

CONVERGENCE OF REGULATION AND COMPETITION IN TELECOMMUNICATION AND FINANCE : A PROPOSED REGULATORY FRAMEWORK

ABSTRACT

The convergence of regulation and competition in the telecommunications and financial services has arisen as a result of the convergence of telecoms and financial services. In Kenya, the introduction of mobile money transactions have presented regulatory challenges mainly because; it involves an overlap between multiple sector regulators and competition regulator thus adding to the complexity of oversight needed. There has been a rapid growth in technological advancement in telecommunication and ICT which has subsequently generated business opportunities, including mobile banking, which in effect is changing the traditional business models and the financial landscape. Due to its novel and dynamic nature, national regulations have not kept pace with developments in the field, whereas there has been limited legislative and regulatory experience in other jurisdictions from which to draw lessons.

It is from this premise that this paper investigates, identifies and addresses the gaps and potential overlaps between the existing telecommunications, financial and competition regulatory frameworks, to provide safeguards without hindering the industry.

This paper proposes for the development of a regulatory framework that will enable the competition regulator to effectively regulate the converged sectors in collaboration with other sector regulators in the telecommunication and financial services industry, to provide sensitive sector related information to the competition regulator and enhance effective competition regulation of the mobile financial services.

INTRODUCTION

The innovations in the telecommunications and financial sector have led to the urgent need for the development for an effective and robust legal and regulatory framework.¹

The field of mobile-payments and mobile-banking is not only new and fast evolving in the Kenya and the larger East African Community but also sits at the overlap of several regulatory and legislative domains those of banking and telecommunication². The overlap substantially raises the risk of coordination failure, where legislation or regulatory approaches are inconsistent or contradictory. In turn, this has created considerable uncertainty about the appropriate regulatory response that must be established and also what supervisory regime applies to the various activities involving banks and non-banks³.

The analysis of this sector is imperative taking into account the tremendous growth that has been witnessed in the mobile money transfer services subsector within the last five years. This sector has revolutionized both money transfer as well as payments systems, and thereby creating a greater impact on economic development and poverty reduction in Kenya.⁴

Mobile Money Transfer (MMT) is an innovation to transfer money using the Information and Communications Technology (ICT) infrastructure of the Mobile Network Operators (MNO)⁵. The MNO infrastructure becomes a channel for funds transfer between customers of one or multiple MNOs to both the cellular terminals or to business organization to pay, or procure goods or to bank account to transact through the account⁶.

Currently, there are four private mobile telecommunications companies, Safaricom, Airtel, Telkom Kenya (Orange), and Essar Telecom.⁷ In terms of market share, according to the CCK Quarterly Sector Statistics Report of October/December 2013, Safaricom records the largest

¹ John Kariuki Nyaga, 'Mobile banking services in the east African community (EAC): Challenges to the existing legislative and regulatory frameworks.' (2013) US-China Education Review A & B, USA <http://pcmlp.socleg.ox.ac.uk/an-ox/2012> accessed on 12th January 2015

² UNCTAD 'Mobile Money for Business Development in the EAC: A Comparative Study of Existing Platforms and Regulation' UNCTAD/DTL/STICT/2012/2 <http://www.unctad.org> assessed on 12 December 2014.

³ Ibid.

⁴ Muriuki Mureithi 'State of Competition in Mobile Telephony: mobile money transfer (MMT) services in Kenya" in *The State of Competition Report: mobile money transfer, agricultural bulk storage and milling, and the media sectors in Kenya* (2011) IEA Research Paper Series No. 1/2011, Institute of Economic Affairs, Nairobi. <http://www.ieakenya.or.ke> accessed 20 December 2014.

⁵ Ibid

⁶ Ibid

⁷ Communications statistics report (2008), available at http://www.ca.go.ke/resc/statistics/Communications_Statistics_Report_2008.pdf

share of 67.9 percent; Airtel Networks follows with 16.5; Essar Telecom registers 8.5 percent market share; and Telkom Kenya (Orange) records 7.2 percent market shares⁸.

In Kenya, MPESA⁹ has taken the lead in terms of innovation for providing more inclusive access to finance a large part of the population who hitherto had been without a bank account creating financial inclusion for the poor.¹⁰ The growth of the MPESA alongside other ICT innovations has created the need for a nexus between the financial services regulator and the telecommunications regulator.¹¹

This change arose from the fact that some of the services offered by Mobile Network Operators such as mobile financial services fall under the financial services sector, telecommunications and therefore the financial services regulators and policymakers have had to consider a converged approach to regulating the MNOs in their provision of these cross-sectoral services¹². Consequently, this has spiraled into the regulatory convergence of the telecommunications and financial services between sector regulators in other countries¹³.

In the same thread, regulatory oversight must not only guard against anticompetitive behaviors that may distort competition in the mobile telephone and banking services but also not lag behind technological innovations¹⁴. The convergence of these sectors has created a different regulatory domain: as many as three regulators (bank supervisor, payment regulator, telecommunication regulator, and competition regulator) may be involved in crafting policy and regulations which affect this sector.

These regulators include first; the Competition Authority of Kenya (hereinafter referred to as CAK) which has the primary jurisdiction in regard to competition and consumer welfare matters in the economy and is applicable to all persons including the Government, state corporations

⁸ ibid.

⁹ Ignacio Mas and Dan Radcliffe, 'Mobile Payments Go Viral: M-PESA in Kenya' (2011) The Capco Institute of Journal Transformation <http://ssrn.com/abstract=1593388> accessed 10th February 2015. M-PESA was developed by mobile phone operator Vodafone and launched commercially by its Kenyan affiliate Safaricom in March 2007. M-PESA ("M" for mobile and "PESA" for money in Swahili) is an electronic payment and store of value system that is accessible through mobile phones. To access the service, customers must first register at an authorized M-PESA retail outlet. They are then assigned an individual electronic money account that is linked to their phone number and accessible through a SIM card-resident application on the mobile phone

¹⁰ John Kariuki Nyaga, *supra* note 1.

¹¹ Ibid Ignacio Mass and Dan Radcliffe note 9

¹² *Supra* note 4

¹³ Rolf H. Weber 'Regulatory framework for mobile financial services ,'in *Mobile applications of inclusive growth and sustainable development*, '(2010) Telekom Regulatory Authority of India, New Delhi, India, pp. 87-93.

¹⁴ Kimenyi, M. and N. Ndung'u, 'Expanding the financial services frontier: lessons from mobile phone banking in Kenya,' (2009) Brookings Institution,

and county governments (in so far as they deal in trade)¹⁵. Second is the Communications Authority of Kenya (herein after referred to as the CA) which is the main regulatory body for telecommunication in Kenya and is also mandated to regulate competition in the telecommunications sector¹⁶ and to guard against anti-competitive behavior by licensed operators.¹⁷ Third, is the Central Bank of Kenya (hereinafter referred to as the CBK) which has jurisdiction as the banking and payment regulator¹⁸.

This paper therefore seeks to analyze the convergence of regulation and competition in the telecommunications and financial services which has upset the traditional nature employed by regulators. This paper seeks to explore what regulatory approach should competition regulator together with the financial services regulator and telecommunication regulator and policy makers should explore to effectively regulate converged services such as mobile financial services. This paper is however limited to a regulatory approach in the converged telecommunications sector and financial services with reference to competition related issues.

2. REGULATORS IN THE KENYAN MOBILE FINANCIAL SERVICES SECTOR

The role of competition law in ensuring efficiency in the mobile financial services market has become a growing concern.¹⁹ This is because competition is intended to protect the process of competition to ensure efficiency and maximize consumer welfare.²⁰

The regulatory framework of competition in the telecommunications and financial services sector falls within the domain of the the competition regulator, financial services regulator and the telecommunications regulator.

2.1 The Competition Authority of Kenya

The competition regulator, CAK is responsible for regulating competition across all economic sectors in the country, and is established under the Competition Act, No. 12 of 2012, to be mandated to *inter alia*, promote and safeguard competition in the national economy, and to protect consumers from unfair and misleading market conduct²¹. The CAK is also mandated to

¹⁵ Section 5 of the Competition Act No 12 of 2010, Laws of Kenya. This section also provides that in so far as any other written law conflicts with the Competition Act with regard to matters concerning competition, consumer welfare and the powers or functions of the Authority under this Act, then the provisions of this Act shall prevail.

¹⁶ Kenya Information and Communication Act, Rev, 2010

¹⁷ Communications Authority of Kenya website, available at http://www.ca.go.ke/news/2014/Mobile_Virtual_Network.html

¹⁸ Central Bank of Kenya Act, Laws of Kenya

¹⁹ Supra note 4

²⁰ Richard Whish and David Bailey, *Competition Law*(7th edn, Oxford University Press 2012) 3, 980

²¹ Section 7, Competition Act No. 7 of 2010

negotiate agreements with any regulatory body with which it has concurrent jurisdiction in respect of any conduct regulated under the Act in order to identify and establish procedures for management of concurrent jurisdiction²².

2.2 The Central Bank of Kenya

The financial services regulator, CBK is established by article 231 of the Constitution of Kenya, 2010 and section 3 Central Bank of Kenya Act²³ as the financial services regulator. The CBK is charged with the mandate of formulating monetary policy, promoting price stability, issuing currency, formulating and implementing policies to promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems²⁴. The CBK is similarly mandated to licence, regulate and supervise banking and microfinance businesses, regulate and supervise payment systems and payments services providers.²⁵ Further, under the National payment systems regulations, CBK prohibited exclusivity contracts between payment service providers and agents.²⁶

2.3 The Communications Authority of Kenya

Communications Authority of Kenya (hereinafter referred to as the CA) is established under the Kenya Information and Communication Act, Rev, 2010, to license and regulate information and communication services²⁷. The CA is the primary regulator for the telecommunications sector in Kenya and is mandated to promote, develop and regulate information and communication services in accordance with the provisions of the Act²⁸. The CA is also mandated under sections 84Q to 84W of the Act to ensure fair competition and equality of treatment in the information and communication sector²⁹. Pursuant to regulations 4(2)³⁰ the CA is obligated to cooperate with statutory agencies with which they have concurrent jurisdiction on competition matters³¹.

²² section 5(3) of the Competition Act

²³ Cap 491, laws of Kenya

²⁴ Section 4 Central Bank of Kenya Act, Laws of Kenya

²⁵ Section 4A, *ibid*

²⁶ regulation 15 (2) the National Payment System Regulations, 2014 Kenya Gazette Supplement No. 119

²⁷ Section 3 of the Kenya Information and Communication Act, Rev, 2010

²⁸ Section 5, *ibid*.

²⁹ *ibid*

³⁰ Kenya Information and Communication (Fair Competition and Equality of Treatment) Regulations, 2010,

³¹ *Ibid*.

2.4 Potential Overlaps

The convergence of mobile telecommunication services and financial services has created new challenges to the regulatory framework for competition. As a result, there are several overlaps between the CBK, CA and the CAK mandates to regulate, investigate, and punish anti-competitive practices in the financial services and telecommunications sector. In cases where there are sector regulation on competition law in addition to a competition law regime, the question arises as to which law should govern competition issues in the regulated industries.

Whereas the CAK like other competition authorities have an overarching mandate that usually covers all economic activities, including regulated sectors with particular characteristics, like the telecommunications sector³². The objective of competition law is to preserve and promote free market competition and consumer welfare protection in regulated industries³³. In order to achieve these objectives, competition law generally prohibits restrictive trade practices³⁴ and the abuse of dominance³⁵ such practices include; predatory pricing, price discrimination and bundling. Competition law also analyses the impact of mergers and acquisitions³⁶ in the economy, as well as unreasonable restraints on competition³⁷. The sector regulators in the telecommunications sector and financial services are also subject to sector-specific regulations to safeguard other socially desirable goals e.g. ensuring quality of service of telecommunications, creating a balance between the innovations in the telecommunications sector and financial stability³⁸.

Similarly, the CA has a wide mandate to regulate³⁹ competition in commercial services connected with telecommunications services in Kenya⁴⁰. This mandate extends to mobile financial services, because these services have been thoroughly integrated into the voice and data service provision⁴¹. The CA can also to develop standards and procedures for determining

³² International Competition Network, Antitrust Enforcement in Regulatory Sectors Working Group (2004) Report to the Fourth ICN Annual Conference <http://www.internationalcompetitionnetwork.org/annualconferences>

³³ Competition Act No. 12 of 2010, section 9

³⁴ Ibid, section 21,22.

³⁵ Ibid, section 24.

³⁶ Ibid. section 42.

³⁷ Ibid, section 50.

³⁸ Kimenyi, M. and N. Ndung'u, supra note 14.

³⁹ See 84W Kenya Information and Communications Act

⁴⁰ 23(2)(b) of the Kenya Information and Communications Act

⁴¹ Jeremmy Okonjo Odhiambo, 'Convergence between Mobile Telecommunications and Financial Services Implications for Regulation of Mobile Telecommunications in Kenya', (LLM thesis University of Nairobi 2013)

anti-competitive conduct and establishing dominance in the telecommunications sector⁴²; determine anti-competitive breaches in the telecommunications sector⁴³; and, investigate complaints and allegations of unfair competition and discrimination in the telecommunications sector. Moreover, the CA is mandated to regulate anti-competition conduct such as predatory pricing, margin squeeze, discriminatory pricing, product bundling (linked sales), exclusive dealing arrangements, cross-subsidy, control of essential intellectual property, and information sharing⁴⁴ and to analyze dominance and market segmentation⁴⁵.

The CBK is similarly mandated to regulate the banking sector and consequently has access to sector sensitive information of banks and financial institutions.⁴⁶ Moreover the CBK can formulate and implement such policies that best promote the establishment, regulation and supervision of efficient and effective payment, clearing and settlement systems payment systems in the mobile financial services sector⁴⁷ and particularly to prohibit exclusive agreements between operators and agents⁴⁸.

While the CBK⁴⁹, CA⁵⁰ and CAK's⁵¹ respective governing laws and regulations refer to cooperating with other agencies in the area of competition regulation, there is no explicit framework or mechanism to facilitate such cooperation.

3. TYPES OF REGULATION

The convergence of telecommunications and financial services in the services such as M-PESA has raised regulatory challenges in terms of determination of the legal duties vested in each party to the converged telecommunications financial service and thereby, which regulator

⁴² Information and Communications (Fair Competition and Equality of Treatment Regulations) (2010), section 3

⁴³ Ibid. section 4

⁴⁴ Section 84S of the Kenya Information and Communications Act

⁴⁵ The Kenya Information and Communications (Tariff) Regulations, (2010), section 2.

⁴⁶ The Central Bank Act of Kenya, Cap 499. Also see Banking Act, Cap. 488, Laws of Kenya

⁴⁷ See section 17, The National Payment Systems Act No.39 of 2011, Laws of Kenya

⁴⁸ The National Payment Systems Regulations 2014, see regulation 15

⁴⁹ The Central Bank Act of Kenya, section 3(4).

⁵⁰ Information and Communications (Fair Competition and Equality of Treatment Regulations) (2010), section 4(2)

⁵¹ Competition Act of Kenya No 12 of 2010, section 5 (3).

will have primary jurisdiction.⁵² Jeremmy therefore posits the regulators are faced with conceptual difficulties which include regulatory overlap, regulatory inertia, and regulatory arbitrage⁵³.

Due to the dynamic and evolving nature arising from the convergence of telecommunications and financial services, unique products – such as e-money and e-wallets have since been created and in the absence of a clear responsive framework for convergence has encouraged the market players to capitalize on regulatory loop-holes hence occasioning regulatory arbitrage⁵⁴. Similarly, the economic developments that also arise due to the converged services can also create regulatory inertia where the regulators are unaware of how to respond to the developments.⁵⁵

However, in the Kenyan context, there is more of a regulatory overlap in the telecommunications financial services sector. As aforesaid, the CBK is seen as the primary regulator with regard to the banking and payments systems, while the CA is the primary regulator for telecommunications sector and CAK having primary jurisdiction over competition issues in the economy⁵⁶.

According to the India-based Consumer Unity and Trust Society (CUTS), there are three distinct aspects of regulation in terms of regulatory roles: technical regulation, economic regulation, and access and competition regulation⁵⁷.

CUTS argues that technical regulation involves setting and enforcing product and process standards designed to deal with safety, environmental and switching cost externalities; and allocating publicly owned or controlled resources such as spectrum or rights of way⁵⁸.

⁵² Jens C. Arnbak, 'Multi-utility Regulation: Yet Another Convergence,' in Robin Mansell, Rohan Samarajiva & Amy Mahan (eds.) *Networking Knowledge for Information Societies: Institutions and Intervention*, (DUP Science, Delft 2002) p. 144.

⁵³ Supra Jeremmy Okonjo Odhiambo, note 41

⁵⁴ Ibid. citing Jérôme Bezzina and Mostafa Terrab "Impacts of New Technologies in Regulatory Regimes: An introduction (2005) Communications & Strategies. HighBeam Research. <<http://www.highbeam.com/>>

⁵⁵ Ibid. citing Alliance for Financial Inclusion. 'Enabling Mobile Money Transfer: The Central Bank of Kenya's Treatment of M-Pesa,'(2010). <http://www.gsma.com/mobilefordevelopment/wpcontent/uploads/2012/03/> accessed 26th February 2015.

⁵⁶ See Sections 3 and 4 of the Central Bank of Kenya Act, and Sections 5 and 6 of the Kenya Information and Communications Act, Cap 411. And sections 5(2) of the Competition Act No. 12 of 2010 respectively.

⁵⁷ CUTS, 'Competition and Sectoral Regulation Interface', (2003) Briefing Paper No. 5/2003

⁵⁸ CUTS–CCIER/Consumer Unity and Trust Society – Centre for Competition, Investment and Economic Regulation. 2008. "Competition authorities and sector regulators: What is the operational framework?". *Viewpoint No. 2/October 08*. Available at <http://www.cutsinternational.org/pdf/Viewpointpaper-CompAuthoritiesSecRegulators.pdf>; last accessed 8 February 2015.

While the OECD posits that economic regulation implies directly controlling or specifying production technologies (other than those linked with setting common technical product standards); granting and policing licences; terms of sale (i.e. output prices and terms of access); and standard marketing practices (e.g. advertising and opening hours)⁵⁹. Moreover, it also requires expertise if sector specific knowledge as it is an on-going rather than periodic exercise⁶⁰.

Access and competition regulation on the other hand, involves ensuring non-discriminatory access to necessary inputs, especially network infrastructures, the control of abuse of dominance, anti-competitive agreements, and anti-competitive mergers and acquisitions, using provisions of the competition law⁶¹.

CUTS propagates that technical regulation is generally regarded as an ex ante exercise and thereby a structural issue that should be handled by the sector regulator while competition enforcement is generally an ex post exercise (except in merger analysis) and therefore qualifies as a behavioural issue which should be handled by the competition authority. This rules may not apply to converged sectors such as the mobile financial services.⁶²In any event economic regulation requires the sector specific expertise as well as the competition regulator to handle matters such as specification of production technologies, granting of licenses, determining terms of sale and marketing practices.⁶³

4. CHALLENGES OF CONCURRENT AND COMPETING MANDATES

While the regulatory approach to be adopted to manage the relationships between competition authorities and sector regulators has created differing views over the preferred mechanisms for ensuring that both regulators' and competition authorities' views and mandates are taken into account. It is however widely agreed that both competition authorities and sector regulators have different core competencies and coordination is required in order to harmonize the application of competition policies and regulations⁶⁴.

⁵⁹ OECD , 'Relationship between Regulators and Competition Authorities', (1999)AFFE/CLP(99)8

⁶⁰ Ibid.

⁶¹ Supra CUTS_CCIER, note 58.

⁶² Jeremmy Okonjo Odhiambo, supra note 41.

⁶³ Supra note 58.

⁶⁴ OECD Global Forum on Competition 'The Relationship between Competition Authorities and Sectoral Regulators' (2005) Issues Paper DAF/COMP/GF(2005)2 <http://www.oecd.org> accessed 20 February 2015 The coordination among the competition agency and regulators is essential to avoid inconsistency and overlap in the enforcement of competition law and sector specific regulations.

By dint of their oversight roles, sector regulators have extensive, ongoing knowledge of the technical aspects of the products and services that are regulated and as a result are better suited to technical regulation than competition authorities. In addition, their ability to issue ex-ante rules that apply to all market players, give them an advantage to deal with recurrent conducts that are more costly to be addressed through ex-post competition law enforcement. The competition authorities on the other hand, are better suited to competition law oversight arising from the vast expertise acquired from investigating and analyzing various competition cases and concerns in diverse sectors.

Consequently, cooperation between competition and sector regulators is important to avoid duplicity of activities, encourage timely sharing of sector specific information, ensure consistency of decisions and thereby preventing forum shopping. Table 1 therefore illustrates the comparison between enforcement by sector regulators and the competition authority.

Table 1: Enforcement by Sector Regulator vs Competition Authority⁶⁵

Sector Regulator	Competition Regulator
Fast, definitive resolutions are required	Defining markets for regulatory purposes is necessary
Ex-post enforcement creates excessive uncertainty	Ex-ante regulatory enforcement risks distorting market outcomes, stifling new products and more generally creating costly errors
Scientific and technical expertise is required to assess merits of arguments	Markets will not require ongoing oversight.
The standards of proof required for competition law cases would not be met for achieving the socially desired regulatory outcomes	Products of interest are subject to strategic manipulation that cannot be foreseen through regulation
Structurally similar situations are repeated and consistent basic rules are desired	

Source: OECD

⁶⁵ Ibid.

5. DEALING WITH CONFLICTING MANDATES

Arising from the possibility of conflicting mandates, five frameworks are proposed as best practices to ensure coordination and policy coherence between sector regulators and the competition authority, which are classified as follows⁶⁶:

- a) to combine technical and economic regulation in the sector specific regulation and leave traditional competition law issue, such as the prohibition of anticompetitive conduct and merger control, to the competition law;
- b) to combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects;
- c) to combine technical and economic regulation in the sector specific regulation and include as well some or all traditional competition law aspects, while ensuring that the sector regulator performs its functions in coordination with the competition authority;
- d) to organize technical regulation as a stand-alone function for the sector regulator and include economic regulation into the general competition law;
- e) to rely solely on competition law enforced by the competition authority⁶⁷.

While there is no ideal type for the division of labour between sector regulators and competition authorities. A wide range of factors such as the social and economic context and the legal system may influence the division, alongside the characteristics of the regulated industry to determine on the choice of regulatory framework to be employed by a given country⁶⁸.

International Experience

Table 2 outlines the different approaches have been used by different countries.

Table 2: Alternative approaches in existing legislation – Interface between competition authority and sector regulators Country Integrated agency model⁶⁹

⁶⁶ UNCTAD 'Best Practices for defining respective competences and settling of cases, which involve joint action of competition authorities and regulatory bodies' (2004) TD/B/COM.2/CLP/44 accessed 20 February 2015

⁶⁷ Ibid.

⁶⁸ UNCTAD, 'Best Practices for Defining Respective Competences and Settling of Cases, which involve Joint Action of Competition Authorities and Regulatory Bodies (2004) TD/B/COM.2/CLP/44 <http://unctad.org/en/docs//> accessed 27 February 2015

⁶⁹ UNCTAD, 'Model Law on Competition – Chapter VII' (2010) TD/RBP/CONF.7/L.7 <http://unctad.org/en/docs//> accessed 18 February 2015

Country	Model	
The Netherlands	Integrated Agency Model	The Netherlands Competition Authority (NMa) is attributed general competition law enforcement as well as industry specific regulation in the areas of energy and transport. Its enforcement powers are laid down in the Competition Act, the Electricity Act 1998, the Gas Act, the Passenger Transport Act 2000, the Railway Act and the Aviation Act. According to the organizational structure of the NMa, which is referred to as a “chamber model”, industry-specific regulation and monitoring tasks lie with the Office of Energy and Transport Regulation, a particular chamber within the NMa. Other sector specific regulation is administered by separate enforcement bodies, such as the Independent Post and Telecommunications Authority, with which the NMa cooperates and coordinates.
Germany	Separate enforcement entities with expressly attributed jurisdictions	The German Act against Restraints of Competition contains specific rules for certain industries (agriculture, energy and press), which complement the general competition rules in these areas; see chapter 5 of the Act: “Special provisions for certain sectors of the economy”. Furthermore, the electricity, gas, telecommunications, postal and railway infrastructure markets are specifically regulated. The general competition rules apply to the regulated industries as long as the sector regulations do not provide for an exhaustive regulation of the specific matter, see e.g. section 2(3) TKG and section 111(3) EnWG. The jurisdiction of the Federal Cartel Office is not altered by the sector specific regulation, which provides for specific rules on the cooperation between the Federal Network Agency, the sector regulator and the Federal Cartel Office. The respective provision of the Telecommunications Act (section 2(3) TKG) reads as follows: “The provisions of the Act against Restraints of Competition remain applicable as long as this law does not expressly provide for an exhaustive regulation. The tasks and competences of the cartel authorities remain unaffected.”
United Kingdom		The Office of Fair Trading and sector regulators have concurrent jurisdiction. The Competition Act 1998 (Concurrency) Regulations 2004 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

		<p>dispute. The relevant provisions read as follows: “Determination of the exercise of prescribing functions “4. - (1) If a competent person proposes to exercise any of the prescribed functions in relation to a case and he considers that another competent person has or may have concurrent jurisdiction to exercise Part 1 functions in relation to that case, 11he shall inform that other competent person of his intention to exercise prescribed functions in relation to that case. “ (2) Where a competent person has informed another competent person of his intention to exercise prescribed functions in accordance with paragraph (1) in relation to a case all such competent persons (together “the relevant competent persons”) shall agree who shall exercise prescribed functions in relation to that case. “(3) When agreement has been reached in accordance with paragraph (2), the case shall be transferred to the competent person who is to exercise prescribed functions in relation to that case and the OFT shall as soon as practicable inform in writing the relevant competent persons which competent person is to exercise prescribed functions in relation to the case. “Dispute “5. - (1) If the relevant competent persons are not able to reach agreement in accordance with regulation 4(2) within a reasonable time, the OFT shall inform the Secretary of State in writing. “(2) Any relevant competent person may make representations in writing to the Secretary of State no later than the date upon which the OFT informs the Secretary of State in accordance with paragraph (1) of the failure to reach agreement. “(3) The Secretary of State shall within 8 working days of receipt of a communication made in accordance with paragraph (1) –</p> <p>“(a) determine which competent person shall exercise prescribed functions in relation to the case and direct that the case shall be transferred to that competent person; and “(b) inform in writing all relevant competent persons which competent person is to exercise jurisdiction in relation to the case and the date of transfer of the case. “(4) In making a determination in accordance with paragraph (3)(a) the Secretary of State shall take into consideration any representations made in accordance with paragraph (2).”</p>
Mauritius	Separate enforcement entities without	Mauritian competition law requires that the competition commission and specific sector regulators enter into a memorandum of understanding governing their respective

	expressive repartition of competences	competences. The relevant provision of the Mauritian Competition Act No. 25 of 2007 reads as follows: “66. Memorandum of Understanding between Commission and regulators “The Commission and regulators shall enter into a memorandum of understanding governing the effective exercise of their respective responsibilities and establishing mechanisms for practical cooperation in the exercise of those responsibilities, including the use of the sector-specific expertise of the regulators in respect of investigations under this Act.”
South Africa		Sector regulators have concurrent jurisdiction. However, the Competition Act neither explicitly defers to other regulation nor explicitly claims precedence over it. The competition authority is required to negotiate agreements with sector regulators to coordinate the exercise of jurisdiction over competition matters in regulated sectors (in those sectors where the regulators have an explicit mandate over competition matters in their sector – i.e. this does not imply agreements with every sector regulator). In 2004, the competition authority had agreements with regulators in the broadcasting and electricity sectors, and under these agreements the Competition Authority is the lead investigator in concurrent jurisdiction matters. The relevant provisions of the South African Competition Act read as follows: “3. Application of Act “This Act applies to all economic activity within, or having an effect within, the Republic, except – [...] “(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. “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). “21. Functions of Competition Commission “The Competition Commission is responsible to – [...] “(h) negotiate agreements with any regulatory authority to coordinate and harmonize 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; (i) participate in the proceedings of

		<p>any regulatory authority; (j) advise, and receive advice from, any regulatory authority; [...] “82. Relationships with other agencies “(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 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) Subsection (1)(a) and (b), read with the changes required by the context, applies to the Competition Commission. “(3) In addition to the matters contemplated in section 21(1)(h), an agreement in terms of subsection (1) must - “(a) identify and establish procedures for the management of areas of concurrent jurisdiction; “(b) promote cooperation between the regulatory authority and the Competition Commission; “(c) provide for the exchange of information and the protection of confidential information; and “(d) be published in the Gazette. “(4) The President may assign to the Competition Commission any duty of the Republic, in terms of an international agreement relating to the purpose of this Act, to exchange information with a similar foreign agency.”</p>
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Source UNCTAD

From the above discussion, two distinct approaches may be adopted either the cooperation approach or the concurrent approach⁷⁰. While it is clear that the place of sector regulators to enhance competition enforcement is indeed invaluable, what is more difficult to determine is the most appropriate approach for a given jurisdiction. The cooperation approach prefers that each authority has a distinct mandate, concerns from the other regulator has to be sought before decision is passed on matters which overlap while the concurrent approach provides that both competition authorities and sector regulators mandates in competition matters, using the same competition law⁷¹.

The different approaches employed by different countries indicates that there is clearly no ‘one size fits all approach’. Accordingly, a number of jurisdictions have created regulators' forums through which sector regulators and the competition authority keep in regular contact and

⁷⁰ Supra CUTS_CCIER, note 58.

⁷¹ Cornelius Dube, ‘Interface between Competition Law and Sector Regulation,’ CUTS Centre for Competition, Investment and Economic Regulation (CUTS CCIER) www.cuts-ccier.org accessed 22 February 2015

strengthen and consolidate their cooperation and coordination. While in other jurisdictions the competition authority has concluded memoranda of understanding with other regulatory bodies, which typically set out the manner in which the parties will interact with respect to issues that require joint action.

6. PROPOSED APPROACH

The objective of both the competition regulator and the sector regulators in regulated industries is to improve economic performance by preventing market power and avoiding inefficient regulations⁷².

Kenya has previously adopted the combination of the technical and economic regulation being handled by a sector regulator while giving - some or all competition law enforcement functions to the competition regulator⁷³. This has been the approach adopted by the CAK, where on competition matters it has taken over enforcement functions as in the case of a complaint made by *Airtel Ltd against Safaricom Ltd* on exclusivity agreements with agents⁷⁴. However, in other instances, CAK handles the competition issues while approval from other sector regulators must still be sought as in some of the cases handled in *Baran Telecom Networks Kenya Limited and Bara telecommunications Network*⁷⁵ and *I & M Limited and City Trust Limited*⁷⁶.

However, the converged telecommunications and financial services will require continuous oversight and regulatory supervision particularly now that the CBK has regulatory jurisdiction over the payment platform systems and CA equally has competition regulatory jurisdiction over anticompetitive behavior in the telecommunications industry. Therefore a new regulatory approach out to be adopted to manage the different interests in these sectors.

In the United Kingdom, the concurrency approach has been adopted and the Capital Markets Authority has gone further to develop guidelines whereby the Authority plays a leading role to promote and coordinate the effective application of competition law in the regulated sectors⁷⁷.

⁷² John C. Hilke, 'Improving Relationships between Competition Policy and Sectoral Regulation' (Fourth meeting of the Latin American Competition Forum, San Salvador, 11th and 12th July 2006,)

⁷³ Supra CUTS_CCIER, note 58.

⁷⁴ Notice of Settlement between Competition Authority of Kenya and Safaricom Limited, Gazette Notice No. 6856.

⁷⁵ Competition Authority of Kenya Annual Report (2012) This was a merger in the telecommunications sector.

⁷⁶ Ibid. (2012) merger notification in the banking industry

⁷⁷ CMA, 'Regulated Industries: Guidance on Concurrent Application of Competition Law to Regulated Industries (2014) <http://www.gov.uk/cma/> accessed on 27th February 2015

Minding the need to coordinate the efforts of the competition authority and sector regulators, hence the development of a concurrency regime⁷⁸. This approach is however criticized as inappropriate for developing countries where vested interest and regulatory capture could undermine the principles for deciding which institution is best suited to handle issues.⁷⁹ In addition to creating confusion for both the regulators and stakeholders, who may not know which institution to approach⁸⁰. Consequently, the cooperation approach with a requirement for mandatory consultations is lauded as a better approach through the adoption of MOUs to set up a mode of cooperation⁸¹.

While the cooperation approach is ideal, the challenge of such a framework would be ensuring that the concerns raised by the different regulator is implemented and also determining which regulator will take the lead in enforcement will still subsist. In this regard, for the converged telecommunications and financial services market, this paper proposes for the introduction of joint board with experts from the three regulators and development of a regulatory framework whereby the board can adopt appropriate enforcement mechanisms from three sector regulators. The proposed joint board would should also have a regulatory mandate granting it overarching jurisdiction to handle cases where there is a regulatory overlap. Therefore, any notifications to either sector regulator would be handled by the joint board and this would giving certainty to market players as the manner that a matter would be enforced and also avoiding the issue of forum shopping.

Due to the representation from the three regulators the decisions should incorporate the technical, economic and competition concerns of the three sector regulators but will be privy to sector specific information which can be adopted to fit the context. This would envisage a scenario whereby the ex-ante and ex-post concerns arising are dealt with by one body⁸².

With the growing innovations in the converged telecommunications and financial services sector, this regulatory approach would be beneficial in promoting synergies and cooperation between the CA, CBK and CAK in which coordination and information exchanges between them to be ensured.

⁷⁸ Ibid.

⁷⁹ Supra CUTS_CCIER, note 58.

⁸⁰ Supra UNCTAD, note 68.

⁸¹ Ibid.

⁸² Supra CUTS_CCIER, note 58.

7. CONCLUSION

With the varying interests of the sector regulators in different jurisdictions, a one size fits all approach is not feasible. The role of the competition regulator and sector regulator must be harmonized to ensure consultation and coordination. This paper therefore proposes a model of a joint board that can ensure the regulatory concerns in the converged telecommunications and financial services sector are addressed without concerns of regulatory interia⁸³.

Where the economy-wide competition law takes precedence, the sector regulator may still have a role to play in assisting the competition authority to conduct analyses of the competitive effects of agreements in the regulated industry, especially with the latter regulator's natural advantage in respect.

The international experience discusses in this case, it is clear that the interaction between competition regulators and sector regulators should be complementary and can be managed through institutional approaches: giving primacy either to the competition law or the sector regulatory law, or requiring consultation between both types of regulator⁸⁴.

The Kenyan context, envisages substantial regulatory overlaps between the competition regulator and sector regulators, therefore the degree of interaction to ensure regulatory oversight will be equally substantial. In the circumstances, it is only appropriate that the regulatory approach adopted will create some level of certainty by putting in place a predetermined regulation outlining the degree of cooperation and coordination.

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⁸³ Supra Jeremmy Okonjo Odhiambo, note 41.

⁸⁴ Taimi Amunkete, 'Ensured Effective Cooperation between the Namibian Competition Commission and Sector Regulators – A Namibian Perspective (2013) accessed 21st February 2015 <http://www.nacc.com.na/>

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