

Background

The Common Market for Eastern and Southern Africa is a regional economic grouping of twenty sovereign states in the Eastern and Southern Africa region. Its membership is composed of the following countries: Angola, Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Ethiopia, Eritrea, Kenya, Madagascar, Mauritius, Malawi, Namibia, Rwanda, Seychelles, Sudan, Swaziland, Zambia and Zimbabwe. The main aims and objectives of the Common Market under Article 3 of the Treaty that established the organisation include the following:

- (a) to attain sustainable economic growth and development of member states by promoting a more balanced and harmonious development of its production and marketing structures;
- (b) to promote joint development in all fields of economic activity and the joint adoption of macro –economic policies and programmes to raise the standard of living of its peoples and to foster closer relations among its member states;
- (c) to co-operate in the creation of an enabling environment for foreign , cross border and domestic investment ; and
- (d) Co-operation in strengthening of relations between the Common Market and the rest of the world.

In the field of economic and social development, member states of COMESA have also made specific undertakings such as:

- (a) The adoption of a regional policy that will look into all possible economic problems they may face in the implementation of the Treaty and propose ways and means of redressing such problems that will satisfy the conditions of equitable and balanced development within the Common Market;
- (b) Harmonise their laws to the extent required for the functioning of the COMMON Market.

The COMESA Economic Integration Agenda is through a process of gradual reduction of tariffs and non-tariff barriers among COMESA member states on the basis of an agreed set of Rules of Origin. To date eleven COMESA member states are now trading at zero tariff following the launch of the COMESA Free Trade Area in October 2001. The launching of the COMESA Free Trade Area has given rise to a considerable increase in intra-COMESA Trade and also an inflow

of investment into the COMESA region translating into creation of jobs and better lives for the people of the region.

A Historical Perspective of Economies of the COMESA Region.

Although Intra COMESA Trade has increased considerably as a result of the COMESA trading arrangement, it is common knowledge that developing countries have not achieved the expected results in terms of integration into the Global Market to compete with developed countries and also to reduce levels of poverty that is rampant throughout the African Region. Looking at reasons of failure to achieve the required results, one needs to look at the historical perspective of the economies of the region which can be described as being in a transition. Through privatisation programmes launched with the onset of World Bank Structural Adjustment Programmes, most African economies have moved from economies led by state owned monopolies to Private Sector Monopolies. With trading arrangements established through Regional Economic Organisations such as COMESA, these private sector monopolies normally foreign owned have transcended national boundaries to become regional monopolies as trans-national corporations. If one were to look closely at why developing countries have moved from having state owned national monopolistic enterprises to private owned monopolistic enterprises one realises that one of the reasons for this development is the lack of Competition Policy and Legislation at national and regional levels. As a result of lack of Competition Policy and Legislation at national and regional levels, the business environment in developing countries such as COMESA member states has not ensured equity and fairness through a predictable and level playing field. As a result of this unfair business environment which has led to transnational corporations to engage in restrictive business practices, local companies and the poor have been prevented from gaining the full benefits of globalisation.

The experience of developing countries has shown that trade liberalisation and privatisation alone can not be relied upon to bring about fair competition. Indeed trade liberalisation has brought about competition but not fair competition. Private monopolies have little incentive to pass on efficiency gains to consumers through lower prices. On the other hand, local cartels hang onto the benefits of cheaper prices for imports than passing them to consumers, thereby perpetuating the vicious cycle of poverty in developing countries. It therefore goes without saying that without competition policy and legislation at national and regional levels as well as relevant domestic institutions, economies of developing countries are vulnerable to both domestic and global anti-competitive prices. Accordingly it is not easy for developing countries to be integrated into the global market as well as reduce poverty levels.

The founding fathers and mothers of COMESA had foreseen the need for free and fair competition in the Common Market for Eastern and Southern Africa. To this effect they made provision for free and fair competition in Article 55 of the

COMESA Treaty. The provision prohibits anti-competitive practices and also makes provisions for regulations to regulate competition within member States. To-date, COMESA has a draft Competition Policy and Regulations which are under consideration by COMESA member States for adoption.

Anti- Competitive Activities of Monopolistic Enterprises in Developing Countries and the Integration of Developing Countries into the Global Economy.

From the foregoing paragraph, it is clear that as a result of the culture of monopolies in developing economies, efforts to integrate developing countries into the global market can not succeed unless local enterprises can participate effectively on a fair and level playing field in their economies at both national and regional levels. However, looking at the situation on the ground the situation is the direct opposite of what trade liberalisation and privatisation have intended in terms of improving the participation of local enterprises in the market at national and regional levels. In a bid to attract foreign direct investment into their economies, developing countries have given incentives to foreign investors to the effect that distortions are introduced in the market in the form of investment incentives i.e. tax holidays that give foreign investor a dominant position in a specific sector of the economy to the effect that local enterprises can not compete with such investor. In the end the foreign enterprise mostly transnational corporations start engaging in Restrictive Business Practices through horizontal agreements, abuse of dominant positions in the market and concentration of market power through mergers, acquisitions and other forms of control. In order to see how such restrictive business practices hinder the effective participation of local enterprises into their economies leading to the eventual integration of developing countries in the global economy, one has to take a look at how these restrictive Business Practices operate.

Horizontal Agreements

Horizontal Agreements are agreements that are made between enterprises normally in dealing in the same kind of products to stop competing against each other. As an example, such agreements can be made between wholesalers and retailers in the same market for mutual benefit. Such Agreements can also be between producers of raw materials and manufacturers. Such agreements lead to Cartels that engage in restrictive business practices at another level in the form of fixing prices, collusive tendering, restraint on production or sales or concerted refusal to purchase or supply with an aim of controlling the entry and competition in that specific sector of the market. As a result of such agreements small and medium enterprises find it difficult to participate in that specific sector and they end up going bankrupt.

Abuse of Dominant Position

As a result of an enterprise having a dominant position in a specific sector of the market or economy, the dominant enterprise often engage in restrictive business practices leading to forcing i.e. its suppliers or distributors to accept certain conditions which are restrictive. Such restrictive conditions are in the form of agreements between suppliers and purchasers where-by the purchaser is allocated a specific territory where to sell her merchandise or specific customers to which she can sale her merchandise. Other forms of abuse of Dominant Position are exclusive dealing arrangements, resale price maintenance and transfer pricing among others. With such agreements prevailing in the market or economy, local small and medium enterprises find it difficult to compete in the market and they are automatically forced to exist from the market or enter it because of existing market conditions that do not allow fair competition.

Concentration of Market Power through Various Forms of Control

The absence of Competition Policy and Legislation in a market or an economy allows for mergers and acquisitions which have the effect of distorting market conditions in terms of free and fair competition. Normally mergers and acquisitions will reduce the number of competing enterprises and concentrate market power in one enterprise or the foreclosure of sources of raw materials or distribution channels leading to the death of other enterprises in the market. In an economy or market where there is competition Policy and legislation, such mergers and acquisitions are controlled through the process of prior notification to the competition authority. The Competition authority in order to allow the merger or acquisition will consider the effect of the merger or acquisitions in relation to several factors such as the general market structure, the degree of market concentration, the competitive position of other enterprises and the advantages to be gained by the acquisition over other enterprises in the market. All these factors are considered in order to ensure that there is free and fair competition in the market.

Competition Policy and Law and Economic Development.

As discussed above, for developing countries to effectively be integrated into the global economy, there must be economic development which can only come about if there is an industrial base to produce products that can compete in the global market. This can only be possible if investment into a country can be able to stimulate industrial development other than kill efficient enterprises already in the economy or market. On the other hand, in cases where local monopolies are insulated from competition, such monopolies are often inefficient as a result of lack of competition. Such inefficient monopolistic enterprises do not create a suitable environment conducive to economic development in addition to failure to integrate in the global economy or market where competitiveness to a great

extent depends on the efficiency of its industries and the ability to compete with other enterprises.

Competition Policy and Law and Poverty Reduction

One of the main challenges facing most developing countries and in particular most COMESA member states is the reduction of poverty. It is therefore important that economic development policies of developing countries which are being pursued through trade liberalisation should ensure that they contribute to their poverty reduction strategies. From the foregoing discussion we have seen that most trade liberalisation programmes in developing countries do not protect the weak and the poor. Effective trade liberalisation policies should protect the weak and the poor through trade policies that ensure that enterprises operating in the economy or market promote economic development as well as reduce poverty. It is unfortunate that most monopolistic enterprises in developing countries are in the sectors that produce essential commodities and services such as sugar production, cement production, petroleum production, electricity, water, air transport etc. As a result of having monopolies in crucial sectors as outlined above, most people in developing countries can not afford basic necessities leading to escalation of poverty and low levels of food security. Where consumers can afford basic necessities, in most cases they have no choice of products but forced to buy what is available in the economy or market.

On the other hand, most enterprises in dominant positions also hold or own Intellectual Property Rights to the effect that through Intellectual Property Rights ownership enhanced by compulsory licensing, it leads to exploitative situations in basic or life saving commodities such as drugs. In addition to preventing access to basic and life saving drugs, smaller and medium enterprises are also not able to participate effectively in a specific sector of business such as the pharmaceutical market.

The Case for Competition Policy and Law and Consumer Protection

The discussion above clearly indicates that for any economic development policy of a developing country through trade liberalisation to succeed, there is need for the economy or market to be regulated so that economic activities are carried out in an environment where there is free and fair competition which can only come about through the Competition Policy and Legislation. It is only in a country where there is economic development that her enterprises can be integrated into the global economy or market. Furthermore, through free and fair competition guaranteed by Competition Policy and Legislation, the weak and poor are allowed to participate effectively in their economy thereby reducing poverty levels. In addition to allowing the weak and poor to participate effectively in the economy or market on a level playing field, an effective competition policy

and Legislation will also ensure general consumer protection and prevent exploitation.

International Cooperation and Networking of Competition Agencies

A recent study on Competition Policy and Legislation in the COMESA region showed that out of the twenty member states of COMESA, only five countries have competition policies and legislation. The study also indicated that almost all the member states that have functional Competition Agencies have had to deal with issues of extra territorial nature such as regional cartels. Concern has recently been raised in a number of COMESA member states with regards to the emergence of regional cartels in cement, pharmaceuticals, and sugar industries. In addition to the foregoing, anti-competitive business practices are not only detrimental to the welfare of the country or territory in which they take place, but they are also of concern to trading partners in other territories. The study also revealed that a large number of cases involving mergers and acquisition dealt with by these agencies involves foreign enterprises, or assets and information located outside their jurisdiction. This situation does not come as a surprise since in the light of the fact that with globalisation of business activities, issues relating to economic activities and business have also taken an international dimension .

The discussion above clearly brings out the case for international cooperation and networking of competition agencies in the region and the world as a whole. International cooperation is essential in the areas of: anti-competitive practice across borders or of a regional nature, extra-territorial investigation, extra-territorial enforcement of competition laws, conflict of laws, information sharing and capacity building among other things. In addition to the foregoing list of issues to be covered by international cooperation and networking, it is also important to note that just as economies of the region are small, most of the agencies in the region do not have the capacity to address anti-competitive cases of an international nature due to various reasons such as lack of capacity as well as lack of human and financial resources. International cooperation and networking of competition agencies can ensure that agencies pull their resources together to effectively deal with competition cases with an international dimension as well as domestic ones.

Modalities of International Cooperation and Networking among Competition Agencies

For international cooperation and networking to be effective, there is need for formal arrangements to be put in place. Such formal arrangements can be in the form of negotiated bilateral agreements between competition agencies, regional competition agreements such as the COMESA Draft Competition Policy which has provisions for cooperation and networking of competition agencies among COMESA member states or international multilateral agreements.

Conclusion

It is therefore important to note from the foregoing discussion that, Competition Policy and Legislation can make a significant contribution to the integration of developing countries into the Global Market as well as reduce poverty levels. The regulation of a free market economy can not be completed without Competition Policy and Legislation which is there to ensure that competition in the market is free and fair. It is also an important point to note that with globalisation, the existence of Competition Policy and Legislation in one country whilst other countries around it do not have is not enough to prevent multi-competitive practices in a region is problematic in dealing with cross border anti-competitive practices. There is need to ensure that there should be concerted efforts by countries to tackle anti-competitive practices through international cooperation and networking of competition agencies. Since most countries in the COMESA region and the entire Africa region do not have Competition Policies and Legislation, there is need to promote awareness of the need from Competition Policy and Legislation in countries where there is none and to help enhance the capacity of competition agencies that are already in existence and operational. It is also important to create awareness of the need for Competition Policy at regional and multi-lateral levels so that there is international cooperation and networking of competition agencies in order to curb global anti-competitive practices.

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