

**COMESA Competition Commission Agenda Setting Power in COMESA and COMESA
Member State's Competition Policy Legislative Processes.**

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ABSTRACT

The 2004 COMESA Competition Regulations (CCR) grant the COMESA Competition Commission (CCC) agenda-setting power to influence the competition policy legislative process at the COMESA and Member States' level. So far, at the COMESA level, in 2015, the COMESA Council approved the COMESA Competition Rules introducing quantifiable merger thresholds and reducing merger filing fees to address jurisdictional conflicts from some national competition agencies (NCAs) and COMESA Member States against CCC. At the national level, two COMESA countries –Kenya and Eswatini –have adopted legislative initiatives which further the implementation of CCR. There is also evidence that CCC unsuccessfully tried to trigger legislative initiatives at the national level to grant CCR direct applicability in the domestic markets. Consequently, these empirical observations invoke several questions worth scholarly inquiry, such as, did CCC seek to influence these legislative outcomes in any way? If so, why and how? Why was CCC successful and unsuccessful in some cases? Unfortunately, despite being a fascinating and informative object of study, no scholarly work has paid any theoretical or empirical attention to these competition policy legislative outcomes. Thus, using a combination of process tracing, qualitative document analysis, and elite interviews, while building on insights from research on the agenda-setting power of European Union (EU) institutions in the EU legislative process, this study explores how different agenda-setting strategies produce different outcomes, contributing to agenda-setting and agenda denial literature in a political institution beyond the EU.

I. INTRODUCTION

This paper contributes to scholarly work explaining why, how and when international organizations (IOs) exert their agenda-setting power to influence the legislative outcomes of the IO and its Member States.¹ According to Bradley and Kelley, the agenda-setting authority of an IO is its ability 'to formally set or control the legislative agenda of an international body or member states'.² Yet, unlike domestic agenda-setters, as an outsider, an IO cannot directly influence legislative proposals at the national level, even if it has been given this power in the founding Treaty or Regulations. This would be against state sovereignty principles; as national level legislative process is exclusively a Member State affair. Thus, how and under which conditions an IO influences legislative outcomes at the IO and Member State level deserves special consideration.

In the general view, agenda-setting power is an actor's ability to influence a policy outcome even when the decision to adopt the policy lies somewhere else.³ According to agenda-setting literature, an actor can be granted formal agenda-setting power by the founding legislation giving it the power to initiate legislative proposals.⁴ Nevertheless, even when an actor has no formal agenda-setting power, they can indirectly influence potential policy actors to consider an issue by exerting informal agenda-setting power.⁵

¹ Mark A Pollack, 'Delegation, Agency, and Agenda Setting in the European Community' (1997) 51(1) *International Organization* 99;

² Curtis A Bradley and Judith G Kelley, 'The Concept of International Delegation' (2008) 17(1) *Law and Contemporary Problems* 1, 14.

³ John W Kingdon, *Agendas, Alternatives and Public Policies* (2nd ed, Harper Collins 2003); Mark A Pollack, *The Engines of European Integration: Delegation, Agency, and Agenda Setting in the EU*, (Oxford University Press 2003).

⁴ Gloria Rose, Ira van Keulen and Georg Aichholzer, 'Formal Agenda-Setting (European Level)' in Leonhard Hennen and others (eds), *European E-Democracy in Practice* (Springer 2020) 209-236; Henning Deters and Gerda Falkner, 'Remapping the European Agenda-setting Landscape' (2021) 99 *Public Administration* 290, 292.

⁵ Michael Webb and Amie Kreppel, 'The European Parliament's Role as an Informal EU Agenda Setter: The Influence of Own Initiative Reports' (2021) 99 *Public Administration* 304.

Existing literature on IO's formal and informal agenda setting power, however, has focused mainly on the EU institutions:⁶ the EU Commission,⁷ EU Parliament,⁸ EU Council,⁹ and the EU Court of Justice(ECJ).¹⁰ Nevertheless, insights from this literature could *inform* the study of other political institutions. If so, this paper provides an in-depth empirical analysis of how a supranational institution in Africa—the Common Market for Eastern and Southern Africa (COMESA) Competition Commission (CCC) –has sought to exert its *informal* agenda-setting power to influence the COMESA and Member States' competition policy legislative outcomes.¹¹

CCC is located in Lilongwe, Malawi, and is the institution established to enforce the 2004 COMESA Competition Regulations (CCR). The CCR establishes the norms, institution framework, and procedures governing the COMESA Competition regime.¹² CCC regulates anticompetitive business practices and conduct, mergers and acquisitions, and consumer welfare as stipulated under Part 3, 4, and 5, respectively. However, the application of CCR is only limited to conduct that has a regional dimension –that affects trade between two or more COMESA countries. Existing national competition agencies (NCAs) regulate any conduct that affects domestic markets. This division of power between NCAs and CCC seeks to reduce jurisdictional conflicts.

Equally important, CCR grants CCC formal agenda-setting power to influence competition policy legislative processes at the COMESA and Member State level. At the COMESA level, Article 7(2, b) of the CCR empowers CCC to 'regularly review regional competition policy to advise and make representations to the Council with a view to improving the effectiveness of

⁶ B Guy Peters, 'Agenda-setting in the European Community' (1994) 1(1) *Journal of European Public Policy* 9; Christine Reh and others, 'The Informal Politics of Legislation: Explaining Secluded Decision Making in the European Union' (2011) 46(9) *Comparative Political Studies* 1112.

⁷ Mark A Pollack, 'Creeping Competence: The Expanding Agenda of the European Community' (1994) 14(2) *Journal of Public Policy* 95; Amie Kreppel and Buket Oztas, 'Leading the Band or Just Playing the Tune? Reassessing the Agenda-Setting Powers of the European Commission' (2017) 50(8) *Comparative Political Studies* 1118.

⁸ George Tsebelis, 'The Power of the European Parliament as a Conditional Agenda Setter' (1994) 88(1) *American Political Science Review* 128; Andreas Mauer, 'The Legislative Powers and Impact of the European Parliament' (2003) 41(2) *Journal of Common Market Studies* 227; Daniela Kietz and Andreas Mauer, 'The European Parliament in Treaty Reform: Predefining IGCs Through Interinstitutional Agreements' (2007) *European Law Journal* 13(1) 20-46.

⁹ Jonas Tallberg, 'The agenda-shaping powers of the EU Council Presidency' (2003) 10(1) *Journal of European Public Policy* 1.

¹⁰ Alexis Lubow and Susanne K Schmidt, 'A hidden Champion? The European Court of Justice as an Agenda-setter in the Case of Posted Workers' (2019) 99 *Public Admin.* 321.

¹¹ COMESA established under the 1994 COMESA Treaty is an African regional economic community (REC) made up of twenty-one Member States; Burundi, Comoros, Democratic Republic of Congo (DRC), Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Malawi, Madagascar, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Tunisia, Uganda, Zambia and Zimbabwe.

¹² COMESA, *2004 COMESA Competition Regulations* (COMESA 2004).

the Regulations'. This provision provides CCC with the power to initiate legislative proposals on CCR and table them before the COMESA Council for approval.

At the national level, Article 17(2, c) of CCR requires CCC to 'help Member States promote national competition laws and institutions, with the objective of the harmonisation of those national laws with the regional Regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market'. This specific provision allows CCC to influence the adoption, repeal, and amendment of national laws, relying on the harmonization project. However, as an outsider, CCC can only shape legislative outcomes at the national level via informal agenda-setting power by influencing potential policymakers to consider an issue.

Nevertheless, since CCC began enforcing the CCR on 14th January 2013, three legislative outcomes have occurred at the COMESA and national level providing a prism to examine CCC's agenda-setting power in practice. At the COMESA level, in 2015, the COMESA Council approved an amendment of the COMESA Competition Rules, which introduced quantifiable merger thresholds and reduced the merger filing fees. These amendments sought to address contestations against CCC's exercise of Authority over cross-border mergers. Although per Article 39 of CCR, only the CCC Board can adopt and amend the Competition Rules and submit them to the COMESA Council for approval, the role of the CCC in influencing this legislative outcome cannot be underestimated. The reason is that jurisdictional conflicts against CCC were a threat to its survival, and thus we expect it to play a critical role in the amendment of the Competition Rules.

At the national level, two legislative outcomes have occurred so far that support CCC's implementation of CCR. In 2019, the Competition Authority of Kenya (CAK), upon parliament approval, adopted the Competition (General) Rules 2019. Section 8 provides that mergers under CCC's jurisdiction should be filed with CCC and not CAK. Moreover, in 2020, Eswatini repealed its 2007 Eswatini Competition Act. The 2020 Eswatini Competition Bill includes various provisions –discussed in detail in Section V of this paper –requiring Eswatini NCA to cooperate and support CCC in particular and implementation of regional competition policies in general. Overall, these legislative outcomes reflect CCC's preferences, such as enhancing the operationalization of CCR and reducing potential jurisdiction conflicts between CCC and NCAs.

In addition to the above legislative outcomes, there are other cases where CCC sought to shape the national-level legislative process. Still, it failed or did not pursue its legislative proposal to

completion. One example is when CCC sought to push COMESA countries to adopt legislative initiatives to grant CCR direct applicability in the domestic markets through the domestication process. However, COMESA countries were not receptive to these legislative initiatives. Moreover, some COMESA countries –Djibouti, the Democratic Republic of Congo (DRC), and Comoros –adopted competition laws after 2013, and CCC was involved in the pre-legislative process. Yet, their competition laws do not have explicit provisions that recognize CCC or regional competition regimes. This invokes a question as to whether CCC unsuccessfully sought to push the national level policymakers to include provisions that explicitly recognize CCC, as evidenced by Eswatini Competition Bill.

Generally, this paper contributes to scholarly work on IO's agenda-setting power. Analyzing CCC's role in the pre-legislative process leading to the adoption, amendment, and repeal of competition laws and regulations provides an in-depth understanding of why and how CCC exerts its agenda-setting power. Indeed, unlike the EU agenda-setting literature that has focused mainly on how EU institutions influence the EU legislative process, CCC provides an avenue for understanding how IOs influence Member State's legislative process. Moreover, explaining why and how CCC might have unsuccessfully sought to influence the above legislative outcomes contributes to agenda denial/blocking literature that has received little scholarly work.¹³

Consequently, I make three core arguments. Like the EU Commission, CCC exerts its agenda-setting power in response to politicization.¹⁴ Thus, jurisdictional conflicts from some of the COMESA NCAs, the Member States, and business firms provided CCC with an opportunity to exercise its informal agenda-setting power at the COMESA and national level through issue linkage and saliency input. Second, because CCC lacked the formal agenda-setting power, CCC is more likely to exert discursive agenda-setting power by gaining the attention of potential policymakers through enhanced participation, the creation of appropriate institutional avenues, and issue framing. Finally, similar to the EU Parliament, which has relied on its own initiative reports (OIR) to influence EU legislative outcomes,¹⁵ CCC has relied on Memorandum of Understandings (MoUs) with NCAs to shape national-level legislative outcomes.

¹³ Ana Cláudia Niedhardt Capella, 'Agenda-setting policy: strategies and agenda denial mechanisms' (2016) 23(79) *Organizações & Sociedade* 675-691.

¹⁴ Edoardo Bressanelli, Christel Koop and Christine Reh, 'EU Actors under Pressure: Politicisation and Depoliticisation as Strategic Responses' (2020) 27(3) *Journal of European Public Policy* 329-341.

¹⁵ Webb and Kreppel (n 5).

Consequently, through process tracing, document analysis, and elite interviews,¹⁶ this paper examines the pre-legislative process leading to the above-mentioned legislative outcomes, unraveling whether, why, and how CCC sought to influence them. The rest of the paper proceeds as follows. The second section discusses the concept of agenda-setting power in the legislative process. The third section explores how CCC has exerted its agenda-setting power and the outcome.

II. AGENDA SETTING POWER: THEORETICAL INSIGHTS

a. What is agenda-setting power?

Agenda setting –an integral component in the social, economic, and political decision making– envisages a scenario where actors, including those outside the formal institutional framework, bring to the *attention* of policymakers the existence of a problem, seeking to influence them to *consider* an issue.¹⁷ At this stage, the agenda-setter seeks to influence what is to be included or excluded from the agenda. At its most general, agenda-setting power determines whether political attention will be devoted to a particular issue or not and the acceptance of the prescribed solution to a specific problem.

Agenda setting power can be formal (procedural) or informal (discursive) and is influenced by the institutional features of the IO. Deters and Falkner further identify gatekeeping and leadership agenda-setting power.¹⁸ I explore the four typologies of agenda-setting power briefly in the next sections.

b. Typologies of agenda-setting power

Formal agenda-setting power.

Formal agenda-setting power is granted to an institution by the founding legislation allowing it to initiate legislative proposals.¹⁹ In short, the founding treaties of IOs set out the formal procedures in which laws are developed or revised and who possesses the legislative power to initiate legislative proposals. In this case, the formal rules will grant a certain actor monopoly of legislative initiative. Over time, the said actor develops information advantage and credibility drawn from its expertise and policy output.²⁰ Due to increased credibility and monopoly, the actor's legislative proposals are likely to be considered.

¹⁶Oisín Tansey, 'Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling' (2007) (40) 4 *Political Science and Politics* 769-772.

¹⁷ Princen, *Agenda-Setting in the European Union* (Palgrave Macmillan 2009) 19; Kreppel and Oztas (n 7); Deters and Falkner (n 4) 291.

¹⁸ Deters and Falkner (n 4).

¹⁹ Rose and others (n 4).

²⁰ George Tsebelis and Geoffrey Garret, 'Agenda setting, vetoes and the European union's co-decision procedure' (1997) 3(3) *The Journal of Legislative Studies* 74; Deters and Falkner (n 4) 292.

For instance, Article 17(2) of the Treaty of the European Union (TEU) grants the EU Commission monopoly to initiate legislative proposals, granting it formal agenda-setting power.²¹ On the other hand, EU Parliament and EU Council can only request the EU Commission to initiate legislative proposals.²² Even if the EU Parliament and Council have, in limited cases, influenced the EU Commission to consider certain legislative proposals through their informal agenda-setting power, the EU Commission has the discretion on which legislative proposal it should adopt or not. Moreover, it is difficult for the EU Council and Parliament to modify the commission's legislative proposals. This makes it easy for the commission to exert its agenda-setting power in the EU legislative process successfully.

Similarly, Article 7 (2 c) of CCR grants CCC the formal agenda-setting power to initiate legislative proposals concerning CCR. And because CCC is the institution that enforces the CCR, due to its information advantage on competition policy drawn from its expertise, we expect CCC legislative proposals to be more likely to be accepted and considered by COMESA Council. However, CCC had not proposed any CCR legislative proposals to the COMESA Council when writing this paper.

However, having formal agenda-setting power does not always translate into successful outcomes. Interestingly, existing procedural rules could also limit how an actor can exercise its formal agenda-setting power.²³ Moreover, agenda-setting is a highly political process involving extensive formal and informal bargains.²⁴ Hence, in explaining legislative outcomes, as Cross and Hermansson point out, one must go beyond the formal rules and examine the informal bargains (particularly early agreements) developed through informal networks and contacts.²⁵

Informal agenda-setting power.

Informal agenda setting –also referred to as discursive agenda setting –is exercised indirectly either by the agenda-setter or through other actors to mobilize support among potential policy actors.²⁶ As Deters and Falkner succinctly put it,²⁷ discursive agenda setting 'consists of the ability to influence how an issue is perceived by *potential* decision-makers and stakeholders'.

²¹ Pollack (n 1); Kreppel and Oztas (n 7).

²² Lubow and Schmidt (n 10).

²³ Tsebelis and Garret (n 22).

²⁴ On how informal bargains influence policy or legislative outcomes see: Maximilian Haag, 'Bargaining Power in Informal Trilogues: Intra-institutional Preference Cohesion and Inter-Institutional Bargaining Success' (2021) *European Union Politics* 1; He who controls the process controls the outcome? A reappraisal of the relais actor thesis

²⁵ James P Cross and Henrik Hermansson, 'Legislative amendments and informal politics in the European Union: A text reuse approach' (2017) *18(4) European Union Politics* 581.

²⁶ Reh and others (n 6).

²⁷ Deters and Falkner (n 4) 293.

In this case, the agenda setter must first identify the actors that have the potential to influence decision-making outcomes and could be receptive to their preferences. Then bring to their attention the saliency of an issue important for their consideration.²⁸ Yet, to successfully mobilize support and gain attention, the agenda-setter should match their proposals to the problem at hand.

Furthermore, a decision-maker is more likely to consider the proposal if the actor having informal agenda-setting power can show credibility and expertise.²⁹ This is because successful informal agenda setting has a great chance when information asymmetry exists. As Pollack aptly puts it,³⁰ although 'supranational institutions enjoy no formal monopoly on the right to set the Council's substantive agenda. Nevertheless, their policy expertise and institutional persistence can provide them with certain informational advantages vis-a-vis both competing agenda setters and the Council of Ministers in a setting of incomplete information'. If this is the case, we should expect CCC to successfully exert its informal agenda-setting power in countries without competition laws than in countries with already established competition regimes.

Gatekeeping agenda-setting power

Gatekeeping agenda setting occurs when an actor determines what is kept *off* the agenda. Such actors' define the status quo as first mover',³¹ as they possess a monopoly of initiative in their domain. Thus, gatekeeper agenda-setters can be allies or opponents of legislative initiatives, especially at the Member State level. Lubow and Schmidt,³² for instance, argue that ECJ uses case law and judicial treaty interpretation to ensure that certain policy issues are kept off the agenda of the EU policy process by the EU Commission, Parliament, and Council.

If CCC successfully influences national-level competition policy outcomes, it has to target the gatekeeping agenda setters, especially those at the domestic level. Consequently, competition policy entrepreneurs and established NCAs could possess gatekeeping agenda-setting power in the competition policy realm, determining what is included and excluded in COMESA and national level competition policy legislative processes. For instance, NCAs usually have the formal agenda-setting power at the national level to initiate legislative proposals. They can determine whether legislative initiatives seeking to support the operationalization of CCR are included or excluded in the final legislative outcomes or not. Thus, NCAs can be allies or

²⁸ Kreppel and Webb, 'European Parliament resolutions—effective agenda setting or whistling into the wind?' (2019) 41(3) *Journal of European Integration* 383, 384.

²⁹ Pollack (n 1); Reh and others (n 6).

³⁰ Pollack (n 1) 102.

³¹ Deters and Falkner (n 4) 292.

³² Lubow and Schmidt (n 10).

opponents to how CCC exercises its agenda-setting power. For instance, NCAs may be reluctant to initiate legislative proposals that undermine their bureaucratic autonomy and initiate those that bolster their reputation.

Leadership agenda-setting power

According to Deters and Falkner,³³ leadership agenda setting refers to the ability of an actor to rally for a consensus over an issue or proposal, setting a focal point in which negotiations converge. Like discursive agenda setting, leadership agenda-setting power is based on the agenda-setters credibility and expertise to influence a policy outcome. In the context of COMESA, actors such as US Federal Trade Commission (FTC), EU, OECD, and UNCTAD possess leadership agenda-setting power in competition law drawn from their experiences in the enforcement of competition law. Thus, because they can rally consensus on regionalization of competition law, we expect them to exact their leadership agenda-setting power at the COMESA and Member State level. Moreover, CCC could invite leadership agenda setters, especially the EU, which already had a regional competition regime, to rally consensus over the most appropriate solution.

Having identified the four typologies of agenda-setting power in the literature, I explore how they interact to produce the legislative outcomes in COMESA. Thus, before discussing the competition policy legislative outcomes observed at COMESA and COMESA Member State, it is important to know when successful and unsuccessful agenda setting occurs.

c. When is agenda-setting power successful or unsuccessful?

It is important to know that successful agenda-setting power is not automatic at the onset.³⁴ Moreover, in addition to existing decision rules that could limit agenda-setting power, agenda-setting is a highly political process involving extensive bargains. Thus, reaching a consensus can be a strenuous task, requiring the agenda-setter to adopt specific strategies that make their proposals compelling if they were to influence decision outcomes. As Kreppel and Oztas succinctly argue:

The power to initiate legislation, even when that power is a formal monopoly, does not necessarily translate into unilateral, or even effective political agenda-setting power. Without the ability to participate in decision-making and/or to prevent other actors from amending their initiatives, formal agenda setters can be relegated to a technical, rather than a political role in the policy process.³⁵

³³ Deters and Falkner (n 4).

³⁴ Serra Boranbay-Akan, Thomas König and Moritz Osnabrügge, 'The Imperfect Agenda-setter: Why do Legislative Proposals Fail in the EU Decision-making Process?' (2017) 18(2) European Union Politics 168.

³⁵ Kreppel and Oztas (n 7) 1119.

Nonetheless, successful agenda setting occurs when an actor influences the decision-making outcome. According to Tsebelis and Garret,³⁶ successful agenda-setting power is reflected when preferences are accepted with no or limited modification. This confirms the agenda setters' ideal point. Moreover, Tsebelis argues that when the agenda-setter proposal is almost equal or not far from the legislatures status quo, then the legislator is less likely to reject the proposal.³⁷

Consequently, in explaining whether CCC exerted considerable agenda-setting power in the competition policy legislative process, we first must identify *CCC's preferences (or interests)*. If CCC's preferences are considered in the legislative outcomes, whether wholly or partially, we conclude that CCC will have successfully exerted its agenda-setting power. If so, I explore how CCC communicated its preferences and which tools CCC employed to shape its preferred legislative outcomes.

Accordingly, CCC's preferences can be inferred from its functions stipulated under the CCR. For instance, the main goal pursued by CCC is to ensure that the implementation of CCR does not face any gridlocks and CCR enjoys applicability within domestic markets. At the national level, any action undertaken by the Member States or NCAs to further harmonize CCR with national-level competition laws and reduce jurisdictional conflicts reflects CCC's preferences. Thus, if there is an inclusion of a provision within a national or regional competition law/Regulation that recognizes CCC's jurisdiction, then such provision reflects CCC's preferences.

Thus, in identifying whether CCC successfully exercised its agenda-setting power, I first identify the COMESA Competition legislative outcomes at the COMESA level that enhance the implementation of CCR and strengthen CCC's survival. Then, through process tracing and elite interviews, I trace CCC's involvement in the pre-legislative process, determining whether CCC communicated its preferences. Subsequently, whether the policymakers considered those preferences, if they did, then CCC successfully exerted its agenda-setting power. To explain CCC's unsuccessful agenda-setting power and determine when its preferences were not considered despite CCC communicating the same, I also explore instances when CCC withdrew its legislative proposals.

³⁶ Tsebelis and Garret (n 22).

³⁷ Tsebelis and Garret (n 8).

III. COMESA Competition Commission Informal Agenda-Setting Power in COMESA and Member States' Competition Policy Legislative Process

As already stated above, the first step in predicting whether CCC has invoked Articles 17 (2b, c) to influence legislative outcomes is first to identify those legislative outcomes that reflect CCC's interests or preferences. So far, two observable legislative outcomes have influenced my case selection. The first legislative outcome occurred in 2015 through the amendment of the COMESA Competition Rules by the COMESA Council as proposed by the CCC's Board. Second, legislative outcomes have occurred at the national level. In 2019, CAK adopted regulations recognizing CCC's jurisdiction over mergers with a regional dimension to reduce jurisdictional conflicts between CCC and CAK. In 2020, Eswatini repealed its Competition Act introducing explicit provisions seeking to address potential jurisdiction conflicts between CCC and Eswatini NCA, ultimately enhancing cooperation.

Third, I also trace legislative outcomes that CCC unsuccessfully influenced, such as the push to have Malawi and Uganda domesticate the CCC. Further, explaining why CCC withdrew its legislative proposals, building on the work by Koop and others who explain why EU Commission withdraws its legislative proposals during politicization.³⁸

A. The Amendment of the COMESA Competition Rules.

Before explaining how CCC might have influenced the amendment of the Competition Rules, it is important to understand COMESA's legislative process first, as procedural rules either limit or foster agenda-setting power.

a) COMESA's legislative process.

According to article 190 of the COMESA Treaty, an amendment of the Treaty is a preserve of the COMESA Authority, consisting of COMESA Member States. Such Treaty amendments can only be initiated by the Member States or the COMESA Council. Treaty amendment proposals are then forwarded to the COMESA Secretary-General, which forwards them to the COMESA Authority through the Committee of Legal Affairs. The amendment of the COMESA Treaty is done through a two-thirds Member States' ratification.³⁹ However, under exceptional circumstances, the Authority could provide a Treaty amendment upon its adoption by the Authority. Generally, a decision of the Authority is binding. So far, there have been no legislative proposals to amend the COMESA Treaty.

³⁸ Christel Koop, Christine Reh and Edoardo Bressanelli, 'Agenda-setting under Pressure: Does Domestic Politics Influence the European Commission?' (2022) 61 *European Journal of Political Research* 46.

³⁹ COMESA Treaty, Art 190 (5).

When it comes to amendment and adoption of COMESA Regulations, this is exclusively a preserve of the COMESA Council.⁴⁰ The COMESA Council, COMESA's legislative body,⁴¹ comprises Ministers of Trade appointed by COMESA countries. According to Article 9 of the COMESA Treaty, the Council can 'make regulations, issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this Treaty'. Accordingly, adopted Regulations are binding on all COMESA countries, which have a Treaty obligation to ensure effective implementation.

Moreover, the COMESA Treaty requires the Member States to grant Regulations adopted by the COMESA Council the force of law and the necessary legal effect within their territories. Domestication, a process through which Member States grant ratified multilateral or bilateral treaties applicability and enforceability within their jurisdictions, is one-way CCR could enjoy legal effect within domestic markets. Generally, countries are not legally bound by the ratified treaties in the absence of domestication.

Thus, in case of contestations against CCR, we should expect CCC to push COMESA countries to domesticate CCR, granting it legal effect within domestic markets. Such a legislative proposal reflects CCC's preferences. However, whether COMESA countries would consider such a legislative proposal is another question that this paper seeks to unravel. Furthermore, CCC could argue that CCR is binding irrespective of whether COMESA countries initiate a legislative process to domesticate it or not.

Nevertheless, even if the Council's legislative power is unassailable, COMESA Treaty grants COMESA institutions agenda-setting power in the COMESA legislative process. Hence, COMESA institutions can propose legislative amendments to COMESA Regulations on specific policy areas to the COMESA Council. For instance, article 48(3) of the COMESA Treaty requires the COMESA Intergovernmental Committee from time to time to propose amendments to the Rules of Origins to the COMESA Council.⁴² Similarly, according to Article 17(2b) of CCR, CCC can propose legislative proposals to the COMESA Council that could lead to repeal or amendment of CCR.

⁴⁰ COMESA Treaty, Arts. 9 & 10.

⁴¹ COMESA Treaty 1994, Art. 9.

⁴² According to Article 15 of the COMESA Treaty, Technical committees are involved in the drafting of legislative proposals. The Committee on Legal Affairs, and the Committee on Trade and Customs Union were involved in the formulation of the CCR. Also the COMESA Secretariat has the power to put competition law on the agenda of COMESA Council's meeting.

However, even when COMESA institutions initiate legislative proposals, COMESA Council's approval is not automatic. Although the decision of the COMESA Council can be taken by consensus, in some cases, they could fail to reach a consensus.⁴³ If so, then a two-thirds majority of the Council can decide. However, if a Member State records an objection to the Council's decision, the proposal is submitted to the Authority, whose final decision is final.

Therefore, it is not automatic that the COMESA Council will consider CCC's legislative proposals even when it has formal agenda-setting power. Moreover, CCC has not initiated any legislative proposals to amend CCR before the COMESA Council. Thus, CCC's formal agenda-setting power is not a subject of discussion in this particular paper. The only legislative process that has occurred at the COMESA level is the amendment of the COMESA Competition Rules in 2015.

b) Adoption and Amendment of COMESA Competition Rules

Article 39 of CCR grants the CCC Board the formal agenda-setting power to initiate legislative proposals leading to the adoption and amendment of COMESA Competition Rules upon the COMESA Council's approval. Overall, CCC's Board is the supreme policy body appointed by the COMESA Council upon the COMESA Secretariat's recommendation. CCC's Board adjudicates disputes that arise from CCC's decisions.⁴⁴ The Board also issues a determination on prohibited conduct under CCR and hears any appeals arising from CCC's decisions.

Moreover, Article 23(4) of CCR grants CCC's Board the Authority to determine merger thresholds.⁴⁵ Nevertheless, even though the CCC Board is expected to be an independent body from CCC and the Commissioners are precluded from involving themselves in the day-to-day administration of the CCC,⁴⁶ this does not preclude the CCC from influencing the Rules adopted by the Board. Indeed, on 6th March 2015, the COMESA Council, in a meeting held in Addis Ababa in Ethiopia, approved two amendments to the COMESA Competition Rules as proposed by the CCC Board. These amendments resulted from the backlash against the COMESA merger regime from some COMESA constituency actors,⁴⁷ COMESA countries, NCAs, lawyers, and transnational business actors (TBAs). Therefore, this paper seeks to explore whether CCC

⁴³ Ibid.

⁴⁴ CCR, Art 12.

⁴⁵ It follows then that either CCC' Board proposed the introduction of the merger thresholds in 2015 or CCC influenced CCC Board to initiate legislative proposals.

⁴⁶ CCR, Article 13(5).

⁴⁷ Generally, constituency actors are those bound by the IOs rules and laws and have an institutionalized political bond with the IO.

exerted its informal agenda-setting power to influence this legislative outcome at the COMESA level when the decision to amend Competition Rules lies with CCC's Board.

a. Amendment of the 2012 COMESA Competition Rules on the Determination of Merger Notification Thresholds and Method of Calculation (COMESA Merger Threshold Rules).

These amendments introduced quantifiable merger thresholds as required under Article 23(4) of CCR. In particular, as a result of the amendments, undertakings were required only to notify a merger to CCC if their combined annual turnover or combined value of assets in the COMESA Common Market, whichever is higher, equals or exceeds the US \$50 million. Secondly, suppose the annual turnover or value of assets of each of at least two of the merging parties in the Common Market, whichever is higher, equals or exceeds COM\$ 10 million. In that case, such a merger falls within CCC's jurisdiction. However, if more than two-thirds of the annual turnover or value of assets in the Common Market of each merging party is achieved or held within the same Member State, then NCA assesses the specific merger.

The amendments replaced the zero merger threshold, which granted CCC jurisdiction over mergers affecting two or more COMESA countries irrespective of their turnover in the domestic market. The zero merger threshold blurred the distribution of competencies between the NCAs and CCC, leading to jurisdictional conflicts among NCAs.⁴⁸ According to Büthe and Kigwiru,⁴⁹ jurisdictional conflicts 'might occur over authority for implementation and enforcement, *even when the applicable laws do not differ or are compatible*'.

Kenya was the first country to invoke jurisdictional conflicts publicly. In a letter addressed to CCC, the then Kenyan Attorney General clearly stated that CCR would not take precedence over the Kenyan Competition Act without its domestication.⁵⁰ Thus, even if merger transactions fell within CCC's jurisdiction, merging parties were required to file with CAK if the mergers met Kenya's merger notification requirements. In addition to Kenya, other NCAs such as Egypt, Ethiopia, Zambia, and Zimbabwe have invoked jurisdictional conflicts.⁵¹ For instance, Kekesi found that these NCAs have made their positions known through public oral statements, posting

⁴⁸ Andreas Stargard, 'The Zero Threshold Contagion: Too Little of a Good Thing in Pan-African Merger Control' (2013) XIV (1) ABA Antitrust Law XIV 35.

⁴⁹ Tim Büthe and Velloso Kigwiru, 'The Spread of Competition Law and Policy in Africa: A Research Agenda' (2020) 1 African Journal of International Economic Law 41.

⁵⁰ Muthoki Mumo, 'Authority Criticizes COMESA arm over Rollout of Competition Rules' (Daily Nation, 17 March 2013).

⁵¹ Gomolemo Kekesi, 'A Practitioner's Critique: The One-Stop Shop Regime of the COMESA Competition Commission' (Masters of Law Thesis 2018) 8.

notices, or guidelines on the NCA's websites requesting national filings despite a similar notification at the CCC.⁵²

Unfortunately, these jurisdictional conflicts led to multiple merger notifications at the national and COMESA level, increasing regulatory risks for merging firms due to inconsistent decision-making and increased business and legal costs. Equally important, CCC's survival was under threat. Its involvement in the amendment of the Competition Rules, even when CCC's Board has the formal agenda-setting power, deserves scholarly inquiry. In these circumstances, tracing this process will unveil what was included and excluded from the agenda and how various actors –with special attention to CCC –involved in the negotiation process shaped the final legislative outcome.

b. Amendment of the 2004 COMESA Competition Rules.

This amendment reduced the merger filing fees from the initial 0.5% to 0.1% of the combined turnover in the COMESA Market and capped it at US\$ 200,000 from the previous US\$ 500 000.⁵³ COMESA's constituency actors had contested the initial COMESA merger filing fees set because they were too high and constrained small-sized market enterprises (SMEs) expansion in the COMESA market by increasing their cost of doing business.⁵⁴ Some TBAs had preferred filing their mergers with NCAs if the cost of filing the same merger with CCC was high. If firms preferred NCAs over CCC, this threatened CCC's survival. Thus, we expect CCC to push for legislative proposals that bolster its reputation and survival.

The 2004 Competition Rules were also amended, requiring merging parties with non-notifiable mergers, to no longer pay merger filing fees.⁵⁵ Non-notifiable mergers are mergers that do not meet the set merger thresholds. Normally, parties are under no obligation to file such mergers with CCC. However, CCC could require parties to file such mergers if they negatively affect Competition within the COMESA Common Market.

In sum, the above legislative outcomes reflect CCC's preference to address contestation against the implementation of CCR and enhance cooperation between CCC and NCAs. Even if the above legislative outcomes reflect CCC's preferences because they sought to bolster its survival and reputation, reaching a consensus on the appropriate merger threshold and merger filings

⁵² Ibid p 11.

⁵³ CCC, *Amendment to COMESA Competition Regulations 2004* (COMESA Council 2015).

⁵⁴ Amanda Visser, 'Regional Competition Body for COMESA under Fire for Inflated Merger Filing Fees' (Business Day, 20 August 2013).

⁵⁵ *ibid*, s. 10.

may not have been easy. Various actors –including gatekeeper agenda setters such as NCAs – were interested, and persuading them to consider CCC's legislative proposal required CCC to adopt appropriate strategies.

Moreover, most of the members of the CCC Board in 2015 were NCA executives.⁵⁶ And because zero merger threshold intruded into their regulatory autonomy, CCC might have had a hard task in proposing legislative proposals to be likely considered by CCC Board. Also, CCC in itself had just begun enforcing CCR. Thus it had not developed expertise and institutional credibility. And being a new regime intruding into the Member States and NCA's regulatory Authority, we expect CCC to have worked in concert with actors having leadership agenda-setting power to rally for consensus.

B. Adoption of legislative initiatives at the national level.

The second legislative outcome that reflects CCC's preferences are observed at the national level. Article 17(2, c) of CCR grants CCC the power to further influence the competition policy legislative process to harmonize CCR with national competition laws and enhance cooperation. So far, two COMESA countries have undertaken legislative initiatives that recognize CCC's jurisdiction and deepen NCA's working relationship with CCC. In 2020 Eswatini repealed its 2007 competition law. In 2019 Kenya adopted Regulations that explicitly recognize CCC's jurisdiction over regional mergers.

It is important to note that Kenya and Eswatini's legislative initiatives occurred after the amendment of the COMESA Competition Rules in 2015. Also, in 2016, CCC entered into MoU with Kenya and Eswatini NCAs. Did these two events trigger national-level competition policy legislative initiatives?

a. Kenya's Competition (General) Rules 2019

Kenya is the first COMESA country to consider a legislative initiative that supports CCC's jurisdiction over regional mergers, despite contesting the same in 2013. On 25th November 2019, Kenya adopted the Competition (General) Rules 2019 under Gazette Notice No. 176. Although CAK initiates the adoption of Competition Rules and Regulations, they require legislative approval. After CAK's adoption –which also involves participation by various stakeholders –the draft is sent to the National Treasury and the Attorney General. If they accept the draft, they forward it to Parliament for approval. The 2010 Competition Act of Kenya grants CAK the formal agenda-setting power to initiate legislative proposals on the Competition Act.

⁵⁶ Ibid.

Thus, CCC possesses gatekeeping agenda-setting power and can block or consider CCC's legislative proposal.

Reflecting CCC's preferences, these Regulations seek to eliminate jurisdictional conflicts between CCC and CAK. The objective of the Regulation is to provide 'clarity on the transactions notifiable to the Authority and the COMESA Competition Commission, respectively'. By explicitly mentioning CCC, Kenya has shown its intention to enforce the CCR. Section 8 of the Competition Regulations further provides that 'where a merger meets the threshold prescribed under the COMESA Competition Regulations and Rules, the parties shall notify the COMESA Competition Commission in the prescribed form, and inform the Authority in writing regarding the notification'.

If CCC shaped this legislative outcome, it follows then that it successfully exercised its agenda-setting power. Therefore, it is important to explore whether CCC influenced CAK's inclusion of Section 8 in the 2019 Competition Regulations and, if so, how and to what extent.

b. Repeal of the 2007 Eswatini Competition Act

Whereas CAK adopted Regulations without amending or repealing its Competition Act, in 2020, Eswatini repealed its 2007 Eswatini Competition Act. When writing this paper, the Eswatini President had not assented to the 2020 Eswatini Competition Bill. Nonetheless, the Bill has provisions that explicitly recognize the COMESA Competition regime in particular and the need for Eswatini NCA to cooperate with regional competition regimes of which Eswatini is part.

The Bill stipulates in its Memorandum of Objects and Reasons that 'the object of this Bill is to increase the effectiveness, consistency, predictability and transparency in the enforcement and administration of competition law in Eswatini, give effect to the regional frameworks such as the COMESA Competition Commission Regulations and international best practices...'. Precisely, Section 7(o) of the 2020 Eswatini Competition Bill places an obligation on the Eswatini NCA to 'cooperate with and assist regional competition regulators in the enforcement of the national and regional competition law'.

Another important provision included in the Eswatini Competition Bill is Section 75, which requires the Eswatini NCA to abide by any bilateral, regional, or enforcement actions that Eswatini or the NCAs has entered into. However, the Bill also stipulates that this could happen when such Treaties have been domesticated in Eswatini. Moreover, such cooperation will be

per the MoU that Eswatini NCA would have entered into. A clear indication that MoUs have a positive influence on national-level legislative outcomes.

Equally important, the Bill has sought to address potential jurisdictional conflicts between CCC and Eswatini NCA. To address any conflict between Eswatini and CCC in the application of national competition law and CCR, Section 75(2) of the Bill stipulates that 'where there are conflicts of interest or inconsistencies in operational bilateral, regional or other multilateral treaties or arrangements, the commission shall timeously seek the guidance of the Minister on the best option available, taking into consideration:

- a. The overall policy direction of the country;
- b. What would be most efficient and effective Treaty or arrangement to comply with in a given situation; and
- c. What would be in the best public interest.

The Minister is then required to respond to the Eswatini NCA within seven days upon receiving the request with a formal and written position. The involvement of the Minister in addressing conflicts with RCR is an indication of government involvement, and that government preferences might take priority. Section 75(2) of the Bill indicates that government policy direction and public interest will determine Eswatini interaction with any RCR. However, suppose the Ministry fails to respond within the stipulated time. In that case, the Eswatini NCA can decide how to solve the conflicts considering the factors indicated in Section 75(2) of the Bill. This provides the NCA with the power to determine whether to cooperate with an RCR or not.

The sections of the Eswatini Competition Bill identified above reflect CCC's preferences, harmonization, and support of CCR's implementation. Consequently, by tracing CCC's involvement in the pre-legislative process leading to the amendment of the 2007 Eswatini Competition Act, this paper explores whether and how CCC could have influenced this legislative outcome by exerting its informal agenda-setting power.

C. Non-adoption of legislative proposals

While legislative outcomes could infer how CCC had successfully exerted its informal agenda-setting power, non-adoption of legislative proposals even when CCC sought to influence the legislative process deserves special consideration. In this case, I examine two events. First is CCC's role in pushing COMESA to initiate legislative initiatives that could grant CCR direct applicability in their domestic markets through the domestication process.

The domestication of CCR

Indeed, the Member States and NCA, who contested CCC's exercise of authority over mergers, argued that they were not bound in the absence of domestication of CCR. And because the domestication of Treaties is a national legislative initiative, it becomes critical to examine how CCC sought to influence this legislative outcome. Preliminary findings show that CCC sought to trigger this legislative initiative. For instance, in 2016, CCC assisted Uganda's Ministry of Industry and Trade in printing COMESA's Treaty brochures for distribution to the Members of Parliament to facilitate the legislative process of passing the COMESA Implementation Bill.⁵⁷ Yet, the Bill has never been adopted so far, and neither has Uganda enacted a competition law. To date, there is no COMESA country that has explicitly undertaken this legislative initiative. Why did CCC unsuccessfully exert its agenda-setting power on the domestication of CCR? This is the question that this paper seeks to contribute toward as well.

Adoption of competition laws

CCC is well placed to shape the Member States' legislative process in competition policy, pushing for its preferences during the pre-legislative process. In countries without competition laws, it is anticipated that CCC can leverage its information and resource advantages to influence legislative outcomes over time. Thus, we expect CCC to push COMESA Member States without competition laws to consider legislative proposals that further the implementation of CCR.

To test this observation, I analyze CCC's involvement in the pre-legislative stage of countries without competition laws since 2013. I categorize two countries, those that have already adopted competition laws and those in the process of adopting competition laws. Since 2013, Comoros (2013)⁵⁸, DRC (2018)⁵⁹, and Djibouti have enacted competition laws. Only DRC's NCA has started enforcing its competition law. On the other hand, Eritrea, Somalia, and Uganda have not enacted competition laws. However, Uganda has had a competition Bill pending before its Parliament since 2013. Thus, where a draft competition law exists, qualitative content analysis is more likely to show that CCC's preferences were considered.

⁵⁷ COMESA, *COMESA 2017 Annual Report 2017* (COMESA 2017) 118.

⁵⁸ Loi no.13-014/AU relative a la concurrence en Union des Comores 2014

⁵⁹ Loi organique no. 18/020 du 09 juillet 2018 relative a la liberte de prix et a la concurrence

IV. Explaining CCC's success and failure in the COMESA and Member State Competition Policy Legislative Process

Despite the above legislative outcomes, no study explores how they came about. How can we explain CCC's unsuccessful influence over other legislative processes even when it sought to influence them? Determining whether CCC sought to influence competition legislative outcomes goes beyond answering the why question, identifying how CCC's preferences are reflected and whether CCC was involved in the pre-legislative process. If competition policy legislative initiatives are important for CCC's survival and reputation, we do not expect CCC to be a passive participant.

Importantly, CCCS' exercise of Authority over cross-border competition cases within COMESA conflicts with NCAs and COMESA Member States' interests in regulating their domestic markets. Thus, we should expect the negotiation process leading to successful and unsuccessful legislative outcomes to be highly political.⁶⁰ Moreover, we should expect some actors to have more control over the negotiation process (especially those with gatekeeping agenda-setting power), and persuading them may require CCC to adopt specific strategies over time tactfully. In sum, to exert agenda-setting power successfully –particularly during politicization and when the agenda setter lacks formal agenda-setting power –actors must adopt specific strategies that make their proposals normatively compelling.⁶¹

According to Princen,⁶² actors seeking to ensure policymakers consider a specific issue have to adopt strategies to gain attention and build credibility. Gaining attention involves getting potential supporters *to pay attention* to the issue or agenda setter's preferences.⁶³ While building credibility reflects the ability of the policymakers to consider an institution as the most appropriate to deal with a specific issue.⁶⁴

And because influencing legislative outcomes requires that CCC ensures potential actors pay attention to its proposals, I focus on how CCC sought to gain actors' attention to consider its preferences. We should expect CCC to pay attention to the issues raised and solutions recommended by the contesting actors, such as reducing merger filing fees and delineating the

⁶⁰ Was there a compromise text and lack of agreement during informal bargains?

⁶¹ Azad Bali and Darren Halpin, 'Agenda-setting instruments: means and strategies for the management of policy demands' (2021) 40(3) *Policy and Society* 333.

⁶² Sebastiaan Princen, 'Agenda-setting strategies in EU policy processes' (2011) 18(7) *Journal of European Public Policy* 927.

⁶³ Sebastiaan Princen, 'Agenda-setting in the European Union: A Theoretical Exploration and agenda for research' (2007) 14(1) *Journal of European Public Policy* 21.

⁶⁴ Princen (n 62).

scope of work between CCC and NCAs. While at the same time, adopting strategies that are not intrusive to NCA's regulatory autonomy. As such an attempt is less likely to lead to favorable legislative outcomes from NCAs or COMESA Member States. Furthermore, the strategies adopted by CCC will vary over time, largely influenced by competition policy awareness in the region and CCC's policy output. For instance, post-2015, I expect the introduction of quantifiable merger thresholds and reduction of merger filing fees, and CCC's enhanced credibility through policy output to greatly influence the national-level legislative outcomes we observe in Kenya and Eswatini.

According to agenda-setting literature, successful agenda-setting is influenced by: tactfully involving actors, creating appropriate institutional avenues, issue framing, and the political context in which the debate occurs. At the same time, unsuccessful agenda-setting power could result from agenda denial or an agenda-setter withdrawing its legislative proposals, especially when they threaten its survival.⁶⁵

a. Predicting CCC's successful influence on competition policy legislative outcome

In explaining CCC's successful agenda-setting power, building on EU insights, I explore four strategies: mobilizing support, establishing institutional avenues, issue framing, and adopting tools such as MoUs (MoUs are similar to own initiative reports adopted by the EU Parliament).

i. Mobilizing Support

In its broader sense, agenda-setting power is an interactive process among various institutional actors geared towards reaching a consensus,⁶⁶ influenced by the formal and informal network bargains.⁶⁷ Moreover, the agenda-setting process begins with identifying a problem that requires a solution. Importantly, during backlash, the root and solution to a problem are usually stated by those contesting an institution's Authority. Accordingly, issue linkage and policy saliency are likely to influence successful agenda-setting power positively. Subsequently, to influence policy outcomes, one needs to mobilize support among the various actors by tactfully targeting *potential* supporters, who are actors more likely to be receptive to their agenda and with the ability to influence the decision outcome or the decision-maker to consider an issue. As noted by Princen:

⁶⁵ Gill Allwood, 'Agenda setting, agenda blocking and policy silence: Why is there no EU policy on prostitution?' (2018) 69 *Womens Studies International Forum* 126.

⁶⁶ Patrick Emmenegger, 'Agency in Historical Institutionalism: Coalitional Work in the Creation, Maintenance, and Change of Institutions' (2021) 50 *Theory and Society* 607,

⁶⁷ Cross and Hermansson (n 25).

By involving participants who support their cause and excluding participants who oppose it, political actors can change the agenda. In order to do so, they need to convince their (potential) supporters that they should devote time and effort to their cause while, ideally, they should also discourage (potential) opponents from becoming involved.⁶⁸

Sad to say, unfortunately, when actors have distinct perspectives over an issue as a result of diverging interests, as was in the case of backlash against CCC's jurisdiction over regional mergers *visa vis* NCAs, reaching a consensus can be strenuous. Thus, targeting potential actors alone is not enough. Yet, getting contesting and potential supporters to reach a compromise and pay attention to the agenda setter's preferences can also be arduous. In such a scenario, the actor seeking to have their preference considered must be able to identify the actors that control the process, then seek to persuade them or target actors who can persuade them.

If identifying actors is important, one cannot explain competition policy legislative outcomes in Section III above without first analyzing the negotiation process and actors involved. This is because, during negotiations, formal decision-making power is reduced, and informal bargains shaped by power distributions among actors take center stage. As aptly put by Cross and Hermansson,⁶⁹ in the context of the EU legislative process, 'the ability of these actors to have their policy demands reflected in policy outcomes is shaped and constrained by the mixture of formal and informal institutional constraints that are in place'.

Moreover, Brandsma and Hoppe note,⁷⁰ he who controls the process controls the policy outcome. If so, CCC's ability to establish contacts, connections, and networks within and beyond COMESA is likely to influence its ability to gain attention. We expect CCC to tactfully mobilize the support of domestic agenda-setters and actors with leadership agenda-setting power.⁷¹

Domestic agenda-setters

Gaining attention requires CCC to create strategic contact and network with potential supporters at the national level, communicating its preferences through issue linkage and saliency. In the context of this paper, domestic agenda-setters are not limited to NCAs and government officials but include lawyers, industrial associations, business firms, Parliament, etc.⁷² Although, NCAs and government officials have more gatekeeping agenda-setting power because they are granted

⁶⁸ Princen (n 62) 929.

⁶⁹ Cross and Hermansson (n 25) 598-599,

⁷⁰ Gijs Jan Brandsma and Alexander Hoppe, 'He who controls the process controls the outcome? A reappraisal of the relais actor thesis' (2021) 43(3) *Journal of European Integration* 347.

⁷¹ Sarah L Resodihardjo, 'The Agenda-Setting Process and Crises: Toward a Conceptual Framework' in EK Stern, (ed), *The Oxford Encyclopedia of Crisis Analysis* (Oxford University Press).

⁷² The defining element is that they whole originate within a particular country.

the formal agenda-setting power to initiate competition policy legislative proposals pending parliament approvals. For instance, Section 41 (2b) of the Zambian Competition and Consumer Protection Act of 2010 grants the Zambian NCA power to propose legislative amendments to the Minister after a market inquiry if the remedies available are insufficient. Whereas, in countries without competition laws, government officials, especially the Ministry of Trade and Attorney Generals, are granted the power to initiate competition policy legislative proposals.

In the broader sense, the likelihood that CCC influences competition policy legislative process so that its preferences are considered increases when CCC strategically engages with domestic agenda-setters. The reason is that domestic agenda-setters are likely to exert their gatekeeping agenda-setting power creating a systematic bias in favour of certain issues at both COMESA and national levels.⁷³ For example, NCAs have the power to influence the COMESA Council to consider the CCR legislative proposal tabled by CCC through their Member States.

Yet, mobilizing support alone is not enough. CCC's legislative proposals have a great chance of success if they reflect and prioritize contesting actors' issue salience and policy output. Consequently, the CCC status quo should not be further away from NCA's or Member State's ideal point or interests. For example, the Council may have approved the amendment of the Competition Rules in 2015 because the amendment increased NCA's autonomy and Member States' powers over national markets. Moreover, the legislative outcomes we observed at the national level from 2019 could have been influenced by CCC building its credibility over time, particularly through policy input. As a result, CCC's constituency actors have recognized CCC's expertise and organized capability to deal with regional mergers, restrictive trade practices, and consumer welfare. Thus, influencing the Member States and NCA's legislative initiatives. This analysis leads to the following hypothesis:

***H1a:** Mobilizing the support of domestic agenda-setters increases the chance of CCC influencing favourable legislative outcomes at the COMESA and Member State level.*

Leadership agenda-setters

Mobilizing the support of domestic agenda-setters can only be successful if they understand the benefits of a regional competition policy and the CCC has the resources to mobilize support. It is worth noting that in 2013 when CCC started implementing the CCR, it had limited resources and expertise. It was a new regime, and jurisdictional conflicts threatened its survival. Thus, even though domestic agenda-setters are integral to CCC's ability to influence legislative

⁷³ Allwood (n 67).

outcomes, we should expect CCC to mobilize the support of actors with expertise and credibility in the regulation of regional competition law. Such actors (including expert groups) have leadership agenda-setting power and are likely to be receptive to CCC's agenda. Additionally, they can convince constituency actors, drawing from their own experiences, to consider and support CCC's proposals. For instance, as noted by Deters and Falkner,⁷⁴ because leadership agenda setters possess the expertise, they are in a position to rally consensus over an issue by setting a focal point where negotiations converge.

In the context of actors involved in the globalization of competition policy, the EU, OECD, UK, US, World Bank, and UNCTAD have leadership agenda-setting power drawn from their experiences. However, the EU has more leadership agenda-setting power due to its successful implementation of a regional competition policy. Indeed, a close analysis of CCC's quantifiable merger thresholds introduced in 2015 vide amendment of COMESA Competition Rules shows that they are similar to the EU's merger thresholds.

And because the EU had expertise and credibility in the regulation of mergers with a regional dimension, its proposals in addressing jurisdictional conflicts are more likely to be accepted by the contesting parties. For instance, similar to COMESA Merger Thresholds, and according to the EU 2004 Merger Regulation,⁷⁵ the EU Commission has no jurisdiction over mergers where each of the firms achieves more than two-thirds of its EU-wide turnover within the same Member State. This similarity is an indication that the EU enjoying a fast-mover advantage, might have exerted leadership agenda-setting power. Hence, this analysis leads to the following hypothesis:

H1b: *The involvement of actors with leadership agenda-setting power positively influenced CCC's ability to influence competition policy legislative outcomes.*

ii. Issue Framing

When backlash emanates from below spearheaded by policymakers seeking to shape legislative outcomes, targeting potential actors is not enough. Gaining attention and reaching a consensus on the ideal solution requires the agenda-setter to consider the salient issues raised by the contesting actors. Thus, successful agenda-setting will be determined by how the agenda-setter frames the issue for consideration.⁷⁶

⁷⁴ Deters and Falkner (n 4).

⁷⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings

⁷⁶ Princen, 'Agenda-Setting and Framing in Europe', in Edoardo Ongaro and Sandra Van Thiel (eds), *The Palgrave Handbook of Public Administration and Management in Europe* (Palgrave Macmillan 2018) 535-551; Borja

At its most general level, issue framing involves *claiming authority* through message construction or narratives.⁷⁷ According to Princen, issue framing 'implies the construction of a convincing argument about why the issue is European in scope and, hence, is legitimately dealt with at the EU level'.⁷⁸ Generally, effective issue framing can arouse interest and influence the possibility of the actors considering an issue. In short, successful issue framing is influenced by an institution's credibility, that is, the ability of actors to consider an institution as the most appropriate to deal with a specific issue. For instance, Princen further notes that the EU has credibility when three factors exist.⁷⁹ First, it has the legal competence granting the EU the legal basis for dealing with the specific issue. Second, the legal basis in itself is not sufficient. The EU must show that it possesses the expertise and organizational capability to deal with the specific issue. Finally, if other institutions can deal with the issue, the EU's 'added value vis-a-vis those other venues should be clear'.⁸⁰

Suppose this logic was to be applied in the context of CCC when engaging with the various institutional actors; CCC has to adopt issue framing that justifies CCC as the most appropriate institution. At the same time emphasizes that it has a legal basis well-encapsulated under the CCR as the regulation of cross-border competition cases falls under its competence. Additionally, to show CCC's added value vis-a-vis NCAs, we expect CCC to rely on the benefits of having a one-stop-shop, such as addressing conflicting decisions, enhancing legal uncertainty, and predictability in doing business in the region. Moreover, as CCC policy output increases over time, we expect COMESA countries to see CCC's added value vis-a-vis NCAs regulating cross-border competition cases.

Subsequently, through qualitative content analysis, I anticipate CCC's issue framing to align with a legal basis (inferring competence), credibility (CCC as the most appropriate institution), and value addition arguments. More so, because the observed legislative outcomes are geared toward addressing jurisdictional conflicts, the negative implications of jurisdictional conflicts should provide CCC with an opportunity to frame issues. To test the above observation, I inquire from countries that have adopted legislative initiatives whether the benefits accrued

García and others, 'Issue Framing and Institutional Constraints In EU Agenda-Setting: An Analysis of European Union Sport Policy' (2018) 14(1) *Journal of Contemporary European Research* 23-39.

⁷⁷ Dietram A. Scheufele and David Tewksbury, 'Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models' 57 (2007) *Journal of Communication* 9-20.

⁷⁸ Princen (n 62) 931.

⁷⁹ *Ibid* p. 930.

⁸⁰ *Ibid*.

from CCC's regulatory authority influenced their decision. This analysis leads to the following hypothesis:

H2: *How CCC frames issues has a great chance of shaping legislative outcomes.*

iii. Establishing Institutional venue

Mobilizing support and involving various actors in the negotiation process alone is not enough. Successful agenda setting, especially during crisis or backlash, will be influenced by appropriate institutional venues at the local and international levels, considering the political, economic, and historical context. Mobilizing supporters, therefore, 'consists of shaping participation through institutional avenues'.⁸¹ Institutional venues refer to locations where issues are discussed (framed) and considered, providing a platform where policy debate is constructed and issues framed.⁸² According to Timmermans and Scholten, policy avenues are:

locations where policies originate, obtain support, and are adopted as binding decisions... Venues are sites of strategic issue control, and such control may be directed to stabilizing or destabilizing a policy monopoly. Strategic actors thus seek venues where they can get established, and influence images of problems and solutions.⁸³

Examples of policy avenues include international organizations, media, research institutions, think tanks, conferences, and judiciary studies.⁸⁴ Accordingly, the choice of policy venue influences whether an issue is included or excluded from the agenda because they provide opportunities and, at the same time, can create constraints. A good policy venue, for instance, can limit the scope of conflict and depoliticize the issue. It will also arouse interest and support for a policy formulation. As aptly noted by Tallberg,⁸⁵ conferences as an institutional avenue for policy deliberation enable the agenda-setter to discuss the issue and frame solutions.

For instance, CCC's director General George Lipimile used the media and conferences as an institutional avenue to argue that the objective of a zero merger threshold was to understand the merger landscape in the region, then introduce the merger threshold later.⁸⁶ The implication was that CCC was cautious not to show that it was intruding into NCA's regulatory autonomy. This action depoliticized jurisdictional conflicts. Thus, this leads us to the second hypothesis:

⁸¹ Princen (n 62) 931.

⁸² Ibid p. 933. Also see Sarah B Pralle, 'Venue Shopping, Political Strategy, and Policy Change: The Internationalization of Canadian Forest Advocacy' (2003) 23(3) *Journal of Public Policy* 233.

⁸³ (2006, 1105),

⁸⁴ Pralle (n 87).

⁸⁵ Tallberg (n 9) 6-7.

⁸⁶ George Lipimile, 'Early Experiences of the New COMESA Competition Regime' (Interview by Jenine Hulsmann and Alastair Mordaunt Clifford Chance).

H3: *The choice of institutional avenue greatly influences CCC's successful agenda-setting power.*

iv. Agenda-Setting Tools

In addition to mobilizing support, establishing institutional avenues, and issue framing, agenda-setters can adopt specific tools that indirectly trigger legislative responses in their preferred direction. For instance, Article 241 of the Treaty on the Functioning of the European Union (TFEU), grants the EU Council the power to request the EU Commission to undertake studies and submit proposals to the Council. Through these studies, the EU Council has sought to influence the legislative proposals adopted by the EU Commission.

Moreover, various studies show that even when the EU Parliament has had increased powers in other domains, its role in initiating legislative proposals is limited. However, this has not inhibited the EU Parliament from seeking to influence the legislative proposals initiated by the EU Commission. In identifying how EU Parliament has sought to gain the EU's commission's attention, researchers adopting process tracing and document analysis trace the EU's Parliament's communication and involvement in the EU's pre-legislative phase.⁸⁷ These findings show that the EU Parliament exerts discursive agenda-setting power during the pre-legislative process using various strategies to gain EU Commission's attention.⁸⁸ One of the most commonly cited strategies is EU Parliament's own-initiative reports (OIR).⁸⁹ Through OIR, the EU Parliament communicates its preferences and establishes the salience of an issue. Framing issues in a way to mobilize support among the EU Commission. As noted by Deters and Falkner (2020, 294):

Adopting own-initiative reports is, first and foremost, part of a discursive agenda-setting strategy. By debating and publishing own-initiative reports, the EP brings the issues that it cares about to the attention of the commission and mobilizes support among other EU institutions, member states, stakeholders, and voters.

Nevertheless, how effective OIR has successfully influenced EU Commission's legislative proposals is underexplored. In a study carried out by Kreppel and Webb,⁹⁰ which analyzed 1825 OIR adopted by the EP between 2000 and 2007, they found that the EC considered 12.2% of

⁸⁷ Simon Hix, 'Constitutional Agenda-Setting Through Discretion in Rule Interpretation: Why the European Parliament Won at Amsterdam' 2002 32(2) British Journal of Political Science 259-280; Webb and Kreppel (n 5).

⁸⁸ Deters and Falkner (n 4) 293-295.

⁸⁹ Maurer, A. & Wolf, M.C. (2018) Agenda-shaping in the European parliament and the European Commission's right of legislative initiative. In: Ege, J., Bauer, M.W. & Becker, S. (Eds.) The European Commission in turbulent times. Baden-Baden: Nomos, pp. 53-84; The European Parliament's right of initiative [https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655134/IPOL_STU\(2020\)655134_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/655134/IPOL_STU(2020)655134_EN.pdf)

⁹⁰Kreppel and Webb (n29).

the reports. However, this does not water down the ability of EP's OIR to influence the EU legislative process.

While the EU Parliament uses OIR, we anticipate CCC indirectly shaping national-level legislative outcomes through MoUs. Of the 14 COMESA countries that have NCAs, CCC has concluded MoUs with 11 NCAs. In 2016 alone, CCC entered into MOUs with ten established NCAs in Kenya, Seychelles, Eswatini, Egypt, Madagascar, Malawi, Mauritius, Sudan, Zambia, and Zimbabwe.⁹¹ In 2021, CCC did sign an MoU with the National Competition Commission of the Democratic Republic of Congo known as "Commission De La Concurrence (COMCO)".

Albeit voluntary and non-binding in the strict legal sense, MoUs have consequences that shape political outcomes. Taken seriously, MoUs could catalyze national-level legislative initiatives over time. Generally, MoUs enhance cooperation between CCC and NCAs through notifications, information sharing, coordination of actions, and consultation. Additionally, MoUs require NCAs to undertake measures that enhance the implementation of CCR. Viewed this way, MoUs also provide CCC with an avenue to debate and persuade NCAs to consider adopting legislative initiatives.

Indeed, CCC has noted that MoUs with NCAs have reduced conflicts between CCC and NCAs, and enhanced the harmonization of CCR with national competition laws. For instance, as noted by Kigwiru and Mwemba 'a notable success arising from such cooperation frameworks has been the review of merger notification thresholds at the national level in Kenya which led to the elimination of double notification of regional mergers to the Competition Authority of Kenya and CCC'.⁹² To test the effectiveness of MoUs in triggering legislative initiatives, I focus on Kenya and Eswatini, questioning whether existing MoUs, to some extent, influenced their legislative initiatives. Thus, I hypothesize that:

H4: *MoUs between CCC and NCAs greatly influence favourable national-level legislative outcomes.*

In the above section, I have explained how CCC could have influenced favourable legislative outcomes. In the next section, I predict why CCC's effort to push for legislative outcomes failed in other cases.

⁹¹ CCC, 'MoUs' <https://www.comesacompetition.org/mous/> accessed 17 January 2022.

⁹² Vellah Kedogo Kigwiru and Willard Mwemba, 'The COMESA Competition Commission (CCC), Earlier Experiences and Lessons for Regional Competition Regimes in the Global South' (AfronomicsLaw Blog August 30 2021).

b. When does agenda setting fail?

Some issues get into the agenda for consideration, while others never get into the agenda. This could happen when the agenda-setter withdraws its legislative proposal or the policymakers reject it. Thus, it is pertinent that we also explain instances when CCC sought to influence legislative outcomes to enhance the implementation of CCR or bolster institutional survival, yet its legislative proposals were not considered. Secondly, instances when CCC withdrew its legislative proposals.⁹³

Agenda denial

Capella, defines agenda denial as 'the process by which issues are kept from government consideration and deliberation'.⁹⁴ Agenda denial strategies include avoidance, attack, or threats. In explaining why CCC's legislative proposals failed to be considered by COMESA country even when CCC pushed for their inclusion, I draw insights from the agenda denial literature.⁹⁵ Various reasons explain why some issues fail to be considered (denied or blocked).⁹⁶ For instance, actors interested in maintaining the *status quo* are more likely to keep certain issues from the agenda if they are intrusive in their regulatory authority. Kreppel and Oztas observe that a proposal to amend or adopt legislation can only be effective if the status quo is not desirable and the policy outcome is desirable.⁹⁷

Thus, NCAs and COMESA countries should be more interested in maintaining their status quo of regulating domestic markets. Thus:

H5a: Legislative proposals affecting the status quo are more likely to be rejected.

For an issue to be considered by policy makers, the actor seeking favourable legislative outcome must show that they have legal competence.⁹⁸ Legal competence is stipulated within the institution's laws, granting it the authority to regulate a specific issue area or seek actor's compliance. For instance, after carrying out a market inquiry on the issue relating to the domestication of CCR by COMESA countries, CCC explicitly noted that such a legislative proposal fell under the competence of the COMESA Council and COMESA Secretariat. This analysis leads to the following hypothesis:

⁹³ Koop and others (n 38).

⁹⁴ Capella (n 13) 676.

⁹⁵ Ibid.

⁹⁶ Princen (n 62) 938-940.

⁹⁷ Kreppel and Oztas (n 7) 1121.

⁹⁸ Allwood (n 67).

H5b: *A legislative proposal will be rejected when an actor submitting it lacks the legal competence to push for it.*

In other cases, an actor may withdraw its legislative proposals, denying the policymakers the chance to consider the issue. An issue is more likely to be excluded or withdrawn when it is controversial. Unfortunately, pushing an issue that raises controversy increases the number of opponents, leading to more politicization—making it difficult to reach a consensus. Additionally, controversial issues threaten an institution's survival and reputation. In the context of the EU, Princen succinctly argues that:

Controversy is likely to mobilize opponents, who in the EU system can relatively easily block policy initiatives. Thus, unlike their colleagues in majoritarian systems, agenda-setters in the EU can less readily rely on strategies that are meant to provoke controversy in order to widen the scope of participation. The need to limit the number of active opponents will tend to place a bonus on strategies that confine debates on the issue to a small circle of supporters – something that the functionally differentiated EU policy-making system readily allows for.⁹⁹

If the above observation is true, we expect CCC to withdraw legislative proposals or be cautious in pushing for legislative proposals that raise controversy. Treaty domestication is highly controversial. If pursued by international organizations, it is more likely to threaten its survival. When an issue is highly contested, Princen argues that it is important for the agenda-setter to take small steps such as undertaking studies, which could influence successful agenda-setting power over time.¹⁰⁰

Moreover, when an issue is highly controversial and likely to threaten an institution's survival, the best alternative is to withdraw. For example, research on the EU Commission's agenda-setting power shows that it withdraws and prioritizes legislative proposals when its survival is threatened during politicization.¹⁰¹ According to Koop, Reh and Bressanelli:

... the commission's responsiveness is motivated by bureaucratic survival under threat, and by policy-output under salience. The commission, we argue, uses legislative priorities to signal aggregate restraint in response to threats, and targeted performance in response to salience.¹⁰²

Against this backdrop, we expect legislative proposals that raise controversy not to be considered or withdrawn by CCC. Therefore:

⁹⁹ Princen (n 62) 940.

¹⁰⁰ Ibid p. 939.

¹⁰¹ Christine Reh, Edoardo Bressanelli and Christel Koop, 'Responsive Withdrawal? The politics of EU Agenda Setting' (2020) 27(3) *Journal Of European Public Policy* 419.

¹⁰² Koop and others (n 38) 52.

H5c: *The more controversial a legislative proposal, the more likely it will be rejected or withdrawn by CCC.*

V. DISCUSSION AND ANALYSIS