Why Your Data Never Been Deleted' (2015)

officials involved in the negotiations around the Competition Protocol, as well as students in this area of law.

1.6 RESEARCH METHODOLOGY

This is a desktop study that utilises both primary and secondary data sources. The primary sources of information include legislation, case law, treaties and protocols. In terms of secondary sources, articles, journals, books, discussion papers and internet sources have been used. The study employs three methodologies: analytical, historical, and comparative. In terms of comparators, the USA is examined because it is a pioneer in modern competition law development, and tools such as the effects doctrine for cross-border competition law enforcements were introduced primarily by the USA. The EU, on the other hand, was selected because of its sophisticated law concerning cartel conduct, and its members' strong cooperation strategies in cross-border conduct law enforcement. Furthermore, COMESA was chosen instead of other African RECs as it has the most advanced competition regime. To this end, lessons from the USA, the EU and COMESA will be useful in developing the legal competition framework of the AfCFTA.

1.7 OVERVIEW OF CHAPTERS

This mini-thesis consists of seven chapters, including this one.

Chapter 2 assesses the conceptual developments of modern competition law and the basic foundation issues of competition law.

Chapter 3 reviews the historical antecedents of modern competition law.

Chapter 4 compares and contrasts the competition regimes of COMESA, the USA, and the EU, focusing on cartel cross-border conduct detection and law enforcement effectiveness.

Chapter 5 discusses options for the use of digital investigative techniques in cartel detection.

Chapter 6 discusses the implications of the thesis analysis within the prospective ACC.

Chapter 7 provides a conclusion and suggests possible recommendations to promote cartel cross-border competition law enforcement.

CHAPTER TWO:

CONCEPTUAL FRAMEWORK

2.1 INTRODUCTION

The linkages between competition law and economics are symbolic. This is as a result of the fact that competition law is founded upon economic principles.⁴⁸ Principally, as discussed in chapter 1, the main objective of competition law is to foster free and fair markets. This entails resource efficiency in the allocation of resources and the maximisation of consumer welfare.⁴⁹

Consumer welfare can be promoted by mitigating harm to consumers. A number of theories have been advanced to explain what harm entails in the competition context. Three theories are important for this process. These are output limitation theory, open market theory, and fair competition theory. The theories are a basis for detecting which market activities are regarded as anti-competitive conduct.

Against this backdrop, this chapter seeks to provide a conceptual framework for the governance of competition within a market. Structurally, the chapter first discusses different economic theories and their arguments regarding market regulation. Thereafter, it considers the competition theories that are the basis for detecting which market activities are regarded as anti-competitive. The main argument of the chapter is that either the market regulates itself or the government should regulate the market.

2.2 FOUNDATIONAL ISSUES

Competition law, as a body of law, is referred to as an economic law due to the application of economic concepts within competition law.⁵⁰ Five economic theories have been foundational for the development of the competition law principle: the Classical Theory; the Neo-classical Theory; the Harvard School; the Chicago School; and the Post-Chicago

⁴⁸ Hassan G and Lipimile G L The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects(2008) 4

⁴⁹ Hassan G and George G The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects(2008) 44

⁵⁰ Hassan G and Lipimile G ‘The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects’ (2008) 4

School. The contestation of these economic theories is that either the government regulates the market or the market regulates itself.

2.2.1 The classical theory

The classical theory hinges on the concept of a free market.⁵¹ It views competition as a long-term, dynamic process wherein firms compete against each other for market dominance.⁵² The theory advocates self-regulation without government interference. It further asserts that although free markets sometimes lead to a firm's dominant position, this is usually as a result of the firm's superior skills or innovativeness.⁵³ However, in 1776, Adam Smith contested the classical theory.

In his famous 'Wealth of Nations' philosophy, Smith contested the classical theory, arguing that the concept of the classical theory results in monopoly power.⁵⁴ He strengthens his argument with the idea that the effect of a monopoly is the same as that of a cartel. This is because monopolists can lead to the market being under-stocked, thus resulting in an increase in price; this is similar to the effect of a cartel. Notwithstanding the above, Smith did not make any practical propositions as to any specific legal methods through which the market should be governed.

The ideology behind the classical theory still has some support in today's digitalised world.⁵⁵ The proponents are of the view that businesses, especially those operating in digital markets, enjoy the benefits of their innovation to become 'too big to fail'.⁵⁶ They cite prominent companies such as Google, Meta (formerly known as Facebook), Amazon, Microsoft, and Alibaba, which enjoy dominant positions in their relative markets.⁵⁷

The monopoly position of businesses is largely due their investment in innovation, technology and new business practices.⁵⁸ They contend that their business models have a lot

⁵¹ Campbell R. McConnell, and Stanley L *Economics: Principles, Problems, and Policies* (2005) 602

⁵² McNulty PJ 'A note on the history of perfect competition' (1967) 396

⁵³ Doğan E 'The effect of innovation on competitiveness' (2016) 62

⁵⁴ Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) chapter 7 Para 26

⁵⁵ Ioanna DC, Virpi KT, and Attila M 'Digitization and the New Dimensions of Competition: The Case of Digital Platforms in the Sharing Economy' (2017) 15

⁵⁶ Lee Yohn D, Why Great Innovation Needs Great Marketing available at <https://hbr.org/2019/02/why-great-innovation-needs-great-marketing> (accessed 19 May 2022)

⁵⁷ Ioanna DC, Virpi KT, and Attila M 'Digitization and the New Dimensions of Competition: The Case of Digital Platforms in the Sharing Economy' (2017) 15

⁵⁸ Organisation for Economic Co-operation and Development (OECD) 'Regulatory Reform and Innovation' (2014)

to benefit consumers through economy of scale, resulting in lower prices and superior products.⁵⁹ Naturally, this has been contested by some scholars. They propose that these businesses are an enemy to competition, and limit it in their markets.⁶⁰ They argue that, although these businesses innovate, sometimes their dominant position is as a result of their first-mover advantage and the swallowing of potential competitors.⁶¹

For example, Facebook has been accused of buying out the competition. It has bought companies such as Whatsapp and Instagram, thereby keeping itself the dominant player in the social media space.⁶² The result has been that Facebook has been accused of manipulating its dominant position.⁶³ For example, it made unilateral changes to its privacy policy for Whatsapp that were contested by consumers and led in turn to a rescission on this position.⁶⁴ On its Facebook platform, Facebook has been accused of violating consumer's privacy and being autocratic in its operations. This is the reason why Facebook has decided to rebrand itself as Meta, to mitigate the effects of bad publicity. Accordingly, while there is benefit to the self-regulation of markets, there are many potential challenges and hazards that necessitate government intervention.⁶⁵ Without such intervention, consumers are left with little protection against large businesses controlling billions in resources.⁶⁶ Furthermore, it becomes difficult to regulate market externalities.



⁵⁹ Arvind R, Nicole M, and Felten G et al 'The role of marketing in digital business platforms' (2021) 75

⁶⁰ These scholars are mostly the proponents of the neo-classic theory and Adam Smith

⁶¹ Barwise P and Watkins L The Evolution of Digital Dominance How and Why We Got to Google, Amazon, Facebook, and Apple 24 (2018)

⁶² Wong Q Facebook owns Instagram and WhatsApp and plans to make that obvious available at <https://www.cnet.com/tech/mobile/facebook-owns-instagram-and-whatsapp-and-plans-to-make-that-obvious/> (accessed 20 May 2022)

⁶³ Wong Q Facebook owns Instagram and WhatsApp and plans to make that obvious available at <https://www.cnet.com/tech/mobile/facebook-owns-instagram-and-whatsapp-and-plans-to-make-that-obvious/> (accessed 20 May 2022)

⁶⁴ Wong Q Facebook owns Instagram and WhatsApp and plans to make that obvious available at <https://www.cnet.com/tech/mobile/facebook-owns-instagram-and-whatsapp-and-plans-to-make-that-obvious/> (accessed 20 May 2022)

⁶⁵ Pettinger T Should the government intervene in the economy? available at <https://www.economicshelp.org/blog/5735/economics/should-the-government-intervene-in-the-economy/> (accessed 11 May 2021)

⁶⁶ Pettinger T Should the government intervene in the economy? available at <https://www.economicshelp.org/blog/5735/economics/should-the-government-intervene-in-the-economy/> (accessed 11 May 2021)

2.2.2 The neo-classical theory

The classical theory has been criticised by proponents of the neo-classical theory since it is in contradiction to perfect market competition.⁶⁷ The main argument of this theory is that the market price does not always reflect the true value of products, as people will pay more for a product than it is worth.⁶⁸ The market price should be based on the interference between supply and demand, which is referred to as the ‘price theory’ model.⁶⁹ This is because government interference in the market is essential for the effective allocation of limited productive resources. Otherwise, market reconciliation between the demand and supply sides is challenging, due to consumer budget limits on the demand side and the driving motive to maximise profits on the supply side.⁷⁰

The theory also argues that any potential firms can freely enter and exit the market.⁷¹ It posits that there is no profit upper limit as long as the price of the product is driven by consumer perception.⁷² However, some argue that this way of thinking contributed to financial crises such as that of 2008.⁷³ The main challenge with the neo-classical theory is that it is a broad theory that determines the market price through the relationship of supply and demand.⁷⁴ The pricing strategy ignores the actual economic variables such as gross domestic product (GDP), the cost of production, and the inflation rate (or time-value of money).⁷⁵ The theory also only focuses on consumer perceptions, ignoring the nature of human emotional response.⁷⁶

2.2.3 The Harvard School

The Neo-classical theory argues that the market should be regulated by the government. However, similarly to Adam Smith, as discussed in 2.2.1, the theory does not establish a legal foundation for market regulation. The Harvard School has established a legal basis for

⁶⁷ The concept of perfect competition is that of a market in which numerous businesses sell a homogenous product with a tiny proportion of market share that is influenced by consumer needs.

⁶⁸ Strader MJ *The Impact of Neoclassical Price theory On Monopolization law: a Transatlantic Perspective* (PHD thesis University College London 2015) 10

⁶⁹ Nicholas H ‘What is the Problem with Neoclassical Price Theory?’ (2012) 459

⁷⁰ Strader MJ *The Impact of Neoclassical Price theory On Monopolization law: a Transatlantic Perspective* (PHD thesis University College London 2015) 11

⁷¹ Pindyck RS and Rubinfeld DL *Microeconomics* 8th Ed. Boston: Pearson Education, (2013) 280

⁷² Pindyck RS and Rubinfeld DL *Microeconomics* 8 th Ed. Boston: Pearson Education, (2013) 281

⁷³ Carlos BL *The 2008 financial crisis and neoclassical economics* (2010) 3

⁷⁴ Pindyck RS and Rubinfeld DL *Microeconomics* 8 th Ed. Boston: Pearson Education, (2013) 282

⁷⁵ Strader MJ *The Impact of Neoclassical Price theory On Monopolization law: a Transatlantic Perspective* (PHD thesis University College London 2015) 17

⁷⁶ David DF, *Price Theory* (1986) 27

preserving market competitiveness by regulating anti-competitive conduct based on the neo-classical theory and Adam Smith's arguments.⁷⁷ The Harvard School concept investigates the connection between market structure and its consequences for detecting anti-competitive conduct.⁷⁸

It developed the Structure, Conduct, Performance (SCP) model for detecting anti-competitive conduct.⁷⁹ The SCP model is a concept that states that market structure is a determinant of market conduct, which in turn determines market performance.⁸⁰ Monopolistic market structure, for example, is a source of monopolistic market conduct, which leads to poor market performance. From 1936 to 1972, the SCP Harvard School model dominated court application analysis on anti-competitive conduct.⁸¹

The main limitation of this concept is that the market structure definition is vague. It does not clearly define parts such as the number of firms, their relative size, mobility of resources, nor consider the possibility of dominant firms. Also, determining the relationship between market structure and its consequences for analysing market conduct favours mostly the consumer, not competition. In today's digital world, some argue that the Harvard School concept prohibits innovation.⁸²

2.2.4 The Chicago School

The Chicago School argues that the goal of antitrust action is to perfect the operation of competitive markets.⁸³ It allows competitors to engage in certain conduct even although it harms the consumer.⁸⁴ It believes that market competitive imbalance is corrected on its own, and that government only interferes in the competitive process.⁸⁵ The Chicago School further developed the Neo-classic Price Theory (NPT), which was utilised as a method for

⁷⁷ See 'Enduring ideas: The SCP framework' available at <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/enduring-ideas-the-scp-framework> (accessed 10 October 2021)

⁷⁸ Herbert J and Fiona S 'Framing the Chicago School of antitrust analysis' (2020) 1872

⁷⁹ Gilbert F and Heinz D. Kurz, *Handbook on the History of Economic Analysis*(2016) 297

⁸⁰ James N, Susan L and David W 'Game Theory: Q & A on economic concepts' (2006) 98

⁸¹ Divakar B *The Competition Act 2002 A Critical Study* (2010) 3

⁸² Thomas AP 'Reconciling the Harvard and Chicago Schools: a new antitrust approach for the 21st Century'(2007) 348

⁸³ Thomas AP 'Reconciling the Harvard and Chicago Schools: a new antitrust a approach for the 21st Century' (2007) 350

⁸⁴ Thomas AP 'Reconciling the Harvard and Chicago Schools: a new antitrust a approach for the 21st Century' (2007) 351

⁸⁵ Thomas AP 'Reconciling the Harvard and Chicago Schools: a new antitrust a approach for the 21st Century'(2007) 351

detecting anti-competitive conduct. The main aim of the price theory is to investigate the actual competitive effect of market conduct, which is difficult to do using the Harvard School's SCP model.⁸⁶

The Chicago School concept argues that antitrust law tends towards economic efficiency gain.⁸⁷ Maximising wealth, efficiency, and consumer welfare are the basic factors to take into account during competition law enforcement.⁸⁸ The enforcement of antitrust law from 1973 to 1991 is as per the efficiency explanations by the Chicago School through legal writings such as Judge Robert Bork's book.⁸⁹ The US Supreme Court has used the Chicago School approach in several recent cases.⁹⁰ However, the drawback of the Chicago School is that it overlooks the idea of consumer welfare and the promotion of innovation.

2.2.5 The Post-Chicago School

The Post-Chicago School argument is based on a contestable market concept.⁹¹ Unlike the Chicago School, it acknowledges the intervention of government in the market, which is a Harvard School concept. The main difference between the Post-Chicago School and the Harvard School is that the Post-Chicago School focuses on market conduct, while the Harvard School focuses on the entire market structure.⁹² Also, the Harvard School SCP model for detecting anti-competitive conduct is a simple analytical framework that lacks theoretical underpinnings.⁹³ The Post-Chicago game theory model, on the other hand, supports the investigation into anti-competitive conduct with empirical analysis.

Game theory is a technique utilised for investigating and analysing market power.⁹⁴ It analyses interactive rational decision-making on the assumption that the performance of each market player is dependent on the performance of the others.⁹⁵ This means the market-

⁸⁶ Thomas AP 'Reconciling the Harvard and Chicago Schools: a new antitrust approach for the 21st Century' (2007) 347

⁸⁷ Robert B 'The antitrust paradox: a policy at war with itself' (1978) 279

⁸⁸ Robert B 'The antitrust paradox: a policy at war with itself' (1978) 279

⁸⁹ Divakar B 'The Competition Act 2002 A Critical Study' (2010) 14

⁹⁰ For example, the US Federal Trade Commission will issue refund vouchers totaling more than \$2.2 million to consumers who lost money to Vemma Nutrition Company's alleged pyramid scheme. This complaint was made on 26 August 2015, and the money was returned on 19 September 2015, with an anti-competitive analysis based on the Chicago School Theory pricing theory.

⁹¹ Christopher S 'The Post-Chicago antitrust revolution: a retrospective' (2020) 2160

⁹² Christopher S 'The Post-Chicago antitrust revolution: a retrospective' (2020) 2161

⁹³ James N, Susan L and David W 'Game Theory: Q & A on economic concepts' (2006) 98

⁹⁴ Christopher S 'The Post-Chicago antitrust revolution: a retrospective' (2020) 2163

⁹⁵ Christopher S 'The Post-Chicago antitrust revolution: a retrospective' (2020) 2162

player course of action or strategy takes into account the choices of other market players. Game theory mainly contributes to vertical merger anti-competitive conduct detection.⁹⁶ However, its main criticism is that it is abstract and complex.⁹⁷ This is because, depending upon the circumstances of the case, it employs quantitative analysis that utilises different dependent and independent variables for detecting anti-competitive conduct. Therefore, it is difficult to implement, as it depends on the circumstances of cases for its underpinning theory.⁹⁸

2.3 COMPETITION THEORIES

The government intervenes in the market by prohibiting activities that harm free and fair competition, which is a doctrine of neo-classical theory.⁹⁹ The government requires some theoretical underpinnings in order to formulate its intervention strategies in the market. Competition theory, which is founded on the neo-classical theories, serves as a theoretical framework for formulating modern competition law. The three most prominent theories, which serve as a framework, are the output limitation theory, the open market theory, and the fair competition theory.¹⁰⁰

The first theory, known as the ‘output limitation theory’, influenced USA antitrust law thought, particularly through the Chicago School concept, which believes in only regulation of the competition process. The theory prohibits both the market character and the competition process that limit the output of a relevant product or service. As such, the product or service’s availability is reduced in the market, and the shortage results in a price increase.¹⁰¹ The second theory, known as an ‘open market theory’, represents EU thought, which believes in open and free markets. According to this theory, competition law should ensure market access, market openness, and the right of firms to compete on merit by regulating dominant firms that unfairly marginalise smaller businesses.¹⁰²

⁹⁶ Christopher S ‘The Post-Chicago antitrust revolution: a retrospective’ (2020) 2164

⁹⁷ Kemp K ‘The Big Chill? A Comparative Analysis of Effects-Based Tests for Misuse of Market Power’ (2017) 19

⁹⁸ Strader MJ *The Impact of Neoclassical Price theory On Monopolization law: a Transatlantic Perspective* (PHD thesis University College London 2015) 40

⁹⁹ Nicholas H ‘What is the Problem with Neoclassical Price Theory?’ (2012) 461

¹⁰⁰ Ephraim M. Developing a Suitable Competition Law and Policy for Developing Countries: A Case Study of Tanzania (Unpublished LLM thesis, University of Cape Town, 2014) 4-6

¹⁰¹ Eleanor M F, ‘We Protect Competition, you Protect Competitors’ (2003) 26

¹⁰² Ephraim M. Developing a Suitable Competition Law and Policy for Developing Countries: A Case Study

The third theory, the ‘fair competition theory’, represents the developing countries’ thought and focuses on creating an enabling environment for small- and medium-size businesses.¹⁰³ This is because some producers have greater power and more advantages than others, as discussed in section 2.2.1. The theory is broad and incorporates the regulation of output limitation theory, open market theory, and unfair competition.

Overall, from an examination of competition theories, it is evident that these distinct legal systems are a result of differences in competition theory ideology. These differences are reflected even in today’s digital platform regulation. For example, the US Federal Trade Commission (FTC) accused Google of search bias in 2013, for using Google as Samsung’s default search button.¹⁰⁴ However, the FTC terminated its investigation since it had not found sufficient evidence that Google had manipulated its search algorithms to unfairly disadvantage vertical websites. In contrast, in 2018 the EU found Google guilty of market dominance by using Android as a vehicle for its search engine.¹⁰⁵ This is because Google’s dominance denied competitors the opportunity to innovate and compete on merit.

The different decisions in the USA and the EU jurisdiction are a result of their distinct competition-theory ideologies. The USA believes that Google’s dominance is due to its advanced skills and investment, while the EU believes that Google’s dominance is due to its merit advantage, which swallows other competitors.

2.4 DEFINITION OF KEY CONCEPTS

The fundamental economic concept is that a more efficient resource allocation is the result of numerous competitors,¹⁰⁶ since competition enhances the efficiency of individual firms through the threat of business loss.¹⁰⁷ A non-competitive environment results in product scarcity, imbalance between supply and demand, purchasing-power limitation, and a decline in the time-value of money. Competition is therefore critical in achieving economic goals, as it makes the market more efficient. Economists have argued that either a perfect or imperfect market structure is required to boost market competitiveness.

of Tanzania (Unpublished LLM thesis, University of Cape Town, 2014) 5

¹⁰³ Eleanor M F ‘What is Harm to Competition? Exclusionary Practices and Anticompetitive Effect’ (2002) 70

¹⁰⁴ *The Federal Trade Commission vs Google* case no 111-0163

¹⁰⁵ *The EU Commission Vs Google* case no 40099

¹⁰⁶ Smith A, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) 452

¹⁰⁷ Mark W, *Competition Policy: One Theory, Three Systems* (2004) 4

2.4.1 Perfect market structure

A perfect market structure hinges on three main economic assumptions. These are that firms are price-takers, that products are homogeneous, and that there is freedom to enter and exit the market.¹⁰⁸ Firms are price-takers since competitor's pressures other firms to accept the existing market price, as the price should reflect the overall supply and demand of the market.¹⁰⁹ Also, there should be many sellers and buyers offering homogenous products or services, with firms controlling a very small market share that contributes insignificantly to the market.¹¹⁰ In addition, there should be no barrier to enter or exit the market, and both the buyers as well as seller have perfect information.¹¹¹

2.4.2 Imperfect market structure

An imperfect market structure is an economic concept where firms can offer heterogeneous products and services. It results in imperfect competition since there are many sellers in the market with heterogeneous products.¹¹² This is an opportunity for firms to earn more profit through having significant market share, which results in a price increase. Also, the firms set their own prices and create barriers to entering and exiting the market.¹¹³ Imperfect market competition results in the formation of either a monopoly or an oligopoly market structure.

2.4.2.1 Monopoly vs oligopoly

A monopoly is an imperfect market structure where one dominant seller sets a price with no substitute product.¹¹⁴ An oligopoly is an imperfect market structure where few sellers produce homogeneous products and many buyers are found in the market.¹¹⁵ These few players set prices together and block the market for new entrants. However, a company might have a monopoly in one region, while operating as an oligopoly in a larger

¹⁰⁸ Pindyck RS and Rubinfeld DL *Microeconomics* (2013) 280

¹⁰⁹ Pindyck RS and Rubinfeld DL *Microeconomics* (2013) 281

¹¹⁰ Strader MJ *The Impact of Neoclassical Price theory On Monopolization law: a Transatlantic Perspective* (PHD thesis University College London 2015) 12

¹¹¹ Strader MJ *The Impact of Neoclassical Price theory On Monopolization law: a Transatlantic Perspective* (PHD thesis University College London 2015) 12

¹¹² Richard BM and Dwight RL *Firm Strategy under Imperfectly Competitive Market Conditions* (2010) 'ch' 11 'para' 1

¹¹³ Richard BM and Dwight RL *Firm Strategy under Imperfectly Competitive Market Conditions* (2010) 'ch' 11 'para' 1

¹¹⁴ Openstax economics *Monopolistic Competition and Oligopoly* (2016) 'ch' 10 'para' 1

¹¹⁵ Openstax economics *Monopolistic Competition and Oligopoly* (2016) 'ch' 10 'sec' 2

geographical area.¹¹⁶ For example, Netflix operates under an oligopoly, since there are a few companies such as Amazon that control the entire market.

2.5 CONCLUSION

This chapter has examined the main economic concepts that are crucial for detecting anti-competitive conduct impact. The key economic theories are the classical theory, the neo-classical theory, the Harvard School concept, the Chicago School concept, and the Post-Chicago School concept. The classical and neo-classical theories argue as to whether the market regulates itself or the government should regulate the market.

The Harvard School, the Chicago School, and the Post-Chicago School have developed different models that are utilised for detecting cartel conduct based on the neo-classical theory concept. The Harvard School cartel detection method favours greater consumer protection, while the Chicago School prefers the competition process. The Post-Chicago School method promotes and advances the Harvard School method by providing additional tools to detect cartel conduct.

In today's digitalised world, there appears to be a return to the classical theory. From this we can conclude that, of the theories shown, none are perfect. Rather, all the theories are open to criticism. Furthermore, we can conclude that the current different jurisdiction competition theory ideology is based on neo-classical price theory, which in turn introduces the respective jurisdiction competition law principle. In chapter three, the focus will be on the historical antecedents of competition law.

¹¹⁶ Openstax economics *Monopolistic Competition and Oligopoly* (2016) 'ch' 10 'sec' 2

CHAPTER THREE: HISTORICAL OVERVIEW OF COMPETITION LAW

3.1 INTRODUCTION

This chapter traces the historical antecedents of competition law. It discusses the historical development of the USA, the EU, and the African competition regimes. The main argument made in this chapter is that the modern competition regime is founded on the USA Sherman Act of 1890, which was amended in 1914 by the Clayton Act and the Federal Trade Commission (FTC) Act. The competition regime of the EU promotes the development of a modern competition regime.

The aim of this chapter is to examine the historical development of competition law in order to determine which competition regime is the most influential. As a result, the comparative analysis in chapter four will be based on these competition regimes. The USA and the EU have established strong competition regimes and influenced the rest of the world to develop competition regulation. However, the evolution of early competition law can be seen in Roman legislation, where anti-competitive conduct was regulated in the control of price fluctuations and unfair trade practices.

3.2 EARLY DEVELOPMENT

The earliest forms of the regulation of competition law are found first in Roman legislation, and then in the Middle Ages. The Roman legislation was enacted for the purpose of governing local production around 50 BC.¹¹⁷ The Empire had some regulations that dealt with unfair trade practices in the form of trade combinations or joint actions which resulted in price fluctuations.¹¹⁸ In the Middle Ages, competition regulation was seen in England, where the focus was on controlling monopolies and restrictive practices.¹¹⁹

¹¹⁷ The history of competition law is predominantly divided into Roman Legislation (50BC to 393 AD), Middle Ages (5th to 15 century) and the Modern Age period. The Modern Age is further divided into three periods: the early modern age (15th to 18th century), the late modern period (18th to 20th century) and the post-modern age (since the 20th century).

¹¹⁸ Wilberforce R *The Law of Restrictive Trade Practices and Monopolies* (1966) 11

¹¹⁹ Wilberforce R *The Law of Restrictive Trade Practices and Monopolies* (1966) 21

Later, other countries such as the USA, France, Germany, Canada, and other EU member states followed suit.¹²⁰ This later competition regime was triggered by the concept of a market economy and by the industrial revolution, since it created a wave of anti-competitive conduct.¹²¹ Some countries accepted that regulating unfair business practices was mandatory for the sake of safe competition, while others argued that government interference should not be part of the free market economy. Due to this, anti-competitive conduct regulation became fragmented, with some countries enacting it on a case-by-case basis. Following World War II (WWII), competition regulation has become more widespread, and has been enacted in a standardised way across Europe.

3.3 THE USA AS A PIONEER

The USA is perhaps the bedrock of the development of competition law, particularly because of the enactment of the Sherman Act of 1890.¹²² The Sherman Act sought to prohibit conspiracies and restraint of trade.¹²³ It still serves as the foundation of most modern competition regulation. The Sherman Act prohibits monopoly and cartel business conduct.¹²⁴ Specifically, its provisions prohibit the restraint of trade due to companies' cooperation with rivals to fix outputs, prices, and market shares.¹²⁵

The content of the Sherman Act was complemented by the enactment of the Clayton Act of 1914.¹²⁶ The Act made provision for price discrimination, anti-competitive mergers, and acquisition conduct.¹²⁷ Furthermore, the Clayton Act defined what is meant by 'reasonable restraint'.¹²⁸ The Federal Trade Commission (FTC) Act of 1914 added further content to the Sherman Act of 1890.¹²⁹ The aim of this document is to protect consumers by preventing all unfair methods of competition, and unfair practices.¹³⁰ This reinforced the contents of the Sherman Act and the Clayton Act.

¹²⁰ Mario M 'Anti-trust in the US and Europe, A History of convergence' (2001) 5-6

¹²¹ Divakar B 'The Competition Act 2002 A Critical Study' (2010) 24

¹²² The Act for the Prevention and Suppression of Combination formed in Restraint of Trade(1889)

¹²³ Sherman Act of 1890 Section 1 and 2

¹²⁴ Sherman Act of 1890 Section 1 and 2

¹²⁵ The Sherman Act of 1890 section 3

¹²⁶ The Clayton Act of 1914

¹²⁷ The Clayton Act of 1914 section 13 (a-f) and 18

¹²⁸ Jonida L The Evolution of Antitrust Law in USA (2018) 156

¹²⁹ The Federal Trade Commission (FTC) Act of 1914

¹³⁰ Divakar B The competition act 2002 A critical study (2010) 31

Another relevant document to be considered in the context of the USA is the Robinson Patman Act of 1936. This document amended the price discrimination provision in the Clayton Act by adding further provisions to protect small retail shops.¹³¹ The Act prohibited price discrimination in the form of setting a minimum price, supplying preferred customers, and charging different prices for the same product.¹³² Finally, the Celler-Kefauver Anti-merger Act of 1950 provided further rules for mergers and acquisitions.¹³³

3.4 COMPETITION LAW IN THE EU

In the EU context, Germany was the first to enact an anti-cartel law in 1923. Sweden and Norway adopted similar laws in 1925 and 1926, respectively. Before this, Germany had no statute that prohibited restraint of trade. Rather, section 1 of the Trade Regulation Act of 1869 prohibited the government from interfering in the market-based economy. The idea behind this was that the market should regulate itself.¹³⁴ This ties into the arguments raised by the classical theory, as discussed in chapter two. The Ordinance of 1923 was therefore a vital document in providing for competition rules in Germany. The Ordinance of 1923, section 1 provides that all

agreements and understandings which contain obligations regarding the manipulation of production or of sales, regarding the conditions to be observed in business transactions, regarding the method of fixing prices or regarding demand prices (syndicates, cartels, conventions, and similar agreements) have to be executed in writing.

The Ordinance of 1923 was, however, plagued by many challenges.¹³⁵ For example, in 1927, the provision on price fixing at both vertical and horizontal levels was introduced into the ordinance. The problem with these changes was that the regulations were too narrow.

¹³¹ Robinson Patman Act of 1936.

¹³² The Robinson-Patman Act, section 2(a-F)

¹³³ The Celler-Kefauver Antimerger Act of 1950

¹³⁴ Trade Regulation Act for the North German Confederation (Gewerbeordnung für den Norddeutschen Bund), 1869 245. Section 1 provides that 'all trade is open to everyone, unless this Statute provides exceptions from or limitations upon this rule'. This provision was workable until the Saon Woodpulp Manufacturer ended up forming cartels.

¹³⁵ The interwar period was characterised by a significant change in social, political, and economical perspectives throughout the world. The interwar period is a short period from the end of WWI (1918) to the beginning of WWII (1939).

Competition law, however, fell into the background around 1929 following the economic downturn after the stock market crash of that year.¹³⁶ However, two decades later, after the end of WWII in 1945, conversations around competition law began to resurface. Many European governments began to review their competition laws.¹³⁷ This was because of the re-emergence of the competition value system, in which competition law was viewed as being critical for encouraging economic growth, economic revival, reducing class antagonisms, and achieving political acceptance of the post-war settlement.¹³⁸

After the end of WWII, the United Kingdom and Germany were the first European countries to adopt modern competition laws, under pressure from the United States.¹³⁹ By 1951, the debate on competition law in Europe had become robust.¹⁴⁰ This led to the founding of the European Coal and Steel Community Agreement. The agreement was established at regional level, with the goal of regulating the coal and steel industries.¹⁴¹ It was between France, Germany, Italy, Belgium, the Netherlands and Luxembourg. The intention of this agreement was to prevent Germany from re-establishing its dominant position in coal and steel production, as this position had contributed to the outbreak of war. Articles 65 and 66 of the Agreement, respectively, prohibited cartel conduct and dominant positions.¹⁴² In 1957, these articles were further amended by the Treaty of Rome, commonly referred to as the European Economic Community Treaty.¹⁴³

The European Community Treaty set the foundational competition principle for the EU. Article 81 of the treaty prohibits agreements that limit or fix prices, quantities, investments or innovations, as well as market shares. Article 82 of the treaty prohibits the abuse of dominance, which can result in excessive pricing, natural monopolies, and predatory pricing. The current EU competition law is derived from articles 101 to 109 of the Treaty of the Functioning of the European Union (TFEU).¹⁴⁴ Article 101 of the TFEU prohibits cartel conduct, while article 102 of the TFEU prohibits abuse of the dominant position. Also, the

¹³⁶ Garraty, JA *The Great Depression* (1986) 3. The Great Depression was a worldwide economic downturn that began in 1929 and lasted until 1939.

¹³⁷ David JG 'The origin of European competition law in Fin-de-Siècle Austria' (1992) 37

¹³⁸ ¹³⁸ David JG 'The origin of European competition law in Fin-de-Siècle Austria' (1992) 36

¹³⁹ Wilberforce R, Alan C and Neil E *The Law of Restrictive Practices and Monopolies* (1966) 7

¹⁴⁰ Papadopoulos AS *the International Dimension of EU Competition Law and Policy* (2010) 3

¹⁴¹ The European Coal and Steel Community Agreement

¹⁴² Papadopoulos AS *The International Dimension of EU Competition Law and Policy* (2010) 12–13

¹⁴³ The Treaty of Rome 1957 Article 3

¹⁴⁴ See http://europa.eu/abc/treaties/index_en.htm

EU 139/2004 merger regulation prohibits horizontal and vertical merger agreements as per the Treaty of Lisbon.¹⁴⁵

3.5 COMPETITION LAW IN AFRICA

While developments in competition law have been taking place in other parts of the globe for a considerable period of time, the phenomenon is still relatively new in the African context. Early developments in this area can be noted around the 1980s.¹⁴⁶ Pioneers in this regard were countries such as Gabon, Kenya, and South Africa.

The South African Harmful Business Practice Act of 1988 provided the founding framework for the current competition law. Prior to that, there were fragmented regulations through various Acts. The main regulations are the 1969 resale price maintenance regulation, the 1955 monopoly regulation, and the 1979 merger regulation.¹⁴⁷ Currently, South Africa is utilising the Competition Act of 2000, which amended the Competition Act of 1998.¹⁴⁸ It contains provisions on restrictive practices, mergers and acquisitions, and abuse of a dominant position, amongst others.

Gabon enacted a competition law for the first time in 1989.¹⁴⁹ The Competition Act included provisions on unfair business practices and the abuse of a dominant position.¹⁵⁰ However, the 1998 Gabon Competition Law was broader than the initial document, covering concerted practices, abuse of market dominance, merger control, and unfair competition, amongst other provisions.¹⁵¹

The Kenyan Competition Act, which prohibits restrictive trade practices, monopolies, and price control, came into force in 1989.¹⁵² The 1989 Act is an update of the statute of 1972, which reviewed the 1956 price control ordinance. The current Competition Act was adopted in 2010 and revised in 2014.

¹⁴⁵ The Treaty of Lisbon is known as a reform treaty that amended the Maastricht Treaty (1992) and the Treaty of Rome (1957). The treaty was signed on 13 December 2007 and entered into force on 1 December 2009.

¹⁴⁶ Büthe T and Kigwiru V 'The spread of competition law and policy in Africa: a research agenda' (2020) 44

¹⁴⁷ Organisation for Economic Co-operation Development(OECD) 'Competition Law and Policy in South Africa' (2003) 8-17

¹⁴⁸ Organisation for Economic Co-operation Development(OECD) 'Competition Law and Policy in South Africa' (2003) 17

¹⁴⁹ Vellah K 'The Cooperation on Competition Policy under the African Continental Free Trade Area' (2020)6

¹⁵⁰ Law n ° 5/89 of July 6, 1989 relating to competition, Article 6 and 12

¹⁵¹ Gabon Competition Act of 1998 chapter 2, 4, 6,7and 8

¹⁵² Africa Resource Centre competition law in Kenya - A Snapshot available at https://cuts.nairobi.org/pdf/Competition_Law_in_Kenya.pdf (accessed 25 September 2021)

This notwithstanding, buy-in from other African countries on the continent has been slow. Between 1990 and 2013, only 26 African countries adopted competition law regimes.¹⁵³ Since then, there has been some notable growth in this regard. The latest figures, published in 2020, indicate that 37 countries now have competition regimes in Africa.¹⁵⁴ While this progress is notable, it is still worrisome that there are a notable number of countries such as Sierra Leone, Ghana, Guinea, and Lesotho that are yet to adopt competition regimes.¹⁵⁵

3.5.1 Regional competition law in Africa

The African Union (AU) recognises eight RECs, of which six have a competition regime.¹⁵⁶ The competition regimes of the six RECs were established between 1996 and 2019.¹⁵⁷ The Southern African Development Community (SADC) was the first of the RECs to adopt a competition provision, in 1996.¹⁵⁸ The competition provisions were included within the trade protocol in 1996, and came into force in 2000. Unfair business practices were prohibited, and all member states were to take measures as per section 25 of the provision.¹⁵⁹ This obligation has been enforced, since most members did not have a competition regime at the time that the competition provision was enacted in 1996.

The Economic Community of West African States³ (ECOWAS) competition regulation was enacted in 2008. However, its competition regime was established only in 2019. It prohibited abuses of a dominant position, restrictive practices, mergers and acquisitions.¹⁶⁰ COMESA established its competition regime in 2004. However, the challenge was that, for a prolonged period, there was no enforcement authority. COMESA's Competition Commission only began to operate in 2013.¹⁶¹ The competition regime covers issues such as basic principles, the institutional framework, and practical cooperation between COMESA's Competition Commission and the national competition authorities. In terms of the principles covered, the document prohibits cartels, concerted practices, mergers, and abuse of

¹⁵³ Deloitte, *Competition Law in Africa: Maximising Competitor Advantage* (2017) 5

¹⁵⁴ Büthe T and Kigwiru V 'The spread of competition law and policy in Africa: a research agenda' (2020) 46

¹⁵⁵ Gelaga Investment in Africa Country Chapter for Sierra Leone, available at <https://iclg.com/alb/special-report/sierra-leone> (accessed 20 October 2020)

¹⁵⁶ Büthe T and Kigwiru V 'The spread of competition law and policy in Africa: a research agenda' (2020)45

¹⁵⁷ Büthe T and Kigwiru V 'The spread of competition law and policy in Africa: a research agenda' (2020) 43

¹⁵⁸ SADC Competition law of 1996

¹⁵⁹ Competition Act of SADC 2000

¹⁶⁰ COMESA 'COMESA in brief' (2018) 7

¹⁶¹ COMESA 'COMESA in brief' (2018) 7

dominance.¹⁶²

Overall, there have been many challenges with regulation at a regional level. In particular, challenges have arisen as a result of the overlapping regional economic communities (RECSs).¹⁶³ This also affects competition regulation efficiency and effectiveness. For example, Kenya is a member of COMESA and the East Africa Community (EAC), while Zimbabwe and Zambia are members of COMESA and SADC.¹⁶⁴ Against this background, it is difficult to create uniform rules for competition regulation at a regional level to tackle anti-competitive conduct.

Nonetheless, there have been efforts to address these challenges. For instance, in 2015, three RECs, specifically COMESA, EAC and SADC, concluded negotiations on the Tripartite Free Trade Area (FTA) Agreement (TFTA).¹⁶⁵ This was an attempt to deal with the consequences of overlapping membership.¹⁶⁶

However, the challenge is that only eight countries have ratified the agreement, which is still short of the 14 signatures required for the Agreement to enter into force.¹⁶⁷ A new deadline for ratification of the Agreement had been set for June 2021, but it has not been confirmed whether this has been met.¹⁶⁸ It is argued that the implementation of the AfCFTA has provided the impetus to countries that have not yet ratified the Agreement to do so.¹⁶⁹ The work already done under the tripartite framework has contributed to the speedy implementation of the continental trade regime.

The members of the TFTA are yet to reap the rewards that they had expected from the Agreement, as non-ratification by other members has held them back. The AfCFTA, however, intends to use these existing RECs as building blocks for its development.¹⁷⁰ This

¹⁶² COMESA Guidelines on Restrictive Business Practices of 2019

¹⁶³ Desta M and G rout G The Challenge of Overlapping Regional Economic Communities in Africa: Lessons for the Continental Free Trade Area from the Failures of the Tripartite Free Trade Area (2018) 3

¹⁶⁴ Kenya is the founder of EAC and signed an agreement of membership in 1999, while Kenya became member of COMESA in October 2000. Likewise, Zimbabwe and Zambia joined COMESA in October 2000 and they were founders of SADC in 1980.

¹⁶⁵ SADC-EAC-COMESA Tripartite Free Trade Area agreement Art 3

¹⁶⁶ SADC-EAC-COMESA Tripartite Free Trade Area agreement Art 2

¹⁶⁷ See New Deadline set for Ratification of Tripartite Free Trade Area available at <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/> (accessed 21 May 2022)

¹⁶⁹ The preamble of AfCFTA Art 5

¹⁷⁰ The preamble of AfCFTA Art 3

¹⁷¹ The preamble of AfCFTA Art 4

would minimise conflict of multiple memberships through cooperation.¹⁷¹ Conflict resolution includes negotiation on competition law cooperation strategies. At present, Phase II of the AfCFTA negotiations includes the drafting of a protocol on competition law.

3.6 CONCLUSION

The historical analysis reveals that competition law originated in and was influenced by the USA, the UK, and the EU. The USA's Sherman Act of 1890 served as a basis for the world's modern competition regulation formulation. Later, it was amended by the Clayton Act of 1914 and the Federal Trade Commission Act (FTC) of 1914. These Acts were adopted by the UK and other European countries, partly due to pressure from the USA after WWII. Accordingly, the EU and the USA's competition regimes are the most useful to draw on for comparison with the COMESA competition regime. In the following chapter, this mini-thesis will examine the EU and USA competition regulations for comparative analysis with COMESA.



CHAPTER FOUR:

A COMPARATIVE ANALYSIS OF THE COMESA, THE EU, AND THE US COMPETITION REGIMES

4.1 INTRODUCTION

This chapter compares the competition regimes of the USA, the EU, and COMESA, focusing on cartel detection and law enforcement. The comparison focuses on the key provisions, the main detection tools, the law enforcement process, and the challenges of cartel conduct. It also compares attempts taken by the three institutions in order to regulate digital platforms and cross-border cartel conduct.

Structurally, the chapter first discusses the experience of the COMESA Competition Commission (CCC). Secondly, it discusses the experience of the EU Commission and the USA Antitrust Division respectively. Thereafter, it compares the three institutions' successes and failures in regulating cartel conduct.

Generally, the chapter finds that there are challenges in cartel law enforcement, particularly in cross-border cases. The challenges are mainly that traditional tools are inadequate for gathering sufficient information about a cartel's conduct. This is true within the jurisdiction of the EU, the USA and COMESA, although it is worse in COMESA.

4.2 COMESA COMPETITION COMMISSION

The COMESA Competition Commission (CCC) was launched on December 2008 under article 6 of the COMESA Competition Regulation.¹⁷² However, the CCC officially launched its operations on 14 January 2013; it is based in Lilongwe, Malawi.¹⁷³ The mandate of the CCC is to ensure fair competition and transparency among its members.¹⁷⁴ It also seeks to monitor competition and investigate anti-competitive practices within the common market. By so doing, the CCC seeks to enforce article 55 of the COMESA Treaty which sets the foundational principles of the COMESA competition regime.¹⁷⁵ Key to this provision is subsection (1), which prohibits unfair trade practices that distort competition. The

¹⁷² COMESA Competition Regulation (2004)

¹⁷³ COMESA competition regulation Art 6

¹⁷⁴ COMESA competition regulation Art 3

¹⁷⁵ The Treaty Establishing the COMESA, Article 55

COMESA competition regulations consist of three main elements, namely anti-competitive business practices, consumer protection violations, as well as mergers and acquisitions.¹⁷⁶

4.2.1 Key cartel provisions and detection tool

The anti-competitive business practices provisions prohibit horizontal and vertical agreements, concerted practices, and abuses of dominance that have a cross-border effect.¹⁷⁷

The main activities that constitute cartel conduct are defined in article 19(3)(a–f) of the Competition Regulation.¹⁷⁸ It prohibits conduct on fixing prices, collusive tendering and bid-rigging, market allocation agreements, allocation of quotas, collective action to enforce arrangements, and concerted refusal to supply goods or services.

The CCC reviews an application for authorisation in accordance with article 20 of the Competition Regulations. The procedure of the Commission on request, and the procedure of the Commission on its own initiative, should be conducted in accordance with article 21 and 22 of the Competition Regulation. Penalties for cartel conduct are based on article 8(5) of the Competition Regulation.¹⁷⁹ For establishing infringements based on articles 20 and 21, there should be a tool that detects cartel conduct at an early stage.

In order to increase the early stage of cartel detection, the CCC established a tool called the ‘Fast Track’ platform for the purpose of collecting day-to-day complaints.¹⁸⁰ However, these complaints are mostly about merger cases rather than cartels, due to the increasing rate of mergers and acquisitions in all COMESA member states.¹⁸¹

The CCC has little experience in using circumstantial evidence as a tool for cartel detection. Circumstantial evidence-gathering is important for new countries that have recently begun anti-cartel efforts. This is because direct evidence-gathering is difficult for the competition authority that has little experience.¹⁸² So cartel detection, with the help of circumstantial evidence-gathering, might not be sufficient to unmask cartel conduct.

¹⁷⁶ COMESA competition regulation (2004)

¹⁷⁷ COMESA Guidelines on Restrictive Business Practices (2019) Section 3

¹⁷⁸ COMESA competition regulation, (2004) Article 19

¹⁷⁹ COMESA competition regulation, (2004) Article 8

¹⁸⁰ COMESA ‘COMESA in brief’ (2018) 7

¹⁸¹ COMESA ‘COMESA in brief’ (2018) 7

¹⁸² OECD Prosecuting Cartels without Direct Evidence (2006) 41

The CCC is unsuccessful in cartel detection mainly due to not utilising different cartel conduct detection tools for unmasking cartel conduct. There should be provisions that promote cartel detection by utilising different tools. For example, there should be some legal basis for leniency programme applications. Therefore, the CCC needs to work more on tools that have the potential to uncover cartel conduct.

4.2.2 Cartel enforcement process

The purpose of COMESA's competition law is to promote competition by preventing anti-competitive conduct that hinders the efficient operation of the common market.¹⁸³ The cartel enforcement process can be condensed into six basic steps.¹⁸⁴ First, an investigation request is submitted by anyone with sufficient information. Secondly, the CCC starts its preliminary assessment and proceeds with the investigation. Thirdly, the CCC consults with any interested parties; it will notify them of the suspicion. Fourth, the defendants can respond to the suspicion. Fifth, a decision is made based on the investigation. Finally, if there is any appeal, it can be submitted to the Commission.¹⁸⁵

As we can see from the cartel enforcement process, the first step is that an investigation request can be submitted by anyone with sufficient information. The CCC does not use any tools such as leniency programmes for early-stage detection. Hence, there are no tools that provide evidence to detect cartels at an early stage. This results in very few cartel investigation requests.

4.2.3 Experience of cross-border conduct

The COMESA competition regulation experience in cross-border jurisdictions reveals a legal gap in cross-border conduct cooperation.¹⁸⁶ This is due to both the Treaty and Competition Regulations not being taken as binding by some members. Accordingly, the national competition authorities of those countries are not legally obliged to collaborate. Additionally, various influences on African countries by their colonisers have affected their legal systems and their jurisdictional operating systems. This in turn affects the CCC. This

¹⁸³ COMESA Competition Regulation 2004, Article 3

¹⁸⁴ COMESA Competition Regulation 2004, Article 21

¹⁸⁵ COMESA Competition Regulation 2004, Article 21

¹⁸⁶ Vincent NA *Competition Law and Regional Integration: COMESA* (unpublished MIPLC thesis Universität; Munich, 2013) 3

has had an impact on the CCC during anti-competitive conduct detection and law enforcement.

The provisions on restrictive business practices stipulate certain conditions that allow the intervention of the Commission. The CCC intervenes in anti-competitive conduct if an agreement or conduct has an obvious effect on trade between member states.¹⁸⁷ This provision limits the practice of the CCC supranational power in combatting the cross-border effect. Even using the effects doctrine for cross-border effect law application becomes questionable.

Due to the lack of supranational power outside its jurisdiction, to date no international cartel conduct has been fined by the CCC.¹⁸⁸ Certainly, officials are allowed to examine books and other business records, take copies or extracts from books and business records, ask for verbal explanations on the spot, and enter any premises. However, the member state competition authorities are legally bound to keep information confidential, which is challenging for cartel-conduct investigations across the common market.¹⁸⁹

Furthermore, the different skills levels across the member states' competition authorities affect the CCC.¹⁹⁰ To reduce such challenges, the CCC has realised that cooperation agreements are critical for joint enforcement of cross-border cartel conduct. Since 2015, the CCC has had bilateral cooperation agreements with 11 member states.¹⁹¹ This cooperation includes collaboration on notification procedures, exchange of information, and cooperation on investigation.

For the purposes of this cooperation, the CCC established a platform known as the COMESA Restrictive Business Practice Network (RBP network).¹⁹² Through this network, member states share information, exchange knowledge, build capacity, and cooperate on law enforcement activities. Therefore, the CCC requires members to do a good job

¹⁸⁷ COMESA Competition Regulation (2004) Article 16

¹⁸⁸ Willard M, COMESA: Tug of War on Extraterritoriality and the Saving Grace of Regional Law (2021) 5

¹⁸⁹ Mwemba W International Experiences and Best Practices in Competition Law Enforcement Against Cross Border Cartels: The COMESA Experience(2021) 4

¹⁹⁰ Mwemba W International Experiences and Best Practices in Competition Law Enforcement Against Cross Border Cartels: The COMESA Experience(2021) 5

¹⁹¹ Mwemba W International Experiences and Best Practices in Competition Law Enforcement Against Cross Border Cartels: The COMESA Experience(2021) 7

¹⁹² Mwemba W International Experiences and Best Practices in Competition Law Enforcement Against Cross Border Cartels: The COMESA Experience(2021) 3

regarding their cooperation strategies. Likewise, more work on methods of cartel detection is necessary, since the mining of evidence of cartel conduct is highly challenging.

4.2.4. The experience of digital platform cartel detection and law enforcement

The 41R, driven by the need to digitise, has been characterised by innovation and new technologies.¹⁹³ Although these technologies offer many potential benefits, they also have an impact on different sectors, including the competition sector.¹⁹⁴ This has happened as digital platforms have proliferated rapidly while legal and economic analysis by competition regime has remained the same. Many countries, and regional competition regimes, face this problem, although the situation is worse in developing countries, particularly in Africa including the CCC.

The main challenge for the CCC in detecting digital platform cartels is the lack of expertise and financial resources. This is because almost all COMESA member states are either from developing or Least Developed Country(LDC) that might be impacted by the large amount of data, resources, and skills. To date, there has been no attempt to regulate digital platform cartel conduct as has been done in the EU and the USA. The CCC has done nothing to regulate digital platform anti-competitive conduct even though the rapid digitalisation of the African countries' economies affects the competition of the common market.

4.2.5 Challenges and cases

The main challenge of the provision concerning cartel conduct is that cartel conduct is not criminalised: it is an administrative offence subject to a fine. However, there are member states of COMESA, such as Zambia, which categorise certain vertical and horizontal agreements as criminal offences subject to criminal sanctions.¹⁹⁵ The difference between national and regional laws affects the CCC during law enforcement. Moreover, national-level cartel enforcement within the common market is mostly unsuccessful, which in turn affects the CCC.

The other challenge is that utilisation of different cartel-conduct detection tools by member states is poor. For instance, the application of the leniency programme is weaker due to the

¹⁹³ Aizhi W, Fourth Industrial Revolution Technological Drivers Impacts and Coping Methods (2017) 627

¹⁹⁴ Aizhi W, Fourth Industrial Revolution Technological Drivers Impacts and Coping Methods (2017) 627

¹⁹⁵ Vincent NA *Competition Law and Regional Integration: COMESA* (unpublished MIPLC thesis Universität; Munich, 2013) 23

non-immunisation of leniency programmes and the risk of commercial retaliation against leniency applicants.¹⁹⁶ Only a few competition authorities in the common market have used information-gathering tools such as dawn raids. Additionally, the CCC is challenged by the parallel cooperation of cartel detection and law enforcement, since there are members who do not investigate cartel cases at all.¹⁹⁷

All in all, the CCC is challenged in regulating cartel conduct. The root cause of the problem is the lack of effective cartel detection tools, and the law enforcement gaps between the CCC and its member states. Due to this, cartel cases are addressed less so by the CCC than mergers, which come into effect after cartel conduct regulation. For instance, in 2020, 33 merger cases were received by the CCC, of which 26 were finalised, while in 2019, of the 37 merger cases received by the CCC, all cases were finalised.¹⁹⁸ However, regarding cartels, only one case has been received by the CCC. The CCC commenced its investigation on 8 November 2019, and the case was finalised on 10 June 2020.¹⁹⁹ To date, no digital platform cartel conduct has been detected and prosecuted by the CCC.

4.3 EU COMMISSION

The current competition regime of the EU, as discussed in chapter three, is based on the Lisbon Treaty that established the European Commission (EC) in 2009; it is located in Brussels. The EC is responsible for enforcing EU laws, proposing legislation and directing the administrative operations.²⁰⁰ The current EU competition law is derived mostly from articles 101–109 of the Treaty of the Functioning of the European Union (TFEU).²⁰¹ These articles provide the legal basis for the prevention of cartels, monopolies, and mergers, and for the control of state aid.

¹⁹⁶ Interview with George Lipimile, Director of the COMESA Competition Commission available at *w . a n t i t r u s t s o u r c e . c o m* (accessed 23 October 2021)

¹⁹⁷ Mwemba W 'International Experiences and Best Practices in Competition Law Enforcement Against Cross-Border Cartels: The COMESA Experience' (2021) 3

¹⁹⁸ See Merger and Anti-competitive Business Practise Cases, available at https://www.comesacompetition.org/?page_id=335 (accessed 23 December 2020)

¹⁹⁹ Anti-competitive Business Practices – cases available at https://www.comesacompetition.org/?page_id=335 (accessed 22 December 2020)

²⁰⁰ see overview of European Commission available at https://european-union.europa.eu/institutions-law-budget/institutions-and-bodies/institutions-and-bodies-profiles/european-commission_en (accessed 21 May 2022)

²⁰¹ Art 101 and 102 of TFEU are the legal basis for cartel conduct

4.3.1 Key cartel provisions and detection tools

Cartel regulation is one of the key areas of EU competition regulation under article 101 of the TFEU. The regulation prohibits restrictive agreements between independent market operators acting either at the same level of the economy, known as horizontal agreements, or at different levels of the economy, known as vertical agreements.²⁰² It also prohibits decisions taken by an association of firms, and concerted practices.²⁰³ The major cartel conduct prohibited within the EU are price fixing; bid rigging; applying dissimilar conditions to equivalent transactions; limitation or distortion of production, markets, technical developments or investments; and sharing markets or sources of supply.²⁰⁴

Most cartel activities are subjected to administrative offence, while bid rigging and conspiracies are subjected to criminal sanctions.²⁰⁵ Cartel activity can be defined as illegal conduct which is an infringement of article 101 of the TFEU. Article 102 prohibits unfair price discrimination, discounting and other illegal incentives, refusal to supply, predatory conduct towards new entrants, and exclusive arrangements.

In order to detect cartel conduct, the Commission has strong experience in utilising different tools such as consultation with firms or consumers, on-site visits, and leniency programmes.²⁰⁶ For early-stage cartel detection, the Commission has implemented leniency programmes successfully since 1996.²⁰⁷

The various tools were adopted by their respective national competition authority in 2006 and updated in 2012.²⁰⁸ The immunity granted through the leniency programme is applied only in cartel cases that restrict trade by fixing purchase or selling prices, the allocation of production or sales quotas, the sharing of markets including bid rigging, restricting import and export, and fixing trading conditions.²⁰⁹ It is by far the most successful tool initiated in the period between 1996 and 2000.

²⁰² EU Competition law, Cartel legislation (2013)

²⁰³ Art 101 of TFEU

²⁰⁴ See EU Anti-competitive regulation available at https://ec.europa.eu/info/business-economy-euro/doing-business-eu/competition-rules_en (accessed 05 May 2021)

²⁰⁵ Article 3 of Regulation (EU) 1/2003

²⁰⁶ Wouter PW The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years (2016) 9

²⁰⁷ Michael H and Hüschelrath K *Cartel Cases and the Cartel Enforcement Process in the European Union 2001 – 2015: A Quantitative Assessment* (2016) 3

²⁰⁸ Wouter PW The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years (2016) 10

²⁰⁹ Johan Y and Jennifer B Leniency and competition law: An overview of EU and national case law (2018) 1

4.3.2. Cartel enforcement process

The EU cartel law enforcement process is generally divided into investigation and decision stages, followed by the appeal process. The investigation and decision stage is subdivided into initial information-gathering, preliminary investigation, case proceedings, statement of objections, oral hearings, and decision.²¹⁰ The information-gathering stage is the most difficult one, since cartel participants keep their agreements secret.²¹¹ In the preliminary investigation, certain investigative powers, such as dawn raids and the leniency programme, can be used to detect cartel collusion.²¹²

The investigator decides to initiate case proceedings, then in-depth investigation is commenced. In accordance with results of the in-depth investigation, the EC furnishes a statement of objections. Thereafter, cartel participants have the right to reply to the statement of objections in writing or to request oral hearings. Finally, a draft decision is submitted to the Advisory Committee for a final decision. The Advisory Committee is composed of representatives of the EU member state competition authorities.²¹³

The appellate court proceedings have either one or two stages. In the first stage, cartel participants can appeal against the fining decision of the European Court (EC) to the General Court (GC). The second stage is that judgements of the GC might be appealed before the European Court of Justice (ECJ). The ECJ is the highest European appellate court with the power of overseeing the decision of the GC. This sums up the way that cartel conduct law enforcement is undertaken.

4.3.3 Experience of cross-border conduct

The Commission and the national competition authority have parallel powers for the application of EU competition rules.²¹⁴ This shows that the EU has strong cooperation in networking competition law enforcement. The strength of member cooperation is an advantage to the EU for detecting cross-border effects. Between 2010 and 2017, 54 per cent

²¹⁰ Michael H and Hüschelrath K *Cartel Cases and the Cartel Enforcement Process in the European Union 2001 – 2015: A Quantitative Assessment* (2016) 4

²¹¹ Michael H and Hüschelrath K *Cartel Cases and the Cartel Enforcement Process in the European Union 2001 – 2015: A Quantitative Assessment* (2016) 4

²¹² Michael H and Hüschelrath K *Cartel Cases and the Cartel Enforcement Process in the European Union 2001 – 2015: A Quantitative Assessment* (2016) 4

²¹³ The Advisory committee is composed of member state for final check up of the conduct

²¹⁴ EU regulation 1/2003

of complex merger cases and 65 per cent of all cartel cases were detected in cooperation with the Commission and external competition agencies.

The EU members' legal systems and their jurisdictional operating systems are almost the same. This shows that the EU members are committed to and have the willingness for cooperation in cross-border effects.²¹⁵ This strong cross-border cooperation is a result of the influence of the Commission and the design of an appropriate framework at the national level. For example, signatories to the European Outline Convention on Trans-Frontier Cooperation in Madrid in 1980, 1995 and 1998, recognised borders and formulated an official definition of cross-border areas agreements – these developments bear witness to their commitment to cooperation.²¹⁶

The EU cross-border law enforcement is divided into three phases. The single-economic-entity doctrine was the first phase proposed by the ECJ in 1972 in the *Dyestuffs* case.²¹⁷ In terms of the single-economic-entity principle, the EU can enforce jurisdiction over legal entities of domiciles outside the EU where a form of business collusion is occurring between the parent and subsidiary companies.²¹⁸ The ECJ phase-two approach for cross-border conduct is that of the implementation doctrine tool which was utilised primarily in the *Woodpulp* case.²¹⁹ This tool was utilised by the ECJ, since the single-economic-entity doctrine focused on company's conspiracy within the EU, while in the *Woodpulp* case, none of the foreign producers had subsidiary companies within the EU. The ECJ finally started to utilise the US effects doctrine after the *Intel* case, as the *Intel* anti-competitive conduct was formed outside the EU, while the abuse was formed within the EU.²²⁰

4.3.4 The experience of digital platform cartel detection and law enforcement

The EU Commission uses innovative technology to detect cartel conduct. The EU takes a strong stand in regulating the market character of digital platforms and the competition process.²²¹ This ties up with the competition-theory ideology arguments in chapter two, in terms of which the EU believes in merit-based market competitiveness. For this reason, the

²¹⁵ Kati C Comparing Laws in the Enforcement of EU and National Competition Law (2010) 9

²¹⁶ Council of Europe Manual on Removing obstacle to Cross-border Cooperation (2013) 2

²¹⁷ *Imperial Chemical Industries Ltd. v Commission of the European Communities* Case 48-69

²¹⁸ Okeoghene O and David B the single economic entity doctrine in EU competition law (2014) 1722

²¹⁹ *Ahlström Osakeyhtiö and others Vs EU Commission* case no C- 89/85

²²⁰ *Intel vs EU Commission* Case C- 413/14

²²¹ Anwar A and Urška P How to regulate Big Tech (2020) 3

EU Commissions favours the protection of potential competitors even if market leaders, for example Google, have managed to outperform their competitors and gain consumer loyalty.²²²

Regulating competition with respect to innovative technology is challenging with the traditional legal and economic analysis, even within the EU that has a sophisticated anti-competitive enforcement system. However, the EU has competent expertise and is a financially strong institution. This gives the EU Commission the opportunity to cope with any innovative technology regarding competition regulation. The EU performs a number of activities in regulating digital platform cartel conduct.

The E-commerce Directive is the foundational legal framework for the EU cross-border online service cartel regulation.²²³ Moreover, the EU has proposed new regulations and competition tools for detecting and prosecuting digital platform cartel conduct. The EU Digital Market Act (DMA) is the other proposal that could ensure competition and fair markets for online platforms. Moreover, the Digital Service Act proposal has upgraded rules on the governing of digital services. The EU is also discussing the effectiveness of the digital screening cartel tool that detects bid rigging. The various proposals, and the discussion forum on the regulations of digital platform cartel conduct, indicate that the EU is working strongly on addressing digital platform cartel conduct.

4.3.5 Challenges and cases

Cartel detection in the EU is still rather difficult, despite the successful implementation of the leniency programme. The main factor limiting the programme in the EU is inconsistency of application among member states. For instance, in Germany the leniency programme does not apply to vertical arrangements. Prior to 2017, there was no attempt to protect individuals who decided to cooperate by confession. Since 2017, the EU has introduced an online leniency detection system that allows anyone to anonymously report cartel violations.

The leniency programme boosts the efficiency and effectiveness of cartel detection. From 2001 to 2005, 20 out of 33 cases were detected with the leniency programme. From 2006 to

²²² Eleanor.MF, EU and US Competition Law; a Comparison chapter 10 (1999) 343

²²³ The E-commerce Directive of 2000/31/EC

2010, 25 out of 31 were detected, and between 2011 and 2015, 21 out of 23 cases were detected through the programme.²²⁴

For example, in 2010 the EU Commission fined Brose and Kiekert a total of €18 million in two cartel agreements.²²⁵ The agreement was between car parts suppliers in the European Economic Area. The case determined that Magna, based in Canada, and Brose, based in Germany, were in collusion over the supply of window regulators and door modules in certain models of cars. Magna and Kiekert, based in Germany, also conducted cartel activities in the selling of latches. All three companies acknowledged collusion to increase their profits from the sale of these components.

The cartels affected the competitiveness of the European automotive sector and harmed European consumers. Magna was not fined due to immunity under the leniency programme, since it revealed its cartel conduct to the Commission. Brose and Kiekert also benefited from reductions of their fines, as they cooperated during the investigation. In addition, Kiekert was granted partial immunity for the second infringement due to a leniency notice. So the leniency programme increased the efficiency and effectiveness of the EU Commission in detecting cartel conduct.

The leniency programme has increased the number of cartel detections, but cartel detection is still difficult. The new dynamics of algorithmic price setting and big data challenge the leniency programmes.²²⁶ The EU has proposed different regulations in order to regulate the digital platform cartel cases. However, the tools proposed for cartel decision have not been enough to detect cartel conduct. Competition authorities such as those in UK and Germany have established and invested in digital platforms for detecting cartel conduct only in the case of bid rigging.²²⁷ However, the EU is still debating the effectiveness of using the digital platform as a tool for detecting cartel conduct. The characteristics of cartel conduct, coupled with the new dynamic of digital platform price setting, have challenged the current competition regime. In considering cartel cases in recent years, a total of 20 cases were detected in 2019 and seven in 2020. Of these, a total of five cases in 2019 and two in 2020

²²⁴Wouter PW The Use of Leniency in EU Cartel Enforcement: An Assessment after Twenty Years (2016) 10

²²⁵ See cartel cases of EU available at https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1774 (accessed 15 November 2021)

²²⁶ OECD Digital Screening Cartel Tools in Developing Countries (2020) 3

²²⁷ See cartel cases available at <http://ec.europa.eu/competition> (accessed 10 April 2021)

were finalised by the EU, or only 25 per cent of cases. Accordingly, cartel conduct detection and competition law enforcement remain key features of the EU competition regime agenda.

4.4 THE USA ANTITRUST DIVISION

US antitrust law was founded on three pieces of legislation, the Sherman Act of 1890, the Federal Trade Commission Act and the Clayton Act of 1914, as discussed in chapter three. The current USA antitrust law is derived mostly from section 1 of the Sherman Act, which prohibits price-fixing and the operation of cartels as well as other collusive practices that restrain trade. The main functions of US antitrust laws are to protect consumers and competitors by creating fair competition.

4.4.1 Key cartel provisions and detection tools

Cartel prevention is an essential part of US antitrust law, which is governed by section (1) of the Sherman Act of 1890. Cartel activities fall into four major categories according to US antitrust law. First, agreements such as price-fixing or the sharing of markets are automatically classified as illegal. Secondly, the law developed the ‘rule of reason’, when restraint of trade is used in a way that has a positive impact on, or is for the benefit of the consumer or society. Thirdly, if a concentrated market is formed due to firms’ information sharing for tactical collusion, the action is illegal. Fourth, vertical agreements between a business and supplier or purchaser with an ‘up or down stream’ to raise market power are also illegal.

The Sherman Act prevents hard-core cartel activities such as price-fixing, bid rigging, and customer or market allocation agreements, all of which are offences under criminal law for both corporations and individuals. Such kinds of felony result in criminal charges and a maximum fine of \$100 million for corporations and \$1 million for individuals, with a possible maximum sentence of 10 years’ imprisonment.²²⁸ The fine can sometimes extend to twice the gross gain, or twice the gross loss suffered by the victims, under certain conditions. Accordingly, the USA has done much for cartel conduct detection, including the successful implementation of a leniency programme.

²²⁸ See legal information on Antitrust available at <https://www.law.cornell.edu/wex/antitrust> (accessed 9 May 2022)

The USA uses various tools such as complaints, external information, and leniency applications on the initial stage of cartel detection. The leniency programme is used for violations of section 1 provisions for price fixing, bid rigging, and market or customer allocation.²²⁹ The USA utilises leniency programmes successfully for cartel detection at the early stages.

Various jurisdictions have adopted different tools to assist in regulating cartel conduct. For instance, 50 jurisdictions have adopted similar leniency programmes.²³⁰ Cartel participants are granted immunity through leniency programmes if they report their conduct to the antitrust division, take steps to end their participation in the conduct, admit to their crimes, and cooperate during the investigation. The cooperation of different jurisdictions in implementing the leniency programme contributes significantly to the success of the USA's leniency programme, given that the USA has a long history of prosecuting cartels as criminal enterprises, subject to criminal convictions with direct evidence. Direct evidence is evidence such as that from the leniency programme, where cartel participants directly confess their participation in the market conduct.

4.4.2. Cartel enforcement process

The EU and USA have different approaches to cartel law enforcement. The EU uses an administrative system which is built on financial sanctions against undertakings. The USA considers cartel behaviour as a crime, hence cartel detection is the same as any other criminal detection process. The USA agrees that cartels are an extreme kind of antitrust behaviour that requires exemplary prosecution.²³¹ The USA cartel enforcement approach is, first, to establish or convene a grand jury, which is an independent investigation body.²³² The established grand jury gathers the relevant documentary and testimony evidence or information. Once sufficient information is gathered, formal criminal proceedings are initiated. Thereafter, a defendant appears for responses. If matters are not resolved, the case proceeds to trial and a decision is made. Finally, there is an appeal process where defendants file a notice of appeal.

²²⁹ Sherman act 1890, section 1

²³⁰ John D, John T, *Cravath, S and 'et al' The Cartels and Leniency Review: USA* (2021) expert panel law review

²³¹ See cartel enforcement in the United State and (beyond) available at <https://www.justice.gov/atr/speech/cartel-enforcement-united-states-and-beyond> (accessed 15 December 2020)

²³² See cartel enforcement in the United State and (beyond) available at <https://www.justice.gov/atr/speech/cartel-enforcement-united-states-and-beyond> (accessed 15 December 2020)

4.4.3 Experience of cross-border conduct

The USA does an extraordinary job in the case of cross-border conduct law enforcement. It introduced an effects-doctrine tool for cross-border law enforcement. The effects doctrine is the most effective tool for cross-border conduct law enforcement. It was enacted for the first time in the international banana cartel case between USA and Panama in 1973.²³³

The idea is that activities practised abroad are regulated according to their impact on interests within the territorial state's domain.²³⁴ However, there are still states that are not willing to cooperate within their jurisdiction for the application of the effects doctrine due to issues of state sovereignty. Accordingly, to date, the USA is struggling to maintain an effective anti-competitive detection system for cross-border conduct detection and law enforcement.

4.4.4 The experience of digital platform cartel detection and law enforcement

The USA has the most technologically powerful economy in the world, and its firms are at the frontline of technological advancements.²³⁵ For example, the country is the first to have developed digital business models such as social media platforms, digital taxi apps, and e-commerce marketplaces. The USA has the capacity to absorb any technological force.

However, the USA is still challenged with digital platform anti-competitive conduct regulation. This is because the profusion of technology has raised criticism against the 'winner-take-all' business model in view of network effects that attract more users to join the winning group. This kind of market conduct is regarded as anti-competitive conduct; however, the USA accepts a market lead earned through competition as long as this produces greater efficiencies and cost-savings for consumers. This is because the USA argues for protection of the competition process, as discussed in chapter two. The USA has done much work in regulating digital platform cartel conduct; however, the mining evidence of the conduct is difficult to determine.

²³³ Peter Behrens, 'The Extraterritorial reach of EU Competition Law revisited: The "effects doctrine" before the ECJ' (2016) 8

²³⁴ Samie N 'The doctrine of "effects" and the extraterritorial application of antitrust laws' (1982) 23

²³⁵ See World Factbook Central Intelligence Agency US (2019) available at https://play.google.com/store/books/details/The_CIA_World_Factbook_2019_2020?id=9HmNDwAAQBAJ&hl=en&gl=US (accessed 04 April 2021)

Digital cartel conduct detection is difficult, given that the collusion occurs through algorithmic price setting. For instance, Google was accused of search bias in 2013 by the US Federal Trade Commission (FTC) for making itself Samsung's default search button.²³⁶ However, the FTC terminated its investigation since it had not found sufficient evidence that Google manipulated its search algorithms to unfairly disadvantage vertical websites. Accordingly, insufficient evidence-gathering results in only a little successful detection and prosecution of a few cartels.

4.4.5 Challenges and cases

The leniency programme was introduced in 1978, and there was one leniency applicant per year. However, the 1993 revised leniency programme increased leniency applicants to an average of one applicant per month.²³⁷ The applications increased twenty-fold in 2010. For example, *The Art Auctions* is a case which involved an agreement between two leading art auction houses, Sotheby's and Christie's, in which they fixed their commission rates.²³⁸ Alfred Taubman was the other party in the case. He was, however, not prosecuted due to immunity under the leniency programme. The leniency programme application proved the existence of cartel agreements, although the jury used other communication evidence, much of it written, to prove the vertical cartel agreement between Sotheby's, the main company, and Christie's, its subordinate. After the investigation, the jury convicted Taubman, who was fined \$7.5 million and sentenced to a year and a day in jail due to the immunity under the leniency programme. Sotheby's and Christie's agreed to pay a \$512 million criminal fine in 2000; the investigation had started in 1992.²³⁹

Despite the successful application of leniency programmes, cartel detection requires plentiful work. For example, over two years, in 2019 and 2020, a total of 8 and 10 cartel activities were detected within the US Antitrust Division.²⁴⁰ Additionally, digital platform cartel detection with traditional tools is challenging. The US has been discussing the means

²³⁶ *The Federal Trade Commission vs Google* case no 111-0163

²³⁷ Organisation for Economic Co-operation Development (OECD) challenges and co-ordination of leniency programmes (2018) 3

²³⁸ OECD Prosecuting Cartels without Direct Evidence 2006 Round table discussion DAF/COMP/GF(2006)39

²³⁹ See *Art Auction Houses Agree to Pay \$512 Million in Price-Fixing Case* available at <https://www.nytimes.com/2000/09/23/business/art-auction-houses-agree-to-pay-512-million-in-price-fixing-case.html> (accessed 16 December 2021)

²⁴⁰ See US Antitrust cases available at <https://www.justice.gov/atr/antitrust-case-filings-alpha>, (accessed 15 December 2020)

for digital platform cartel regulation. However, when compared to the EU, the US could do more.

4.5 COMPARATIVE ANALYSIS OF THE COMESA, EU AND US COMPETITION REGIMES

A comparative analysis of the EU, USA and COMESA shows that the CCC needs to improve its competition regime. It also shows that there are legal gaps within the three institutions when detecting cartel activities and cross-border effects.

Cartel conduct in the form of price fixing, market allocation, bid rigging and restraints of production or sale is prohibited within the three institutions. However, cartels are considered criminal behaviour in the USA and there is some conduct, such as bid rigging, which is taken as criminal behaviour in the EU. However, COMESA does not have any provision on cartel criminalisation.

The immunity given by leniency programmes guarantees cartel performers' freedom from criminalisation both in the EU and the USA, although not in COMESA. Although the leniency programme has increased the number of cartel applicants, cartel detection is minimal when compared to merger conduct within the three institutions. As a result, tools used to detect cartels have proved ineffective, and this has been exacerbated by cross-border effects within all three institutions.

Cross-border-effect conduct requires state cooperation for data traceability and transparency, since anti-competitive conduct regulation depends on data accessibility. The EU and the USA have applied different tools for cross-border law enforcement. Initially, the EU executed a single economic doctrine and implementation doctrine for extraterritorial effect. Afterwards, the EU started to use the most effective tool, called the effects doctrine, which was introduced by the USA for cross-border law enforcement. Due to the institution's capacity limitations, the CCC has been unsuccessful in utilising the effects doctrine and leniency programme tools.

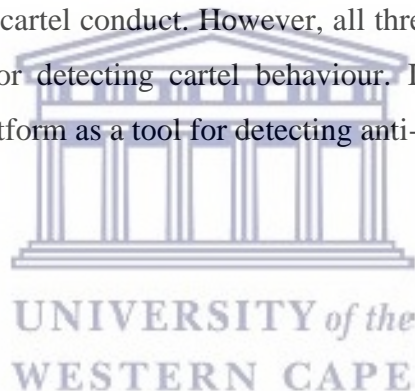
The EU Commission and the USA Antitrust Division have used the effects doctrine and leniency programme tools successfully. However, cartel conduct detection and cross-border law enforcement remain a challenge, although the EU and the USA have done much better than the CCC. Furthermore, the EU, USA, and COMESA have been much affected by

digital platform cartel conduct. The EU and the USA are working on regulating the digital platform, while COMESA has not done anything.

4.6 CONCLUSION

Regional competition regulations require clarity and detailed descriptions that have influencing strategies for adequately harmonising national and regional regulations. Based on these facts, this chapter has confirmed that the COMESA cartel framework lacks clarity, manipulating strategies and descriptions of each member's commitment when compared to those of the EU and USA cartel regulations.

This study concludes that COMESA should reform by adopting a combination of EU and USA cartel regulations by taking the best elements from both sets of regulations, as per the comparative analysis outcomes. For instance, in terms of cross-border-effect conduct, the USA's effects doctrine is better than the EU's implementation doctrine. The EU and the USA are much better at cartel detection and cross-border law enforcement, including dealing with digital platform cartel conduct. However, all three institutions need to do more in developing better tools for detecting cartel behaviour. In view of this gap, the next chapter proposes a digital platform as a tool for detecting anti-competitive behaviour.



CHAPTER FIVE:

POSSIBLE TYPES OF DIGITAL PLATFORMS FOR CARTEL DETECTION AND DATA PRIVACY

5.1 INTRODUCTION

The aim of this chapter is to discuss possible methods of digital-platform establishment as a tool for the purpose of cartel conduct detection. The chapter first discusses the role of digital platforms in promoting competition law enforcement. Thereafter, it discusses the various options for establishing a digital platform in the context of the EU, US, and CCC competition regimes. Finally, the chapter discusses the balance between digital platform access and data privacy, as the establishment of the digital platform will raise the issue of privacy.

The chapter argues for the establishment of a digital platform that allows data to be shared for fast and reliable communication during early-stage cartel conduct detection.²⁴¹ There is no single digital platform that fits all sizes. Hence, the possible ways of establishing digital platforms depend on respective jurisdictions' competition theory ideology, their cartel law, and the existing situation. The chapter discusses the ways in which digital-platform establishment could be appropriate in the jurisdictions of the EU, the US, and COMESA.

5.2 THE ROLE OF THE DIGITAL PLATFORM IN PROMOTING CARTEL COMPETITION LAW ENFORCEMENT

Traditional competition law enforcement methods, which rely on document review, witness testimonies and economic analysis, lack efficiency and effectiveness.²⁴² The reason for this ineffectiveness is mainly that current economic analysis tools are not sufficient for mining the evidence of cartel conduct at an early stage. Different economic analysis tools such as price theory, as discussed in chapter two, are utilised for cartel conduct detection, but the tools fail to capture the economy as a whole.²⁴³ This means that the tools are not sufficient

²⁴¹ Organisation for Economic Co-operation and Development (OECD) *Data Portability, Interoperability and Digital Platform Competition* (2021) 8

²⁴² Jenny F 'Competition Law Enforcement and Regulation for Digital Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward'(2021) 1

²⁴³ Jenny F 'Competition Law Enforcement and Regulation for Digital Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward'(2021) 1

to assess in detail the problems on the consumer's side or perform an in-depth analysis of price discrimination and market share.²⁴⁴

Today's competition law is still based on the neo-classical price theory, as discussed in chapter two, which might not provide sufficient economic data to fully comprehend the different dimensions of the digital world's competition game.²⁴⁵ Hence, cartel detection in the digital world is harder, given that the collusion is in algorithmic price setting.²⁴⁶ The characteristics of cartel conduct detection in digital platforms require a different approach from that of the traditional competition regime.²⁴⁷ However, the concept of competition law remains the same, as discussed in chapter two. For example, the first US digital platform cartel case was the Microsoft case, which was regulated using the Sherman Act 1890, section 1.²⁴⁸

Current cartel law is sufficient to prosecute cartel participants. However, mining evidence of cartel conduct is the most difficult part. For instance, as discussed in chapter four, subsection 4.4.4, the FTC terminated its investigation into the Google Search Bias case in 2013 due to lack of sufficient evidence. Different types of evidence-gathering tools have been used, including consumer consultation, circumstantial evidence-gathering, leniency programmes, and dawn raids. However, cartel conduct detection is still difficult, as large multinational companies use their significant resources to evade detection of their cartel conduct.²⁴⁹ Also, the new dynamics of algorithmic price setting and big data challenge the leniency programme, which is the most effective tool.²⁵⁰

To date, cartel detection is difficult even within the competition regimes of the EU and USA, which have the most sophisticated laws and implement the leniency programme successfully. For instance, as mentioned in chapter four, only 25 per cent of cartel cases were finalised from 2019 to 2020 under the EU competition regime. Accordingly, the

²⁴⁴ Marco B and Klaus W EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy (2018) 20

²⁴⁵ Ioannis L Competition Law for a Complex Economy (2019) 3

²⁴⁶ Competition Commission of South Africa competition in the digital economy (2020) 36

²⁴⁷ Dr. Maria M, Paul RM, and Dr. Fred W, 'Resetting competition policy frameworks for the digital ecosystem' (2016) 3

²⁴⁸ Laura PS US Antitrust Law and Policy in Historical Perspective (2019) 23

²⁴⁹ Organisation for Economic Co-operation Development (OECD) 'Cartels and Anticompetitive Agreements' available at <https://www.oecd.org/competition/cartels/> (accessed 28 May 2020)

²⁵⁰ OECD Digital Screening Cartel Tools in Developing Countries (2020) 3

current competition regime is facing the challenges of appropriate tools for cartel detection.²⁵¹

In the 2019 discussions, *Defining Markets in a New Age*, Margrethe Vestager, Executive Vice President of the EU, said that there is a need to create a new tool for cartel detection.²⁵²

Some competition authorities have noticed the potential role of digital platforms in detecting cartel conduct at early stage. The competition authorities of Brazil, Germany, Mexico, Portugal, Russia, South Korea, Spain, Switzerland and the UK have established and made investments in digital cartel screening detection tools.²⁵³ These tools are in addition to the traditional cartel detection tools for unmasking cartel conduct at an initial stage.²⁵⁴

These new tools provide economic evidence of market structure and/or behaviour.²⁵⁵ They provide economic data to jurisdictions in order to establish infringements. The tools benefit other competition authorities if they are established within their respective jurisdictions. This is because the main concern for jurisdictions is a lack of systematic information about cartel conduct, particularly at an early stage.²⁵⁶ The tools are limited to the bid rigging type of cartel conduct. However, given some legal basis, the tools might work for other types of cartel conduct, such as price fixing, applying dissimilar conditions to equivalent transactions, and market allocation or sharing.

Digital platforms have an important role to play in promoting competition law enforcement. Competition law enforcers can trace and get fast and reliable data from digital platforms to detect cartel conduct at early stage.²⁵⁷ Also, digital platforms build trust between the parties without the need for any trust indemnity within the jurisdiction.²⁵⁸

²⁵¹ United Nations Conference on Trade and Development Competition law, policy and regulation in the digital era(2021) 8

²⁵² Bruno D, Olivier D and Thomas P Competition Policy and Industrial Policy: for a reform of European Law (2020) 1

²⁵³ OECD Digital Screening Cartel Tools in Developing Countries (2020) 2

²⁵⁴ OECD Digital Screening Cartel Tools in Developing Countries (2020) 4

²⁵⁵ OECD Digital Screening Cartel Tools in Developing Countries (2020) 3

²⁵⁶ Anu B, Adam S. Chilton C and Nathaniel S, *Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets*,(2019), 415

²⁵⁷ Organisation for Economic Co-operation and Development (OECD) *Data Portability, Interoperability and Digital Platform Competition* (2021) 8

²⁵⁸ see Global competition and digital change: updating European competition policy available at <https://www.youtube.com/watch?v=6D29oyjkpE0> (accessed 9 March 2020)

5.3 POSSIBLE WAYS OF A DIGITAL-PLATFORM ESTABLISHMENT

As discussed above, using a digital platform as a tool to trace data for cartel conduct detection can benefit the competition regime. The potential usage of the digital platform leads to the discussion of the possible ways to launch the digital platform. There is no single digital platform that fits all sizes. The choice of a digital platform establishment approach takes three things into account. Primarily, it considers the competition authority's situation and the respective jurisdiction's competition theory ideology, as discussed in chapters two and four. Also, the current argument about ways to regulate digital-platform anti-competitive conduct serves as an input to choose the appropriate approach for digital-platform establishment. To this end, three possible options for digital-platform establishment are suggested.

5.3.1 Option one: case-specific manner

An approach to launching a digital platform in a case-specific manner is suggested for a jurisdiction whose competition theory ideology is based on 'output limitation' theory, as discussed in chapter two. In accordance with this theory, the principle of competition law focuses on regulation of the competition process, as discussed in chapter three. The other competition law principle is that of regulating anti-competitive conduct in a case-specific manner, as case-specific skills and sector knowledge are essential for effective competition law enforcement.²⁵⁹ An evidence-based case-by-case approach has been applied in most competition regimes to define the digital business model, and hence regulate anti-competitive conduct.²⁶⁰

A case-by-case approach means that a specific concern is addressed by a unique body within the regulated industry.²⁶¹ For instance, data privacy issues should be dealt with by a data privacy governing body, not a competition authority, since the development of competent expertise in the specific sector requires long-term success with constant professional development.²⁶² Hence, the competition authority accesses the digital platform in a holistic

²⁵⁹ United Nations Conference on Trade and Development (UNCTAD) *Ways and Means to Strengthen Competition Law Enforcement and Advocacy* (2015) 14

²⁶⁰ Organisation for Economic Co-operation and Development (OECD), *Digitalisation, Business Models and Value Creation* (2018) 26-27

²⁶¹ Feld H *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms* (2019) 48

²⁶² United Nations Conference on Trade and Development (UNCTAD) *Ways and Means to Strengthen*

way for anti-competitive conduct detection in a case-by-case investigation based on need.²⁶³ For example, the USA Antitrust Division uses a digital platform called Comparative Market Analysis (CMA) for anti-competitive conduct detection.

The competition authority provides support for sector regulators to ensure market competitiveness.²⁶⁴ The opposition to digital platform regulation in a case-specific manner argues that sectoral-level digital platforms result in big data and that the management of big data is complex.²⁶⁵ However, the proponents of digital platform anti-competitive conduct regulating in a case-specific manner argue that big data is manageable with artificial intelligence (AI). It is also advantageous for the CA, since big data enables law enforcers to discover and share consumer information, or harvest and analyse that data.²⁶⁶ For example, if we look at the Google platform, it tracks the activities of consumers to build on its database. Accordingly, the antitrust enforcer can trace this data and access reliable information for anti-competitive detection if the competition regime has some binding agreement with Google.

Some argue that big data management requires a strong economy that absorbs the high cost and risk. They agree that it is practicable in a developed economy; hence the concern of the competition authority should be data relevancy while accessing data for the purpose of regulating anti-competitive conduct. Also, sectoral data sharing for cross-border conduct anti-competitive conduct regulation is questionable due to state sovereignty and nationalism.²⁶⁷ Moreover, the relationship between sectoral regulation and competition authority depends on the political stability of the state.²⁶⁸

5.3.2 Option two: harmonised data

This option suggests the launching of the digital platform as a tool for anti-competitive conduct regulation in a harmonised way. The option is suitable for jurisdictions whose competition theory ideology is based on the 'open and free market', as discussed in chapter

Competition Law Enforcement and Advocacy (2015) 16

²⁶³ See Understanding Digital Market: Implication for Future Competition Policy and Practice available at https://www.youtube.com/watch?v=T6wBP_Cs9K4 (accessed, 25 June 2020)

²⁶⁴ Feld H *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms* (2019) 53

²⁶⁵ Filippo L, *Competition in Digital Markets: A Review of Expert Reports*, (2020) 18-20

²⁶⁶ Keith NH *Digital Platforms and Antitrust Law* (2019) 3

²⁶⁷ Patricia C, *Self-determination Sovereignty, territorial integrity, and the right to secession* (2016) 2-5

²⁶⁸ Unite National Conference on Trade and Development (UNCTAD) *Ways and Means to Strengthen Competition Law Enforcement and Advocacy* (2015) 15

two, since regulation of an open and free market requires complex legal and economic skills.²⁶⁹ Such an ideology requires a competition principle that regulates both market character and competition process, as discussed in chapter three. In a jurisdiction whose ideology is based on an open and free market, data harmonisation is the best way for cooperation in every sector, including the competition regime.

This approach is debated by some CAs when applied to the regulation of digital platform anti-competitive conduct. The argument is based on, for example, the European Commission Digital Single Market (DSM) strategy. It is clear that information and communications technology (ICT) is no longer a specific sector, but rather the foundation of all modern innovative digital economic systems.²⁷⁰ Also, they argue that there are issues which require a combination of different sectors, as in the Uber digital taxi driver case. Such a taxi app touches different sectors, hence launching a digital platform in a harmonised way is best since it incorporates the data of different sectors. They further argue that anti-competitive conduct detection in a specific manner might hinder essential data accessibility across different sectors, even if there are proper laws for data accessibility in different sectors.

5.3.3 Option three: as a cross-cutting issue

The third option is to launch a digital platform as a cross-cutting issue. The purpose of this digital platform launch is for monitoring and evaluation, by linking the digital platform to the respective industry. The industry integrates and mainstreams its policy design in accordance with competition law principles. This option fits those jurisdictions whose competition theory ideology refers to the fair competition theory, as discussed in chapter two. The theory is that anti-competitive regulation enhances business competitiveness by providing free and fair competition in accordance with the level of the business.²⁷¹ This means the principle of competition law is to maintain market competitiveness by protecting small firms that are affected by large firms, for example Google.²⁷² This option is best for a

²⁶⁹ Unite National Conference on Trade and Development (UNCTAD) Ways and Means to Strengthen Competition Law Enforcement and Advocacy (2015) 14

²⁷⁰ Massimiliano K European Union Competition Law in the Digital Era (2015) 1

²⁷¹ Unite National Conference on Trade and Development (UNCTAD) Ways and Means to Strengthen Competition Law Enforcement and Advocacy (2015) 14

²⁷² Unite National Conference on Trade and Development (UNCTAD) Ways and Means to Strengthen Competition Law Enforcement and Advocacy (2015) 14

competition authority that has little experience and works within a weak economy and an unstable political situation.

This option is argued for in today's digital platform anti-competitive conduct regulation. The basis of it is that any market imperfection, particularly in the digital market, should be tackled at its origin, based on industrial policy considerations.²⁷³ The main rationale for this is that third-party intervention in the digital market may discourage investment in innovation.²⁷⁴ This argument seems to be the same as the arguments concerning digital platform anti-competitive regulation in a case-specific manner. However, the latter option is argued for because of the challenges of big data management. The argument is that 'big data needs baby brothers', due to the cost and risk of big data volume management, since digital platform anti-competitive conduct regulation in a case-specific manner might raise concerns about unauthorised access to individual and firm-level information.

Furthermore, big data is easy to attack and interrupt, and business information can be disclosed unless it is managed by AI. However, data management using AI has high costs. There are jurisdictions that cannot afford the cost and risk of big data management because of their weak economies or political ideologies. Therefore, in such jurisdictions, launching digital platforms in a cross-cutting way is best. The competition authority establishes the digital platform and links with the industry so that the digital platform can be accessed to follow up on the authority's way of regulation; interference is based on need.

5.4 INTERPRETATION OF THE THREE OPTIONS IN THE JURISDICTION OF THE EU, THE USA, AND COMESA

These three options are discussed in accordance with the distinct competition theory ideology, which in turn determines the competition law principle. The discussion is also based on the methods of digital-platform anti-competitive conduct regulation in their respective jurisdictions. Hence, the discussions are based on a theoretical framework. This sub-section interprets the three options in the jurisdiction of the EU, the USA and COMESA as per the comparative analysis in chapter four, which is a practical view. The comparative

²⁷³ Organisation for Economic Co-operation and Development (OECD) Regulatory Reform and Innovation, (2014)

²⁷⁴ Massimiliano K, European Union Competition Law in the Digital Era (2015) 5

analysis found that the difference between the three institutions' competition aims is mostly a reflection of their countries' economic and/or political ideologies.

Country or regional market structures, affordability of initial investment, big data volume management, and the hiring of competent employees are highly affected by a country's economic level and political ideology. For instance, concerning the comparative discussion of the EU and the USA's competition regulation aims in chapter four, the EU is focused on consumer protection through controlling the competition process, while the USA is concerned with the competition process itself. Accordingly, the USA performs digital-platform launching in a case-specific manner, while digital-platform establishment in a harmonised way is appropriate for the EU.

The EU has made many proposals to harmonise the regulation of anti-competitive conduct on digital platforms. For example, it laid down harmonised rules for the purpose of regulating digital platform anti-competitive conduct.²⁷⁵ It also defined the digital platform service in a single set across the EU membership.²⁷⁶ Moreover, the EU internal market online service rules set up cross-border online service regulation in a harmonised way.²⁷⁷ These attempts all reflect the EU's competition theory ideology and its competition principles.

Digital-platform establishment, either in a case-specific manner or in a harmonised way, is inappropriate for developing countries, particularly in Africa. This is because African countries have weak economies, are challenged in absorbing technological forces, and lack political stability, as discussed in chapter four when analysing the external environment. Therefore, digital-platform launching as a cross-cutting exercise is logical for the COMESA Competition Commission (CCC), since harmonised digital-platform establishment in a case-specific manner has high risks and cost. It also requires a binding instrument and member commitment to an integrated approach to anti-competitive conduct.

Generally, digital-platform establishment as a cross-cutting issue is suggested for the CCC, due to its fair competition theory ideology and situational analysis, as discussed in chapter four. As for the EU and the USA, their different forms of digital-platform establishment are

²⁷⁵ EU legislation, Digital Platform Market Act, (2020)

²⁷⁶ EU legislation, Digital Service Act, (2020)

²⁷⁷ EU Electronic Commerce Directive (2000)

suggested mainly because of their competition theory ideologies and the principles of their competition laws.

5.5 THE DIGITAL PLATFORM AND DATA PRIVACY

The establishment of a digital platform as a tool for cartel conduct detection provides an advantage for both data protection and competition law, since it affords an opportunity for market conduct regulators to interpret data in a coherent and consistent way.²⁷⁸ However, business firms believe that digital-platform establishment benefits the competition authority since the purpose of the platform is to act as a tool for detecting cartel conduct. They think that it is a weapon used by anti-competitive firms; as a result, they may be unwilling to cooperate with the establishment of a digital platform. If the competition authority makes it obligatory, this anti-competitive conduct might change this behaviour.

Many individuals have shown their unwillingness to cooperate when firms share their personal information with third parties. For example, Meta (formerly known as Facebook) is accused of sharing sensitive information without the consent of users.²⁷⁹ The result of litigation was that Meta was found guilty of abusing consumer privacy. Hence, the competition authorities might be challenged by individuals or firms concerning data privacy if they request cooperation for the establishment of the digital platform.

The competition authority requires a balance between access to information and data protection. The mining of evidence with the digital platform is useful to the competition authority rather than to business firms. To this end, the concept of 'privacy' needs to be defined when the competition authority designs the digital platform as a tool for anti-competitive conduct detection.²⁸⁰ The definition should be in accordance with the respective country or region's data protection regulations. For example, the EU has data protection regulations that govern the personal data of individuals; this applies across different sectors and to all sizes of companies.²⁸¹

²⁷⁸ Wiedemann K 'Data protection and competition law enforcement in the digital economy: why a coherent and consistent approach is necessary' (2021) 916

²⁷⁹ *Consumer privacy user profile Vs Facebook*

²⁸⁰ Wolfgang K Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection (2016) 1

²⁸¹ The EU General Data Protection Regulation (2018)

On the one hand, privacy enables people to attain independence and self-confidence, and hence is an enabler of positive liberty.²⁸² On the other hand, privacy is a component of negative liberty, a form of liberty that people should enjoy without unlawful interference from the state and other agents.²⁸³ The competition authority needs to balance the negative and positive aspects when they plan to establish a digital platform for the purpose of data access.

The right to privacy might include the right to be 'left alone' and 'the right to be forgotten/to be erased' in digital age.²⁸⁴ Also, the right of humans 'with whose affairs the community has no legitimate concern' should not be dragged into undesirable and undesired publicity.²⁸⁵ The competition authority might face an obstacle when an obligatory regulation is set for market competitors to utilise the competition authority digital platform for trading. The data produced by the digital platform should be protected from any threats and misuse. This is because there is a possibility that the competition authorities might violate some basic principles of privacy.

Access to information and personal data that is stored in the digital platform should be regulated in accordance with general data protection regulation principles.²⁸⁶ Some rules that balance access to information and data privacy should be present when regulating cartel conduct through the digital platform tools. The issue of data privacy should be looked at from both an economic and a human rights perspective.²⁸⁷ The Competition Authority needs to define the legal boundaries of data privacy both from an economic and a human rights perspective.

Hence, the following points are mandatory when defining the boundaries of the right to privacy while the CA utilises the digital platform.²⁸⁸ The points are based on Warren and Brandeis' work, 'The Right to Privacy':

²⁸² Anita. L. Lying to Protect Privacy (1999) 3

²⁸³ Larry D A Rational Response to the Privacy 'Crisis' (2013)

²⁸⁴ Warren SD and Louis DB The right to privacy (1890) 198

²⁸⁵ Warren SD and Louis DB The right to Privacy (1890) 191

²⁸⁶ Romansky R and Noninska I 'Challenges of the digital age for privacy and personal data protection' (2020) 3

²⁸⁷ Wolfgang K Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection (2016) 5

²⁸⁸ Warren SD and Louis DB (1890),) 193-220

- the right to privacy does not preclude the publication of information of public or general interest;
- the right to privacy does not prohibit the communication of any matter that can be administered by the law of the competition authority;
- in the absence of special damage, the right to privacy would probably not grant any redress for invasion of privacy by oral publication;
- the right to privacy would cease upon the individual himself publishing the content of the facts; or publishing them by others with his consent; and
- whether the published issue is true or false (i.e., the truth of the matter) provides a defence; however, the absence of ‘malice’ in the publication does not provide a defence.

Therefore, when the competition authority establishes the digital platform to be used as a tool for cartel conduct detection, data privacy protection should be planned. Business firms will be willing to collaborate in the digital platform if data privacy is examined in the light of the five points raised above. In this way, the legal boundaries for data privacy should be defined, as there is a need to balance data privacy and digital platform accessibility such that the competition authority can regulate anti-competitive conduct effectively while valuing firms’ and individuals’ rights to privacy.

5.6 CONCLUSION

The use of a digital platform as a tool of cartel detection and cross-border law enforcement will increase competition law’s efficiency and effectiveness. Hence, it is important to discuss ways to launch the digital platform. Possible ways of launching the platform are founded on the competition authority’s competition theory ideology and competition law principles. The chapter discussed three possible ways of launching digital platforms that promote cartel competition law enforcement. From the theoretical point of view, the suggestions are that a digital platform should be launched in a case-specific manner, in a harmonised way, or as a cross-cutting issue.

The suggestions are further evaluated from a practical perspective, which entailed assessment of the Competition Authority's existing situation. A conceptual and practical analysis leads to the conclusion that digital-platform launching in a case-specific manner is appropriate for the USA. Digital-platform launching in a harmonised way and as a cross-cutting issue is suggested for the EU and COMESA, respectively.

The chapter also discussed how the establishment of digital platforms, as a tool of anti-competitive conduct detection, can raise the issue of data privacy. Hence, there should be a legal boundary that balances data access and data privacy. The following chapter discusses the implications of the digital platform's launch for the future of the AfCFTA Competition Commissioner (ACC), in order to provide a road map.



CHAPTER SIX:

THE IMPLICATION OF THE DIGITAL PLATFORM FOR THE AfCFTA

COMPETITION COMMISSION

6.1 INTRODUCTION

This chapter discusses the implications of the suggested digital platform in the context of the prospective AfCFTA Competition Commission (ACC). The aim of the platform is to boost data traceability and transparency during cartel conduct detection, and hence promote competition law enforcement.

Structurally, the chapter first provides an overview of the AfCFTA. Secondly, it discusses the main arguments of the comparative analyses of the CCC, the EU Commission, and the US Antitrust Division. Thereafter, it summarises the possible ways of digital-platform establishment, as discussed in chapter five, in order to choose an appropriate digital platform for the ACC, based on lessons drawn from the CCC.

6.2 SNAPSHOT OF AfCFTA

African representation in world trade consists of only 3 per cent of the world's GDP, which is rather insignificant.²⁸⁹ As of 2018, 15 per cent of trade is intra-African, while intra-European trade is 67 per cent, intra-Asian trade is 58 per cent, and intra-North American trade is 48 per cent.²⁹⁰ Moreover, African businesses face higher tariffs when exporting within Africa than outside Africa, with average tariffs of 6.1 per cent.²⁹¹ These tariff and non-tariff barriers result in a low trade performance.²⁹² In order to improve intra-Africa trade, and boost the African trading position in the world market, the AU introduced the African Continental Free Trade Area (AfCFTA) in March 2018.

²⁸⁹ African Development Bank Group, "Trade Finance in Africa: Overcoming Challenges", Cote d'Ivoire (2017) 4

²⁹⁰ African Export-Import Bank, African Trade Report 2018: Boosting Intra-African Trade: Implications of the AfCFTA, available at <https://www.tralac.org/documents/news/2042-african-trade-report-2018afreximbank/file.html> (accessed 23 December 2020)

²⁹¹ United Nation Economic Commission for Africa, African Continental Free Trade Area Questions and Answers available at <https://hdl.handle.net/10855/43253> (accessed 23 September 2021)

²⁹² See interview with Dr. Mukhisa Kituyi, Secretary-General of UNCTAD available at <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1838> (accessed 10 May 2020)

The agreement that established the AfCFTA was negotiated from 2016 to 2018, with many back-to-back meetings. The 10th Extraordinary Summit of the AU in Kigali, Rwanda, officially introduced the AfCFTA on 21 March 2018.²⁹³ The agreement came into effect on 30 May 2019, and the operation phase was launched on 7 July 2019, at the 12th Extraordinary Summit of the AU.²⁹⁴ In February 2020, 54 out of 55 AU members signed the agreement, and 44 out of 55 members of the AU ratified the instrument, the AfCFTA. The AfCFTA Secretariat finally established the operational phase on 17 August 2020 in Accra, Ghana, and commenced trading under the agreement on January 1 2021.²⁹⁵

Prior to the AfCFTA, there were eight Regional Economic Communities (RECs) recognised by the AU.²⁹⁶ Of the eight RECs, six have competition regimes, as discussed in chapter three.²⁹⁷ The competition regime practices across these RECs have variations in terms of institutional arrangements, competition law enforcement, and cooperation between national and regional authorities. COMESA has the most advanced competition regime in comparison to the other RECs, since it has done more work in advancing its competition regime. For instance, COMESA prepared a document on cooperation strategies, and then advocated for the benefit of the document.²⁹⁸ It is also building the capacity of members in cooperation strategies. Therefore, the CCC can provide a valuable lesson for the future ACC relative to the other RECs.

The ACC will be established based on Phase II negotiations of the AfCFTA outcomes. The AfCFTA negotiations were scheduled in two phases, and Phase II is still under way. The Phase I protocols of the AfCFTA negotiation dealt with trade in goods and trade in services, as well as dispute settlements. Phase II of the AfCFTA negotiations will deal with the adoption of protocols required for investment, competition policy and intellectual property

²⁹³ see CFTA Summit Media Announcement (2018) available at <https://au.int/en/announcements/20180306/2018-cfta-summit-media-announcement> (accessed 12 August 2021)

²⁹⁴ See Operational Phase Of The African Continental Free Trade Area Launched available at <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched> (accessed 12 December 2021)

²⁹⁵ See Operational Phase Of The African Continental Free Trade Area Launched available at <https://au.int/en/articles/operational-phase-african-continental-free-trade-area-launched> (accessed 12 December 2021)

²⁹⁶ These eight RECs are the Economic Community of West African States (ECOWAS), Common Market of Eastern and Southern Africa (COMESA), East African Community (EAC), Southern African Development Community (SADC), Inter governmental Authority on Development (IGAD), Economic Community of Central African State (ECCAS), Arab Maghreb Union (AMU) and Indian Ocean Commission (IOC).

²⁹⁷ Büthe T and Kigwiru V 'The spread of competition law and policy in Africa: a research agenda' (2020) 43

²⁹⁸ Deloitte, Competition Law in Africa: Maximising Competitor Advantage (2018) 8

rights. The competition policy negotiations will be in Phase II as per art 4(c) of the AfCFTA preamble.²⁹⁹ This article declares that ‘states shall cooperate on investment, intellectual rights, and competition policy’.

Initially, the plan was that Phase II negotiation draft texts would be ready for adoption by January 2021, as per article 4(c) of the AfCFTA preamble. However, to date, it is not yet clear exactly what member states will agree on the competition policy protocol due to various obstacles, including Covid-19.

Against this backdrop, this thesis will serve as a road map for the Phase II negotiation protocols with regard to the competition regulations, specifically focusing on tools that will improve cartel detection. Therefore, it is suggested that the proposed digital platform as a tool for reducing the challenges of CCC cartel detection should be used within the future ACC. Article 5 of the AfCFTA preamble is ‘preservation of the *acquis*’, meaning that the competition policy of the future AfCFTA will build on what already exists within the RECs.

6.3 SUMMARY OF COMPARATIVE ANALYSIS OF CCC, EU AND US COMPETITION REGIMES

Chapter four of this thesis compared the COMESA competition regime with those of the EU and the USA. The comparison focuses on the key provisions, the main detection tools, the law enforcement process, and the challenges of cartel conduct. It also compares attempts taken among the three institutions in order to regulate digital platform cartel conduct. The comparison reveals the successes and failures of the competition regimes.

Generally, the chapter finds that there is a challenge in cartel law enforcement, particularly in cross-border and digital platform cartel cases. The current cartel law is sufficient to prosecute cartel participants. However, mining the evidence of cartel conduct is the most challenging part. The traditional tools are unable to gather sufficient information about cartels’ conduct. This is true within the jurisdiction of the EU, the USA and COMESA, although it is worse in COMESA. As such, another tool of cartel conduct detection should be considered.

²⁹⁹ The preamble of AfCFTA

6.4 SUMMARY OF THE WAYS OF ESTABLISHING DIGITAL PLATFORMS

Chapter five of the thesis proposed digital platforms as a tool for cartel conduct detection. The chapter analysis confirmed that there is no single type of digital platform that can be proposed for every competition commission. Rather, the means of digital platform establishment depends on the competition authority's competition theory ideology and its competition law principles. Three ways of digital platform establishment are proposed using the theoretical and practical perspectives of the respective competition commissions. The suggestion is that a digital platform should be established in a case-specific manner, in a harmonised way, or as a cross cutting issue.

The means of digital-platform establishment have been developed further based on the current digital platform cartel conduct detection arguments. The EU argues that it should be regulated in a harmonised way, while the USA argues that it should be regulated in a case-specific manner. Most developing countries argue that digital platform cartel conduct should be regulated as a cross-cutting issue, as the harmonised way and case-specific regulations have high risks and costs. As a result, there is no straightforward answer for establishing the digital platform in a uniform way. The mini-thesis has also discussed the need for balance between data access and data privacy.

6.5 THE IMPLICATION OF THE DIGITAL PLATFORM FOR THE FUTURE ACC

The AfCFTA agreement aims to create a single market of 1.27 billion consumers, with an aggregate GDP of between US \$2.1 and \$3.4 trillion.³⁰⁰ It is expected to be a fast-growing market, as consumer numbers are expected to increase to 1.7 billion by 2030.³⁰¹ The AfCFTA market currently stands at 350 million consumers, with an expected rise to 600 million by 2030.³⁰² The establishment of the AfCFTA is a striking political achievement, but it needs to be backed by action to make sure that African businesses and citizens actually benefit from it. One of the main actions to be taken is to preserve the continental market competition by regulating anti-competitive conduct.

³⁰⁰ Vellah K The Cooperation on Competition Policy under the AfCFTA (2020) 6

³⁰¹ Woolfrey and Bruce B Preparing for trade under the AfCFTA Agreement, What is in the AfCFTA market? (2020) 4

³⁰² Woolfrey and Bruce B Preparing for trade under the AfCFTA Agreement, What is in the AfCFTA market? (2020) 4

The increase in international trade will worsen anti-competitive conduct, particularly the cross-border effect.³⁰³ The main challenges faced by the competition regimes of AfCFTA will be overlapping memberships, as discussed in chapter three. Although AfCFTA was established to combat the challenge of overlapping memberships, to date other REC's have continued to function.³⁰⁴ Also, cooperation between national, regional, and continental bodies in anti-competitive detection and law enforcement will prove a challenge, as strong cooperation is required.

The modalities of cooperation between the national and regional competition regimes are categorised as voluntary or mandatory.³⁰⁵ Of the six Africa RECs that have a competition regime, COMESA, EAC, ECOWAS, and CEMAC have adopted the mandatory model, whereas SADC and SACU have adopted the voluntary model.³⁰⁶ The RECs with the mandatory model competition regime have adopted a decentralised form of competition law.³⁰⁷ This shows that African countries and regional competition commissions are focused more on the modality of competition law cooperation, while there is a legal gap in finding and applying the best cartel detection tools. Even leniency programmes and the effects doctrine have been used by only few states such as South Africa, as discussed in chapter three, which weakens the effectiveness of competition law further.

The future ACC should be required to consider a digital platform as a tool of cartel detection. This suggestion is based on a comparative analysis of the three institutions of the CCC, EU Commission and US Antitrust Division which demonstrates the difficulty of cartel conduct detection and cross-border law enforcement. Moreover, chapter five discussed possible ways of establishing digital platforms to be used as tools for cartel conduct detection and law enforcement. Of these three ways, the digital platform establishment as a cross-cutting method is appropriate for the CCC due to the lack of available finances and its mitigation of high risk. The risk is that data might be easily attacked or intercepted and

³⁰³ Jesus RG and Yuanchen Y International Trade and Corporate Market Power (2020) 4

³⁰⁴ The preamble of AfCFTA, Article 3

³⁰⁵ Deniz GB 'Models of Regional Cooperation in Competition Law and Policy from Around the World: Lessons for the ASEAN Region' in in Burton Ong (ed), The Regionalization of Competition Law and Policy within the ASEAN Economic Community (2018) 165-201.

³⁰⁶ A voluntary model does not have a binding competition law and only requires Member States to cooperate with each other and adopt national competition regimes voluntary while a mandatory model creates binding obligations and mandates among the Member States.

³⁰⁷ Valarie D The Future of International Competition Law Enforcement: An Assessment of the EU's Cooperation Efforts 11-21

information disclosed. For this reason, the future ACC is required to think about the establishment of a digital platform as a cross-cutting issue by relying on the CCC analysis.

As a result, designing regulations for data tracing from business firms and other sectors which detect cartel conduct is critical. There are, however, regulations for monitoring and evaluation as cartel conduct regulation should be addressed by industry. Regulations also need to have legal boundaries that balance firms' data access and data privacy.

6.6 CONCLUSION

An increase in trade at both a continental and global level will boost African competitive advantage by exploiting untapped potential and, as such, reduce poverty levels.³⁰⁸ However, it will increase cross-border anti-competitive conduct, as international trade raises the possibility of a concentration of 'market power' and the formation of 'international cartels'.³⁰⁹ International cartels appear to be a serious problem for the world economy, as cartel investigation is problematic due to highly secretive arrangements. Digital platforms as a tool of cartel activity detection will contribute to the effectiveness of competition law. This chapter discussed the implications of this digital platform for the prospective ACC.

The chapter indicates the advantages of a digital platform for the future ACC and proposes the digital platform best suited to their needs. In accordance with the comparative analysis, digital-platform establishment as a cross-cutting issue is suggested for the future ACC, based on the facts about the current CCC. The future ACC should consider the implications of the proposed digital platform as a road map for the competition negotiation protocol. This process for establishing the digital platform is not easy, but it is practical and possible to embed into the future ACC for an effective competition regime.

³⁰⁸ Bertelsmann S, 'Boosting Intra-African Trade: Hindrances, Opportunities and the Continental Free Trade Area' (2018) 18

³⁰⁹ Jesus RG and Yuanchen Y International Trade and Corporate Market Power (2020) 4

CHAPTER SEVEN:

CONCLUSION AND RECOMMENDATIONS

7.1 INTRODUCTION

This chapter provides a conclusion and recommendations based on the overall analysis of the mini-thesis. To do this, the chapter recaps the main findings of each chapter's discussion. Thereafter, in accordance with the main findings, a conclusion is drawn and possible recommendations that promote cartel detection, and hence law enforcement, are made.

The main finding is that cartel law enforcement is challenging, since mining evidence of the conduct is difficult. The case is worse during digital platform and cross-border cartel conduct detection. Different jurisdictions have introduced and utilised different tools for cartel detection including the leniency programme, which is the most effective tool. In the case of cross-border effect, the EU's single-entity and implementation doctrine as well as the USA's effects doctrine have been utilised by different jurisdictions. However, none of these tools has been efficient in detecting cartel conduct.

Furthermore, the new dynamics of digital platform cartel conduct, with algorithmic price setting and big data, challenge the leniency programmes, which is the most effective cartel detection tool.³¹⁰ Accordingly, today's competition regulation tools require a paradigm shift, or a change from the usual way of thinking. To do so, a digital platform is suggested as a tool to detect cartel conduct.

7.2 RECAP OF THE STUDY FINDINGS

The first chapter established the study context by conceptualising the role of digital platforms in enhancing cartel competition law enforcement. The foundational issue for conceptualising the digital platform is that one of the major cartel law enforcement legal gaps is the lack of appropriate tools for detecting the conduct, as discussed within the problem statement. The chapter highlighted the challenges of cartel detection by way of a comparative analysis between the USA, the EU, and COMESA competition regimes. In

³¹⁰ OECD Digital Screening Cartel Tools in Developing Countries (2020) 3

accordance with the comparative analysis, it discussed the implication of the digital platform for the prospective ACC.

The second chapter looked at competition law as economic law, since the economic concept provides the theoretical foundation for competition theories.³¹¹ The three most notable competition theories are the output limitation theory, the open market theory, and the fair competition theory. These theories, which form the base of the key principles of competition regulation, are founded on neo-classical theories. The neo-classical theory argues that governments should regulate markets. The different jurisdictions' competition law principle is based on neo-classical price theory, which might not provide sufficient economic data to detect cartel conduct.³¹²

Chapter three traces the historical ancestry of competition regulation. It assesses the development from early competition law to digital era competition law, focusing on cartel law. The chapter provides evidence of which competition regimes are stronger and more influential. History shows that modern competition law originated in the UK, the USA, and the EU, while Africa has little experience of regulating competition. The rest of the world has adopted its regulations either from the EU or the USA, whose regulations are founded on the USA Sherman Act of 1890. Hence, the EU and the USA competition regimes are used for comparative analysis with the competition regime of COMESA.

The fourth chapter examined the existing COMESA competition regime's successes and failures in a comparative analysis between the EU and the USA competition regimes. The comparison focuses on cartel conduct investigation approaches. It also compares attempts taken among the three institutions to regulate digital platform and cross-border cartel conduct. The finding is that cartel law enforcement is challenging, since cartel conduct detection is challenging. The traditional tools are insufficient to unmask cartel conduct. This is true within the jurisdiction of the EU, the USA and COMESA, although it is worse in COMESA.

The fifth chapter discussed the role of digital platforms in promoting cartel competition law enforcement if a digital platform is established as a tool of cartel conduct detection. The

³¹¹ Hassan G and Lipimile G, *The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects* (2008) 4

³¹² Ioannis L *Competition Law for a Complex Economy* (2019) 3

discussion concerning digital platforms shows that there is no one-size-fits-all solution. Rather, the possible ways of digital platform establishment are highly dependent on the respective jurisdiction's competition theory ideology, as discussed in chapter two.

The chapter proposed three ways of possible digital platform establishment: in a case-specific manner; a harmonised way; or as a cross-cutting issue. The proposal considered the EU, the USA and the CCC's competition theory ideologies and their competition law principles. Having considered the various possibilities, a digital platform as a cross-cutting issue is the best option for the CCC. The deployment of a digital platform in a harmonised way is suitable for the EU Commission, and a digital platform in a case-specific manner fits the USA Antitrust Division. The chapter further discussed that, when the digital platform is executed for the purpose of data traceability, there will be concerns about data privacy. Hence, there is a need to set competition law's boundaries by balancing the digital platform and data privacy.

Chapter six discussed the implications of the digital platform for the prospective ACC as a means of cartel conduct detection. The chapter's discussion is based on the current CCC's legal gaps and indicates the best lessons for the future ACC. This may serve as a road map for the prospective ACC during their ongoing Competition Negotiations Protocol. The CCC's legal gaps have been taken as a benchmark, as article 5 of the AfCFTA preamble states that competition regulations for the future AfCFTA will be built on the existing RECs.³¹³

The digital-platform establishment for cartel conduct detection is advisable for the prospective ACC. This is because in the CCC the utilisation of different cartel conduct detection tools is poor, and the institutional framework for cartel detection and persecution is weak. These facts have impacted on the supra-national power of the CCC during competition law enforcement, which is a good lesson for the prospective ACC. In addition, the single continental market will raise the issue of international cartel conduct. Furthermore, the rapid digitalisation of African countries' economies requires some tool that regulates digital cartel conduct.

³¹³ Agreement establishing the African Continental Free Trade Area (AfCFTA), Article 5

Therefore, digital-platform establishment for cartel detection appears to be the best tool for the prospective ACC. The type of digital platform which has been proposed, in view of the facts about the CCC, is that of the digital platform execution as a cross-cutting issue.

7.3 CONCLUSION

Cartel law enforcement is challenging, mainly due to the fact that unmasking cartel conduct is difficult. The situation is worse when considering digital platforms and cross-border cartel conduct. The different tools that have been utilised for cartel detection have proved ineffective. Even the most effective tools, such as leniency programmes for cartel detection and the effects doctrine for cross-border law enforcement have not been as effective as expected.

The situation has been challenging, even in the jurisdictions of the EU and the USA, despite their sophisticated competition regimes. The situation is worse in the competition regime of developing countries' jurisdictions, such as the CCC. Thinking about other ways to detect cartel conduct is crucial. The digital platform as a tool of cartel conduct detection might be the best option. This is because the digital platform provides fast and reliable communication.

This leads to the conclusion that the role of the digital platform in promoting competition law enforcements is important. Some competition authorities have noticed the potential role of digital platforms in screening cartel conduct at an early stage. The competition authorities of Brazil, Germany, Mexico, Portugal, Russia, South Korea, Spain, Switzerland, and the UK have established and capitalised on digital screening cartel detection tools.³¹⁴ However, the digital screening cartel tool is only limited to bid rigging, although conduct such as price fixing, market allocation, collective action, and refusal to supply goods or services is considered cartel conduct.³¹⁵

To conclude, the role of digital platforms in mining the evidence of cartel conduct is significant. The digital screening cartel tool can serve, in the case of bid-rigging conduct, as a benchmark for its establishment. However, the possible forms of digital-platform establishment require discussion. The different competition theories ideology, as discussed

³¹⁴ OECD Digital Screening Cartel Tools in Developing Countries (2020) 2

³¹⁵ see the press on digital tool to fight bid-rigging available at <https://www.gov.uk/government/news/cma-launches-digital-tool-to-fight-bid-rigging> (accessed February 28 2022)

in chapter two, demonstrates how different theories shape the competition law principles in their respective jurisdictions. This argument serves as a basis for choosing the appropriate digital platform approach for each jurisdiction.

Generally, digital-platform establishment as a cross-cutting issue is appropriate for the CCC, whereas digital-platform establishment in a case-specific manner and harmonised way has been proposed for the USA and the EU, respectively. Based on the existing facts about the CCC, the implications of this digital platform have led to the conclusion that the prospective ACC requires the implementation of a digital platform as a cross-cutting issue. The digital platform raises the issue of data privacy. Therefore, there should be a legal framework for data privacy that considers to what level a third party can gain access to data confidentiality and copyrights.

7.4 RECOMMENDATIONS

The recommendations of this mini-thesis focus, more broadly, on digital platform-establishment as a tool of cartel conduct detection. This tool is recommended due to the fact that cartel law enforcement efficiency and effectiveness depends on the level of detecting certain conduct. Competition law enforcers are challenged in detecting conduct due to the non-availability of data and insufficient information. To date, the different tools for cartel conduct detection that have been used, including the leniency programme, have proved ineffective, and the situation is worse in Africa.

Digital-platform establishment requires some expenditure, and competent expertise as well, as it has high risks. A digital screening cartel tool implementation needs to be contextualised in the respective jurisdiction, since there is no single digital platform that suits every context. The following recommendations should be taken into consideration for the establishment of an appropriate digital platform.

7.4.1 An African perspective

In the case of Africa, it is suggested that a digital platform that can be established as a cross-cutting issue is appropriate. It is suggested that the aim of the establishment of the digital platform should be to monitor and evaluate market competitiveness. This means that the digital platform as a tool of cartel detection provides economic evidence of the market

structure and/or behavior. The suggested tool is like that of the digital screening cartel tool for bid-rigging detection implemented by different countries such as UK and Brazil.³¹⁶ Hence, it is recommended that the CCC, and thus the prospective ACC, should establish a digital platform as a cross-cutting issue.

7.4.2 In the EU environment

The EU has successful experience of harmonising its competition law. In such an environment, digital-platform establishment in a harmonised way is appropriate. It is suggested that the purpose of establishing the digital platform is to harmonise data from different sectors, so that the commission can access the data during a cartel conduct investigation.

7.4.3 In the USA environment

The USA has the capacity to manage big data at a country level. In such an environment, digital-platform establishment in a case-specific manner is appropriate. It is suggested that the aim of the digital-platform establishment should be to access data from different sectors during cartel conduct detection. The competition law enforcer can access the digital platform when there is a need for information from the respective sector.

7.4.4 The digital platform vs data privacy

Digital-platform establishment is advantageous for the competition commission, since it enables law enforcers to discover and share consumer information, or harvest and analyse that data.³¹⁷ However, digital-platform establishment can raise the issue of privacy. It is suggested that data privacy should be taken into consideration when accessing essential digital platforms for the purposes of cartel detection. The exchange of confidential information should balance the right to access information in accordance with the right to individual, firms, and country's data privacy.

³¹⁶ OECD Digital Screening Cartel Tools in Developing Countries (2020) 3

³¹⁷ Keith NH Digital Platforms and Antitrust Law (2019) 3

BIBLIOGRAPHY

BOOKS

Campbell R. McConnell, and Stanley L *Economics: Principles, Problems, and Policies* 18ed (2005) New York: The McGraw-Hill Economics Series

Johan AG *The Great Depression* (1986) San Diego: Harcourt Brace Jovanovich

David GJ *Law and Competition in Twentieth Century Europe* (1998) Oxford: Oxford University Press

David DF, *Price Theory* (1986) Ohio: South-Western Publishing Co

Feld H 'The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms' (2019) Roosevelt Institute

Gilbert F and Heinz D. Kurz, *Handbook on the History of Economic Analysis*(2016) UK: Edward Elgar Publishing

Lord Wilberforce R, Campbell A and Neil E *The Law of Restrictive Trade Practices and Monopolies* (1966) London: Sweet and Maxwell Ltd.

Openstax economics *Monopolistic Competition and Oligopoly* (2016) 'ch' 10 Texas: Openstax

Pindyck RS and Rubinfeld DL *Microeconomics* 8 th Ed. Boston: Pearson Education, (2013) Boston: Pearson Education

Richard BM and Dwight RL Firm strategy under imperfectly competitive market conditions (2010) 'ch' 11 England: Cambridge University Press

Smith A *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) London: W. Strahan and T. Cadell,

Taylor M *International Competition Law: a New Dimension for WTO* (2006) England: Cambridge University Press

Padopoulos AS *the International Dimension of EU Competition Law and Policy* (2010) England: Cambridge University Press

Valarie D *The Future of International Competition Law Enforcement: an Assessment of the EU's Cooperation Efforts* (2019) Leiden: Brill Nijhoff

Warren S and Brandeis L *the Right to Privacy* (1890) USA: Harvard Law Review Association

CHAPTERS IN BOOKS

Bjørn L 'Global Crises, Global Solutions Susan R The challenge of poor governance and corruption(2004) Cambridge University Press

Frederic J and Yannis K *Competition Law Enforcement in the BRICS and in Developing Countries* Marc I Frédéric J and Aleksandra K *Cartel damages to the economy: an assessment for developing countries* (2016) UNCTAD

David RJ and Edward MG *Global Competition Policy* Eleanor MF *EU and US competition law: a comparison* (1999) USA: Colombia University Press

Daniel S and Joannis L *The Global limits of Competition Law* Javier T and Santiago M *Judicial scrutiny and competition authorities* (2013) Oxford: Oxford University press

Moore M and Tambini D, *Digital Dominance The Power of Google, Amazon, Facebook, and Apple(GAFA)* Barwise P and Watkins L *The Evolution of Digital Dominance How and Why We Got to GAFA* (2018) Oxford University Press

OpenStax *Principle of Management* David S Anastasia H Donald G and 'et al' *The internal organisation and the external environments*, (2019) Texas: Rice University

Wolters K *the Limit of Competition Policy* Rodriguez A and Menon A *the short-coming of antitrust in developing and reforming economies* (2010) Austin: Kluwer Law International

CASES

Ahlström Osakeyhtiö and others Vs EU Commission case no C-89/85 (27 September 1988)

American Banana Company vs United Fruit Company 213 U.S. 347 (26 April 1909)

Competition Commission vs Pioneer Foods (Pty) Ltd 15/CR/ (07 February 2010)

Imperial Chemical Industries Ltd. v Commission of the European Communities Case 48-69 (14 July 1972)

Intel vs EU Commission Case C- 413/14 (6 September 2017)

The EU Commission Vs Google case no 40099 (18 July 2018)

The Federal Trade Commission vs Google case no 111-0163 (3 January 2013)

Consumer privacy user profile Vs Facebook Case No. 18-md-02843-VC (09 August 2019)

USA vs Microsoft corporation case no 98-1232(CKK) (11 November 1999)

JOURNAL ARTICLES

Aizhi W, 'Fourth industrial revolution technological driver's impacts and coping methods' (2017) 27 *Chinese Geographical Science Peking University* 626–637

Alford RP 'The extra-territorial Application of Antitrust Laws: The United States and European Economic Community Approaches' (1992) 33 *Notre Dame Law School NDL Scholarship* 1-51

Anita. L 'Lying to protect privacy' (1999) 44 *Villanova Law Review University of Pennsylvania Carey Law School* 161-187

Anu B, Adam S. Chris M and Nathaniel S 'Competition law gone global: introducing the comparative competition law and enforcement datasets' (2019) 16 *Journal of Empirical Legal Studies Columbia Law School* 411-434

Arvind R, Nicole M, and Felten G et al The Role of Marketing in Digital Business Platforms (2021) 51 *Journal of Interactive Marketing* 72-90

Bruno L and Andreas M, 'Competition law and big data: the enforcers' view' (2017) *Italian Antitrust Review* 87-103

Büthe T and Kigwiru V 'The spread of competition law and policy in Africa: a research agenda' (2020) 1 *African journal Of international economic law* 41-83

Celen A and Eralp EA 'The Effects Doctrine in accordance with the Turkish competition law legislation' (2018) 19 *GSI Articletter* 7-20

Christopher S ‘The Post-Chicago antitrust revolution: a retrospective’ (2020) 168 *University of Pennsylvania Law Review* 2145-2169

Carlos BL ‘The 2008 financial crisis and neoclassical economics’ (2010) 30(1) *Brazilian Journal of Political Economy* 1-30

David B and Okeoghene O ‘The single economic entity doctrine in EU competition law’ (2014) 51 *Common Market Law Review* 1721 – 1757

David JG ‘The origin of European competition law in Fin-de-Siècle Austria’ (1992) 36 *American Journal of Legal History* 405-440

Dabbah M ‘Competition law and policy in developing countries: a critical assessment of the challenges to establishing an effective competition law regime’ (2010) 33 *World Competition Law and Economic Review* 457 – 475

Doğan E ‘The effect of innovation on competitiveness’ (2016) 24 *Istanbul University* 60-81

Eleanor MF ‘What is harm to competition? exclusionary practices and anticompetitive effect’ (2002) 70 *American Bar Association* 371-411

Eleanor MF ‘We protect competition, you protect competitors’ (2003) 26 *World Competitions: Law and Economics Review*. 149-165

Deniz GB, ‘The regionalization of competition law and policy within the ASEAN economic community’ (2018) *Cambridge University Press* 408

Destà M and Gérout G *The Challenge of Overlapping Regional Economic Communities in Africa: Lessons for the Continental Free Trade Area from the Failures of the Tripartite Free Trade Area* (2018) *Ethiopian Year book of International Law*

Friedberg JJ ‘The convergence of law in an era of political integration: the Wood Pulp case and the ALCOA Effects Doctrine’ (1991) 52 *University of Pittsburgh Law Review* 289

Fabienne I, Adriaan D, Viktoria K, and Nuno S ‘Steps towards a deeper economic integration: the internal market in the 21st century a contribution to the single market review’ (2007) 271 *European Commission Economic Paper* 1725-3187

Filippo L and Patricia M ‘Competition in digital markets: a review of expert reports’ (2020) 26 *Stanford Journal of Law, Business and Finance* 65-170

Herbert J and Fiona S ‘Framing the Chicago School of antitrust analysis’ (2020) 168(7) *Faculty Scholarship at Penn Law* 1843-1878

Kemp K ‘“The Big Chill”? a comparative analysis of effects-based tests for misuse of market Power’ (2017) 40(2) *University of New South Wales Law Journal* 493

Lianos I ‘Competition law for a complex economy’ (2019) 50 *International Review of Intellectual Property and Competition Law* 643-648

James N, SUSAN L and David W *Game Theory: Q & A on Economic Concepts* (2006) 16 *American Bar Association* 98-100

Jonida L ‘The evolution of antitrust law in USA’ (2018) 13 *European Journal of Scientific Research* 154

Ioanna DC, Virpi KT and Attila M ‘Digitization and the new dimensions of competition: the case of digital platforms in the sharing economy’ (2017) 33 *Copenhagen Business School* 5-21

Keith H ‘Digital platforms and antitrust law’ (2019) 19 *Boston University School of Law* 8-29

Kati C ‘Comparing laws in the enforcement of EU and national competition law’ (2010) 3 *European Journal of Legal Studies* 7-44

Massimiliano K ‘European Union competition law in the digital era’ (2015) 13(4) *Zeitschrift für Wettbewerbsrecht Journal of Competition Law* 403-431

Maurice ES ‘Is competition always good?’ (2013) 1 *Journal of Antitrust Enforcement* 162-197

Mike W ‘Competition policy and digital platform: six uncontroversial proposition’ (2020) 16 *European Competition Journal* 1-10

Nicholas H ‘What is the Problem with Neoclassical Price Theory?’ (2012) 3(4) *Pluto Journals* 457-477

Paul JM 'A note on the history of perfect competition' *Journal of Political Economy* (1967) 75 *University of Chicago Press* 395-399

Patrick M 'Market definition and market power in competition analysis: some practical issues' (2000) 31(4) *The Economic and Social Review* 309-328

Rita Y and Lut L 'The role of competition law: an Asian perspective' (2013) 9(7) *Asian Social Science Journal* 47-53

Robert B. 'The antitrust paradox: a policy at war with itself' (1978) 127 *University of Pennsylvania Law Review* 273-282

Safinaz MH, Nazura AM, and Mahmud ZM 'Market definition and market power as tools for the assessment of competition' (2012) 13 *International Journal of Business and Society* 163-182

Samie N 'The doctrine of "effects" and the extraterritorial application of antitrust laws' (1982) 14 *University of Miami Inter-American Law Review* 23-59

Schwartz E 'Antitrust legislation and policy in Germany-a comparative study' (1957) 105(5) *University of Pennsylvania Law Review* 617-690

Thomas AP 'Reconciling the Harvard and Chicago Schools: a new antitrust approach for the 21st Century' (2007) 82(2) *Indian Law Journal* 349-410

Vellah K, 'The cooperation on competition policy under the AfCFTA' (2020) 17(1) *Manchester Journal of International Economic Law* 98-121

Vlatka BM and Ivana K 'EU competition law in the digital era: what to tell about Intel' (2018) 2 *EU and Comparative Law Issues and Challenges Series* 31-62

Willard M 'COMESA: tug of war on extraterritoriality and the saving grace of regional law' (2021) 7 *Global Competition Review* 120-152

Wiedemann K 'Data protection and competition law enforcement in the digital economy: why a coherent and consistent approach is necessary' (2021) 52 *Max Planck Institute for Innovation and Competition* 915-933

Wouter PW ‘The use of Leniency in EU cartel enforcement: an assessment after twenty years’ (2016) 39(3) *World Competition* 327-388

LEGISLATION

Africa

COMESA Competition Regulation of 2004

COMESA Competition Regulations of 2012

COMESA Guidelines on Restrictive Business Practices of 2019

EAC Competition Regulation of 2010

SACU Competition Policy 2002

SADC Competition Act of 2000

SADC Competition law of 1996

Austria

The Language Ordinance of 1923

Canada

The 1898 Act for the Prevention and Suppression of Combination formed in Restraint of Trade



EU

EEC Council Regulation No. 17/62 of 6 February 1962

EU Competition Law Cartels Legislation of 2013

EU Competition Regulations

EU Electronic Commerce Directive (2000)

EU Digital Platform Market Act (2020)

EU legislation, Digital Service Act, (2020)

EU Law n ° 5/89 of July 6, 1989 relating to competition

EU merger law of 139/2004

Gabon

Competition law of 1989

Competition Act of 1998

Germany

Trade Regulation Act for the North German Confederation 1869

Kenya

Competition Act of 2010

Price Control Ordinance of 1956

Restrictive Trade Practices, Monopolies, and Price Control (RTP Act) Act of 1988

South Africa

Competition Act of 1998

Competition Act of 2000

Competition legislation of 1969

Maintenance and Promotion of Competition Act No. 96 of 1979

The Harmful Business Practice Act of 1988

UK

Competition Act of 1998

Enterprise Act of 2002

USA

Clayton Act of 1914



UNIVERSITY of the
WESTERN CAPE

Celler-Kefauver Antimerger Act of 1950

Robinson-Patman Act of 1936

Sherman Act of 1890

The Federal Trade Commission Act (FTC) of 1914

TREATIES AND CONVENTIONS

Agreement establishing the AfCFTA (2018)

Treaty of European Union (TEU) sets out the European Union's purpose (2007) Doc C 326/15

Amsterdam Treaty developed Members Cooperation (1997) No ISBN 92-828-1652-4

Rome treaty established the European Economic Community (EEC) (1957)

Lisbon treaty uniform treaty that renamed the TEU as the Treaty on the Functioning of the European Union (TFEU) (2009)

Maastricht treaty laid down the foundation treaty for the European Union (EU) (1993)

The COMESA-EAC-SADC tripartite free trade agreement (2015)

The European Coal and Steel Community Agreement establish a basis for completion law principle (1951)

Treaty establishing the COMESA (1991)

DECISIONS, REPORTS AND POLICIES

African Development Bank Group report on *Trade Finance in Africa: Overcoming Challenges Cote d'Ivoire* (2017) Stephane Bidouze: Côte d'Ivoire

African Union decision on *Boosting Intra-African Trade and Fast Tracking of CFTA* (2016) Dec.394 (XVIII)

Competition Commission of South Africa discussion paper on *competition in the digital economy* (2020)

Council of Europe Manual *on Removing obstacle to Cross-border Cooperation* (2013)
Istituto di Sociologia Internazionale di Gorizia: Gorizia (Italy)

European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *a Digital Single Market Strategy for Europe*, (2015) Rep 192, Brussels

Elizabeth G *AfCFTA Phase II Negotiations: A Space for a Competition Protocol?* (2020)
Policy implication research report no 56 UNCTAD/SER.RP/2020/15

G20 young entrepreneurs Alliance *Five Ways to win with Digital platform* (2016)

John D, John T, Cravath, S and 'et al' *The Cartels and Leniency Review: USA* (2021) expert panel law review

Larry D *A Rational Response to the Privacy 'Crisis'* (2013) CATO Institute, policy analysis no 716

Marcin S *EU Competition Policy, Key to a fair single market* (2019) European Parliamentary Research Service policy analysis 140814REV1

Michael H and Hüschelrath K *Cartel Cases and the Cartel Enforcement Process in the European Union 2001 – 2015: A Quantitative Assessment* (2016) Centre for European Economic Research Discussion Paper No. 16-063

MWEMBA W *International Experiences and Best Practices in Competition Law Enforcement Against Cross-Border Cartels, The COMESA Experience* (2021)
Intergovernmental Group of Experts discussion on Competition Law and Policy

Maria M, Paul R, Paul M, and Dr. Fred W *Resetting Competition Policy Frameworks for the Digital Ecosystem* (2016) report for policy recommendation by Group Special Mobile Association (GSMA)

Mario M *Anti-trust in the US and Europe, a History of convergence* (2001) General Counsel Roundtable –American Bar Association panel discussion

OECD *Data Portability, Interoperability and Digital Platform Competition* (2021)
Discussion Paper among OECD Competition Committee

OECD *Regulatory Reform and Innovation* (2014) an interim report by The OECD Directorate for Science, Technology and Industry (DSTI)

OECD *Competition Law and Policy in South Africa* (2003) an OECD Peer Review

OECD *Digitalization, Business Models and Value Creation* (2018) an interim report on tax challenges arising from digitalization

OECD Digital Screening Cartel Tools in Developing Countries (2020) discussion on digital evidence gathering in cartel investigations

OECD Prosecuting Cartels without Direct Evidence 2006 Round table discussion on competition DAF/COMP/GF

Oluwatobi E and Olukunle O *Systematic Review of Competition Policy Implementation: Institutional Mechanisms for Success* (2014) conference paper discussion organized by Economic Society of South Africa (ESSA), Cape Town

Patricia C *Self-determination Sovereignty, Territorial integrity, and the Right to Secession* (2016) report from a roundtable held in conjunction with the US department of state's policy planning staff

Peng S and Almas H *International Trade and its Effects on Economic Growth in China* (2010) The Institute for the Study of Labor (IZA) discussion paper No. 5151

Pasquale DA *Cross-border flows operated through the EU budget: an Overview* (2015) European Economy discussion paper 019

Pedro Gonzanga 'Cartel Screen in Digital Era' (2021) European Commission discussion paper

United Nations Conference on Trade and Development (UNCTAD) *Competition law, policy and regulation in the digital era* (2021) Intergovernmental Group of Experts discussion

UNCTAD *Enhancing international cooperation in the investigation of cross-border competition cases: Tools and procedures* (2017) report from Intergovernmental Group of Experts discussion

UNCTAD Ways and Means to Strengthen Competition Law Enforcement and Advocacy (2015) report from round table discussion

Wachs J and Kertesz J 'A Network Approach to Cartel Detection in Public Auction Markets' (2019) a scientific report Rep 9, 10818

Woolfrey S The political economy of regional integration in Africa: A report on COMESA (2016) a report from case study

Wolfgang K Digital Markets, Data, and Privacy: Competition Law, Consumer Law, and Data Protection (2016) joint discussion paper series in economics No. 14-2016

World Bank Breaking Down barriers, Unlocking Africa's Potential through Vigorous Competition Policy(2016) report by world bank group

PAPERS AND BRIEFS

Alina V Nicoleta B Denisa P and 'et al' 'The impact of external environment on organizational developmental strategy' (2010) MPRA Paper No. 26303

Bruno D, Olivier D, and Thomas P 'Competition Policy and Industrial Policy: for a reform of European Law' (2020) foundation Robert Schuman

Bertelsmann S, 'Boosting Intra-African Trade: Hindrances, Opportunities and the Continental Free Trade Area' (2018) tralac

COMESA 'COMESA in brief' (2018) Corporate Communications

Crémer J, de Montjoye YA & Schweitzer H 'Competition Policy for the Digital Era' (2019) European Commission

Hassan G and Lipimile G L 'The Effects of Anti-competitive Business Practices on Developing Countries and their Development Prospects' (2008) *UNCTAD* UNCTAD/DITC/CLP/2008/2

Ioannis L 'Competition Law for the Digital Era: Complex Systems' (2019) Centre for Law, Economics and Society, University of London

Ivaldi M, Jenny F, and Khimich 'A Cartel Damages to the Economy: An Assessment for Developing Countries' (2017) World Bank Group

Jesus RG and Yuanchen Y 'International Trade and Corporate Market Power' (2020) International Monterey Fund 9781513550473/1018-5941

Jenny F 'Competition Law Enforcement and Regulation for Digital Ecosystems: Understanding the Issues, Facing the Challenges and Moving Forward' (2021) OECD Competition Committee

Laura PS 'US Antitrust Law and Policy in Historical Perspective' (2019) Harvard Business School Working Paper 19-110

Marco B and Klaus W 'EU Competition Law Enforcement vis-à-vis Exploitative Conducts in the Data Economy' (2018) Max Planck Institute for Innovation and Competition working paper No. 18-08

Marek D 'Monetary Union and Fiscal and Macroeconomic Governance' (2015) European economy discussion paper 013

Padamja K 'COMESA and SADC: Prospects and Challenges for Regional Trade Integration' (2004) International Monetary Fund working paper No. 04/227

Peter B 'The extraterritorial reach of EU competition law revisited: The "effects doctrine" before the ECJ' (2016) Institute for European Integration, working paper, No. 3/16

UNCTAD 'Competition Issues in the Digital Economy' (2019) Intergovernmental Group of Experts brief on Competition Law and Policy in digital era

WTO document WT/TPR/S/285 Annex 3 GABON, 280 a brief about Gabon economy

INTERNET AND MEDIA SOURCES

African Export-Import Bank 'Boosting Intra-African trade: implications of the AfCFTA' available at <https://www.tralac.org/documents/news/2042-african-trade-report-2018-afreximbank/file.html> (accessed 23 December 2020)

Africa Resource Centre 'Competition law in Kenya - A Snapshot' available at https://cuts-nairobi.org/pdf/Competition_Law_in_Kenya.pdf (accessed 25 September 2021)

Art Auction Houses Agree to Pay \$512 Million in Price-Fixing Case available at <https://www.nytimes.com/2000/09/23/business/art-auction-houses-agree-to-pay-512-million-in-price-fixing-case.html> (accessed 16 December 2021)

CFTA Summit Media Announcement (2018) available at <https://au.int/en/announcements/20180306/2018-cfta-summit-media-announcement> (accessed 12 August 2021)

COMESA Competition Commission 'Anti-competitive Business Practices – cases' available at https://www.comesacompetition.org/?page_id=335 (accessed 22 December 2020)

COMESA Competition Commission 'Merger and Anti-competitive business practise cases' available at https://www.comesacompetition.org/?page_id=335 (accessed 23 December 2020)

COMESA Competition Commission 'Overview of COMESA what is COMESA?' available at <https://www.comesa.int/what-is-comesa/> (accessed 14 December 2020)

Competition and Market Authority 'Digital markets: what are the implications for competition policy and practice' 5 March 2020 available at https://www.youtube.com/watch?v=gSnyRg9TA_Y, (accessed 26 July 2020)

Competition and Market Authority 'Understanding digital market: implication for future competition policy and practice' available at https://www.youtube.com/watch?v=T6wBP_Cs9K4 (accessed 25 June 2020)

Documentary 'Big data need baby brother, thriller from black code' Netflix available at <https://www.youtube.com/watch?v=Gv6bU-kOR14>, (accessed on 10 May 2020)

European Commission 'EU Anti-competitive regulation' available at https://ec.europa.eu/info/business-economy-euro/doing-business-eu/competition-rules_en (accessed 05 May 2021)

European Commission 'Cartel cases' available at <http://ec.europa.eu/competition> (accessed 10 April 2021)

European Commission 'Overview of European competition network' available at https://ec.europa.eu/competition/ecn/index_en.html, (accessed 23 December 2020)

European Commission ‘Digital Platforms- New EU Regulations and Competition Law’ Tools available at <https://www.natlawreview.com/article/digital-platforms-new-eu-regulations-and-competition-law-tools> (accessed 4 April 2022)

Experts and academician discussion ‘Big data, digital platforms and market competition’ (2016) available at <https://www.youtube.com/watch?v=bZNBoKCK5I4> (accessed 26 July 2020)

EuroStat ‘EU, GDP per capita, consumption per capita and price level indices’ available at https://ec.europa.eu/eurostat/statistics-explained/index.php/GDP_per_capita,_consumption_per_capita_and_price_level_indices, (accessed 27 December 2020).

Hartzenberg T ‘Cooperation in competition under the AfCFTA’ available at <https://www.tralac.org/blog/article/14078-cooperation-on-competition-in-the-afcfta.html> (accessed 27 October 2020)

Hope A ‘Cooperation on financial services regulation under the AfCFTA’ available at <https://www.tralac.org/blog/article/14453-cooperation-on-financial-services-regulation-under-the-afcfta.html>

Global Competition Rev. ‘Rating enforcement analysis’ available at <http://globalcompetitionreview.com/surveys/article/41412/analysis-part-2> (accessed 22 July 2021)

Interview with George Lipimile, Director of the COMESA Competition Commission, (28 March 2014) available at w.antitrustsource.com (accessed 23 October 2021)

Interview with Dr. Mukhisa Kituyi, Secretary-General of UNCTAD available at <https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1838> (accessed 10 May 2020)

Lee Yohn D, Why Great Innovation Needs Great Marketing available at <https://hbr.org/2019/02/why-great-innovation-needs-great-marketing> (accessed 19 May 2022)

Mark W ‘Competition policy: one theory, three systems’ available at <https://journals.openedition.org/chinaperspectives/789> (accessed 25 October 2021)

Matsinhe S and Bernstein D ‘Leveraging AfCFTA to drive digital trade in Africa’ available at <https://www.mondaq.com/southafrica/international-trade-investment/853026/leveraging-afcfta-to-drive-digital-trade-in-africa> (accessed 23 October 2020)

McKinsey Consulting company ‘Enduring ideas: The SCP framework’(2008) available at <https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/enduring-ideas-the-scp-framework> (accessed 10 October 2021)

New Deadline set for Ratification of Tripartite Free Trade Area available at <https://www.comesa.int/new-deadline-set-for-ratification-of-tripartite-free-trade-area/> (accessed 21 May 2022)

Organisation for Economic Co-operation Development (OECD) ‘Cartels and anticompetitive agreements’ available at <https://www.oecd.org/competition/cartels/> (accessed 28 May 2020)

Organisation for Economic Co-operation Development (OECD) ‘Competition trends’ available at <http://www.oecd.org/competition/oecd-competition-trends.htm> (accessed 26 February 2020)

Organisation for Economic Co-operation Development (OECD) ‘Challenges and coordination of leniency programmes’ available at <https://www.oecd.org/competition/challenges-and-coordination-of-leniency-programmes.htm> (accessed 28 October 2021)

Pettinger T Should the government intervene in the economy? available at <https://www.economicshelp.org/blog/5735/economics/should-the-government-intervene-in-the-economy/> (accessed 11 May 2021)

Tralac ‘AfCFTA legal texts and policy documents’ available at <https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html> (accessed 27 October 2020).

United Nations Conference on Trade and Development ‘Enhancing international cooperation in the investigation of cross-border competition cases: tools and procedures’

available at https://unctad.org/system/files/official-document/ciclpd44_en.pdf (accessed 27 October 2020).

US Antitrust Division 'Antitrust cases' available at <https://www.justice.gov/atr/antitrust-case-filings-alpha>, (accessed 15 December 2020)

United Nation Economic Commission for Africa 'AfCFTA questions and answers' available at <https://hdl.handle.net/10855/43253> (accessed 23 September 2021)

Wong Q Facebook owns Instagram and WhatsApp and plans to make that obvious available at <https://www.cnet.com/tech/mobile/facebook-owns-instagram-and-whatsapp-and-plans-to-make-that-obvious> (accessed 20 May 2022)

WorldoMetro 'US population' available at <https://www.worldometers.info/world-population/us-population/>, (accessed 31, December 2020)

World Economic Outlook 'Database international monetary fund' (2019) available at <https://www.imf.org/en/Publications/SPROLLS/world-economic-outlook-databases> (accessed 10 September 2021)

NEWSPAPER ARTICLES

EU 'EU population in 2020' eurostat 10 July 2020

Deloitte WW 'Competition law in Africa: maximising competitor advantage' Deloitte Insight Magazine 22 August 2018

Johan Y and Jennifer B 'Leniency and competition law: An overview of EU and national case law' e-Competitions Antitrust Case Laws e-Bulletin 2 August 2018

Michael F 'Why Your Data Never Been Deleted' (2015) Forebs Newsletter 9 June 2015

Woolfrey S and Bruce B 'Preparing for trade under the AfCFTA agreement, what is in the AfCFTA market' Great insights Magazine 5 December 2020

DISSERTATIONS

Amanda RE *20 Years with the Schengen Area - Does it Boost Trade?*(unpublished thesis, Lunda University, 2016)

Divakar B *The Competition Act 2002 a Critical Study* (PhD thesis Sri Venkateswara University 2010)

Ephraim M *Developing a Suitable Competition Law and Policy for Developing Countries: A Case Study of Tanzania* (Unpublished LLM thesis, University of Cape Town, 2014)

Knott RP *Extraterritoriality, the Effects Doctrine and Enforcement Cooperation through Bilateral Agreements with Regards to Antitrust Law* (Unpublished LLM thesis, University of Johannesburg, 2010)

Strader MJ *The Impact of Neoclassical Price theory On Monopolization law: a Transatlantic Perspective*(PhD thesis University College London 2015)

Vincent NA *Competition Law and Regional Integration: COMESA* (unpublished MIPLC thesis Universität; Munich)

