

## INTERFACE BETWEEN CONSUMER PROTECTION AND COMPETITION LAW IN TANZANIA: CRITICAL AREAS OF COOPERATION AND CONFLICT

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### ***Abstract***

Consumer protection law and competition law are interrelated, closely knitted and cannot be dealt with in isolation of the other. The two branches of law are delicately intertwined and often overlap with each other and a critical assessment needs to be undertaken to fully understand and appreciate how the two laws interface with each other.

These two laws have interfaced in many aspects including sharing a common purpose and their cardinal desire to promote and protect each other. It should be borne in mind that through such interface, the two branches of law either co-operate or at times conflict with each other.

In interfacing, Competition and Consumer Protection laws have benefits that include realisation of a fully functioning market, an improved inflow of information, detection of anticompetitive practices, control of complicated products and services, and protection of consumers.

However, the above interface has demerits. These include disincentives to invest by firms holding dominant positions,

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increase of “*fly-by-night*” operators and cropping up of unethical and criminal behaviours as firms compete with each other.

To address the above demerits posed by the interface of the two branches of law, this article suggests that there should be close coordination and coherence of the two laws, use of economics based models and emphasis on consumer protection.

**Keywords:** *Consumer Protection Law, Competition Law, Cooperation, Conflicts, Tanzania.*

## 1. INTRODUCTION

To fully understand consumer protection, one needs to carefully analyse how consumer protection laws interplay with competition law. This is principally due to the fact that some of the rights consumers enjoy are specifically obtained as a result of a sound legal and institutional framework for competition. This article argues that indeed a relationship between competition law and consumer protection laws exists and shows how competition law shapes consumer protection law. The article also shows the merits and demerits of the interaction between consumer protection and competition laws. Further, the article identifies ways of avoiding the tension caused by the said interface and also suggests possible models that Tanzania can adopt to address conflicts in the two laws.

### 1.1 Interface

Consumer protection and competition laws are closely connected and therefore must be dealt with together.<sup>1</sup> These two branches of the law share

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<sup>1</sup> Waller, S.W., “In Search of Economic Justice: Considering Competition and Consumer Protection Law”, 36(2), *Loyola University Chicago Law Journal*, 2005, pp. 631-639; at p. 631. Waller argues that consumer protection and competition law are two

a common purpose and should not work at cross purposes as they often overlap.<sup>2</sup> In expounding on the purpose of these laws, Papeil states that the common purpose shared between consumer protection laws and competition law is that both are driven towards consumer welfare and consumer sovereignty or the effectiveness of having a variety of consumer choices.<sup>3</sup> Dhall clarifies that these laws are sometimes similar or different but in a nutshell, they are mutually enforceable.<sup>4</sup> This is evidenced where competition law helps in reduction of direct consumer policy intervention; likewise consumer policy may also strengthen competition in the market.<sup>5</sup> Consumer policy protects and strengthens consumer position and offers him confidence to participate in a market hence facilitating competition of firms in the market.<sup>6</sup> Further, consumer policy and competition laws can be used in advancing the goals pursued by each other.<sup>7</sup> While competition policy helps in keeping markets effectively competitive and reduces the work that needs to be done by consumer policy, in turn, consumers help to make markets more effectively competitive.<sup>8</sup> This competition that advocates for enhanced consumer choices forces firms to compete on their merits hence

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sides of the same coin of consumer sovereignty and thereby resulting in economic justice. See also Vickers, J., 'Economics for Consumer Policy', British Academy Keynes Lecture, delivered on 29<sup>th</sup> October 2003, at p. 1

<sup>2</sup> *Id.*, pp. 637-638. See also OECD, "Consumer Protection Toolkit", OECD, 2010, p.32.

<sup>3</sup> Papeil, A.S., "Conflict of Overriding Mandatory Rules of Arbitration," in Ferrari, F., and Kroll, S. (Eds.), *Conflicts of Laws in International Arbitration*, Munich, Sellier. European Law Publishers, 2011, 341, at p.374. See also OECD, "Consumer Protection Toolkit", Footnote Number 2, at p.32.

<sup>4</sup> Dhall, V., "Competition Law and Consumer Protection- Insights into their Relationship", in Qaqaya, H., and Lipimile, G. (Eds), *The Effects of Anticompetitive Business Practices on Developing Countries and their Development Prospects*, New York, UNCTAD, 2008, 3, at p.28

<sup>5</sup> *Id.*, at pp. 29-30.

<sup>6</sup> *Ibid.*, at p.30.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Ibid.*

supporting the ends of competition policy.<sup>9</sup>

Another area of interface is the protection aspect. Muris argues that a robust competition framework is one of the best means of protecting the interests of consumers.<sup>10</sup> Muris clearly states that once there is rivalry between existing producers, and a possibility of entry into the market by new suppliers, this prevailing scenario increases the desire to satisfy consumer wants.<sup>11</sup> The affected producers always compete to outperform each other in identifying and satisfying consumer needs.<sup>12</sup> Muris continues to assert that market systems play a crucial role in designing a consumer protection policy that may affect the regulation of advertising and marketing practices which affect consumers.<sup>13</sup> In the absence of a constant reminder of the merits of competition law, programs protecting consumers may enforce controls which in effect are limiting the same competition that is aimed at increasing consumer choices.<sup>14</sup> Muris sums it up by emphasising that competition principles should always ensure that consumer protection is in unison with consumer sovereignty.<sup>15</sup> In a nutshell, competition law is aimed at promoting consumer interests in terms of offering beneficial choices between competing brands price-wise.<sup>16</sup> Competition law ensures scrutiny of

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<sup>9</sup> *Ibid.* See Also Karky, H.H.A., “Competition Policy and Consumer Protection in Jordan”, 29(2), *Penn State International Law Review*, 2010, 335 at p. 341.

<sup>10</sup> Muris, T.J., “The Interface of Competition and Consumer Protection”, A speech delivered at the 29<sup>th</sup> Annual Conference on International Anti-trust Law and Policy at the Fordham Corporate Law Institute in New York on 31<sup>st</sup> October 2002, at p.7 available at [https://www.ftc.gov/sites/default/files/documents/public\\_statements/interface-competition-and-consumer-protection/021031fordham.pdf](https://www.ftc.gov/sites/default/files/documents/public_statements/interface-competition-and-consumer-protection/021031fordham.pdf) (accessed on 30th January 2017).

<sup>11</sup> *Ibid.*, at p.7

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> *Ibid.*

<sup>16</sup> *Toyota Tsbusho Corporation (Alliance Autos Ltd) v. Fair Competition Commission*, Tribunal Appeal No. 6 of 2013, Fair Competition Tribunal at Dar es Salaam, at

anticompetitive conducts that have an effect of increasing prices and reducing output.<sup>17</sup> Further, competition law should be capable of arousing public anger towards high pricing so that consumers are fully protected from such high and exploitative prices.<sup>18</sup> Consequently this helps in realising the cardinal role of competition law that is aimed at maximising consumer welfare.<sup>19</sup>

Supporting the interface between Competition law and consumer protection, Lande and Averitt posit that competition law is best explained in terms of protecting supply of goods and services options in the market whereas consumer protection law is explained in terms of protecting consumers' ability to choose from the available options.<sup>20</sup> Lande and Averitt state:

The antitrust laws are intended to ensure that the market place remains competitive, so that a meaningful range of options is made available to consumers, unimpaired by practices such as price fixing or anti-competitive mergers. The consumer protection laws are then intended to ensure that consumers can choose effectively from among those options, with their critical faculties unimpaired by such violations as deception or the withholding of material information.<sup>21</sup>

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pp.29-20 (Unreported). See Also Day, G., "Innovative Antitrust and the Patent System", 96(4), *Nebraska Law Review*, 2018, p. 829 at p. 830.

<sup>17</sup> Day, G., Footnote Number 16 at p. 830.

<sup>18</sup> Woodcock, R.A., "The Antitrust Duty to Charge Low Prices", 39(5), *Cardozo Law Review* 2018, p. 1741, at p.1744.

<sup>19</sup> *Id.*, p.1745. See Also Jones, A. and Sufrin, B., *EU Competition Law: Text, Cases and Material*, (6<sup>th</sup> ed.), Oxford, Oxford University Press, , 2016, at pp. 26-27.

<sup>20</sup> Averitt, N.W. and Lande, R.H., "Consumer Sovereignty; A Unified Theory of Antitrust and Consumer Protection Law", 65 *Antitrust Law Journal*, 1997, 713, at p.718. See also Karky, H.H.A., footnote Number 9, at p. 342.

<sup>21</sup> *Id.*, at pp.713-714. See also OECD, Footnote Number 2, at p.32.

Lande and Averrit assert that protection against deception and withholding of material information is required at both levels to ensure presence of a market economy that operates effectively.<sup>22</sup> Competition is not simply fundamental to consumer policy but is definitely as important as the other.<sup>23</sup> Lande and Averrit conclude that the relationship between consumer protection and competition law is a way of protecting the variety of consumer options in the marketplace.<sup>24</sup> Individuals are free to choose whatever they want to produce, consume and the price.<sup>25</sup> Freedom of choice dictates what goods to produce and if not produced, consumers may exit the market or reject one supplier in favour of another.<sup>26</sup>

In agreement with this reasoning, Cseres observes the following with respect to interface between these two laws:

Although the two legal disciplines focus on different market failures and offer different solutions and apply different techniques to correct market failures they are both aimed at keeping the market competitive and try to bring market performance close to the model of perfect competition... These are actually two different approaches to achieve the same goal: a competitive market where consumer sovereignty is safeguarded and welfare is maximised. Competition law and consumer protection are thus mutually reinforcing disciplines.<sup>27</sup>

In Tanzania, consumer protection is largely provided for under the competition law and authorities made thereunder.<sup>28</sup> Tanzania does not have

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<sup>22</sup> *Ibid.*, p. 714.

<sup>23</sup> Vickers, J., “Economics for Consumer Policy”, British Academy Keynes Lecture, delivered on 29<sup>th</sup> October 2003, at p. 17.

<sup>24</sup> Averitt, N.W. and Lande, R.H., Footnote Number 20, at p.720.

<sup>25</sup> Brisimi, V., *The Interface Between Competition and The Internal Market: Market Separation Under Article 102 TFEU*, Oxford, Hart Publishing, 2014, at pp. 14-15.

<sup>26</sup> *Ibid.*

<sup>27</sup> Cseres, K.J., “Competition Law and Consumer Protection”, in Qaqaya, H., and Lipimile, G. (Eds), *The Effects of Anticompetitive Business Practices on Developing Countries and their Development Prospects*, New York, UNCTAD, 2008, 3, at p. 28.

<sup>28</sup> The Fair Competition Act, No. 8 of 2003 which oversees competition in

a comprehensive piece of legislation that caters for consumer protection and the competition laws are seen as the mother law for consumer protection. However, some other jurisdictions have the same kind of reasoning of putting consumer protection under competition law.<sup>29</sup>

To understand the relationship between these two branches of law, one ought to understand that these laws interact and cooperate on the one hand and the same laws sometimes conflict with one another on the other hand. This work now proceeds to analyse the areas of cooperation and conflict between these two branches of law.

## 1.2 Cooperation

An area of cooperation between these two branches of law is enhancement of consumer wellbeing.<sup>30</sup> These two laws reinforce themselves in their drive to achieve their intended goals.<sup>31</sup> The intended goal of competition law, among others, is protection of consumers. In this sense, consumer laws are aimed at strengthening competition in the market. These goals are partly achieved by competition law emphasising and reaping benefits of high quality

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Tanzania, explicitly states that the Act is aimed at promoting and protecting effective competition, protecting consumers from unfair and misleading market conducts.

<sup>29</sup> These jurisdictions include Australia, India, Indonesia, Japan, Serbia and Zambia. See also UNCTAD Secretariat Note on The Benefit of Competition Policy for Consumers, UNCTAD Document No. TD/B/C.I/CLP/27 dated 29 April 2014 at p.8, available at [http://unctad.org/meetings/en/SessionalDocuments/ciclpd27\\_en.pdf](http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf) (accessed on 7th April 2016). See Also Waller, S.W., Footnote Number 1, at p. 633.

<sup>30</sup> UNCTAD, “Secretariat Note on The Benefit of Competition Policy for Consumers”, Footnote Number 29, at p. 8. See also Cseres, K.J., Schinkel, M.P., (et al), “Law and Economics of Criminal antitrust Enforcement; an Introduction”, in Cseres, K.J., Schinkel, M.P., (et al), (Eds.), *Criminalisation of Competition Law Enforcement; Economic and Legal Implications for the EU Member States*, Chaltenham, Edward Elgar Publishing Inc., 2006, 1, at p.1. See also Roger, B.J and Macculloch A., *Competition Law and Policy in the EC and UK*, (4<sup>th</sup> Edn.), New York, Routledge-Cavendish, 2009, at p.15.

<sup>31</sup> *Id.*, at p. 9.

goods at low and affordable prices that in turn benefit consumers.<sup>32</sup> Further, competition law ensures that companies enhance their efficiency and innovation thereby resulting in a wide range of choices, quality and low prices of products and services.<sup>33</sup> However, the road that the two branches take to achieve these goals may differ in some instances.

Firstly, competition law is primarily concerned with conduct amongst business entities.<sup>34</sup> In this perspective, competition law deals with preventing behavioural changes that may have a negative impact on competition in the market.<sup>35</sup> Consumer protection law deals with business entities and their relationship with consumers.<sup>36</sup> Consumer protection laws aim at addressing the unequal relationship that exists between business entities and consumers with a view of ensuring that consumers exercise their choices with an informed perspective.<sup>37</sup> Hence competition law addresses the supply side of the market while consumer laws address the demand side of the market.<sup>38</sup>

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<sup>32</sup> Cseres, K.J., Schinkel, M.P., (*et al*), “Law and Economics of Criminal antitrust Enforcement; an Introduction”, Footnote Number 30, at p.1.

<sup>33</sup> Fikentscher, W., Hacker, P., (*et al*), “Fair Economy: Crises, Culture, Competition and the Role of Law”, 19, in Drexl, J., Hilty, R.M., (*et al*), *MPI Studies on Intellectual Property and Competition Law*, Berlin, Springer, 2013, at p. 58.

<sup>34</sup> Dhall, V., Footnote Number 4, at p. 28. This dealing is described as a horizontal plane where the transaction occurs amongst entities that have the same economic, financial and bargaining powers.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*. This dealing is described as a vertical plane where the transaction occurs between entities that are totally unequal in terms of finance, economics and bargaining powers.

<sup>37</sup> *Ibid*. See Also Background Note for Global Forum on Competition, “The Interaction and Coordination of Competition Policy and Consumer Policy; Challenges and Possibilities”, OECD Document No. DAF/COMP/GF (2008), at p. 4, available at <http://www.oecd.org/daf/competition/prosecutionandlawenforcement/39890230.pdf> (accessed 9 April 2016). The document emphasises that competition protects and makes available a range of choices from where consumers can choose whereas consumer policy protects and enhances the quality of the available choices so as to access value for money.

<sup>38</sup> UNCTAD, “Secretariat Note on The Benefit of Competition Policy for Consumers”, Footnote Number 29, at p. 9.

Secondly, competition interacts with consumer protection in the area of remedies and solutions to consumers' problems. Business entities operating under a competitive environment risk losing their valuable customers to rivals especially where customers perceive that they are being cheated and not getting value for money.<sup>39</sup> Consequently, business entities end up attracting and retaining customers while offering practical solutions to problems that benefit consumers.<sup>40</sup>

### 1.3 Conflicts

While competition law is in line with consumer protection, there are some aspects where the two branches of law conflict with one another.<sup>41</sup> These conflicts deserve a thorough discussion as they are crucial in deciding whether to have both aspects covered under one law or to have competition and consumer policy as different laws and housed under different roofs.

One of the major areas of conflict is where competition law favours the aspect of total welfare as opposed to consumer welfare or where competition advocates for productive efficiency *vis-à-vis* allocative efficiency which leads to less satisfaction to consumer interests.<sup>42</sup> In agreement with this area of conflict Cseres opines:

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<sup>39</sup> Background Note for Global Forum on Competition, "The Interaction and Coordination of Competition Policy and Consumer Policy; Challenges and Possibilities", Footnote Number 37, at p. 4. See also Dhall, V., "Competition Law and Consumer Protection- Insights into their Relationship", Footnote Number 4, at p. 28.

<sup>40</sup> Dhall, V., "Competition Law and Consumer Protection- Insights into their Relationship", Footnote Number 4, at p. 28.

<sup>41</sup> Background Note for Global Forum on Competition, Footnote Number 37, at p. 6. See Also Dhall, V., "Competition Law and Consumer Protection- Insights into their Relationship", Footnote Number 4 at p. 31.

<sup>42</sup> Dhall, V., "Competition Law and Consumer Protection- Insights into their Relationship", Footnote Number 4, at p. 31. See Also Jones, A. and Sufirin, B., *EU Competition Law: Text, Cases and Material*, Footnote Number 19, at p. 11.

The economic arguments of competition may lead to outcomes which are not always acceptable to consumers, like high switching costs. More competition might result in the restriction of outlets and, therefore, more difficult access for consumers. Lower prices might be realised at the expense of quality or creating information problems.<sup>43</sup>

Cseres cites an example of telecommunications markets where deregulation and liberalisation have increased competition and lowered prices for consumers, but in turn have also led to additional costs.<sup>44</sup> The additional costs have led to difficulty in coping with the complex calculations involved in making product choice.<sup>45</sup>

#### 1.4 Merits of the Interface

When competition law and consumer protection laws interface, there are many advantages that are realised from this interface. This is because competition law is primarily intended at analysing the effects of competition on consumer welfare in general.<sup>46</sup> There are merits of this interface.

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<sup>43</sup> Cseres, K.J., “Competition Law and Consumer Protection”, Footnote Number 27, at pp. 31-32.

<sup>44</sup> *Id.*, at p. 32. In Tanzania, after liberalisation and deregulation of the telecommunication sector, many telecommunication operators were allowed to operate and these offered lower prices to consumers. Vodacom, Tigo, Airtel, Smart, Zantel, Halotel and Smile are currently offering telecommunication services as opposed to the then existing TTCL that had monopoly over telecommunication services. This competition led to reduced prices for making phone calls and access to data services.

<sup>45</sup> *Ibid.* As Cseres argues, there is a complex situation as companies struggle to put in place new products like bundles to customers. An example is the bundle called “Combo bundles” that include talk time, Short Message Service (SMS) and data services. They are complex to understand how they are being charged, especially from the consumer’s perspective.

<sup>46</sup> Lim, Y., and Min, G., “Competition and Corporate Governance: Teaming Up to

#### 1.4.1 Fully Functioning Markets

When consumer protection and competition law interface, a key object of delivering a well-functioning market is achieved. This is achieved by having a strong supply side that caters for the competition side and a strong demand side that caters for consumers.<sup>47</sup> A fully functioning market leads to perfect competition that has a trickle down effect benefit to the consumers like good quality and low priced products that benefit consumers.<sup>48</sup> Likewise, an effective consumer protection law and policy ensures presence of a fully functioning market. This also prevents consumers from making injudicious decisions as consumer protection laws act as their guide.<sup>49</sup>

A case in point is advanced by Cooper, when analysing the *Microsoft case*.<sup>50</sup> Cooper argues that firms (Microsoft in this case) illegally lessened and or eliminated competition with the cardinal aim of defending and expanding their monopolistic tendencies while imposing a huge price on the general public that is the consumer.<sup>51</sup> Cooper agrees that once the known means of antitrust laws are applied, it leads to promotion of innovation, allows reasonable opportunity of entry into the market of competitors that would otherwise have been eliminated by the anticompetitive behaviours of the dominant companies.<sup>52</sup> Entry of competitors in a market impacts on the price and quality of the products and services in the market.<sup>53</sup>

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Police Tunneling”, *36 Nw. J. Int’l L. & Bus.* 267 (2016), p. 267 at pp. 279-280.

<sup>47</sup> Preparation Paper Note for Global Forum on Competition; “The Interface between Competition and Consumer Policies”, Session V, OECD Document No. DAF/COMP/GF (2008)5 dated 28 September 2007, at p. 2, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF\(2008\)5&docLang=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/GF(2008)5&docLang=En) (accessed 7 April 2016).

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 199).

<sup>51</sup> Cooper M., “Antitrust as Consumer Protection in the New Economy: Lessons from the Microsoft Case”, 52(4), *Hastings Law Journal*, 2001, p. 813 at p. 819.

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

### 1.4.2 Improved Inflow of Information

In a sound legal and regulatory framework for competition, there exists unhampered flow of information from suppliers or service providers to consumers.<sup>54</sup> The information envisaged is required in guiding consumers in making reasoned and informed choices on the type of good or service they wish to procure. The information is also needed in comparing prices in advertisements on different platforms like websites where such information is posted. A case in point relates to consumer reviews posted on commercial websites like amazon, Alibaba and eBay that help consumers in getting informed on the quality and functionality of a product.<sup>55</sup> This information is always obtained through online product reviews, online advertising and the popular “add-to-cart” pages on commercial sites.<sup>56</sup>

Competition improves information flows to consumers by using new technology, for example through comparative advertising,<sup>57</sup> price comparison websites, reader comments on commercial websites and seller ratings.<sup>58</sup> However, consumers should be cautioned that sometimes the information and other communication material posted on commercial websites may be inaccurate, exaggerated or misleading and aimed at

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<sup>54</sup> Preparation Paper Note for Global Forum on Competition; “The Interface between Competition and Consumer Policies”, Footnote Number 47, at pp. 2-3.

<sup>55</sup> Woodcock, R.A., “The Obsolescence of Advertising in the Information Age”, 127(8), *The Yale Law Journal*, 2018, p. 2270, at p. 2274. In respect to telecommunication, the customer reviews on [www.gsmarena.com](http://www.gsmarena.com) where all the latest telecommunication gadgets are posted and customers have a platform to comment on their functions, durability and any defect in case. These reviews constitute a helpful manual for consumers.

<sup>56</sup> *Ibid.*

<sup>57</sup> Comparative advertising compares alternative brands on price or other measurable attributes, and identifies the alternative brand by name, illustration or other distinctive information. See John E. Villafranco, Kelley Drye & Warren LLP, “Comparative Advertising Law in the US”, available at <https://www.kelleydrye.com › getattachment › attachment> accessed on 29th June 2021

<sup>58</sup> Currently Tanzania has many commercial sites which sell goods like *Kikuu*, *Kupatana*, *Kaymu*, *Jumia* and all these disseminate information to consumers involved in online transactions.

exploiting consumers. Consumers are always warned to exercise due care while reading such information.

#### 1.4.3 Increased Benefits to Consumers

Whenever competition and consumer protection laws interact, the ultimate beneficiary is the consumer as competition law is aimed at protecting the welfare of consumers.<sup>59</sup> This merit is witnessed by competition law emphasising high quality goods at low and affordable prices.<sup>60</sup> With a good competition law regime, consumers ought to benefit all the time. This benefit is realised through restricting prices, comparative claims in advertisements and in regulation of professionals.<sup>61</sup> In agreement, Waller cites the case between *California Dental Ass'n v. FTC*<sup>62</sup> where the Federal Trade Commission (FTC) challenged a private dental society's restriction on several soft non-verifiable advertising claims like pain-free dentistry and low prices.<sup>63</sup> FTC had based its challenge on competition related issues but was unsuccessful in the claim.<sup>64</sup>

In as much as one can view this case as fit to be tried under competition law issues, it could as well be tried under consumer protection as it involved prices and advertisements.<sup>65</sup>

#### 1.4.4 Detection of Anticompetitive Practices

Under competition law enforcement, the regulator is always able to detect

<sup>59</sup> UNCTAD, "Secretariat on The Benefit of Competition Policy for Consumers", Footnote Number 29, at pp. 1-2. See also Cseres, K.J., Schinkel, M.P., (*et. al.*)" Competition Law and Consumer Protection, at p.1. See also Roger, B.J and Macculloch A., *Competition Law and Policy in the EC and UK*, Footnote Number 30, p. 15.

<sup>60</sup> Cseres, K.J., Schinkel, M.P., *et. al.*" Competition Law and Consumer Protection, Footnote Number 30, p. 1.

<sup>61</sup> Waller, S.W., "In Search of Economic Justice: Considering Competition and Consumer Protection Law", Footnote Number 1 at p. 637.

<sup>62</sup> *Cal. Dental Ass'n v. F.T.C.*, 526 U.S. 756, 780-81 (1999).

<sup>63</sup> Waller, S.W., "In Search of Economic Justice: Considering Competition and Consumer Protection Law, Footnote Number 1, at p. 637.

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.*

anti-competitive practices that are injurious to consumers.<sup>66</sup> These anticompetitive practices include cartels, abuse of dominant position, bid-rigging, uncontrolled mergers and acquisitions. Through cartels, for instance, business entities are able to either fix prices, limit output or allocate markets among themselves to the detriment of consumers.<sup>67</sup> Upon detection of such malpractices, regulatory bodies may reprimand, fine or order the implicated entities to refrain from such conducts which are detrimental to consumer interests. A vivid example is the ongoing inquiry into the insurance sector in Tanzania. The Fair Competition Commission (FCC) established a *prima facie* cartel case against insurance service providers that colluded and fixed premiums in respect of different insurance packages like motor vehicle insurance.<sup>68</sup> FCC served parties with Statements of the Case in line with Rule 12(3) of the FCC Procedure Rules of 2013 in order to commence full investigations, a process that has stalled to-date.<sup>69</sup> Had this investigation proceeded, it would have highlighted the plight of consumers of insurance services and could possibly lead to a reduction of the current premium rates in Tanzania. The said companies have a dominant position in the insurance sector which has resulted in abuse of this dominant position by exploiting consumers through excessive pricing.

#### 1.4.5 Control of Complicated Products and Services

In some markets, there exist products and services that are very complex for consumers to understand. In such a situation consumers require deliberate

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<sup>66</sup> Cseres, K.J., Schinkel, M.P., *et. al.*, “Competition Law and Consumer Protection”, Footnote Number 30 at p. 3.

<sup>67</sup> *Ibid.*

<sup>68</sup> FCC Annual Report and Audited Accounts for the Year ended on 30<sup>th</sup> June 2016 at p. 23 available at [https://www.competition.or.tz/PUBLISHE\\_DOCUMENTS/ANNUAL%20REPORTS/fcc%20annual%20report%202016.pdf](https://www.competition.or.tz/PUBLISHE_DOCUMENTS/ANNUAL%20REPORTS/fcc%20annual%20report%202016.pdf) accessed on 29<sup>th</sup> June 2021.

<sup>69</sup> *Ibid.*, at pp. 23-24. The process has stalled following the intervention of the office of the Attorney General (AG) in response to the request for legal advice by the Tanzania Insurance Regulatory Authority on the mandate of FCC’s investigation.

measures to ensure that their consumer rights are protected.<sup>70</sup> An example is in the telecommunication sector where consumers are provided with mortgages, loans and other financial products and services with scarce information about the said products and services rendering it difficult for consumers to understand and choose.<sup>71</sup> The biggest challenge facing consumers is that information about such products is only available after the consumer has purchased or subscribed to access the products or services.<sup>72</sup> Where there is a good competition law, an entity that does not supply quality and trustworthy products and services is eliminated as consumers avoid its products and services in preference to trustworthy products and services.<sup>73</sup> Even in the presence of all merits of the interface of the two laws, there are challenges and demerits as shown below.

### 1.5 Demerits of the Interface

When the two laws interface numerous challenges may result. Where a market is exposed to a new competitive environment that did not exist, a concern for consumer protection arises in that consumers are subjected to contracts that are difficult to terminate or in case of termination, hefty termination penalties are applied.<sup>74</sup>

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<sup>70</sup> Preparation Paper Note for Global Forum on Competition; “The Interface between Competition and Consumer Policies”, Footnote 47, at pp. 2-3.

<sup>71</sup> *Ibid.*

<sup>72</sup> See an example of a telecommunication product called “combo package”. Under this package, one has access to voice, data and SMS products but will only know the exact volume of the product after purchasing and using it. This is extremely dangerous as the consumer does not know how the volume is calculated or even the rate of usage of this product. See also Preparation Paper Note for Global Forum on Competition; “The Interface between Competition and Consumer Policies”, Footnote Number 47, at p. 2.

<sup>73</sup> Under a good competition regime, the products that will not meet the standards will not be purchased by consumers as they will shun the inaccurate products especially in the “combo packages”. Further, the competition authorities can reign in hard on business entities that defraud consumers.

<sup>74</sup> Background Note for Global Forum on Competition, “The Interface between Competition and Consumer Policies”, Footnote Number 47, at p. 6. This is

Firms holding a dominant position in the market often lose the ability to invest highly as they seek to exploit the existing customers since competing with new entrants normally erodes their profit.<sup>75</sup> Also, entities holding dominant position operating as monopolies have little or no experience in customer service and marketing. Lack of customer services forces such entities to use deceitful means to attract and retain customers hence a worry in consumer protection.<sup>76</sup>

Additionally, competition interfacing with consumer protection may lead to “*fly by night*”<sup>77</sup> operators whose main objective is exploiting consumers thereby causing distrust among consumers.<sup>78</sup> Business entities deliberately offer products that are difficult to understand and compare,<sup>79</sup> an aspect common in the telecommunication sector.<sup>80</sup>

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further witnessed in the telecommunication sector where telecommunication companies apply standard form contracts for post-paid subscribers who are often penalised upon early termination of the services. These penalties include forfeiture of security deposit when the subscriber obtained the services, forfeiture of the airtime value held on the subscriber’s account or being sued for breach of contracts.

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> “*Fly-by-night*” companies or business means business entities that cannot be trusted because they are likely to get into debts and close down the business to avoid paying the debts or satisfying the existing contractual obligations.

<sup>78</sup> Background Note for Global Forum on Competition, “The Interface between Competition and Consumer Policies”, Footnote Number 37, at p. 6.

<sup>79</sup> *Id.*, at p. 8. The Paper coined the phrase “*confusopoly*” meaning deliberate attempts by firms to offer consumers choices that are confusing, for example by offering prices that are difficult to compare especially in the telecommunication sector. See also Dhall, V., “Competition Law and Consumer Protection- Insights into their Relationship”, Footnote Number 4, at p. 29. See also Ioannidu, M., *Consumer Involvement in Private EU Competition Law Enforcement*, (1<sup>st</sup> Edn.), Oxford, Oxford University Press, 2015, at p. 12.

<sup>80</sup> Dhall, V., “Competition Law and Consumer Protection- Insights into their Relationship”, Footnote Number 4, at p. 29. The telecommunication Operators always tailor products that are sometimes difficult for the consumers to comprehend such as “combo bundles” which have voice, data and SMS services.

Liberalisation of highly controlled markets and technological advancements have shaken up the current market set up in Tanzania that was originally characterised by public utilities.<sup>81</sup> These public utilities operated more or less like monopolies acting in every manner possible to prevent competition lest they faced extinction. An example is the public telecommunication operator in Tanzania.<sup>82</sup> With liberalisation of the telecommunication sector, Mobile Network Operators (MNOs) have been permitted to offer mobile financial services, an aspect that has created a new risk towards consumers that was not previously anticipated.<sup>83</sup> The created challenges include low quality of services offered, poor management of customer complaints, disconnection for failure to pay for services, and complex pricing schemes that restrict consumer choices.<sup>84</sup>

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The challenge is how to manage or track the usage because one needs to use the services till exhaustion so as to know the exact volume. Further, it is very difficult for an ordinary consumer to keep track of how much he or she has used because these packages have a life span of up to thirty days, seven days, daily or even hourly.

<sup>81</sup> Dhall, V., “Competition Law and Consumer Protection- Insights into their Relationship”, Footnote Number 4, at p. 31. See Also Background Note for Global Forum on Competition, “The Interface between Competition and Consumer Policies”, Footnote Number 37, at p. 12.

<sup>82</sup> Tanzania Posts & Telecommunications Corporation which later became Tanzania Telecommunications Company Limited (TTCL) enjoyed monopoly over telecommunication services in Tanzania before the liberalisation of the communication market in 1994. However, upon liberalisation, a challenge was how TTCL adapted to the new era of competition. TTCL did everything possible to kill off competition from other emerging telecommunication operators by restricting or overpricing access to its network through high interconnection rates, high gateway fees and prohibitive fees for co-location on its network infrastructure like telecommunication towers.

<sup>83</sup> From 2008 to-date, Bank of Tanzania and Tanzania Communications Regulatory Authority (TCRA) have approved M-Pesa, Tigo Pesa, Eazy Money, Halo Pesa and Airtel Money to operate. These offer services that include utility payments like pre-paid electricity (*Lipia Umeme Kadiri Utumiajyo* (LUKU)), Pay Television subscriptions, online cash transactions and other services.

<sup>84</sup> Dhall, V., “Competition Law and Consumer Protection- Insights into their Relationship”, Footnote Number 4 at p. 31. See Also Background Note for

Finally, when consumer protection interfaces with competition law, fierce competition between entities arises.<sup>85</sup> In order to survive this fierce competition, entities may resort to unethical or criminal behaviour in order to gain advantage over the other.<sup>86</sup> It can be argued that such unethical behaviour by business entities may be the root cause for consumer exploitation.<sup>87</sup>

## 1.6 Conclusion and Recommendations

From the above, this paper has critically analysed the relationship between Competition laws and consumer protection laws and identified areas where such laws interface with each other leading to either co-operation or conflict. To avoid any conflicts that may arise from this interaction between the two branches of law, a number of working solutions have been suggested.

### 1.6.1 Close Coordination between the Two Laws

The first working solution to avoid conflict is to have a close coordination between the relevant policies in consumer and competition laws.<sup>88</sup> This close coordination ensures coherence in addressing market problems while selecting the most appropriate tools to deal with any shortcoming.<sup>89</sup> All policies should be geared towards consumer interests in both advocacy and enforcement of consumer protection and competition laws.<sup>90</sup> This close coordination may be based on enforcement of different sectoral laws that emphasise consumer protection and competition laws. Further, there can be

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Global Forum on Competition, "The Interface between Competition and Consumer Policies", Footnote Number 37 at p.12. See also Ioannidu, M., "Consumer Involvement in Private EU Competition Law Enforcement," Footnote Number 79, at p.12.

<sup>85</sup> UNCTAD, "Secretariat Note on The Benefit of Competition Policy for Consumers", Footnote Number 29, at p. 11.

<sup>86</sup> *Ibid.*

<sup>87</sup> The unethical behaviour may include deceitful business conducts, inaccurate billing and misleading advertisements.

<sup>88</sup> UNCTAD, "Secretariat Note on The Benefit of Competition Policy for Consumers", Footnote Number 29, at p.12.

<sup>89</sup> *Ibid.*

<sup>90</sup> *Ibid.*

execution of a Memorandum of Understanding between consumer protection and competition law regulatory bodies to address areas that are not covered within the available pieces of legislation.<sup>91</sup>

### 1.6.2 Use of Economics Based Model

Competition law is a branch of law which carries economic principles, guidelines and tools. This means that competition law greatly works under various economic principles which makes an economic based model most appropriate.<sup>92</sup> Thus, understanding economic principles in competition law helps in addressing issues associated with market failure that impact on consumer protection laws. Within the economic principles ought to be devised cost effective solutions in addressing consumer related issues which reduce unwarranted intervention by consumer laws.<sup>93</sup> On this aspect, Lopatka and Page argue that markets should be allowed to operate freely.<sup>94</sup> Any intended government intervention in any market should be as a result of a serious concern for maximising the welfare of consumers.<sup>95</sup> Hence, economics should determine the best model of avoiding any future or unforeseeable conflict of the two branches of law.

### 1.6.3 Implementation of the Laws

Enforcement of competition and consumer protection laws is done by regulatory authorities. The question is whether these authorities are supposed to be located under one institution or should be separated so as to be effective in their implementation and enforcement role.<sup>96</sup> This has not been

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<sup>91</sup> This is evidenced in Tanzania where a close coordination exists between TCRA and FCC in all matters relating to consumer protection and competition law in the telecommunication sector.

<sup>92</sup> Dhall, V., "Competition Law and Consumer Protection- Insights into their Relationship", Footnote Number 4 at p. 33.

<sup>93</sup> *Ibid.*

<sup>94</sup> Lopatka, J.E., and Page, W.H., "Internet Regulation and Consumer Welfare: Innovation, Speculation and Cable Bundling", 52(4), *Hastings Law Journal*, 2001, p. 891, at p. 895.

<sup>95</sup> *Ibid.*

<sup>96</sup> Dhall, V., "Competition Law and Consumer Protection- Insights into their Relationship", Footnote Number 4, at p. 34.

the case in some jurisdictions that have preferred what may be termed as a *“hybrid model”*.<sup>97</sup>

Tanzania has followed this *“hybrid model”* where the Fair Competition Commission (FCC) created under the Fair Competition Act, Act Number 8 of 2003, (FCA) handles all competition and consumer protection issues.<sup>98</sup> At the same time, FCC maintains a close coordination with sectoral bodies that have separate legal frameworks that governs consumer related matters.<sup>99</sup>

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<sup>97</sup> A *‘hybrid model’* is the model that provides for a two pronged approach in addressing consumer affairs. This approach sees competition law and consumer protection being housed under one authority to maximise utilisation of resources.

<sup>98</sup> Sections 92 and 93 of FCA create a National Consumer Advocacy Council (NCAC) that is entitled to handle all consumer related matters arising out of the Fair Competition Act.

<sup>99</sup> These sectors are Telecommunication sector where competition and consumer protection matters are addressed under Part IV (Sections 60-69) of the Electronic and Postal Communications Act (EPOCA), Act No. 3 of 2010 and Electronic and Postal Communications (Competition) Regulations of 2018 that address competition laws and Electronic and Postal Communications (Consumer Protection) Regulations of 2018 that address consumer related issues. Further, under the section 27 of TCRA Act, Act No. 12 of 2003, there is formation of the TCRA - Consumer Consultative Council (TCRA-CCC) that addresses all matters relating to consumers in the telecommunication sector. Concerning the Energy Sector, Energy and Water Utilities Regulatory Authority (EWURA) Act, Cap. 414, Sections 6, 20, 29 deal with competition related matters and under Part V, Section 30 there is a creation of the EWURA Consumer Consultative Council (EWURA-CCC) that addresses all consumer related matters. Part VI deals with consumer complaints. With regards to the transportation sector, The Surface and Marine Transport Regulatory Authority (SUMATRA) Act No. 9 of 2001, sections 19, 28, 34 and 36 deal with competition related matters while under Part V, section 29, there is creation of the SUMATRA -Consumer Consultative Council (SUMATRA- CCC). SUMATRA-CCC has now been replaced by The Land Transport Regulatory Authority (LATRA) -CCC created under section 29 of the LATRA Act, Act Number 3 of 2019 that deals with consumer related matters. For the aviation sector, the Civil Aviation Act, Cap. 80, Sections 40, 49, 55 deal with competition related matters while under Part XII, Section 50, there is a creation of the Tanzania Civil Aviation Authority Consumer Consultative Council (TCAA- CCC) that deals with all matters relating to the aviation sector in Tanzania.

However, the aspect of separate legal mandate has caused confusion as each sector claims supremacy in competition and consumer related matters instead of being complementary to each other. The Fair Competition Act recognises these sectoral conflicts but provides a mechanism to address the disagreements. Any differences that stem from these sectoral bodies in respect of competition or consumer related matters, are handled as an appeal by the Fair Competition Tribunal (FCT), a creature of the FCA.<sup>100</sup> A closer coordination of all sectors on enforcement of competition laws may impact on the prices of goods or services, access to quality services thereby improving consumer choices in the sector.<sup>101</sup> The telecommunication sector provides an example where strict enforcement of competition laws contributed to the reduction of telecom service charges, good quality services as well as enlarged consumer choices.

#### 1.6.4 Consumer Empowerment

Another model of avoiding conflicts between competition and consumer protection is through consumer empowerment. Consumers are a vital component in any economy especially when such consumers are informed about the products or services they consume. Consumers are considered as either promoters or beneficiaries of competition law hence their active participation is required.<sup>102</sup> Consumers always require objective, transparent, accessible and easily manageable information with the aim of making informed decisions.<sup>103</sup> The eventual empowerment through awareness helps in promoting competition that benefits consumers. The empowerment envisaged is achieved through consumer education, facilitation of access to information as well as enhancement of consumers' ability to assess the said

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<sup>100</sup> Section 83 of the FCA created the FCT that is mandated to hear all the appeals originating from the FCC, SUMATRA Act (now LATRA Act), EPOCA, TCAA Act and EWURA Act.

<sup>101</sup> Hartzenberg, T., "Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries", (provide the volume and issue no.) 26 (3) *Northwestern Journal of International Law and Business*, 2006, p. 667, at p. 683.

<sup>102</sup> *Id.*, at p. 684.

<sup>103</sup> UNCTAD, "Secretariat Note on The Benefit of Competition Policy for Consumers", Footnote Number 29, at p.16.

information in making rational decisions.<sup>104</sup> An example in Tanzania is the FCC collaboration with TCRA. Firstly, the two institutions provide education to all consumers of telecommunication services. Secondly, consumers are also empowered through advocacy in consultation with governmental institutions through engaging FCC and TCRA to provide information to consumers that is critical for consumers in decision making.<sup>105</sup> Other relevant governmental institutions are also tasked with provision of such information to consumers.

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<sup>104</sup> *Ibid.*

<sup>105</sup> FCC and TCRA always carry out numerous initiatives to ensure that consumers of telecommunication services obtain the required information about the services they consume. TCRA for instance requires that any offer to be run by a telecommunication company must reveal all the details including pricing, geographical coverage, whether the offer has an effect on competition as well as any other useful information as per Part II of the Electronic and Postal Communication (Consumer Protection) Regulations of 2018.