CONCURRENT JURISDICTION IN COMPETITION LAW ENFORCEMENT IN TANZANIA WITH SOME LESSONS FROM THE UNITED KINGDOM AND SOUTH AFRICA

Yose Joseph Mlyambina[♣]

Abstract

The enactment of concurrent jurisdiction between the Fair Competition Commission and the economic regulatory authorities in Tanzania after adoption of market economy principles in economic management was not an anomaly but a necessary undertaking. This paper attempts to show that the fact that competition authorities use different rules from those used by regulatory authorities both sets of institutions can facilitate competition. The concurrent jurisdiction guidance provided in the laws governing the existing economic regulatory institutions provide that where two legally mandated institutions coincide in dealing with an issue, no law overrides the other unless it is expressly stated in the relevant legislation. In such a situation the issue is referred to the Minister.

The paper's main suggestion is that concurrent jurisdiction in the Acts presupposed a single oversight Ministry for both FCA and regulatory authorities which is currently not the case in Tanzania today. Drawing lessons from similar authorities in the United Kingdom and South Africa, this paper has proposed that Tanzania

♣ Puisne Judge of the High Court of Tanzania, Iringa.

should establish a Tanzania Competition Network (TCN) to act as forum for cooperation between FCC, economic regulatory authorities and Government officials responsible for competition and regulatory issues.

Key Words: Competition, concurrent jurisdiction, competition authorities, oversight Ministry, economic regulatory authorities.

1. INTRODUCTION

Law is by and large about certainty in all spheres of life and therefore nothing is left to chance. It is not a normal occurrence for laws in the same jurisdiction to provide for concurrent jurisdiction to two separate legally enabled institutions; but this has happened in Tanzania and continues in place.[1] The legal framework which provides for the protection of competition and regulation of natural monopolies in Tanzania contains such a phenomenon which is seemingly abnormal.

Therefore, the object of this work is to survey the circumstances and the reasons which led to this scenario and the experience arising from it. Since competition policy and law is relatively new subject in Tanzania and indeed in many developing and even some developed countries, in my attempt to explain the anomaly, it is

[1] See Sections 65 (1) and (5), 96 (2) (3) and (4) of the Fair Competition Act, 2003 (Act No. 8 of 2003); Sections 19 (2), 44 (1) and 60-69 of the Tanzania Communications Regulatory Authority Act (Act No. 2 of 2003); Regulation 5 of the Electronic and Postal Communications (Competitions Regulations, 2018; Section 40 (2) of Electronic and Postal Communications Act, Section 20 (2), Sections 30 (2) (k) (ix) and 183 of Energy Water and Utilities Regulatory Authority Act (Act No. 11 of 2001); Section 46 (2) of Tanzania Communications Aviation Authority Act (Act No. 10 of 2003); Section 22 (2) of Land and Transport Regulatory Authority Act No. 3 of 2019.

necessary to address the conceptual and practical aspects of these new phenomena before I venture to address the issue of concurrent jurisdiction. Therefore, I intend to cover the following: Development of competition law in Tanzania and its importance; the salient features of the Competition Act, 2003; Concurrent jurisdiction on competition matters between Tanzania Communication Regulatory Authority (TCRA), Energy and Water Utilities Regulatory Authority (EWURA) and Fair Competition Commission (FCC); Landmark cases in Tanzania; Lessons from the United Kingdom and the Republic of South Africa; and conclusion.

2. DEVELOPMENT OF COMPETITION LAW IN TANZANIA

It is almost impossible to appreciate the genesis and rationale which prompted the Parliament of the United Republic of Tanzania to enact competition laws without understanding the economic development transition and the underlying policy changes which Tanzania went through at the time. However, it is common knowledge that during the immediate period after Tanganyika (as Tanzania Mainland was then known) got independence in 1961, the economic management and laws guiding the citizens were those enacted during the colonial era. They reflected the economy of the time. It was simply an economy, highly underdeveloped and in which the government of the day was aloof and not taking active part in the running of the economy leaving everything in the hands of the private sector which was small and controlled from outside the countries by major monopolies based in the metropole but with pronounced presence in the East African region through sub-offices in Nairobi, Kenya.

This economic arrangement lasted until 1967 when the then ruling party – Tanganyika African National Union (TANU) came up with

the Arusha Declaration[2] as a blueprint of the party on socialism and self-reliance. It ushered in a different economic discourse, to wit, a centrally planned economy whereby the Government took over control of not only major means of production and exchange,[3] but also economic management of markets by way of price discovery through established legal structures instead of market forces.[4] Several pieces of legislation were swiftly enacted through which various enterprises were taken over by the State.[5] In addition, there were other legislations that were enacted with a view to establishing national trading corporations which were actually intentionally created to be national monopolies.[6]

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[2] See Nyerere, J.K., "The Arusha Declaration: Socialism and Self-Reliance," in Nyerere, J. K., *Freedom and Socialism*, Dar es Salaam: Oxford University Press, 1968, p. 231; Lonsdale, J., "The Tanzanian Experiment," Volume 67 No. 267 *Africa Affairs*, 1968, p. 330; and Mohiddin, A, "Ujamaa na Kujitegemea," in Cliffe, L, and John S. Saul (eds.) *Socialism in Tanzania: An Interdisciplinary Reader* (Volume 1 – Politics), Nairobi: East African Publishing House, 1972, p. 165.

[3] James, R.W., "Implementing the Arusha Declaration – The Role of the Legal System," Volume 5 *Dar es Salaam University Law Journal*, December, 1973, p. 1; Mihyo, P.B, "Foreign Private Investment and Foreign Aid in Tanzania after the Arusha Declaration," Volume 6 *Dar es Salaam University Law Journal*, April, 1977, p. 1; Pratt, Cranford, *The Critical Phase in Tanzania 1945-1968: Nyerere and the Emergence of a Socialist Strategy*, Nairobi: Oxford University Press, 1978, p. 227; and Kassum, A.N, *Africa's Winds of Change: Memoirs of an International Tanzanian*, London and New York: I.B. Tauris, 2007, p. 53.

[4] This has been referred to as a hands-on approach to the economy. See Laitaika, E, "Legal and Institutional Aspects of Fair Competition in Tanzania," Volume 5 *Open University Law Journal*, 2014, p. 59

[5] These included the banking sector, through the National Bank of Commerce (Establishment and Vesting of Assets and Liabilities) Act No. 1 of 1967; in retail and whole sale trade through the State Trading Corporation (Establishment and Vesting of Interests) Act No. 2 of 1967; in the agricultural products marketing through the National Agricultural Products Board (Vesting of Interests) Act No. 3 of 1967 a monopoly in the name of Agricultural Inputs Supply Company (AISCO) was created in this vast agricultural subsector in the country.

[6] In the Insurance sector through the Insurance (Vesting of Interests and Regulations) Act No. 4 of 1967 a monopoly in the name of National Insurance Corporation (NIC) was created in this vast insurance in the country. Industrial

In continuation to this economic management approach, of which the State had an upper role, a price control mechanism was established through the Regulation of Prices Act, 1973.[7] This law established the Price Commission which determined prices for all essential goods and services in Tanzania.[8]

With ups and downs, this centrally planned or command economy approach existed in Tanzania from 1967 to 1986 when it was abandoned due to various social and economic changes that took place in Tanzania and in the rest of the world. Decisive among them was the collapse of the Soviet Union through *perestroika* (restructuring) and *glasnost* (transparency and openness) policies of President Mikhail Gorbachev. Instead, the liberalisation of the economy and adoption of market economy was introduced as a matter of policy change.[9] It was the adaptation of

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shares takeovers in various private companies with more or less similar monopolistic effects was done through the Industrial shares (Acquisition) Act No. 5 of 1967; to mention but a few as the takeovers continued up to 1970s. See Rahim, B., "Legislative Implementation of the Arusha Declaration" Volume IV Nos. 1 and 2 *East Africa Law Journal*, March – June, 1968 p183. See also Nsereko, D.D, "The Tanzania Nationalisation Laws," Volume3 No. 1 *Eastern Africa Law Review*, April, 1970, p. 1; Bradley, A.W., "The Nationalization of Companies in Tanzania" in Thomas, P.A. (ed.), *Private Enterprise and the East African Company*, Dar es Salaam: Tanzania Publishing House, 1969, p. 207; Dias, Clarence, "Tanzanian Nationalizations 1967-1970," Volume 4 No. 1 *Cornell International Law Journal*, 1970, p. 59; Bolton, D., *Nationalization - A Road to Socialism? The Lessons of Tanzania*, London: Zed Books Ltd, 1985; Green, R.H., "A Guide to Acquisition and Initial Operation: Reflections from Tanzanian Experience 1967-1974," in Faundez, J, and Picciotto, S., (eds.), *The Nationalization of Multinationals in Peripheral Economies*, London: The Macmillan Press Ltd, 1978, p. 17; Bradley, A.W., "Legal Aspects of the Nationalizations in Tanzania," Volume 3 No. 3 *East African Law Journal*, 1967, p. 149; and Rugumamu, S., "State Regulation of Foreign Investment in Tanzania: An Assessment," Volume 13 No. 4 *African Development*, 1988, p. 5.

[7] Act No. 19 of 1973.

[8] Section 9(1) of the repealed Price Control Act, 1973.

[9] *Ibid.*

the market economy principles which evoked the need for competition policy and laws in Tanzania.

The introduction of competition policy and law in Tanzania stemmed from two interesting sources of pressure; the first pressure on Government came from Parliament and the second from the Presidential Parastatal Sector Reform Commission (PSRC), a state organ, which was established under the Public Corporation Act, 1992 to coordinate implementation of the Government's economic reform efforts in the form of privatisation and policy proposals of enabling measures for managing the market economy.[10]

Therefore, the transition from a centrally planned economy to market economy, one of the necessary steps required was the repeal of the Regulation of Prices Act, 1973[11] which was done by the Parliament in November 1993.[12] The question to the Government was how the consumers would be protected without price control in place. It was explained by the then Minister of State responsible for Planning, under the President's Office, Mr. Horace Kolimba that the countries would learn how this was handled in developed economies. This was the opening of the way for first-generation competition law namely, Fair Trade Practices Act, 1994 which was hastily enacted.[13]

The pressure from the Presidential Parastatal Sector Reform Commission (PSRC) came much later while PSRC was supervising

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[10] See the Preamble of Cap 257.
[11] Section 9 (1) of Act No. 19 of 1973.
[12]Fair Competition Commission, Presentation to the Seminar on the Role of FCC in Adjudication of Competition Cases in Tanzania for Justice of the Court of Appeal held at Whitesands Hotel, Dar es Salaam, Tanzania, 2008.
[13] Fair Trade Practices Act (Act No. 4 of 1994). Incidentally, it came into force two years later in 1996.

privatisation of more than four hundred parastatals responsible for direct economic activities. This was followed by the privatisation of infrastructural parastatals such as; the Tanzania Railway Corporation (TRC), Post and Telecommunications, Tanzania Harbours Authority; and utility providing parastatals such as Tanzania Petroleum Development Corporation (TPDC), Tanzania Electric Supply Company Limited (TANESCO), and Dar es Salaam Water and Sewerage Corporation (DAWASCO). Both infrastructural and utility providers are generally termed networks providers. This is the reason for most of them being natural monopolies and therefore not amenable to competition but regulation. For example, it is impracticable to have several ports in Dar es Salaam or several roads or railways going to the same destination.

The question for PSRC was whether the utility and infrastructural providers which are by nature monopolistic, could be privatised without a supervisory mechanism. This would have been tantamount to transferring the monopolies under Government supervision to unsupervised private monopolies of which the PSRC found to be worse than the *status quo* of the time. The PSRC technical advisors found that the Fair Trade Practices Act, 1994 provided a partial solution to how natural monopolies could be regulated. However, when the technical advisors went deep into the legal provisions of the Act, they found that the Act had serious inherent problems of commission and omission. In summary, the weaknesses of Fair Trade Practices Act, 1994 were as follows:

One, the provision for establishment of the Office of the Trade Practices Commissioner as a unit within the Ministry of Trade meant that the Commissioner would be an employee of the Government

and therefore would lack the integrity of supervising competition in the economy.[14]

Two, although there was a provision for establishment of the Trade Practices Tribunal, it had not been established.[15]

Three, the role of the Commissioner was merely advisory. The Minister responsible for Trade was the decision maker with a choice of following or departing from the advice of the Trade Practices Commissioner; and[16]

Four, the Office of the Trade Practices Commissioner combined both competition and economic regulation roles without providing for basic tools of operationalising the two gigantic regulatory fields in the economy.[17] This seemingly innocuous provision had very serious implementation dilemma on the part of the Commissioner. The Commissioner was being tasked to supervise two aspects of economic activities whose rules of operations were opposite of each other on account that competition leaves the market to set the prices basing on providers of goods and services to compete for customers depending on price offer and other positive selling points like better quality of goods, better services to customers, better packaging. For this reason pricing setting is prohibited in competition while regulation, on the other hand, sets prices and other desirable qualities to be adhered to because, by nature, the players in the regulated sectors cannot be made to compete but are forced by the regulator to behave like they are in a competitive market. To illustrate, the difficulty for the Commissioner in this case by an example, asking the Commissioner to supervise both

[14] Section 3 of the Fair Competition Act (Act No. 4 of 1994).
[15] *Ibid*, Section 4 (1).
[16] *Ibid,* Sections 32 (1) and 39 (1).
[17] *Ibid*, Section 42 (3) (b).

competition and regulation activities in the economy is similar to, say, the referee of a netball team being asked also to be the referee for a football team while both games are playing: one game using the hands to play while the other game outlaws the use of hands, except for the goal keepers. In this case, therefore, the referee would have to keep switching his mind on and off depending on which game he is facing at the time. This is the reason the Commissioner would be in an implementation dilemma when supervising both activities amenable to competition and activities amenable to regulation in the same economy.

Five, in addition, what was being outlawed in the Fair Trade Practices Act, 1994 was not defined at a sufficient level and detail to enable the wrongs to be prosecuted in a court of law.

For the stated reasons the Trade Practices Act was found highly untenable and not implementable.[18] After another long Government process, the Trade Practices Act, 1994, was repealed[19] and replaced in its entirety by the Fair Competition Act, 2003.[20]

3. IMPORTANCE OF COMPETITION LAW

Understanding of the importance of competition law in a jurisdiction calls for an understanding of the recent history of the world and especially since the 1990s. It has been recorded that in 1970 only 12 jurisdictions had a competition law, and only seven out of them

[18] This can be demonstrated by the outcome of the merger between Kibo Breweries Limited (KBL) and East African Breweries (EABL) where by the plant in Moshi was shut down leading to massive unemployment among other welfare depriving issues. See Fair Competition Commission, Presentation to the Seminar on the Role of FCC in Adjudication of Competition Cases in Tanzania for Justice of the Court of Appeal held at Whitesands Hotel, Dar es Salaam, Tanzania, 2008.
[19] Section 102 of the Fair Competition Act, 2003 (Act No. 8 of 2003).
[20] *Ibid*.

had a functioning competition authority.[21] By 2016, more than half of the world's developing countries had adopted a competition law compared to less than 10 before 1990.[22] By 2020 more than 125 jurisdictions have a competition law regime, and the large majority have an active competition enforcement authority.[23] The spread of these laws has many explanations. The argument put forth by much of the literature, particularly from the Word Bank (WB) and the World Trade Organisation (WTO), is that the neoliberal reforms that were taking shape in many of these countries in the early 1990s did not succeed primarily due to lack of a proper competitive environment. Competition laws were argued to offer the missing link in the reform attempts that would ensure that the State monopolies that were being privatised would not be simply replaced by private monopolies.[24] While this explanation appears plausible, there is a fundamental problem which is being fudged in these explanations. The issue is; why adopting market economy principles is regarded as reform and what actually is involved in market economy that makes it a reform and what specific considerations are needed in undertaking such market reform in order for the country to have what it takes to be a functional market economy? It is in the elaboration of these factors which should obviate the import of competition law in an economy.[25] The introduction of competition and economic regulation policies and laws which when properly

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[21] See OECD Competition Trend, 2020 at http://www.oecd.org/competition/oecd-competition-trends.htm (lastly accessed on 12th August, 2021).
[22] *Ibid.*
[23] *Ibid.*
[24] Büthe, T. and M. Shahryar, *The Global Diffusion of Competition Law: A Spatial Analysis*; Duke University, 6th Meeting of the UNCTAD Research Partnership Platform Geneva, 2016. p. 257.
[25] On background to this see Smith, A., *An Enquiry into the Wealth of Nations*, W. Strahan and T. Cadell, London, United Kingdom, 1776; and Heilbroner, R. The Worldly Philosophers: The Lives, Times and Ideas of the Great Economic Thinkers, Seventh Edition Paperback – August 10, 1999 pp 42-74.

prosecuted protect the interests of a wider part of the population, particularly the consumer in the market economies is one of the most important mechanism for fettering the market.

4. FEATURES OF COMPETITION ACT, 2003

From the outset, it is important to be clear that the features of the Fair Competition Act, 2003 are a mirror of the weaknesses of the Fair Trade Practices Act, 1994 which was repealed and replaced in order to correct the weaknesses[26] which were pronounced by the competition law experts from the PSRC to have been fatal.

Therefore, the new competition law emphasized the following areas which also formed the main features of the Fair Competition Act, 2003:[27] One, to ensure harmonisation between industry specific regulatory Acts and the Competition Act by providing for clear rules with respect to the distribution of responsibilities between industry specific regulators and provide rules as to the primacy of the respective Acts in overlapping areas.[28]

Two, to ensure a pro-competitive environment in Tanzania and update the substantive areas of the Act by removing Sections in the previous Act which appeared to be either outlawing some of the pro competition business conduct, were ill defined or not defined at all. The Act provides for several definitions the most important include "Competition" "market", "market power", "dominant market power". The statement in the Act that the terms are economic concepts was

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[26] See Mlulla, A.S. and D.J. Nangela, "Control and Change of Control in Regulation of Mergers and Acquisitions: A Reflection on the Fair Competition Commission's Practice," Volume 43 Issue 1 *Eastern Africa Law Review*, 2016, p. 25; and Temu, Goodluck, "Jurisprudential Value of Tanga Fresh v. Fair Competition Commission (FCC) in the Law of Mergers & Acquisitions in Tanzania," Volume 42 Issue 2 *Eastern Africa Law Review*, 2015, p. 56.

[27] Section 3 of the Fair Competition Act, No 8 of 2003.

[28] *Ibid.*

intentional in order to indicate in the Act that they should be interpreted accordingly.[29]

Three, to ensure that issues such as cross-border anti-competitive agreements and merger control are addressed in line with best international practices especially within the East African area or recommend the most appropriate vehicle for handling cross-border competition issues.[30]

Four, to streamline the existing legislation into sections, covering institutional arrangements, restrictive and anticompetitive business practices, control of monopoly power and market dominance, control of mergers, consumer protection, offenses, penalties, dispute resolution and appeals as well as setting out clearly the relationship with Industry Specific Regulators Authority Acts and the Industry Specific Acts.[31]

Five, the other feature of the Fair Competition Law is the importance it attaches to "competition advocacy" whose role is to provide education to consumers and the business community so as to enhance awareness of competition and consumer protection issues and encourage a culture of compliance. Competition advocacy also involves critical analysis and commentary on existing and proposed legislations to ensure they are consistent with the promotion and protection of competition in markets and protection of consumers.[32]

Six, the Fair Competition Act, 2003 includes Part VI which deals with unfair conduct and consumer protection. This part was picked whole sale from the repealed and replaced Trade Practices Act. The adjudication processes of this part of the Act are separate from

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[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Ibid.*

competition processes and are supposed to be dealt with in the normal courts.[33]

5. CONCURRENT JURISDICTION ON COMPETITION MATTERS BETWEEN TCRA, EWURA AND FCC

The Fair Competition Act, 2003 (FCA) was enacted to promote and enhance effective competition in commerce and trade in order to protect consumers from unfair and misleading market conduct thus, enhance consumer welfare which is desirable for the attainment of Tanzanian's long-term social and economic development aspirations for enhancing quality of life, governance, the rule of law and transforming the economy to a middle income country.[34]

However, FCA applies to all commercial activities and bodies engaged in trade thus, it provides broader powers which cuts across all sectors and commercial activities to FCC which administers it in Mainland Tanzania. At the same time, various laws establishing regulatory authorities give powers to sectoral regulators to address competition matters in their relevant sectors. These legal provisions are the genesis of concurrent jurisdiction of FCC and regulatory authorities in our economy.[35]

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[33] *Ibid.*

[34] See the Preamble and Section 3 of Act No. 8 of 2003.

[35] Sections 65 (1) and (5), 96 (2) (3) and (4) of the Fair Competition Act, 2003 (Act No. 8 of 2003); Sections 19 (2), 44 (1) and 60-69 of the Tanzania Communications Regulatory Authority Act (Act No. 2 of 2003); Regulation 5 of the Electronic and Postal Communications (Competitions Regulations, 2018; Section 40 (2) of Electronic and Postal Communications Act, Section 20 (2), Sections 30 (2) (k) (ix) and 183 of Energy Water and Utilities Regulatory Authority Act (Act No. 11 of 2001); Section 46 (2) of Tanzania Communications Aviation Authority Act (Act No. 10 of 2003); Section 22 (2) of Land and Transport Regulatory Authority Act, No. 3 of 2019.

The word “concurrent” in the term “concurrent jurisdiction” means simultaneous; converging of equal or joint authority. This means both have powers to deal with competition issues to the extent provided by the FCA and/or sectoral laws. The consequence of this shared authority gives the impression that licensees of a regulatory authority if found in violation of the FCA will be dealt with by a different organ and subjected to a different procedure and remedy. While the one who doesn’t fall in any of the regulated sectors will be dealt with by the FCC in accordance with the FCA and rules and regulations made therein.

Therefore, on the surface, the legal provisions which allow the concurrent jurisdiction of the two authorities appear to generate confusion in our jurisdiction and people are complaining about it; and the source of that confusion is not without basis. Foremost, is that the possibility of generating several legal precedents in the same jurisdiction, some possibly contradictory, is a real one. However, such eventualities were, by design, legislated not to happen, hence my intention to clear and suggest ways to cure that confusion in this paper.

Ii is important to keep in mind that the Sectoral regulator has the object of competition in his logic as well as shown by what regulation is supposed to achieve:

(a) To address market failures where costs and benefits are not reflected correctly in market prices.

(b) To reduce entry barriers, encourage greater competition and innovation and in the long term to increase economic growth.

(c) To ensure consumer, worker and investor safety, transparency, information about products and services and fair distribution of net benefits.

From the foregoing, it is clear that the ultimate object for competition and regulation therefore is the same to the extent that it can be described that the object of regulation is to make sure the design and operations of natural monopolies in the economy mimic their working as though they are in competition. It is the method of working between the two; competition and regulation authorities which makes them different. It is from this common background of intervention in the economy that the concurrent jurisdiction is founded. The only difficult is how to implement it.

As outlined earlier, one of the reasons for doing away with the Trade Practices Act was because the same person was supposed to supervise players who compete on prices and other aspects and the same person to set prices and standards of service for industry specific regulation as well. Therefore, legal provisions were introduced to guide how the two organs, competition and regulatory authorities, could work for a common purpose by allowing for concurrent jurisdiction as the guide.

The genesis of concurrent jurisdiction tis traceable to the drafting period of FCA. The reasoning of its drafting in the Act is explained by Geoffrey Taparell of KPMG Legal of Sydney Australia, a consultant then as explained by Mr. Godfrey Mkocha, the first Director General of Fair Competition Commission (FCC) in an interview in 2020,[36] in two different paragraphs: Firstly, concerning the issue of concurrent current jurisdiction in the following words:

> The Capital Markets Act 1994 regulates conduct in capital markets including merger and acquisitions in order to protect investors and facilitate the operations of capital markets. It is not intended that the Fair

[36] Mr. Godfrey Mkocha, the first Director General of Fair Competition Commission (FCC) with over 40 years' experience in the fields of economics and trade.

> Competition should supersede the provisions of the Capital Markets Act. In most jurisdiction the competition law complements such laws. Similarly, the Banking and Financial Institutions Act 1991 provides for the prudential regulation of banks and financial institutions by the Central Bank of Tanzania and competition law is not intended to override that Act... In my view there is no reason why the Capital market Act and the Banking and Financial Institutions Act cannot or should not operate concurrently with FCA.

Secondly, concerning possible overlap and inconsistencies with other laws and regulators in the following words:

> Inconsistencies between laws are solved in accordance with the intention of Parliament as expressed or implied in the laws themselves. In the absence of express provisions in the laws, certain presumptions are often used to aid interpretation. For example, latter laws are usually presumed to prevail over earlier laws and specific laws on particular subjects are presumed to prevail over general rules. However, presumptions are not conclusive and there is often considerable scope for uncertainty and dispute. A clear expression of intention in the law is far preferable.[37]

According to Mkocha, based on the afore-cited caveats, Geoffrey Taparell strongly suggested, "For the avoidance of doubt it may be desirable to include a provision in the FCA to that effect."[38]

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[37] *Ibid*

[38]"Review of the Fair Trade Practices Act to bring the substantive aspects into line with best practices, March 2002"not published but the document formed the basis for the drafting of the current Fair Competition Act, 2003.

That provision is provided for in Section 96 of FCA and it states:

(1) Subject only to this Section, this Act applies to all persons in all sectors of the economy and shall not be read down, excluded or modified

(a). by any other Act except to the extent that the Act is passed after the commencement of this Act and expressly excludes or modifies this Act; or

(b). by subsidiary legislation whether or not such subsidiary legislation purports to exclude or modify this Act.

(2) A person shall not contravene this Act by reason only of engaging in conduct if a provision of an enactment specified in sub Section (2):

(a) Requires the person to engage in the conduct or conduct of that kind; or

(b) Authorises or approves the person engaging or refraining from engaging in the conduct of that kind.

(3) The enactment referred to in sub-Section (1) are EWURA Act, 2001,[39] SUMATRA Act,[40] 2001 Tanzania Communications Regulatory Authority Act, 2003,[41]Tanzania Civil Aviation Authority, Act, 2003[42] and sector legislations referred to in the sector legislation, enactments for the protection of

[39] Act No. 11 of 2001.
[40] Act No. 9 of 2001.
[41] Act No. 2 of 2003.
[42] Act No. 10 of 2003.

environment and any subsidiary or instrument under any of the aforementioned Acts.

(4) Where the Commission is of the opinion that, any conduct required, authorised or approved by a regulatory authority under any enactment referred to in sub-section (3) would be in breach of this Act if sub-section (1) did not apply to the conduct the Commission may report the matter to the Minister.

(5) Where the Minister receives a report from the Commission under Sub section (4), he may direct the relevant regulatory authority to take the necessary steps to ensure that the conduct described by the Commission is not required, authorised or approved by the regulatory authority.

(6) A person shall not contravene this Act by reason only of engaging in conduct required in order to comply with an enactment other than in enactment referred in Sub-section (3) of this Section.

In addition, the regulatory authorities Acts provide for the same. For example, Section 38 (1) of the EWURA Act states that a person shall not be contravening FCA if EWURA Act, Industry Specific law under EWURA or their subsidiary legislation allow the action or prohibits the action which FCA allows.[43]

If it contravenes, the Acts provide on how to go about it. Section 38 (2) of the EWURA Act[44] allows FCC to refer to the Minister, if a person contravenes the FCA in areas which EWURA, Industry Specific law under EWURA or subsidiary legislation has not allowed

[43] *Ibid.*
[44] *Ibid.*

or prohibited, as the case may be. Therefore Section 38 of EWURA Act provides the model relationship with FCC.[45]

The concurrent jurisdiction guidance provided by these provisions is that, where two legally mandated institutions coincide in dealing with an issue, no law overrides the other unless it is expressly stated in their respective governing law; and in the cases where it is not expressly allowed or prohibited, the issue shall be referred to the Minister responsible to take the decision after being advised.

It is clear therefore that, by concurrent jurisdiction, it does not mean the Industry Specific Regulator deals with competition issues; if she or he did, she or he would be falling in the same trap which caused the Trade Practices Act, 1994 to be repealed and replaced.[46]

Further guidance has been provided in other Sections of the EWURA and TCRA Acts. For example, in the energy and water utilities sector, the regulator also has powers under Section 20 (2) of the Energy and Water Utilities Regulatory Authority Act (EWURA,[47] which essentially provides the same as Section 19 (2) of the Tanzania Communications Regulatory Authority Act (TCRA) Act[48] to deal with all competition issues as per the legal guidance. In addition, the Petroleum Act[49] under Part II, Sub-Part II, through Section 30 (2) (k)(ix) empowers EWURA to promote competition in petroleum activities in areas open for investments; while the overall obligation for the enforcement of competition law in the petroleum sector is dealt with under Part IV, Sub-Part X, Section 183 which provides for assurance of fair competition in the midstream and

[45] Act No. 11 of 2001.
[46] Act No. 4 of 1994.
[47] Act No. 11 of 2001.
[48] No. 2 of 2003.
[49] Act No. 21 of 2015.

downstream petroleum activities where FCA[50] is applicable and FCC has powers to monitor both conditions of the market and trade practices of participants.[51]

However, even though the Acts provide guidance on how the concurrent jurisdiction should be handled, there are a couple of snags in the implementation; Firstly, from the beginning, the design of competition policy and law had provided for the Minister under which the FCA would fall and the Minister under which the industry specific regulators to be one and the same person. The wording which implies the Minister under which both competition and regulatory authorities is one and the same person can be seen in the wording example of Section 38 (2) of the EWURA Act[52] which allows FCC to refer to the Minister, if a person contravenes the FCA in areas which EWURA, Industry Specific law under EWURA or subsidiary legislation has not allowed or prohibited. Besides, this object was stated in the Government policy that the oversight supervision of both set of authorities should be under a single oversight Ministry. But this did not happen. To date, FCA is under the Ministry of Industry and Trade, while EWURA, TCRA and other regulatory authorities are under different Ministries. Secondly, the secondary legislation is another tool provided for in the Acts which could have been used to clarify the roles but due to the fact that the secondary legislations are enactment are proposed by different Ministries and not under one oversight Ministry as envisaged by the laws, the concurrent jurisdiction is somehow handicapped.

One very encouraging factor is that some of the Director Generals who understand the pro-competition concept are taking the initiative

[50] Act No. 8 of 2003.
[51] See Sabby, Francis, "Private Enforcement of Competition Law in Tanzania: The Untapped Opportunity," Volume 43 No. 2 *Eastern Africa Law Review*, 2016, p. 139.
[52] *Ibid.*

to solve the Ministerial oversight vacuum by using the secondary legislation mandates. The idea is to come up with an open legally based understanding on how to work together when the Industry Specific Regulator identifies a competition issue in its Industry specific Regulatory Authority dealings by inviting FCC to deal with the particular aspect. In the same manner, if some of the activities in the Industry Specific regulated sector, for example the downstream distributors of petroleum products, become amenable to competition, the two authorities work together to moved them out of Industry Specific regulation so that they can compete under the supervision of FCC.

It is obvious that if each regulator were to adjudicate competition issues within his regulated industry, there would develop several versions of precedents/common law within the same jurisdiction. If this were to happen, it would create legal chaos in the economy. Therefore, this issue should not be taken lightly.

Another example of concurrent jurisdiction is in the communication sector where Section 19 (2) of the Tanzania Communications Regulatory Authority Act[53] provides TCRA with powers to deal with all competition issues which may arise in the course of performing its functions. Section 19 (2) read:

> The Authority shall deal with all competition issues which may arise in the course of the discharge of the functions, and may investigate and report on those issues, making appropriate recommendations to the Commission or any other relevant authority in relation to;

[53] Act No. 2 of 2003 (R. E. 2017).

(a) any contravention of the Fair Competition Act, 2003 the Standards Act or any other written law;

(b) actual or potential competition in any market for regulated services competition or additional costs in the market and is likely to be detrimental to the public;

(c) any determinants likely to result to the members of the public.

In addition, the Electronic and Postal Communications Act,[54] also provides, under Part IV Sections 60 to 69, powers to TCRA to deal with anti-competitive practice and conduct of its licensees such as abuse of dominance, and anti-competitive agreements in the communication sector.

The FCC-TCRA relation has demonstrated how a well-developed concurrent jurisdiction can unfold in the competition law framework. In their case, the TCRA and the FCC have concurrent competition jurisdiction as contemplated under *Section 96 (2) and (3) of the FCA*[55] read together with Section *44 of the Tanzania Telecommunication Regulatory Authority Act*[56] *and Regulation 5 of the Electronic and Postal Communications (Competition) Regulations, 2018*.[57] The said pieces of legislation provide as hereunder cited.

Section 44 of the TCRA Act,[58] provides:

[54] Cap. 306 (R.E 2017).
[55] Act No. 8 of 2003.
[56] Act No. 2 of 2003.
[57] GN. 26 of 2018.
[58] Act No. 2 of 2003.

(1). A person shall not contravene a provision of the Fair Competition Act, 2003, or the Bureau of Standards Act, 1975 by reason only of engaging in a conduct or refraining from engaging in a conduct permitted, under this Act, sector legislation or any subordinate legislation or instrument under any of the aforementioned Acts.

(a) Requires the persons to engage or refrain from engaging in the conduct or conduct of that kind; or

(b) Authorizes or approves the person engaging or refraining from engaging in conduct of that kind.

(c). Where the Commission is of the opinion that any conduct required, authorized or approved by the Authority -(a) would be in breach of the Fair Competition Act, 2003 if sub-Section (1) did not apply to the conduct; and (b) the conduct is against the public interest, the Commission shall report the matter to the Minister.

(2). Where the Minister receives a report from the Commission under sub-Section (2), he may direct the Authority to take necessary steps to ensure that the conduct described by the Commission is not required, authorized or approved by the Authority.

Regulation 5 of the Electronic and Postal Communications (Competition) Regulations, 2018[59] provides:

> (1) The Authority shall issue rules of fair competition relating to the prohibition of: (a) anti-competitive agreements, arrangement or decisions of concerted practices; (b) abuse of dominant position; (c) anti-competitive mergers, acquisitions, consolidations, takeovers or such anti-competitive arrangements that may result in changes in the market structure in terms of ownership and control; and (d) all other practices and acts with an adverse effect on fair competition including unfair methods of competition, unfair or deceptive acts or practices, the purpose or effect of which is to distort competition in the communications market.
>
> (2) A licensee shall not engage directly or otherwise in any activity, whether by act or omission, which has or is intended or is likely to have the effect of unfairly preventing, restricting or Electronic and Postal Communications (Competition) distorting competition.
>
> (3) For the avoidance of doubt, a licensee shall be deemed to have engaged or to be engaged in an anti-competitive act, if he, commits or omits an act that has an appreciable effect on fair competition in the communications market. "

In 2010, when the Parliament of the United Republic of Tanzania was amending the Electronic and Postal Communication Act,

[59] GN No. 26 of 2018.

2010,[60] it also caused a consequential amendment to Section 65 of the FCA by adding Sub Section 5 immediately after Sub Section 4, with the following provision:

> Where in the course of performing its functions under this Act (FCA) the Fair Competition Authority, encounters any matter related to electronic or postal communications as those terms are defined in the Electronic and Postal Communication Act, *it shall request the written advice of the Tanzania Communications Regulatory Authority* on such matter and upon receiving such request, the *Tanzania Communications Regulatory Authority shall have the power to provide the Fair Competition Commission* with such advice.[61] (Emphasis applied)

There are some lawyers who are of the view that the added sub-section (5) in the amendment of Section 65 of FCA in 2010 has modified FCA to the extent that FCC has no powers to deal with the regulated powers which are expressly vested on regulatory authorities. It is my view that FCA was not modified by that provision. In fact, that is what FCA provides for by the provision in Section 96 (2) that "A person shall not contravene this Act by reason only of engaging in conduct if a provision of an enactment specified in sub Section (2):

(a). requires the person to engage in the conduct or conduct of that kind; or

(b). authorises or approves the person engaging or refraining from engaging in the conduct of that kind.

[60] Act No. 3 of 2010.
[61] Act No. 8 of 2003 as amended in 2010.

As submitted earlier that both FCC and regulatory authorities are pro competition bodies but differ only in the methods of supervising the market economy, no contradiction was envisaged from the inception of the governing laws for both set of authorities.

Based on the aforementioned, the TCRA and FCC should consider at very minimum to establish a platform through a Memorandum of Understanding (MoU) for the operationalization of such statutory joint efforts to ensure that the Government of Tanzania, and the public at large, benefits from judicial performance of mandates of the TCRA and FCC provided in the enabling Acts.

It is highly recommended that the TCRA and FCC mechanism be emulated by other Industry Specific Regulators.

6. LANDMARK CASE ON CONCURRENT JURISDICTION IN TANZANIA

Having looked at the provisions of the law with regard to the concurrent powers of FCC and sectoral regulators, it is clear that sectoral regulators in the cause of their functions also enforce the FCA when dealing with competition issues as they do not have a separate competition law for the sectors they regulate. Looking at the wording of the provisions in the regulatory authorities' laws, the regulators have a mandatory obligation to deal with anti-competitive conduct which arises in the course of discharging their regulatory functions such as was the case when EWURA fined a company for boycotting supply of petroleum products in 2011 giving rise to the case of *BP Tanzania Limited & 12 Others v. EWURA*.[62] This appeal arose after EWURA reviewed the petroleum pricing template (formula) and set out cap prices, both retail and wholesale, for petroleum products. Appellants were aggrieved by the decision of

[62] Tribunal Appeal No. 7 of 2011.

the respondent giving the new cap prices of petroleum products which effectively decreased the prices so they decided to boycott supply which made EWURA issue them with a compliance orders demanding them to supply petroleum products to the public at the approved prices. In principle the appellants' appeal to the Tribunal was not successful for reasons that EWURA followed the procedure in reviewing the prices and legally discharged its duties as the regulatory.

When regulatory authorities have performed the mandatory obligation to deal with competition issues then the law provides them with options to investigate and report to FCC any competition issue and make recommendations accordingly. This power was exercised by EWURA in the above cited dispute between *BP & 12 Others v. EWURA*[63] where at FCC the OMCs opted for settlement.[64] Thus, regulatory bodies mentioned herein above have the exclusive mandate to deal with competition matters within their regulated sectors, and it is not obligatory that they seek guidance or advice from the FCC as the regulators have the discretion whether or not to consult with the FCC.

On the powers of FCC to enforce FCA[65] in regulated sectors, the FCA[66] provides under Section 96 (1) that an act passed after the FCA[67] which expressly excludes or modifies the FCA modify the application of the FCA[68] and consequently FCC's powers such acts

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[63] *Ibid.*
[64] On this case see also Temu, Goodluck, "Reflections on Enforcement of Competition Rules in Tanzania," Volume 41 No. 2 *Eastern Africa Law Review*, 2014, p. 86 at p. 113.
[65] Act No. 8 of 2003.
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*

are like EPOCA,[69] the Petroleum and LATRA Acts.[70] Moreover, Section 96 (4) provides that when such modification is not the case and there is a breach of the FCA[71] arising from any conduct required, authorized or approved by a regulatory authority, FCC shall report the matter to the Minister.

7. LESSONS FROM UNITED KINGDOM

In the United Kingdom, the Competition and Markets Authority (CMA), established under Section 25 of the Enterprise and Regulatory Reform Act 2013 (ERRA 13),[72] is given powers to administer the Competition Act, 1998 which apply across the whole economy. Sectoral regulators such as the Office of Communications (OFCOM), the Financial Conduct Authority (FCA), the Gas and Electricity Markets Authority (GEMA) and the Civil Aviation Authority (CAA) also have powers to deal with competition issues such as powers to enforce the prohibitions on anti-competitive agreements and on abuse of dominance; and undertake market investigation. Thus, powers of sectoral regulators and CMA in competition law regime are in *pari materia* to what obtains in Tanzania Mainland where FCC and sectoral regulators have concurrent powers.

Due to the importance of competition law, CMA and sectoral regulators saw the need to make the concurrency framework effective through the establishment of the UK Competition Network (UKCN) in 2013; a forum for cooperation which enables closer link with the objective of bringing consistency and effectiveness of

[69] Act No. 3 of 2010.
[70] Act No. 21 of 2015 and Act No. 3 of 2019 retrospectively.
[71] Act No. 8 of 2003.
[72] See at legislation.gov.uk.

competition powers given to its members consequently resulting into competitive markets across all sectors.

In their statement of intent in December 2013, the members of the UKCN affirmed: 'The mission of the UKCN will be to promote competition for the benefit of consumers and to prevent anti-competitive behaviour both through facilitating use of competition powers and development of pro-competitive regulatory frameworks, as appropriate.'[73]

There has also been introduced in 2014 the Competition Act 1998 (Concurrency) Regulations 2014[74] which spell out the procedure by which it is decided which authority is better/best placed to deal with a case, and settlement procedures in the event of a dispute.[75] The relevant provisions provide as follows:

> 4 (1) If a competent person proposes to exercise any of the prescribed functions in respect of a case and it considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in respect of that case, it must inform that other competent person in writing of its intention to exercise prescribed functions in respect of that case.
>
> (2) Where a competent person has informed another competent person of its intention to exercise prescribed functions in accordance with paragraph

[73]Source;https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/382445/UKCN_Statement_of_Intent.pdf (Lastly accessed on 14th August, 2021.

[74] 2014 No. 536.

[75] The Regulations are available at: http://www.legislation.gov.uk/uksi/2014/536/pdfs/uksi_20140536_en.pdf (Lastly accessed on 14th August, 2021).

(1) in respect of a case, all such competent persons ("the relevant competent persons") must agree who is to exercise Part 1 functions in respect of that case.

(3) When agreement has been reached in accordance with paragraph (2), the CMA must as soon as practicable inform in writing the other relevant competent persons which competent person is to exercise Part 1 functions in respect of the case.

5 (1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the CMA must notify the other relevant competent persons that it intends to determine which relevant competent person is to exercise Part 1 functions in respect of the case.

(2) Any relevant competent person may make representations in writing to the CMA no later than 5 working days after the date upon which the CMA notifies its intention to make a determination in accordance with paragraph (1).

(3) The CMA must within 10 working days of notifying its intention in accordance with paragraph (1)

(a) determine which competent person is to exercise Part 1 functions in respect of the case; and

(b) inform in writing all other relevant competent persons (i) which competent person is to exercise jurisdiction in respect of the case,

(ii) the date of the determination, and

(iii) the reasons for the determination.

(4) In making a determination in accordance with paragraph (3)(a) the CMA

(a) must take into consideration any representations made in accordance with paragraph (2); and

(b) (subject to paragraph (5)) may decide that it is to exercise Part 1 functions in respect of the case rather than another relevant competent person, where the CMA is satisfied that its doing so would further the promotion of competition, within any market or markets in the United Kingdom, for the benefit of consumers.

(5) Where Monitor is one of the relevant competent persons, the CMA may not make a determination in accordance with paragraph (1) and (3)(a) that a competent person other than Monitor is to exercise Part 1 functions in relation to the case unless the CMA is satisfied that the case is not principally concerned with matters relating to the provision of health care services for the purposes of the NHS in England.

In addition to the UKNC and Concurrency Jurisdiction Regulations, the CMA has entered into bilateral memoranda of

understanding/agreements with most of the sector regulators[76] in order to foster mutual cooperation and coordination that ensures consistency and effective enforcement of the competition law in the UK.

8. LESSONS FROM SOUTH AFRICA

The competition law regime in South Africa also has same salient features with regard to powers of the Competition Commission and sector regulators. Section 3-1A of the Competition Act[77] as amended, provides expressly as follow:

> (1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.
>
> (b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of Sections 21(1) (h) and 82(1) and (2).

[76]https://assets.publishing.service.gov.uk/Government/uploads/system/uploads/attachment_data/file/888738/FCA_CMA_Competition_MOU_-_pdf_---pdf; file:///C:/Users/User/Downloads/Memorandum%20of%20Understanding%20-%20CMA%20and%20CAA.pdf; (Lastly accessed on 14th August, 2021).
[77] Act No. 89 of 1998.

Section 21(1) (h) provides:

> (h) Negotiate agreements with any regulatory authority to co-ordinate and harmonise the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act;

Section 82 (1) and (2) provides:

> (1) A regulatory authority which, in terms of any public regulation, has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 or on matters set out in Chapter 4A within a particular sector;
>
> (a) must negotiate agreements with the Competition Commission, as anticipated in Section 21(1)(h); and
>
> (b) in respect of a particular matter within its jurisdiction, may exercise its jurisdiction by way of such an agreement.
>
> (2) Sub Section (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission.

Following the above provisions, the Competition Commission of South Africa, entered into agreements with regulators in the broadcasting and electricity sectors in 2004, and under these agreements the Competition Authority is the lead investigator in

concurrent jurisdiction matters.[78] As of 2017, the Competition Commission has a number of memoranda of understanding/agreements with sector regulators such as the Construction Industry Development Board, the National Liquor Authority, the National Gambling Board, and the Ports Regulator of South Africa.[79]

9. CONCLUSION

The need to discuss the issue of concurrent jurisdiction between FCC and the regulatory authorities stems from the role these authorities play in the market economy. It has been discussed in this work that competition policy and law is a relatively new subject in Tanzania, and many other developing countries where the market economy principles were by policy decision not the basis for decision making in the economy.

However, in 1986 Tanzania decided that the market economy principles would form the basis for developing the economy. In a market economy, competition policy and laws deal with protecting competition and supervising natural monopolies, the totality of which forms the whole economy of a country, one would expect the legal frame which provides for the mechanism of overseeing the whole market economy to be extremely important; and indeed, in developed market economies, competition and regulatory authorities are very powerful institutions and are administered in a very transparent and on due process basis in order to assist players to compete on a level playing field and to instil confidence in that economy for investors to do more.

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[78] Source: http://www.compcom.co.za/mou-sa-regulators/ (Lastly accessed on 14th August, 2021).
[79] *Ibid.*

Therefore, the choice of looking at how the concurrent jurisdiction in the competition policy and laws is managed in Tanzania has the object of raising the awareness of the public's realization that proper functioning of these FCA and Regulatory authorities is extremely important for providing a business environment where economic players can strive and generate wealth for themselves and the country.

The aim of this work on legal issues of concurrent jurisdiction is to raise awareness of Government and other developmental stakeholders to enable the competition and regulatory authorities to work as they do in developed functional market economies. It can positively contribute to creating a positive business environment for economic players in the economy to perform better than they are doing now. However, that depends on how the work will be received by those to whom it is addressed and the general public.

10. RECOMMENDATIONS

In the light of the above analysis, it is evident that concurrent jurisdiction in competition law enforcement is universal and the problems of dealing with it are similar as indicated by the examples of how the UK and South African Competition regimes are dealing with the issue. However, Tanzania need not copy the way other jurisdiction deal with it because of the difference in the sizes of economy, the way they are run and organised as well as availability of resources in terms funding and quality of personnel.

Tanzania had the advantage of designing competition and regulatory Acts by the same people and at the same period and therefore they were able to deal with both sets of laws concurrently. This is evidenced by the consistency in the design logic in the legal provisions. However, Tanzania has the disadvantage of the

competition regime stemming from an economic reform programme which was not home grown and therefore lacks sustainability of commitment on the part of the Government has the major part in implementation of the legal provisions. With that background and basing on the analysis presented in this work the following recommendations are worth serious consideration:

One, the Government make a quick recovery of the current vacuum by taking the very basic and substantive first step of locating a single Ministerial home for competition policy and law in the country as initially intended and provided for by the laws in order to provide policy and implementation oversight of both competition and regulatory bodies particularly on concurrent jurisdiction.

Two, FCC should enter into bilateral memorandum of understanding/agreements with each of the sector regulators in order to foster mutual cooperation and coordination that ensures consistency and effective enforcement of the competition law in Tanzania. The TCRA and FCC mechanism for dealing with the concurrent jurisdiction issues discussed in this work could be a good example, especially in this case when a vacuum of the envisaged oversight Ministry.

Three, at a later stage when the oversight mechanism has been established, it is recommended that Tanzania learns from the UK competition law system, and establishes a Tanzania Competition Network (TCN) to act as forum for cooperation between FCC, economic regulatory authorities and Government officials responsible for competition and regulatory issues. TCN is ideal for advocacy purposes and bringing consistency and effectiveness in regulating the economic players in the economy.