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# Telecommunications sector in Kenya: legal strategies against anticompetitive conduct.

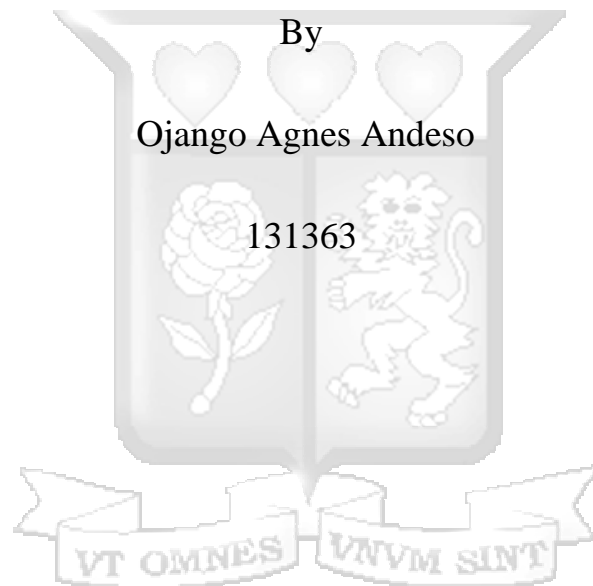
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# **Telecommunications Sector In Kenya: Legal Strategies Against Anticompetitive Conduct**



**Master of Laws**

**2024**

# **Telecommunications Sector in Kenya: Legal Strategies against Anticompetitive Conduct**

By

Ojango Agnes Andeso

131363

**Submitted in Partial Fulfillment of the Requirements for the Degree of Master of Laws at  
Strathmore University**

**Strathmore Law School**

**Strathmore University**

**Nairobi, Kenya**

**JUNE, 2024**

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## ABSTRACT

The telecommunications industry in Kenya is still experiencing anticompetitive conduct even though there are laws and regulatory agencies to address anticompetitive behaviors. Anchored on the neoliberal competition theory and the economic welfare theory, this study interrogated the legal and regulatory framework for competition in Kenya to establish whether it is adequate in curbing anticompetitive behavior in the Kenyan telecommunications industry. The study used doctrinal research methodology to analyze the various anticompetitive conducts in the telecommunication industry. The study sought to analyze what the anticompetitive practices were in the telecommunications industry in general and examine the relevant laws in Kenya to establish their adequacy in addressing the anticompetitive practices in the Kenyan telecommunications industry as categorized in the various themes.

The findings of the study revealed that there are various anticompetitive behaviors in the telecommunications industry that may be categorized in five themes. The findings of the study also revealed that the Kenyan law that regulates anticompetitive practices was not adequate enough to address all the anticompetitive practices that occur in the telecommunications industry in Kenya. Based on these findings the main recommendations of this study are the inclusion of, in the legal and regulatory framework, a comprehensive list of and comprehensive definitions of anticompetitive conduct in the telecommunications industry that are not addressed by the relevant law as it is currently. It is anticipated that the study will be relied on to improve the legal and regulatory framework for competition in the telecommunications industry in Kenya so that it is more comprehensive to adequately curb anticompetitive behaviors experienced in the telecommunications industry in Kenya.

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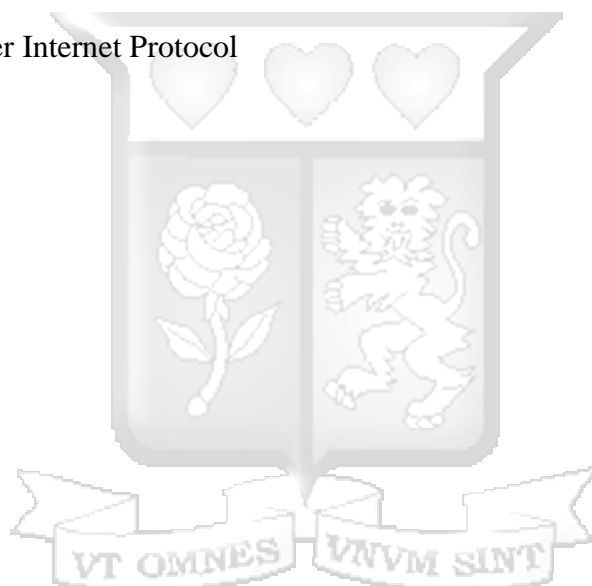
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## LIST OF ABBREVIATIONS

AT & T	American Telephone and Telegraph
BSL	Beta Solutions Limited
CA	Communications Authority of Kenya
CAK	Competition Authority of Kenya
CRTC	Canadian Radio-television and Telecommunications Commission
DT	Deutsche Telekom
FCC	Federal Communications Commission
5G	Fifth Generation
GCRA	Guernsey Competition and Regulatory Authority
GSM	Global System for Mobile
HCA	Hungarian Competition Authority
KFTC	Korea Fair Trade Commission
KT	Korea Telecom
LIS	Linksoft Integrated Systems
LLU	Local Loop Unbundling
MC	Microsoft Corp
MCI	Microwave Communications Incorporated

PCS	Personal Communications Services
SMS	Short Messages Service
TCA	Turkish Competition Authority
TCI	Tele-Communications Inc.
TI	Telecom Italia
VNPT	Vietnam National Posts and Telecommunications
VoIP	Voice Over Internet Protocol



## LIST OF CASES

*Airtel Kenya Limited v Safaricom Limited* CAK/EC/05/34/A (2014), Competition Authority of Kenya

*Clear v New Zealand* (1994) 6 TCLR 138 (PC), The Supreme Court of New Zealand

*Comportamenti Abusivi di Telecom Italia*, Decisione n. 13752/2004, A351, Italian Competition Authority

*Deutsche Telekom AG* Case T-271/03 (2003) European Commission

*Hungarotel* Vj-69/2005/58, Hungarian Competition Authority

*MATAV*, Vj-100/2002 Hungarian Competition Authority

*National Roaming Case* Decision No. 03-40/432 186 (2003), Turkish Competition Authority

*Orange Austria by Hutchison 3G Austria* COMP/M.6497 (2012), The European Commission

*Slovak Telekom and Deutsche Telekom AG* T-851/14 and T-827/14 (2014), European Commission

*Telecom Decision* CRTC 2019-353, Canadian Radio-television and Telecommunications Commission

*Telkom Kenya Limited & another v Competition Authority of Kenya* CT/005/2020, Competition Tribunal of Kenya

*T-Mobile Austria Acquisition of Tele Ring* COMP/M.3916 (2006), The European Commission

## LIST OF LEGAL INSTRUMENTS

Constitution of Kenya 2010

Competition Act No. 12 of 2010

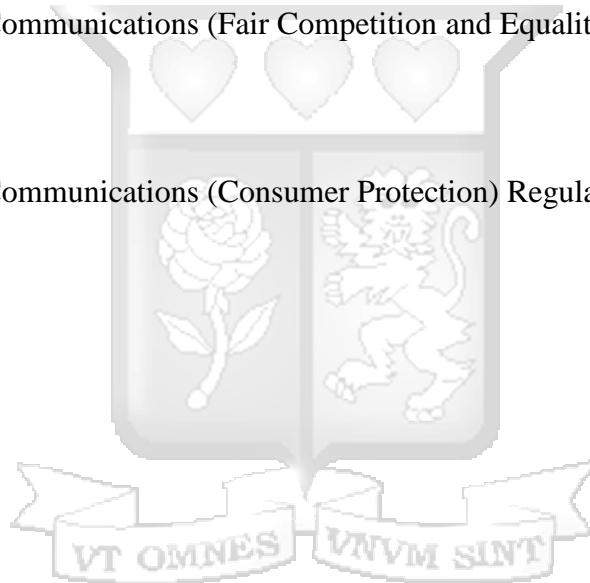
Competition General Rules 2019

Consumer Protection Act No. 46 of 2012

Kenya Information and Communications Act No. 2 of 1998

Kenya Information and Communications (Fair Competition and Equality of Treatment)  
Regulations 2010

Kenya Information and Communications (Consumer Protection) Regulations 2010



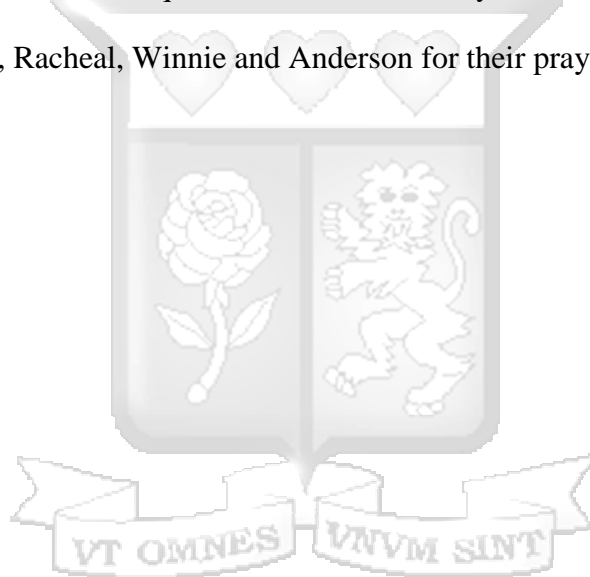
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I thank my domestic helper, Nanjala, for ensuring that my beloved children do not give me too many commercial breaks while working on this thesis. I am grateful to my late parents Hilda and Benson and my late guardians (grandma Esther and auntie Emma) who at their deathbeds inspired me (and my siblings) to believe that we can achieve the education we desire. I wish to thank my siblings Beatrice, Rachel, Winnie and Anderson for their encouragement and prayers. I wish to thank my mother-in-love, Mrs. Maryjoyce Miseda, for continuous prayers for me. I thank my supervisor Dr. Elizabeth Mokeira, for the valuable guidance in ensuring that my thesis indeed contributes to the body of knowledge.

## DEDICATION

I dedicate this thesis to my beloved husband John Opudo, who singlehandedly and at great sacrifice provided monetary facilitation of my master of laws studies and pushed me lovingly to complete this thesis. I also dedicate this thesis to my beloved children Jude, Angeliz, Jo (deceased), Alena, Adeline and the baby (currently in the womb) for their subtle motivation to complete this work. I also dedicate this thesis to my beloved parents Hilda and Benson (both deceased) and my guardians (the late aunt Emma and the late grandma Esther) for encouraging and inspiring my siblings and myself to attain the highest education qualifications that we may desire. I dedicate this work to my beloved siblings Beatrice, Racheal, Winnie and Anderson for their prayers and encouragement.



## CHAPTER ONE

### 1.1 Background and definition of concepts

Healthy competition is a necessity for businesses to thrive in any industry since this eventually leads to economic transformation.<sup>1</sup> Some of the terms commonly associated with business rivalry are explained hereafter. To begin with, monopoly is a business entity that has acquired market power and is therefore considered to dominate an industry to the exclusion of all other viable competitors.<sup>2</sup> Secondly, competition in the economic context means a situation in a market whereby suppliers independently strive for the patronage of buyers to achieve a particular aim which are usually making profits and acquiring and strengthening their market share.<sup>3</sup> Thirdly, consumer protection means a mechanism by which the rights of consumers are guaranteed and respected in a competitive business environment whilst promoting and advancing the social and economic welfare of consumers.<sup>4</sup> Consumer rights are defined as provided in the Constitution of Kenya<sup>5</sup> and the Consumer Protection Act.<sup>6</sup>

The Kenyan telecommunications industry in which a variety of services are offered for sale is not immune to competition.<sup>7</sup> There are occasions when the suppliers engage in anticompetitive conduct despite there being laws and regulations that prohibit anticompetitive behaviour.<sup>8</sup> This issue is not only experienced in the Kenyan telecommunications market but also in the telecommunications market of other jurisdictions. One example is in the telecommunications industry of India where it was observed that private players refused to co-operate with each other

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<sup>1</sup> Competition Authority of Kenya, *11 years of competition law enforcement in Kenya*, 2023, at 2.

<sup>2</sup> <https://www.investopedia.com/terms/m/monopoly.asp> on 27 April 2023.

<sup>3</sup> <https://stats.oecd.org/glossary/detail.asp?ID=3163> on 27 April 2023.

<sup>4</sup> Section 3 (4), *Consumer Protection Act* (Act No. 46 of 2012)

<sup>5</sup> Article 46, *Constitution of Kenya* (2010)

<sup>6</sup> Part II, *Consumer Protection Act* (Act No. 46 of 2012).

<sup>7</sup> <https://ict.go.ke/government-to-promote-fair-competition-in-telecoms-sector/> on 26 April 2023.

<sup>8</sup> <https://ict.go.ke/government-to-promote-fair-competition-in-telecoms-sector/> on 26 April 2023.

for interconnectivity charges.<sup>9</sup> In addition to that, the suppliers in the Indian telecommunications market charged quite high costs for interconnectivity. On top of that, the suppliers in the telecommunications industry of India frustrated the entry of new competitors through engaging in predatory pricing.<sup>10</sup>

In the telecommunications industry of Kenya, anticompetitive behavior is an issue that one of the industry players stated that it was not adequately regulated.<sup>11</sup> Moreover, one of the industry players in the telecommunications market of Kenya holds the view that regulating competition will ensure fairness in trading for all industry suppliers who are competing.<sup>12</sup> In addition, one of the industry players stated that regulation will curb anticompetitive conduct like abuse of dominance that is perpetrated by a competing supplier.<sup>13</sup> On top of that, another supplier in the telecommunications industry in Kenya through its representative appeared before the Senate Standing Committee on Information Technology of Kenya to state that the company was not abusing its market dominance and had no aim of reducing competition from its rivals.<sup>14</sup>

In addition, some of the telecommunications service providers sold locked mobile phones to the consumers and this made it impossible for the consumers to use the sim card of a competitor in the mobile phone they had bought.<sup>15</sup> This led to the consumers having to purchase new mobile phones

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<sup>9</sup> Sahithya M and Chakraborty A, 'Sectoral regulator and competition commission: envisaging a movement from turf war to reconciliation' 11 *NALSAR Student Law Review* (2017), 135.

<sup>10</sup> Sahithya M and Chakraborty A, 'Sectoral regulator and competition commission: envisaging a movement from turf war to reconciliation', 135.

<sup>11</sup> <https://kenyanwallstreet.com/airtel-kenya-calls-for-regulation-of-telco-sector-claims-it-will-boost-competition/> on 2 May 2023.

<sup>12</sup> <https://kenyanwallstreet.com/airtel-kenya-calls-for-regulation-of-telco-sector-claims-it-will-boost-competition/> on 2 May 2023.

<sup>13</sup> <https://kenyanwallstreet.com/airtel-kenya-calls-for-regulation-of-telco-sector-claims-it-will-boost-competition/> on 2 May 2023.

<sup>14</sup> <https://africa.businessinsider.com/local/markets/safaricom-refutes-dominance-claims-by-airtel-says-the-market-is-big-enough-for/klzlm7c> on 27 April 2023.

<sup>15</sup> Chesula O and Kiriinya S, 'Competitiveness in the telecommunication sector in Kenya using porters five forces model' 8 *International journal of research in finance and marketing*, 7 (2018), 2.

so that they can switch the telecommunications service providers.<sup>16</sup> This kind of conduct amounts to anticompetitive practice in the telecommunications industry. This is because the consumers are unable to switch to their preferred telecommunications service provider as and when they want to do so. In addition, competition in the telecommunications sector in Kenya has experienced anticompetitive conduct whose examples are stated hereafter. They include, high switching costs and barriers to entry.<sup>17</sup>

Such kinds of behaviour, among others, is what necessitated the Competition Authority of Kenya (CAK) in its advisory opinion to indicate that the sector regulator in the telecommunications industry in Kenya should introduce initiatives that reduce barriers to entry as well as switching costs.<sup>18</sup> CAK further sensitized one of the suppliers in the telecommunication industry regarding buyer power issues in the industry.<sup>19</sup> The latter implies that there could have been complaints of abuse of buyer power in the telecommunications sector that CAK identified either through market inquiry or complaints brought to CAK.

Moreover, the parliamentary Committee on Communication, Information and Innovation decided to conduct an investigation into the Kenyan telecommunications sector to identify the legislative and regulatory gaps in that sector.<sup>20</sup> The outcome of the investigations, as indicated by the committee was to propose measures that would address any anticompetitive practices in the telecommunications market.<sup>21</sup> One of the industry players even contemplated exiting the Kenyan telecommunications sector stating that their business is negatively affected by anticompetitive

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<sup>16</sup> Chesula O and Kiriinya S, 'Competitiveness in the telecommunication sector in Kenya using porters five forces model', 2.

<sup>17</sup> Competition Authority of Kenya, *Annual Report and Financial Statements*, 2018/2019, at 73.

<sup>18</sup> Competition Authority of Kenya, *Annual Report and Financial Statements*, 2018/2019, at 73.

<sup>19</sup> Competition Authority of Kenya, *Annual Report and Financial Statements*, 2019/2020, at 79.

<sup>20</sup> <https://nation.africa/kenya/business/parliament-opens-probe-into-telcos-mobile-money-and-service-charges-64028> accessed on 19th April 2024.

<sup>21</sup> <https://nation.africa/kenya/business/parliament-opens-probe-into-telcos-mobile-money-and-service-charges-64028> accessed on 19th April 2024.

behavior of the dominant telecommunications service provider.<sup>22</sup> The foregoing indicates that anticompetitive conducts are experienced in the Kenyan telecommunications industry and that the market players hold the view that there should be adequate mechanisms that address these practices.

Regulation of competition in the telecommunications industry leads to enhanced consumer welfare. For example, the dominant player who may charge more for less of the service offered to the consumer will be prevented from engaging in that practice.<sup>23</sup> This ensures that consumers obtain quality services at affordable prices.<sup>24</sup> In addition, unregulated abuse of dominance may result into limited access to quality telecommunications services, high tariffs which eventually limit consumer choices.<sup>25</sup> The foregoing are some of the examples of the negative effects of anticompetitive practices on consumers' welfare thus necessitating the need to address the problem adequately through regulation.

## **1.2 Statement of the problem**

The telecommunications industry across the globe has competitors. In a bid to gain competitive advantage over the competitors many players in this industry may engage in anticompetitive practices. In Kenya research and case law has shown that players in the telecom industry engage in anticompetitive practices. This is the situation despite the fact that Kenya has a legal and regulatory framework regulating competition broadly. This study will interrogate the current legal

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<sup>22</sup> <https://www.businessdailyafrica.com/bd/corporate/companies/airtel-threatens-kenya-exit-over-safaricom-dominance--2095866> accessed on 19th April 2024.

<sup>23</sup> [https://www.itu.int/ITU-D/treg/Events/Seminars/2005/Thailand/Reference%20Material/Reference%20material%20-%20Oz\\_anticmp\\_telecom.pdf](https://www.itu.int/ITU-D/treg/Events/Seminars/2005/Thailand/Reference%20Material/Reference%20material%20-%20Oz_anticmp_telecom.pdf) accessed on 20<sup>th</sup> April 2024.

<sup>24</sup> [https://www.itu.int/ITU-D/treg/Events/Seminars/2005/Thailand/Reference%20Material/Reference%20material%20-%20Oz\\_anticmp\\_telecom.pdf](https://www.itu.int/ITU-D/treg/Events/Seminars/2005/Thailand/Reference%20Material/Reference%20material%20-%20Oz_anticmp_telecom.pdf) accessed on 20<sup>th</sup> April 2024.

<sup>25</sup> <https://ict.go.ke/government-to-promote-fair-competition-in-telecoms-sector/> accessed on 20<sup>th</sup> April 2024.

framework to ascertain whether it is sufficient to curb the anticompetitive practices that are likely to be found in the industry. If the legal framework is not robust enough this study makes recommendations on the way forward.

### **1.3 Research Objectives**

- 1.3.1** Identify and analyse anticompetitive behaviours in the telecommunication industry.
- 1.3.2** Examine the legal and regulatory framework for competition in Kenya and establish whether it adequately protects consumer welfare in the telecommunications industry.
- 1.3.3** Based on the findings make recommendations that will facilitate adequate prevention of anticompetitive practices in the telecommunication industry in Kenya.

### **1.4 Research Questions**

- 1.4.1** What are the anticompetitive behaviours in the telecommunication industry?
- 1.4.2** What is the legal and regulatory framework in Kenya that regulates competition in the telecommunications industry?
- 1.4.3** Based on the findings, what recommendations can be made to facilitate adequate prevention of anticompetitive conduct in the telecommunications industry in Kenya?

### **1.5 Justification for the study**

The anticompetitive conduct experienced in the telecommunications industry affects both consumers and suppliers. For example, the anticompetitive behavior of barriers to entry results into inability of other service providers to enter the telecommunication industry thus creating a monopolistic market. This study is significant in that CAK as the institution tasked with nationwide regulation of competition will learn more about the anticompetitive practices that occur in the telecommunications industry. Moreover, CA as a sectoral regulator will be facilitated by this

information when it conducts investigations into telecommunications anticompetitive practices out of its own motion. In addition, the players in the telecommunications industry stand to benefit from this study since they will learn about these anticompetitive practices so that they stop engaging in them. Finally, the consumers will benefit greatly because this study will create awareness on the anticompetitive practices thus empowering consumers to seek redress from CAK.

## **1.6 Hypothesis**

This thesis hypothesizes that the legal and regulatory framework for competition in the telecommunication industry in Kenya is not robust enough to adequately curb anticompetitive conducts in that industry.

## **1.7 Theoretical Framework**

This study is anchored on the following theories as analyzed below.

### **1.7.1 Neoliberal Competition Theory**

This theory focuses on forbidding conduct, like anticompetitive practices, that adversely affects economic performance and welfare of both the consumers and suppliers in the market.<sup>26</sup> This theory proposes limited interference by the state in market trends and structures.<sup>27</sup> The state therefore steps in through regulation of the market with the aim of increasing economic welfare.<sup>28</sup>

This theory relies on the principle of neoclassical welfare economics.<sup>29</sup> This principle essentially means that market forces of demand and supply are what dictates production, distribution, pricing

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<sup>26</sup> Coniglio J, 'Economizing the totalitarian temptation: a risk-averse liberal realism for political economy and competition policy in a post-neoliberal society' 59 *Santa Clara Law Review*, 3 (2020), 710.

<sup>27</sup> Coniglio J, 'Economizing the totalitarian temptation: a risk-averse liberal realism for political economy and competition policy in a post-neoliberal society', 709.

<sup>28</sup> Coniglio J, 'Economizing the totalitarian temptation: a risk-averse liberal realism for political economy and competition policy in a post-neoliberal society,' 709.

<sup>29</sup> Coniglio J, 'Economizing the totalitarian temptation: a risk-averse liberal realism for political economy and competition policy in a post-neoliberal society,' 710.

and consumption of goods and services. This principle is therefore applied to regulate anticompetitive behaviour in the market. In neoliberal competition theory, technical experts generally rely on legal eras and administrative institutions to apply economic ideas to achieve the goal of economic welfare enhancement.<sup>30</sup> The use of technocrats provides suitable solutions that adequately address existent and emerging economic challenges.<sup>31</sup>

This theory is appropriate for the study as follows. The theory focuses on forbidding anticompetitive conduct because of its negative effects on economic welfare of both consumers and suppliers and proposes that the government regulates markets to protect economic welfare. It therefore aligns with the objectives of the study to improve competition laws so that those laws can adequately curb anticompetitive conduct in the telecommunications industry in Kenya.

### **1.7.2 Economic Theory of Welfare**

This theory is sometimes referred to as the public interest theory of regulation<sup>32</sup> or the helping hand theory.<sup>33</sup> This theory assumes two positions. The first assumption is that adverse effects of monopolies and externalities in economics are the cause of market failure in free markets.<sup>34</sup> The second assumption is that the government has the capability to correct such market failure by introducing and implementing regulation.<sup>35</sup> This theory champions the concept that regulation aims to protect and therefore benefit the members of the public.<sup>36</sup> Moreover, this theory also

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<sup>30</sup> Coniglio J, 'Economizing the totalitarian temptation: a risk-averse liberal realism for political economy and competition policy in a post-neoliberal society,' 710.

<sup>31</sup> Coniglio J, 'Economizing the totalitarian temptation: a risk-averse liberal realism for political economy and competition policy in a post-neoliberal society,' 711.

<sup>32</sup> Aranson P, 'Theories of economic regulation: from clarity to confusion' 6 *Journal of Law & Politics*, 2 (1990), 249.

<sup>33</sup> Shleifer A, 'Understanding regulation' 11 *European Financial Management*, (4) (2005), 440.

<sup>34</sup> Shleifer A, 'Understanding regulation,' 440.

<sup>35</sup> Shleifer A, 'Understanding regulation,' 440.

<sup>36</sup> Domas M, 'The public interest theory of regulation: non-existence or misinterpretation?' 15 *European Journal of Law and Economics*, (2003), 166.

champions the concept that regulation is the remedy for market failure since it will lead to maximization of welfare.<sup>37</sup> In democratic states, this theory is relied on to prescribe the actions to be taken by the government as well as what the government has already been doing to address causes of market failure.<sup>38</sup>

In addition, this theory is also used to justify certain actions by government in addressing anticompetitive behaviour.<sup>39</sup> This theory is also regarded as an anchor for most contemporary public economies. On top of that, increasing growth in regulation and public ownership is rationalized by relying on public interest theory.<sup>40</sup> This theory further suggests that abuse of market power by the suppliers is what justifies government involvement in regulating private economic activity.<sup>41</sup>

The public interest theory of regulation was identified in the work of Lord Matthew Hale.<sup>42</sup> Lord Hale stated that if there is only a single wharf or crane in a port then it is backed up by regulation or ruling authority in monopolizing the delivery of the expected services. He further stated that this has a connection with public interest because it makes the business a public right and should therefore charge reasonable and moderate fees for its services.<sup>43</sup> In Britain, the United Kingdom Competition Commission applies this theory in this manner. It firstly establishes whether a case presented before it has passed the public interest test.<sup>44</sup> In addition, to determine the cases this theory provides the judiciary with a reference point in making such rulings and judgments.<sup>45</sup>

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<sup>37</sup> Domas M, 'The public interest theory of regulation: non-existence or misinterpretation?', 166.

<sup>38</sup> Shleifer A, 'Understanding regulation,' 440.

<sup>39</sup> Shleifer A, 'Understanding regulation,' 440.

<sup>40</sup> Shleifer A, 'Understanding regulation,' 440.

<sup>41</sup> Aranson P, 'Theories of economic regulation: from clarity to confusion,' 258.

<sup>42</sup> *The portibus maris* (1787).

<sup>43</sup> Domas M, 'The public interest theory of regulation: non-existence or misinterpretation?', 166.

<sup>44</sup> Domas M, 'The public interest theory of regulation: non-existence or misinterpretation?', 167.

<sup>45</sup> Domas M, 'The public interest theory of regulation: non-existence or misinterpretation?', 186.

From the foregoing the theory requires regulation as a way of protecting the members of the public whose majority constitutes the consumers and a few suppliers. On top of that, this theory implies that lack of adequate regulation causes consumers to suffer negative effects due to the anticompetitive behaviours of suppliers in the market. From the foregoing, this theory is aligned with the objective of this study which is to propose improvement to the competition regulatory framework to adequately address anticompetitive conduct in the Kenyan telecommunications industry.

## **1.8 Literature Review**

Ombis W in his 2019 paper states that one of the telecommunications service providers (Safaricom PLC) is engaged in abuse of dominance by denying mobile money services to competing service providers.<sup>46</sup> He also stated that Safaricom PLC exhibited abuse of dominance by charging high tariffs for its services.<sup>47</sup> He further states in his paper that the other competing service providers were considering a merger to enable them to compete with Safaricom PLC.<sup>48</sup> From his analysis of the political influence on competition, he suggested that reduced political interference will remove the enabling environment that makes Safaricom PLC abuse its dominant position.<sup>49</sup>

However, Ombis only focuses on one anticompetitive conduct in the telecommunication industry which is abuse of dominant position. In addition, he states that political interference causes abuse

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<sup>46</sup> Ombis W, 'Selected key aspects and challenges facing competition law in Kenya: procedural and substantive concerns, abuse of dominance in the telecommunications sector (Airtel Ltd v Safaricom PLC) and regionalization of competition law in Kenya' Published LLM Thesis, University of Kent, Canterbury, 3 November 2019, 40.

<sup>47</sup> Ombis W, 'Selected key aspects and challenges facing competition law in Kenya: procedural and substantive concerns, abuse of dominance in the telecommunications sector (Airtel Ltd v Safaricom PLC) and regionalization of competition law in Kenya' 3 November 2019, 41.

<sup>48</sup> Ombis W, 'Selected key aspects and challenges facing competition law in Kenya: procedural and substantive concerns, abuse of dominance in the telecommunications sector (Airtel Ltd v Safaricom PLC) and regionalization of competition law in Kenya' 3 November 2019, 43.

<sup>49</sup> Ombis W, 'Selected key aspects and challenges facing competition law in Kenya: procedural and substantive concerns, abuse of dominance in the telecommunications sector (Airtel Ltd v Safaricom PLC) and regionalization of competition law in Kenya' 3 November 2019, 43.

of dominant position to thrive as an anticompetitive conduct in the telecommunications industry. He also fails to show whether the legal and regulatory framework on competition has any impact on abuse of dominance as well as other anticompetitive conducts in the telecommunications industry in Kenya. This indicates that he did not interrogate the law on competition in the telecommunications industry in Kenya.

This study is filling the gap of analysing various anticompetitive conducts, besides abuse of dominance, in the telecommunications industry. This thesis is also interrogating the adequacy of the Kenyan competition legal framework in addressing the anticompetitive conducts to protect consumers in the telecommunications industry in Kenya.

Afande F in his 2015 paper states that price wars have been experienced in the Kenyan telecommunications industry.<sup>50</sup> He also states that price wars are a strategy used by competitors to reduce the competition for customers with other rival service providers in the telecommunications industry.<sup>51</sup> From the explanation he gives, Afande F states that price wars involve reduction in prices of products and services whereby each competitor aims to sell their services and products at lower prices than their counterparts. He further states that price wars benefit dominant industry players to the detriment of smaller scale suppliers.<sup>52</sup> On top of that, he states that when the smaller entities are forcefully exited from the market due to price wars, the dominant entities raise the prices of the products and services.<sup>53</sup> He recommends that the Kenyan government should rely on the ministry of communication to make regulations that foster healthy competition in the Kenyan telecommunications industry.<sup>54</sup>

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<sup>50</sup> Afande F, 'Constraints to expansion of the telecommunications sector in Kenya' 5 *Public Policy and Administration Research*, 3 (2015), 96.

<sup>51</sup> Afande F, 'Constraints to expansion of the telecommunications sector in Kenya', 95-96.

<sup>52</sup> Afande F, 'Constraints to expansion of the telecommunications sector in Kenya' 95.

<sup>53</sup> Afande F, 'Constraints to expansion of the telecommunications sector in Kenya' 95.

<sup>54</sup> Afande F, 'Constraints to expansion of the telecommunications sector in Kenya' 105.

However, the study done by Afande states only one anticompetitive conduct in the Kenyan telecommunications industry this being price wars. Further to that, he gives a very generalized recommendation on how to address anticompetitive behaviour in the Kenyan telecommunications industry. This is where he states that the Kenyan government should rely on the ministry of communication to make regulations that foster healthy competition. However, he does not give the details of how this reliance will be executed to achieve the objective of creating regulations that will curb anticompetitive conduct in the telecommunications industry. On top of that, Afande does not indicate whether there should be any amendments to the laws that regulate competition in the telecommunications industry so that anticompetitive conducts can be addressed adequately.

This Thesis is taking the approach firstly of analyzing the various anticompetitive conducts in the telecommunication industry. Thereafter this research is interrogating the legal and regulatory framework that addresses anticompetitive conducts in the telecommunications industry in Kenya. Finally, this study proposes precise recommendations to improve the law regulating competition in the Kenyan telecommunications industry.

Kiveu M, Namusonge S and Iravo A in their 2019 paper<sup>55</sup> recommend the following as one of the ways to increase sharing of infrastructure among service providers in the telecommunications industry. They state that there should be regulation to address anticompetitive action that may occur during sharing of infrastructure among service providers in the telecommunications industry in Kenya.<sup>56</sup> However, these authors have not pointed out any particular anticompetitive conduct in the telecommunications industry. On top of that these authors make the assumption that there is no regulation to address anticompetitive conduct in the telecommunication industry in Kenya. This

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<sup>55</sup> Kiveu M, Namusonge S and Iravo A, 'Factors affecting mobile telecommunication infrastructure sharing in Kenya' 6 *The strategic journal of business and change management*, 2 (2019), 385.

<sup>56</sup> Kiveu M, Namusonge S and Iravo A, 'Factors affecting mobile telecommunication infrastructure sharing in Kenya', 385.

is implied from their recommendation that there should be regulation to address anticompetitive actions in the telecommunications industry in Kenya.

This study is giving an analysis of various anticompetitive conducts that occur in the telecommunications industry in Kenya. In addition, this thesis takes the approach that there is indeed a legal and regulatory framework to address anticompetitive conducts in the telecommunications industry. Therefore, it is against this background that this Thesis is interrogating the existing legal and regulatory framework to establish its adequacy in curbing anticompetitive behavior in the Kenyan telecommunications industry. Thereafter, this study will propose recommendations to improve the law on competition in the telecommunications industry in Kenya.

Macharia J and Mugo P in their 2021 paper<sup>57</sup> seek to establish, if any, the influence of government laws and regulations on the competitive advantage of telecommunications industry in Kenya. They conclude, in their study, that government licensing has a significant effect on the competitive advantage of the telecommunications entities in Kenya.<sup>58</sup> These authors propose a revision of the regulations to facilitate fairness in competition in the Kenyan telecommunications industry.<sup>59</sup>

However, Macharia and Mugo have failed to analyze, in their research study, the various anticompetitive conducts in the telecommunications industry. On top of that they have not indicated the laws that they reviewed which regulate competition in the telecommunications industry in Kenya. Therefore, their recommendation is too generalized to be effectively applied to improve the laws regulating competition in the telecommunications industry in Kenya.

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<sup>57</sup> Macharia J and Mugo P, 'Government laws and regulations influence on competitive advantage' 12 *Journal of language, technology & entrepreneurship in Africa*, 1 (2021), 57.

<sup>58</sup> Macharia J and Mugo P, 'Government laws and regulations influence on competitive advantage', 66.

<sup>59</sup> Macharia J and Mugo P, 'Government laws and regulations influence on competitive advantage', 66.

This research is analyzing the various anticompetitive conducts in the telecommunications industry. Thereafter it interrogates the competition regulation legal framework and brings out the areas of the laws that require amendment. Afterwards this Thesis is giving recommendations for improvement of the legal and regulatory framework to facilitate adequate regulation of anticompetitive conduct in the telecommunications industry in Kenya.

### **1.9 Research Methodology**

This thesis used doctrinal legal research methodology. It is a methodology that analyses the underlying legal principles of the existing legal rules and formulates legal doctrines.<sup>60</sup> The chosen methodology gets data from primary legal sources<sup>61</sup> and secondary sources. This methodology necessitates an introspective analysis of the legal doctrine. Attention is given to the process of development of legal doctrine and legal reasoning.<sup>62</sup>

This researcher chose to use this methodology because data has been gathered through library-based research. Moreover, this research has analyzed how the legal, policy and practice norms define anticompetitive conduct in the telecommunications industry not only in Kenya but also in other jurisdictions. Afterwards, this study has interrogated the legal and regulatory framework for competition in the telecommunications industry in Kenya and proposed recommendations that shall effectively curb anticompetitive behaviour. The study also analyzed secondary sources such as books, journals, articles and reports on competition.

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<sup>60</sup> Lammasniemi L, *Law dissertations a step by step guide*, Routledge, 2018, 72.

<sup>61</sup> Lammasniemi L, *Law dissertations a step by step guide*, 73.

<sup>62</sup> Amrit Kharel, 'Doctrinal legal research' <https://ssrn.com/abstract=3130525> on 4<sup>th</sup> September 2020 at 2.

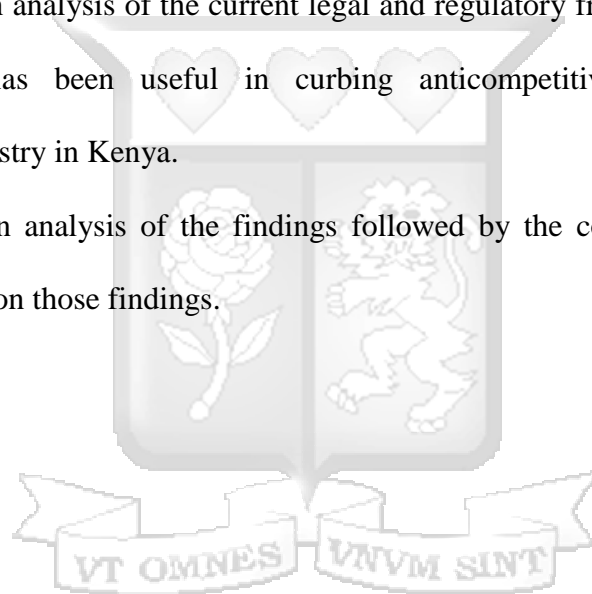
## 1.10 Chapter Breakdown

Chapter one gives the background of the study, statement of the problem, research objectives, research questions, justification of the study, hypothesis, theoretical framework, literature review, research methodology and chapter breakdown.

Chapter two makes an analysis of the various anticompetitive conducts, practices and behaviors in the context of the telecommunications industry in both the Kenyan jurisdiction and other jurisdictions.

Chapter three presents an analysis of the current legal and regulatory framework for competition and how the same has been useful in curbing anticompetitive conduct among the telecommunications industry in Kenya.

Chapter four provides an analysis of the findings followed by the conclusion and finally the recommendations based on those findings.



## CHAPTER TWO

### 2.1 ANALYSIS OF ANTICOMPETITIVE PRACTICES AND BEHAVIOURS IN THE TELECOMMUNICATIONS INDUSTRY

This chapter gives an analysis of various anticompetitive behaviors occurring in the telecommunications industry. The approach taken is analysis of individual practices under the umbrella of several themes as follows.

#### 2.1.1 Market Access Restrictions

Market access restrictions means prevention of the free movement of goods and provision of services as well as the right of establishment for business purposes.<sup>63</sup> These are manifested in the following ways in the telecommunications industry.

##### 2.1.1.1 Tying

This means putting a service that a supplier has significant market power together with another service which the supplier holds little or no market power<sup>64</sup> such that one cannot purchase either service independent of the other service. For example, a supplier may require that for its customers to access its network that they should purchase one of the products or services that are sold by the supplier. The definition of tying can also be derived from the accusations levelled against Microsoft Corp (MC).

MC was investigated by the regulatory authorities of competition of the European Union and the United States of America for allegations of tying.<sup>65</sup> This occurred because MC integrated the sale

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<sup>63</sup> <https://www.ippc.org/IPPC5/Proceedings/Part14/PAPER14-2.pdf> accessed on 22nd April 2024.

<sup>64</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry' 5 *Deakin Law Review*, 1 (2000), 165.

<sup>65</sup> Jurczyk Z, 'The role of economic efficiency in competition law' 16 *Yearbook of Antitrust and Regulatory Studies*, (2017), 141.

of its core product, being its operating system exclusively with the product called Media Player that was sold in Europe and the product called Internet Explorer that was sold in the United States of America. Therefore, from the foregoing tying can be defined as the requirement by sellers that consumers of certain products purchase that product alongside the other product or products attached to it as though the two products were one product.

The anticompetitive authorities in their investigations of MC were guided by the standard of the welfare of consumers. Tying can occur among service providers whereby specific mobile phones are sold but are designed to use the services of only one specific service provider to the exclusion of all others. This was realized in the study done by Kiriinya S and Chesula O on the Kenyan telecommunication market.<sup>66</sup> This happens when either or both the major service providers sell mobile phones that are designed to accept only sim cards manufactured by the specific supplier<sup>67</sup> of the telecommunications service. This is anticompetitive in that a consumer is not free to switch sim cards as and when they want or if need arises. Therefore, they may end up incurring the cost of having to buy a new mobile phone just to be able to use the sim card they prefer.<sup>68</sup>

#### **2.1.1.2 Sim lock**

Sim lock which is done to mobile phones is defined as deterring an end user from changing the service provider for a fixed period.<sup>69</sup> This limits a consumer from switching to a preferred or cheaper service provider at their own free will. This infringes their freedom to change the service provider to a desired one when the consumer wants. In addition, it contributes to a barrier to entry

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<sup>66</sup> Kiriinya S and Chesula O, 'Competitiveness in the telecommunication sector in Kenya using porters five forces model', 3.

<sup>67</sup> Kiriinya S and Chesula O, 'Competitiveness in the telecommunication sector in Kenya using porters five forces model', 3.

<sup>68</sup> Kiriinya S and Chesula O, 'Competitiveness in the telecommunication sector in Kenya using porters five forces model', 3.

<sup>69</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets' 17 *Competition and Regulation in Network Industries*, 1 (2016), 89.

into the market by potential competitors. This is because there will be fewer customers purchasing sim cards from competitors during the sim lock duration hence the market will not be attractive to potential investors.

Though this practice has been shown to happen in the Netherlands telecommunications industry<sup>70</sup> the same can also happen in the Kenyan telecommunications industry since it is the same industry. The legal and regulatory framework in the Netherlands had to require the elimination of sim locks on mobile phones.<sup>71</sup> This requirement sought to empower the end users to choose the service providers they preferred.<sup>72</sup> Therefore prevention of sim lock in Kenya will ensure that consumers of the telecommunication services in the country are empowered to choose their desired service provider.

### **2.1.1.3 Mobility restraints**

This is a situation whereby a consumer of the services of a telecommunications entity is indirectly prohibited from getting the same services from another supplier<sup>73</sup> who is usually a rival. Mobility restraints is manifested in various forms. For instance, a consumer is subjected to a penalty when they exit from a long-term supply agreement and goes to seek the same services from a competitor.<sup>74</sup> It is also manifested in requirement for prepayment of services that have not been supplied yet to the consumer.<sup>75</sup> To explain further, mobility restraints is also manifested when

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<sup>70</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets', 89

<sup>71</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets', 89

<sup>72</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets', 89

<sup>73</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 164.

<sup>74</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 164.

<sup>75</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 164.

there are pricing arrangements that prevent a customer of the telecommunications service from switching suppliers.<sup>76</sup>

It further manifests where there is an attempt to lock a customer into a long term supply arrangement for telecommunications services which may have the effect of discouraging entry, or expansion by, a competitor in a telecommunications market. The latter may eventually lessen competition in that market.<sup>77</sup> Since laws provide for freedom to contract, agreements which are freely entered into will not entail the purchaser accepting less favorable terms than would be available to it from a competitor. In practice therefore, mobility restraints may be associated with an element of duress. This is evident in instances where there are exit penalties which are implemented where a customer terminates an agreement for supply of telecommunications services before a specified term ends thus indicating that a carrier or carriage service provider is attempting to lock in customers.<sup>78</sup>

When there is threat to a penalty when a consumer wants to switch the service provider, the consumer will be forced to tolerate the particular service provider until the duration of the service supply agreement terminates. Moreover, when a consumer decides to switch the service provider midway into using the prepaid services, they suffer monetary loss and also fail to get value for their money in that they pay for services that they no longer want to use.

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<sup>76</sup> Australian Competition and Consumer Commission, *Anti-competitive conduct in telecommunications markets – an information paper*, 1999, at 45.

<sup>77</sup> Australian Competition and Consumer Commission, *Anti-competitive conduct in telecommunications markets – an information paper*, 1999, 45.

<sup>78</sup> Australian Competition and Consumer Commission, *Anti-competitive conduct in telecommunications markets – an information paper*, 1999, 45.

## 2.1.2 Price Manipulations

Price manipulations generally means the activities of the traders who rely on carefully designed trading behaviors to increase or reduce the underlying equity prices for making profits.<sup>79</sup> It is manifested through the following examples in the telecommunications industry.

### 2.1.2.1 Price Squeeze

This is categorized under exclusionary pricing. This happens when a dominant supplier sells to its competitors downstream a product that is necessary for the competitors to provide retail services to the final consumers at high charges in relation to the retail prices of those competitors.<sup>80</sup> It also happens when the mark-up margin of the retail price of the telecommunications service becomes too low or non-existent in comparison to the cost of the wholesale input such that a competitor will have to make loses to sell the same services that the dominant entity is selling.<sup>81</sup> In the latter case it will be referred to as margin squeeze.

The Hungarian Competition Authority (HCA) has defined margin squeeze as a barrier to entry, in the market, of potential competitors and preclusion of existing competitors from offering profitable retail services. This occurs when an entity that is vertically integrated and has dominant position fixes wholesale and retail prices that adversely affect these competitors.<sup>82</sup> HCA sought to establish this from its analysis of the *MATAV* case.<sup>83</sup>

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<sup>79</sup> <https://ieeexplore.ieee.org/abstract/document/6803980> accessed 23rd April 2024

<sup>80</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector' 1 *European Competition Journal*, 2 (2005), 350.

<sup>81</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 350.

<sup>82</sup> Réger A and Horváth A, 'Abuse of dominance in the case-law of the Hungarian competition authority – a historical overview' 21 *Yearbook of Antitrust and Regulatory Studies*, (2020), 110.

<sup>83</sup> *MATAV* (2002), Hungarian Competition Authority.

In this case, the incumbent telecom company was accused of margin squeeze. The details of the allegations were that the way the entity had set the prices for its retail call services as compared to its wholesale price for connection services resulted into barrier to market entry of other service providers.<sup>84</sup> In its investigation, the HCA established that the incumbent entity had a dominant position in the wholesale market. The HCA further noted that the incumbent entity still had a strong market position in the retail market and stated that a margin squeeze by the incumbent entity was aimed at either creating or strengthening its dominant position.<sup>85</sup> In its analysis, HCA discovered that due to high wholesale prices, the profit margins were negative and that this is an important ingredient for margin squeeze. However, HCA stated further that positive profit margin cannot be totally ruled out in establishing a margin squeeze since<sup>86</sup> the positive figure could be too low.

Price squeeze has also been experienced in the telecommunication industry in Italy as demonstrated in the following case. In the Telecom Italia case<sup>87</sup> the competition authority in Italy (Autorità Garante della Concorrenza e del Mercato) penalized Telecom Italia (TI), which was an incumbent service provider in the telecommunications industry of the country. This is because, TI abused its dominance in the telecommunications market by abusive application of a price squeeze.<sup>88</sup> TI was engaged in a public offer for fixed and mobile telecommunication services to be

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<sup>84</sup> Réger A and Horváth A, 'Abuse of dominance in the case-law of the Hungarian competition authority – a historical overview' 110.

<sup>85</sup> Réger A and Horváth A, 'Abuse of dominance in the case-law of the Hungarian competition authority – a historical overview' 110.

<sup>86</sup> Réger A and Horváth A, 'Abuse of dominance in the case-law of the Hungarian competition authority – a historical overview' 111.

<sup>87</sup> *Comportamenti Abusivi di Telecom Italia, Provvedimento* (2004), Italian Competition Authority.

<sup>88</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 351.

provided to the Italian public administration. Investigations by the competition authority in Italy revealed the following issues.

TI in formulating its offer considered its own revenues and margins as well as the revenues and margins of its vertical structure regarding its provision of mobile services.<sup>89</sup> The competition authority in Italy further noted that in case TI wins the tender for provision of fixed telecommunication services and those in its vertical structure lose the tender for provision of mobile telecommunication services, because fixed call to mobile call costs are high, those of its vertical structure would not have suffered external costs because they will receive payment from competitors for ending traffic on their mobile network and not receive payment for termination on the fixed network of TI.<sup>90</sup> In addition, TI had included in the integrated offer prices for fixed line individual services that were below the regulatory level and set at the average variable cost. This in effect brought down accordingly the price of the retail service provision on behalf of TI.<sup>91</sup>

From the foregoing, price squeeze by TI was evident because it increased the charges to its competitors above cost price for accessing its network and charged a reduced price for the same service offered to its internal divisions and retail subsidiary.<sup>92</sup> The competition authority in Italy regarded the behaviour of TI as a violation of anticompetitive laws because it did not allow the competitors of TI to copy its offer hence putting them at a disadvantageous position in terms of competition.

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<sup>89</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 352.

<sup>90</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 352.

<sup>91</sup> Stoyanova M, 'Regulatory and Competition law approaches to price squeeze: access pricing in the telecommunications sector', 352.

<sup>92</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 352.

The inability to replicate TI's offer was a result of the competitors of TI making their offer according to the certified costs of access made by the regulatory authority. It was alleged that the costs of access were required to correspond with the average variable costs of TI.<sup>93</sup> The pricing of TI eventually forced competitors to pay high access costs and simultaneously trying to counter the downstream anticompetitive pressure of TI's low margin on its end-user services.<sup>94</sup>

### **2.1.2.2 Predatory Pricing**

In the context of the telecommunications industry, predatory pricing means a situation where a telecommunications supplier decides to forego short-lived profits by threatening to or reducing the prices of its services.<sup>95</sup> The aim of this is to force exit of the other telecommunications suppliers or prevent entry of new telecommunications suppliers in the market thus removing or cutting down competition. It is necessary for the reduction in price to be lower than the cost of production for the conduct to be considered predatory pricing.<sup>96</sup> In the United States of America, one of the ingredients that constitutes predatory pricing is that the entity must have reasonable expectations of recovering the self-inflicted loss of price reduction.

In the case of Deutsche Telekom (DT)<sup>97</sup> predatory pricing was evident in that DT applied cost-oriented charges to wholesale access of the local network, but it set retail prices that were lower than the competitive level.<sup>98</sup> This was contrary to the requirements set by the German sectoral regulation. In its defense, DT stated that there should not be a comparison between wholesale

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<sup>93</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 352.

<sup>94</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 352.

<sup>95</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 164.

<sup>96</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 164.

<sup>97</sup> *Deutsche Telekom AG* (2003), European Commission.

<sup>98</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 353.

access charges and retail access charges. DT further stated that consideration should be given to the end-user who views access to the local network and the calls carried on the same network as a single product instead of two distinct products.<sup>99</sup>

Their defense was dismissed by the European Commission which gave the following reasons. To begin with, the legislative requirements were that prices should be adjusted to create a balance between revenues and costs.<sup>100</sup> The second reason given by the European Commission, in dismissing that defense, was that from the economical point of view, it is incorrect to generalize that all competitors have a revenue structure that is like the revenue structure of the established mobile operator. Consequently, the competing operators will not have a similar scope of offsetting one source of revenue against another.<sup>101</sup>

### **2.1.2.3 Below-cost pricing**

This means a situation when services are offered to certain customers at costs that are below the tariffed rates. This was the case when some independent Internet Service Providers had obtained wholesale services from a company called Bell Canada and sold the same services at rates that were below the tariffed rates to residential customers.<sup>102</sup> In another case, TekSavvy Solutions accused Bell Canada and Rogers Communications Canada for abusing their dominance in the wholesale market to raise prices in the internet service provision market.<sup>103</sup> TekSavvy stated that the two accused companies sold the same services in the retail market at prices that were lower

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<sup>99</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 353.

<sup>100</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 353.

<sup>101</sup> Stoyanova M, 'Regulatory and competition law approaches to price squeeze: access pricing in the telecommunications sector', 353.

<sup>102</sup> Scott I, 'Competition law in the Canadian telecommunication industry' 37 *Canadian Business Law Journal*, 2 (2002), 265.

<sup>103</sup> <https://www.canadianlawyermag.com/news/general/complaint-filed-against-bell-canada-and-rogers-for-anti-competitive-conduct/326683> on 22nd February 2024.

than the wholesale prices and that this would drive out competitors from the retail market. Canadian Radio-television and Telecommunications Commission (CRTC), found that Rogers Communications Canada and Bell Canada were indeed guilty of the accusations against them and therefore ordered them to reduce the wholesale prices. On top of that Rogers Communications Canada and Bell Canada were also ordered by CRTC to retribute the amount they took from competitors. However, they successfully appealed the CRTC decision<sup>104</sup> in court stating that executing such orders would economically hurt their businesses in an irrevocable manner.

In the *Telecom Decision*<sup>105</sup> of 2019 by CRTC the facts were as follows. Bell Canada a company offering telecommunications services in Canada had applied to CRTC with three requests. The first request was the elimination of the requirement to submit price floor tests as a prerequisite to approving new services in the retail end as well as approval of reduction of rates that were already in use in the existing services of retail. The second request was that Bell Canada wanted CRTC to evaluate the complaints of anti-competitive pricing only after it has approved the new retail service besides the reduced rates for the retail service. The third request was that Bell Canada wanted that CRTC should only analyze complaints of anti-competitive pricing where such pricing is below the price floor threshold.

CRTC had previously instituted the retail price floor test as a measure to make sure that retail tariff applications made by incumbent telecommunications service providers for both long distance services and retail local exchange services were not anticompetitive as a result of being offered below the cost of production. This test required the service providers to prove, prior to being granted their application request, that the rate they had proposed for the telecommunications

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<sup>104</sup> <https://www.canadianlawyermag.com/news/general/complaint-filed-against-bell-canada-and-rogers-for-anti-competitive-conduct/326683> on 22nd February 2024.

<sup>105</sup> *Telecom Decision* (2019), Canadian Radio-television and Telecommunications Commission.

service was not below the cost of producing the said service. The aim of the price floor test was to set the minimum price threshold that facilitates for new competitors to not only survive but also thrive in the telecommunications service markets that are regulated. Moreover, this gives an assurance to the new entrants that the incumbent telecommunications service providers will not engage in anticompetitive pricing that makes it difficult for them to make profits.

Even though Bell Canada in its submissions stated that lower prices for telecommunications services benefit the consumers, CRTC stated that consumers benefit even better when there are many competitors offering service in the telecommunications service industry. Moreover, CRTC stated that waiting for the anti-competitive price to be implemented and then jumping in to stop its further implementation leads to irreparable economic disadvantages to the new entrants. Therefore, with above reasons in consideration, CRTC denied the application by Bell Canada.

### **2.1.3 Exclusionary Practices**

Exclusionary practices mean actions taken by dominant entities, which include contracts and pricing strategies, to prevent either competitors or potential competitors in a given industry from market entry, cause market exit of current competitors, confinement of the competitors to market niches or prevention of expansion of these competitors.<sup>106</sup> In the telecommunications industry, exclusionary practices are manifested as follows.

#### **2.1.3.1 Vertical Foreclosure**

This is a situation whereby an entity that is dominant and has market power in a certain market uses such power to gain advantage in another market that is related to its current market.<sup>107</sup> A

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<sup>106</sup> [https://books.google.co.ke/books?hl=en&lr=&id=0-k4DwAAQBAJ&oi=fnd&pg=PR12&dq=exclusionary+practices+means+in+competition&ots=3sBz2jsggu&sig=LJvCqeIzvBskedcEm8AzBsMNHP4&redir\\_esc=y#v=onepage&q=exclusionary%20practices%20means%20in%20competition&f=false](https://books.google.co.ke/books?hl=en&lr=&id=0-k4DwAAQBAJ&oi=fnd&pg=PR12&dq=exclusionary+practices+means+in+competition&ots=3sBz2jsggu&sig=LJvCqeIzvBskedcEm8AzBsMNHP4&redir_esc=y#v=onepage&q=exclusionary%20practices%20means%20in%20competition&f=false) accessed 23<sup>rd</sup> April 2024

<sup>107</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 165.

common practice in regulatory economics is that a vertically integrated company in the telecommunications sector which has the incentive of ownership of a local and a long distance network does either of the following. Firstly, the entity may deny interconnection into its network from competitors. Secondly, the company can charge high prices for interconnection to its network. Thirdly, the entity can offer a poor interconnection quality to competitors in the long distance market who depend on its local loop to offer telecommunications services to their customers.<sup>108</sup> In other words, a vertically integrated incumbent is deciding access prices and interconnection quality for its local network with the aim of adversely affecting the entrant competing entity in the long distance segment.<sup>109</sup>

The latter conduct occurred in the telecommunications market of the United States of America. The breeding ground for this behavior was the fact that the new long distance competing service providers, (Microwave Communications Incorporated (MCI) and Sprint Corporation) depended on the AT&T local networks to connect with end users. Eventually AT&T was divested in 1984<sup>110</sup> by the competition regulators of the United States of America as expounded hereinbefore. This divestiture was aimed to open up competition within the telecommunications sector of the United States of America.

AT&T was also charged with abusing its dominant position so that it reduces competition at the downstream level of the supply chain. On top of that, AT&T was also accused of indirectly raising the costs of the competitors through refusal to deal. To add insult to injury, AT&T was also charged

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<sup>108</sup> <https://www.semanticscholar.org/paper/C%C3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 17th February 2024

<sup>109</sup> <sup>109</sup> <https://www.semanticscholar.org/paper/C%C3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 17th February 2024

<sup>110</sup> <https://www.semanticscholar.org/paper/C%C3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 17th February 2024.

for selling the local interconnection service to its competitors at high charges. In addition, it reduced the quality of the interconnection access to its network by competitors.<sup>111</sup> Viscusi, Vernon and Harrington in their 1995 paper<sup>112</sup> gave a summary of the history of AT&T negotiations with MCI about the requests for local network interconnection. They stated that initially AT&T response to the request for interconnection entry in 1969 by MCI was a refusal by AT&T to interconnect with them. In the Federal Communications Commission (FCC) decision in 1971, the FCC ordered that AT&T should offer interconnection services to the other telecommunications service provider. However, FCC failed to offer the terms of such interconnection.<sup>113</sup>

As a consequence, the FCC decision did not achieve the desired effects in improving competition among the telecommunications service providers. This is because AT&T placed some hurdles that made interconnection difficult. These included high interconnection costs as explained before.<sup>114</sup> AT&T engaged in the latter conduct in spite of FCC order that required AT&T to open up interconnection in its local network as long lines to the other telecommunications service providers in the market.<sup>115</sup> Once the interconnection was granted, it is believed that AT&T gave its competitors poorer quality connections for interconnection into its local network. This was manifested with customers being required to dial twenty digits to make a long distance call within MCI network, but only eleven within AT&T network.<sup>116</sup> Obviously, consumers perceived that

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<sup>111</sup> <https://www.semanticscholar.org/paper/C%3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 19th February 2024.

<sup>112</sup> <https://www.semanticscholar.org/paper/C%3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 19th February 2024.

<sup>113</sup> <https://www.semanticscholar.org/paper/C%3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 19th February 2024.

<sup>114</sup> <https://www.semanticscholar.org/paper/C%3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 19th February 2024.

<sup>115</sup> <https://www.semanticscholar.org/paper/C%3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 19th February 2024.

<sup>116</sup> <https://www.semanticscholar.org/paper/C%3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 19th February 2024.

AT&T was offering a higher quality product. The competitors of AT&T were therefore necessitated to offer a discount to the consumers of the telecommunications service in order to remain a going concern in the market.<sup>117</sup>

The above anticompetitive behavior that had been perpetrated by AT&T in the United States of America was replicated in the United Kingdom. This occurred after the privatization of British Telecom, especially since there was no policy of vertical break-up in the United Kingdom. Whereas in the United States of America, the policy of vertical break-up was applied in the antitrust suit regarding AT&T. On top of that, the Office of Telecommunications of the United Kingdom failed to take the appropriate steps that would have adequately addressed the anticompetitive issues that arose after privatization of British Telecom.

### **2.1.3.2 Refusals to Supply**

This means a situation where an entity deliberately fails to provide the goods or the services that a competitor depends on to effectively compete.<sup>118</sup> This was illustrated to occur in the telecommunications sector as shown in the *National Roaming Case*.<sup>119</sup> In this case, the Turkish Competition Authority (TCA) came to the conclusion that Turkcell and Telsim were both dominant in Global System for Mobile (GSM) infrastructure and consequently they refused to deal with Avea a new entrant into the GSM market. The facts of the case were that, Turkcell and Telsim were the initial telecommunications service providers in the Turkish GSM market in 1994. They had obtained the requisite license to operate in the Turkish GSM market. A number of years later,

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<sup>117</sup> <https://www.semanticscholar.org/paper/C%C3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102> on 19th February 2024.

<sup>118</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 165.

<sup>119</sup> *National Roaming Case* (2003), Turkish Competition Authority.

the new entrants Avea and Aycell were granted a license to operate in the GSM market of the Turkish telecommunications industry.

It goes without saying that prior to grant of the said license to Avea and Aycell, the incumbent entities, being Turkcell and Telsim, had already taken root adequately in offering country-wide telecommunications coverage infrastructure. The said infrastructure met the demands of the telecommunications service consumers in the whole country of Turkey. The legal framework in Turkey required the incumbent service providers to grant access to their already existing and established infrastructure to the new competitors who wanted to enter the market. This was a way of enabling the new entrants break even until they could establish an adequate coverage infrastructure that would see them offering quality services to the consumers in the telecommunications industry in Turkey.

This definitely would unsettle the competitive advantage enjoyed by Turkcell and Telsim in the Turkish telecommunications industry. Therefore, Turkcell made an application to the Turkish Council of State seeking to suspend the implementation of the law that required them to share with the new entrants their telecommunications infrastructure. Surprisingly, the application by Turkcell was allowed with obvious detrimental consequences on competitive conditions in the GSM market definitely affecting the new entrants adversely.

As if that was not enough, Turkcell and Telsim required Avea to pay excessive charges to them to be granted roaming services. This evidenced indirect refusal to supply perpetrated by Turkcell and Telsim. On the other hand, Avea did not give up but instituted a case before TCA. In the case Avea stated that not only did Turkcell and Telsim refused to deal with them but they also abused their position of collective dominance such that Avea experienced a barrier to entry into the GSM

market of the Turkish telecommunications industry. The TCA instituted investigations against Turkcell and Telsim pursuant to the complaint brought by Avea.

The results of their investigations led TCA to fault the regulatory failure and as a consequence suspended the decision of the Council of State as regards the application made earlier to the council by Turkcell and Telsim. It was observed from the investigations by TCA that Turkcell and Telsim had a telecommunications infrastructure whose coverage was a crucial tool for new competitors to access so that they can survive in the Turkish GSM market. TCA also established that denying such access to the new entrants would see them exited from the Turkish telecommunications services market involuntarily. Another concern raised by TCA after conducting the said investigations was the ineffectiveness of the relevant regulatory framework that adversely affected new entrants into the telecommunications market.

TCA also noted from their investigations that, Turkcell and Telsim took advantage of the regulatory inadequacy to benefit competitively to the detriment of potential competitors by refusing to supply their telecommunications infrastructure to Avea. Obviously this cemented the market position of Turkcell and Telsim and simultaneously weakened the market position of other competitors, case in point being Avea. Therefore, TCA concluded that this conduct by Turkcell and Telsim that adversely affected Avea significantly restricted competition in the Turkish GSM telecommunications market. Besides the imposition of a record fine on both incumbent entities, of importance too is that TCA made it mandatory for Turkcell and Telsim to deal with Avea in order to terminate the anticompetitive conduct. The aim was to allow Avea to benefit from the telecommunications infrastructure of the incumbents until Avea thrives in the market.

In the case whereby *Slovak Telekom and Deutsche Telekom AG*<sup>120</sup> were being charged jointly since the latter was the parent company of Slovak Telekom, the European Commission fined them for barring entry of competitors, for a number of years, into the Slovak market which offered broadband telecommunications services. The parent company received an additional fine on top of the previous fine because it reoffended.<sup>121</sup> Slovakian law required all the incumbent providers of telecommunications services in the country to grant access for interconnection within its local network, therefore Slovak Telekom was no exception to this rule. Slovak Telekom acted contrary to this legal requirement by barring the entry of alternative competing operators into the retail market for broadband telecommunications services when it refused access. This was evidence of abuse of its dominant position in the Slovak market for wholesale broadband telecommunications services that offers Local Loop Unbundling.

The perpetrators appealed the decision of the European Commission seeking that it be annulled. The General Court of the European Union upheld the decision of the European Commission on finding that both Slovak Telekom and Deutsche Telekom had engaged in abuse of their dominant position in the Slovakian telecommunications market. The court also stated that the foregoing was taken into account by the European Commission thus resulting into the imposition of the obligation on Slovak Telekom to grant access to its network. The aim of the requirement was to facilitate the development of effective competition as envisaged in the regulatory framework for competition in Slovak. On top of that, the court stated that Deutsche Telekom, being the parent company of Slovak Telekom was jointly and severally liable for Slovak Telekom's abusive behavior hence they were both fined for the anticompetitive conduct.

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<sup>120</sup> *Slovak Telekom and Deutsche Telekom AG* (2014), European Commission.

<sup>121</sup> Deutsche Telekom AG had already been fined in 2003 for a margin squeeze in broadband markets in Germany.

### 2.1.3.3 Communication blockage

This occurs when a given service provider deliberately prevents communication originating from a competing service provider in a different network from reaching the recipients who are not in the same network. This can occur in the following scenarios. The first scenario is when a given service provider directly blocks calls or messages coming from a competing telecommunications service provider. The second manifestation is when a service provider ends up blocking communication by deliberately failing to invest adequately in safety related infrastructure<sup>122</sup> especially in cases where there are off-net communications.

For example, Madison River Communication, a telecommunications services company in the United States of America was accused of deliberate blockage of internet phone traffic.<sup>123</sup> The company was particularly blocking voice over Internet Protocol (VoIP).<sup>124</sup> Therefore, consumers of VoIP were negatively affected. This was because, Madison River Communication was a broadband service provider. The company blocked communication of the customers of a VoIP service provider by port blocking.<sup>125</sup> Port blocking happens when a company inhibits specific types of internet traffic from channeling through its network.<sup>126</sup> This was noted to affect both the small scale and large scale service providers in the telecommunications industry in the United States of America.<sup>127</sup> The FCC ordered Madison River Communication to refrain from blocking and to also pay a fine for engaging in such anticompetitive conduct.<sup>128</sup>

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<sup>122</sup> Narechania T, 'The secret life of a text message' 120 *Columbia Law Review*, 9 (2020), 205.

<sup>123</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/> on 26<sup>th</sup> February 2024.

<sup>124</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/> on 26<sup>th</sup> February 2024.

<sup>125</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/> on 26<sup>th</sup> February 2024.

<sup>126</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/> on 26<sup>th</sup> February 2024.

<sup>127</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/> on 26<sup>th</sup> February 2024.

<sup>128</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/> on 26<sup>th</sup> February 2024.

## 2.1.4 Competitive Process Interference

Competitive process interference means conduct that harms competition by negatively affecting the competitive process.<sup>129</sup> This is manifested, as follows, in the telecommunications industry.

### 2.1.4.1 Collusion

This means a situation whereby two or more telecommunications suppliers collaborate jointly to achieve either of the following: maintaining certain prices for their products, increasing the prices of their products or denying crucial supplies to their competitors.<sup>130</sup> This is illustrated in the following case obtained from the 2016 paper of Nam I from the KDI School of Public Policy and Management.<sup>131</sup>

Some months after Korea Telecom (KT) had become a fully private firm in 2003 following the finalization of its journey to privatization, the managers of KT and Hanaro both being telecommunications service providers in the South Korean telecommunications market had a meeting. The meeting resulted into the entering of an agreement whereby Hanaro was to raise the monthly fixed fee by a certain margin for supplying telecommunications services and that KT would in turn grant market shares to Hanaro. This was aimed to increase the market share of Hanaro at a definite rate for a certain number of years. If not so, KT would alternatively make monetary payments to Hanaro should the market share reduce contrary to the expectations that were detailed in the agreement between KT and Hanaro. KT had a market share that was way bigger than the one of Hanaro in the telecommunications industry of South Korea.

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<sup>129</sup> [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3293&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3293&context=faculty_scholarship) accessed on 25<sup>th</sup> April 2024

<sup>130</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 165.

<sup>131</sup> Nam I, 'Collusion in a telecom market in which the entrant raises the price in return for a discount in interconnection charges by the incumbent' *KDI School Working Paper Series*, 2016, 7.

It was further specified in the agreement that KT would transfer the money that it owed to Hanaro on a regular basis after every three months. This transfer was to be effected by KT adjusting the costs of interconnection to its local network that it charged on Hanaro. After raising its monthly fees as stipulated in the agreement, Hanaro's expectations were not realized since there was no increase in its market share in the telecommunications industry of South Korea. As a matter of fact, there was a slight fall in its market share in the two months that immediately followed. Relying on the provisions of their agreement, Hanaro insisted that KT should pay them and proposed that such payment should be by way of reduction of the interconnection charges paid to KT by Hanaro which was also provided in the agreement. KT initially made the said reductions but backlash from the management of KT that were handling the interconnection charges settlement made KT abandon that practice and subsequently notified Hanaro.

The Korea Fair Trade Commission (KFTC) began its investigation of the two entities in 2006. However, it is unclear what else transpired between Hanaro and KT before the investigations began. The KFTC and the court ruled later that the agreement was a collusive one and that the two firms maintained collusion based on the agreement for a substantial period of time.

Another illustrative and recent case<sup>132</sup> is the case before Guernsey Competition and Regulatory Authority (GCRA). In this case, both Sure and Jersey Telecom which were companies offering telecommunications services in Guernsey were fined for collusion which is prohibited by the law regulating competition in Guernsey.<sup>133</sup> After GCRA had conducted investigations, it unearthed the following facts. Sure and Jersey Telecom had collaborated in developing a scheme that would be mutually beneficial to them but with anticompetitive effects. This plan entailed that the companies

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<sup>132</sup> GCRA conducted an investigation in 2021

<sup>133</sup> <https://www.itv.com/news/channel/2022-07-21/phone-company-sure-fined-nearly-3m-for-breaching-guernsey-competition-law> on 21st February 2024.

would attempt to unlawfully have the control of provision of mobile networks services in Guernsey. Such control was to be extended to the imminent introduction of Fifth Generation (5G) mobile telephone networks. Moreover, Sure and Jersey Telecom had exchanged information on the commercial strategy that each company had for introducing next generation mobile networks.

The provisions of Guernsey competition law do not mandate competitors to collude but to compete as reiterated by GCRA. It was also discovered by GCRA that Sure had made active and intentional efforts to prevent the collusion from being revealed. To make matters worse, the concerned staff had also provided answers that were untrue when interviewed as a part of investigations. This resulted into Jersey Telecom and Sure being fined for collusion.

GCRA considered as mitigating factors the steps that Jersey Telecom had taken to prevent a repeat offense of collusion. It also considered, as a mitigating factor, the speed of adoption of the steps by Jersey Telecom to desist from collusion and this led to the reduction of the fine meted on Jersey Telecom by GCRA. A statement issued by GCRA indicated that competitors were not permitted to share information regarding their commercial strategy. Jersey Telecom and Sure had violated this requirement when they shared information pertaining to the speed at which they were to bring 5G into the telecommunications market of Guernsey. The two companies also violated this requirement by exchanging information about removing the mobile network of Jersey Telecom from the telecommunication industry of Guernsey. GCRA noted that such conduct has adverse effects on competition in Guernsey and that the consumers of such services in Guernsey would also be adversely affected. Despite the foregoing, Sure the mobile phone company has the intention to appeal<sup>134</sup> the penalty against them by GCRA.

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<sup>134</sup> <https://www.itv.com/news/channel/2022-07-21/phone-company-sure-fined-nearly-3m-for-breaching-guernsey-competition-law> on 21st February 2024

### 2.1.4.2 Anticompetitive mergers

In the United States of America, an anticompetitive merger is defined as an acquisition of assets or stock in any entity of an industry within the territory of the United States of America that has the potential of phasing down competition in a substantial manner.<sup>135</sup> Anticompetitive mergers can also occur in the following scenario. Two large-scale entities that offer competing delivery systems can decide to merge and result in limiting the choices available to the consumer. For example, the acquisition of Tele-Communications Inc. (TCI) (which was a cable distributor in the United States of America) by American Telephone and Telegraph (AT&T) which was a telecommunications supplier in the same jurisdiction. In some instances, such varieties for consumers may be limited to the merged company alone.<sup>136</sup>

In the above mentioned merger TCI owned some of the stock of Sprint personal communications services (PCS)'s mobile wireless telephone business. Joel I. Klein, the Assistant Attorney General in charge of the Antitrust Division in the United States of America then stated that in the few years that had previously passed, there was increased competition in mobile wireless services which had various resultant effects. These effects are the lowering of prices, the improvement of the quality of the telecommunications service offered and not forgetting the millions of new subscribers to the telecommunications services as another desired effect. He added that the settlement of divestiture agreed upon concerning the merger would ensure that the merger would enhance competition in the telecommunications market in wireless services. This he stated further would ensure customers continue enjoying the benefits that come with such competition. This merger was approved on

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<sup>135</sup> Svetlicinii A, 'Telecommunications mergers under the EC competition law and US antitrust law: substantive assessment and procedural cooperation' 4 *Cambridge Student Law Review*, 1 (2008), 25.

<sup>136</sup> Gates A, 'Convergence and competition: technological change, industry concentration and competition policy in the telecommunications sector' 58 *University of Toronto Faculty of Law Review*, 2 (2000), 94.

condition that TCI would divest its interests in Sprint PCS. This was to enable Sprint PCS to continue raising capital that would enable it advance the construction of its wireless network<sup>137</sup>.

In the case of *T-Mobile Austria Acquisition of Tele.Ring*<sup>138</sup> the target company, Tele.Ring, was considered a unique market player. This was because it was associated with giving its consumers the most competitive prices for the telecommunications services it offered. Granting an unconditional approval of the merger would have adverse effects on the consumers in the following manner. The consumers would be denied competitive rates for the telecommunication services sold to them by the new merged entity. Thus such a merger would go against protection of consumer welfare which is also one of the aims of regulating competition in markets. The competitive space in that telecommunications market without the merger had two leading market players that is Mobilkom and T-Mobile.

Moreover, the resultant effect of approving the merger unconditionally was that T-Mobile Austria being a market leader in Austria and the market concentration that would result after the merger would effectively impede competition by denying consumers the competitive rates that they used to enjoy prior to the merger. The European Commission granted conditional clearance under Article 8(2) of its Merger Regulations to the acquisition by T-Mobile Austria of the Austrian mobile phone operator, Tele.Ring. The condition required the divestiture of T-Mobile so that the spectrum can be utilized by other operators who would have lower market share compared to T-Mobile. Therefore, the merger was approved subject to divesting of its spectrum.

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<sup>137</sup> [https://www.justice.gov/archive/atr/public/press\\_releases/1998/2139.htm](https://www.justice.gov/archive/atr/public/press_releases/1998/2139.htm) on 15th February 2024

<sup>138</sup> *T-Mobile Austria Acquisition of Tele Ring* (2006), The European Commission.

In the case of acquisition of *Orange Austria by Hutchison 3G Austria*<sup>139</sup> the European Commission was concerned that the merger would lead to the lessening of competition when one of the four telecommunication service providers in the telecommunications market is subsumed. In fact, as an orbiter in its decision, the Competition Commission held that, in case no new entrant acquires the Auction Spectrum and the Divestment Spectrum, there will be no further obligation on Hutchison 3G to divest spectrum and the Divestment Spectrum license would remain with Hutchison 3G.

As a matter of fact, there was a new market entrant in the telecommunications industry in need of the license. The proposed merger was conditionally approved. The said condition required the acquiring entity to divest frequencies and commit to offer low wholesale access fees to mobile virtual network operators so that there is reduction to barriers to entry for potential new market entrants and encourage competition at the retail level. Hutchison 3G, being the acquiring company therefore committed to divest itself of certain radio spectrum and related rights and to provide wholesale access to its network. The resultant effect was to make it easy for potential competitors to enter the market.

The case of *Telkom Kenya Limited & another v Competition Authority of Kenya*<sup>140</sup> was an appeal to the Competition Tribunal against the decision of CAK regarding the proposed merger between Telkom Kenya Limited and Airtel Kenya Limited who were the appellants. They wanted the Competition Tribunal to overturn the conditions imposed by CAK regarding the proposed merger. The appellants were objecting to the conditions stating that those conditions would adversely affect the would be merged entity considering there was already a dominant player in the Kenyan telecommunications industry. The appellants also stated that the reliance of CAK on the merger

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<sup>139</sup> *Orange Austria by Hutchison 3G Austria* (2012), The European Commission.

<sup>140</sup> *Telkom Kenya Limited & another v Competition Authority of Kenya* (2020), Competition Tribunal of Kenya.

guidelines lacked a legal basis since the guidelines were not legally binding in that they had not been subjected to the statutory process as provided in the Statutory Instruments Act.

The respondents who were CAK in this case stated that they draw their mandate from section 9 of the Competition Act and that they acted within such mandate as well as giving the appellants sufficient time to respond regarding the contentious conditions. The Competition Tribunal held that CAK gave adequate notice regarding the conditions and even gave the appellants time to respond to the said conditions before taking the administrative decision as the national competition regulating body in Kenya. The Tribunal further held that, while the Communications Authority of Kenya (CA) had the statutory mandate to regulate the telecommunications sector, the Kenya Information and Communication (Fair Competition and Equality of Treatment) Regulations, 2010 provided for cooperation between CA and CAK in regulating the telecommunications sector in Kenya.

The Competition Tribunal further stated that such cooperation was enabled through a written memorandum of understanding that was entered into by both CA and CAK. The tribunal further stated that, CA regulates the technical aspects of the Kenyan telecommunications sector thus making it a sectoral regulator and that CAK regulates competition in the telecommunications sector in Kenya and any other sectors since it is the national competition regulating body which cuts across all industries in the Kenyan market.

The tribunal also held that from the facts of the case it was evident that the appellants were legitimately concerned about the long term health of competition law in the Kenyan telecommunications sector. Therefore, CAK had a role to ensure that the appellants remained as a going concern to prevent reducing the Kenyan telecommunications sector into a monopoly. However, the appellant parties eventually decided on their own free will not to merge stating that

the regulatory hurdles were hard to overcome and that there was a change in priorities due to the corona virus pandemic<sup>141</sup>.

The aim of merger control is to preserve healthy competition. This is because anticompetitive mergers facilitate unhealthy competition. When two or more entities merge, their customer base increases because they combine their market share. This increases their dominance and may create potential for abuse of dominant position by the new entity formed out of the merger. Moreover, the latter case demonstrates that anticompetitive mergers can occur in the Kenyan telecommunications industry and should therefore continue to be regulated.

#### **2.1.4.3 Abuse of dominant position**

This is defined as a situation whereby, a specific market supplier possessing significant power in a certain market undercuts other suppliers resulting to crippling their operations and eventually causing their premature exit from the market.<sup>142</sup> This can be manifested in the following ways. For example, using market power to create a barrier to entry of potential competitors. It is also evidenced when market power is used to inhibit a firm from engaging in competitive conduct and using market power to drive out competition by eliminating the competing entities from the same market or any other market.<sup>143</sup>

In the case of *Clear v New Zealand Telecom*<sup>144</sup>, abuse of dominant position was held by the courts to be a situation whereby an entity with a dominant market position misuses this position to drive out competition. The latter is further established by perceiving that a non-dominant entity in similar

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<sup>141</sup> <https://www.africanlawbusiness.com/news/14280-telkom-kenya-airtel-kenya-merger-cancelled> on 15th February 2024.

<sup>142</sup> Obayemi O, 'Competition in the Nigerian telecommunications industry' 5 *Beijing Law Review*, 4 (2014), 287.

<sup>143</sup> Veljanovski C, 'Market power and counterfactuals in New Zealand competition law' 9 *Journal of Competition Law and Economics*, 1 (2013), 176.

<sup>144</sup> *Clear v New Zealand* (1995), The Supreme Court of New Zealand.

circumstances would not have acted as the dominant entity in the same circumstances. From the foregoing, it is evident that abuse of dominant position is a common occurrence in the sphere of competition regulation.

Abuse of dominant position in the telecommunications industry is further illustrated in the following case studies. The first case study is an interconnection dispute between Vietnam National Posts and Telecommunications (VNPT) and Viettel Corporation (Viettel).<sup>145</sup> The facts of the case study are as follows. Viettel was owned and operated by the ministry of defense of Vietnam. The emergence of Viettel threatened the monopoly of VNPT. To attract customers, Viettel launched several promotional programs that aimed at offering its telecommunications services at a cheaper price. To enhance the provision of its services like data transmission, and internet, Viettel had to interconnect with the system belonging to VNPT. It was noted that Viettel also required to connect to six other transmission stations to enable its access to the local stations of VNPT.

To facilitate the latter, Viettel and VNPT signed a binding agreement whereby Viettel had the obligation to pay a leasing fee to VNPT to use its system. On the other hand, VNPT had the obligation to ensure that Viettel connects to its network. Viettel succeeded in increasing its subscriptions of new telecommunications services customers. VNPT was responsible for providing half of the required connections for the customers who had subscribed to the telecommunications services offered by Viettel. However, Viettel noted from the complaints brought to it by its customers, that they experienced slowness in connection when connecting from

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<sup>145</sup> Long T and Walker G, 'Abuse of market dominance by state monopolies in Vietnam' 34 *Houston Journal of International Law*, 2 (2012), 200.

the Viettel network to the VNPT network. Viettel therefore alleged that, interconnection with the VNPT network was limited and that VNPT was unwilling to improve connections.

Viettel stated that despite making several repeated requests to VNPT to increase the connectivity capacity, VNPT always rejected those requests citing that they lacked available ports for the central switchboards and that they lacked adequate funds for the new circuit switchboards. In addition, Viettel claimed that VNPT hindered its customer growth in other regions within the country. VNPT in its response stated that it lacked enough ports to maintain its own network and subscribers. Viettel demonstrated that VNPT had enough ports to offer to it and even showed further that other telecommunication companies were permitted to use more ports than they needed from VNPT. Viettel stated that from the foregoing, VNPT was discriminating against it to curb competition.

The second case study is about a connection dispute between VNPT and EVN Telecom a subsidiary of Vietnam Electricity Group (EVN).<sup>146</sup> The facts of this case study were as follows. When EVN Telecom joined the telecommunications industry, it was offering various services. These services included E-Mobile (based on the mobile technology of code-division multiple access), E-Phone (inner-province mobile calls) and E-com (wireless fixed telephone). E-mobile could not beat the competition from the current mobile providers at the time. This had the resultant effect of E-com becoming prominent in the provision of services of wireless fixed telephone.

EVN Telecom experienced interconnectivity difficulties caused by VNPT as the network infrastructure provider. One of the notable challenges was that E-com subscribers could not use the short messages service (SMS) on VNPT subscribers, contrary to what had been advertised by

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<sup>146</sup> Long T and Walker G, 'Abuse of market dominance by state monopolies in Vietnam', 203.

EVN Telecom. The allegation by EVN Telecom was that VNPT had inhibited the necessary connection ports that aid the SMS service. VNPT in response indicated that it was experiencing technical difficulties and that it was being careful to avoid giving deteriorated quality of the telecommunications service.

On top of that, EVN Telecom experienced difficulties when trying to connect to the provincial networks of VNPT. In fact, VNPT stated that they will not grant connection access to EVN Telecom unless they show VNPT proof of existence of a connection jam. The relevant authority directed VNPT to open more connection ports to EVN Telecom. However, the connection jam complained about by EVN Telecom persisted. This is because VNPT only opened more connection ports to EVN Telecom when there was a complaint about connection jam. As a result, EVN Telecom could not effectively develop their services as a new entrant in the telecommunications industry. When a dominant entity abuses market power, consumers can suffer from deteriorated services as demonstrated in the case study hereinbefore. In addition, the deteriorated services can be offered at high prices whereby consumers will not get value for money.

In the case of *Airtel Kenya Limited v Safaricom Limited*<sup>147</sup> the facts were that CAK received a complaint from Airtel Kenya Limited stating that Safaricom Limited was engaged in practice that amounted to abuse of dominant position. They claimed that Safaricom Limited had gotten into certain agreements with its mobile money agents that made it a requirement that they were not to offer any mobile money transfer services to the competing mobile money transfer service providers. Airtel Kenya Limited stated that Safaricom Limited enforced this requirement through

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<sup>147</sup> *Airtel Kenya Limited v Safaricom Limited* (2014), Competition Authority of Kenya.

threats to the mobile money agents of termination of the contracts should they enter into such contracts with competing mobile money transfer service providers.

CAK conducted investigations accordingly. The investigations revealed that Safaricom Limited was indeed dominant in the mobile money transfer service market and that they had abused that dominant position by entering into an arrangement between itself and its agents. It was also established from the investigation that the aim and effect of the agreement was to lessen competition. After CAK informed Safaricom Limited of the findings of the investigation, Safaricom decided to settle the matter with CAK. Two issues regarding the case needed determination. The first issue that required determination was whether Safaricom Limited was a dominant undertaking as provided and defined under the Competition Act. The second issue for determination was whether Safaricom Limited had indeed abused its dominance by entering into exclusive arrangements with its mobile money agents as explained hereinbefore.

An analysis of the relevant provisions of the agreement in relation to the case revealed several findings. Firstly, that the Kenyan telecommunications industry had three major players, namely Safaricom Limited, Airtel Kenya Limited and Telkom Kenya Limited and that Safaricom Limited had a leading market share thus making it dominant. The second finding revealed that the contracts between Safaricom Limited and its mobile money agents prevented those agents from promoting the products and services of competing entities and that promotion was not limited to selling or displaying the products or services. In addition, it was immaterial whether or not the entity was in direct or indirect competition with Safaricom Limited. The third finding was that the exclusivity clause in those contracts were not included in the contracts between Safaricom Limited and banks or large supermarkets, which were permitted to act as mobile money agents of more than one mobile money transfer service providers.

The fourth finding was that the mobile money agents of Safaricom Limited who wanted to invest in other companies that offered mobile money transfer services were afraid of being victimized by Safaricom Limited hence they did not venture into such investments. The fifth finding was that the mobile money transfers operators, who included Safaricom Limited, made minimal investments at the retail level hence there was no justification for the exclusivity. This is because the mobile money transfer service providers would incur no losses from joyriders if the agents entered into contract with more than one mobile money transfer service provider who were competing with Safaricom Limited.

The sixth finding showed that the exclusive dealing arrangements limited investments by the mobile money agents of Safaricom in other mobile money service providing entities and that this would lead to lessening or distortion of competition in the mobile money transfers at the retail level. On top of that, the exclusive dealing contracts between Safaricom Limited and its agents led to inefficient use of the resources of those mobile money agents and as a consequence there was underutilization of their resources. The foregoing thus curtailed socio-economic growth.

Safaricom Limited was ordered to do several things. The first order was that it was to amend the agreements with its mobile money agents with immediate effect. The particulars of this order was that the restrictive clauses in the agreements between Safaricom Limited and its mobile money agents were to be removed instantly to give the agents liberty to contract with other mobile money transfer service providers. The second order was that there should be limitation on the oversight that Safaricom Limited has over the mobile money agents so that such oversight covers only its business engagement with them. The third order was that each of the mobile money transfer service provider was to be responsible for ensuring that they are complying with the relevant regulations of the Central Bank of Kenya.

The latter case is majorly about abuse of dominant position in the financial sector. However, it is a fact that cannot be ignored that the perpetrator is in the telecommunications industry. In addition, the underlying factors to establish this anticompetitive conduct is dominance in the relevant market and that the dominance thus established has been abused so that the ingredients of abuse of dominance can be satisfied. In light of the foregoing, the same can be transplanted in any other aspect of the market of the Kenyan telecommunications industry. Therefore, the continued regulation of abuse of dominance in the telecommunications industry is a practice that should be enhanced within the Kenyan legal framework.

### **2.1.5 Barriers to Market Entry and Expansion**

This means any aspect that lowers the motivation or capability of potential entrants to access a new market despite the profitability of the market or to expand their niche in the given market.<sup>148</sup>

This is manifested as explained hereafter.

#### **2.1.5.1 Barriers to entry**

Barriers to entry manifest in various forms in the telecommunications sector as expounded by the study report<sup>149</sup> which studies the South African Telecommunications industry and has been considered in this section. One way that barrier to entry manifests is as regards access to facilities. Telecommunications service providers face many hurdles when it comes to acquiring rights of way for putting and deploying their infrastructure underground. This is because various regulatory entities and geographical administrative units are the ones that issue such permits since land is required for deploying the telecommunications infrastructure underground. In addition, the process

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<sup>148</sup> <https://www.sciencedirect.com/science/article/abs/pii/S0148296311000324> accessed on 25th April 2024

<sup>149</sup> Centre for Competition, Regulation and Economic Development, University of Johannesburg, *Competition barriers to entry and inclusive growth: telecommunications sector study*, 2016, 5-7.

of obtaining those rights also may be too complex, uncertain and lengthy. Moreover, once the rights have been granted, the cost of setting up the infrastructure is quite high.

Another way that barrier to entry manifests itself in the telecommunications industry is through the slow paced regulations. This is because for telecommunications services to fully function, the service providers need to be allocated some spectrum by the regulatory body for telecommunications upon application. Sometimes such allocations delay hence affecting efficient and up to date provision of telecommunications services. There are other options for mobile service operators, like increasing the capacity through use of more spectrum, relying on enhanced technology or even constructing additional base stations. Despite all these options, most telecommunications service providers prefer to use spectrum because of its cost effectiveness. To circumvent this challenge, the telecommunications service providers tried merging without much success since there arose competition concerns.<sup>150</sup>

In addition, some new entrants have equally struggled to get spectrum allocation. For instance, Smile Communications had been waiting for the regulator to process its application since 2009.<sup>151</sup> Local Loop Unbundling (LLU) is another alternative to spectrum and this would open up access to various telecommunications service providers in the most expensive layer of the network being the last mile infrastructure. However, LLU has been part of government policy since 2007 which process is yet to be rolled out by the government of South Africa.<sup>152</sup> Unfortunately this is curtailing competition and also innovation in the market for broadband services. Moreover, some entrants

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<sup>150</sup> Centre for Competition, Regulation and Economic Development, University of Johannesburg, *Competition barriers to entry and inclusive growth: telecommunications sector study*, 2016, 6.

<sup>151</sup> Centre for Competition, Regulation and Economic Development, University of Johannesburg, *Competition barriers to entry and inclusive growth: telecommunications sector study*, 2016, 6.

<sup>152</sup> Centre for Competition, Regulation and Economic Development, University of Johannesburg, *Competition barriers to entry and inclusive growth: telecommunications sector study*, 2016, 6.

have complained that competitors do not respond favorably to requests for sharing telecommunications facilities. This is aggravated by inadequate enforcement mechanisms of the regulations for sharing of telecommunications facilities among the service providers who are entering the market in this industry. This definitely raises a competition concern since refusal to share such facilities by the incumbent service providers with the new entrants is a barrier to entry which is an anticompetitive conduct.

Another manner that barrier to entry manifests is through strategic responses by incumbents of the telecommunications industry. This occurs as follows. The incumbent service providers offer favorable rates for on-net telecommunications services and unfavorable prices for off-net telecommunication services. Customers of the incumbents are therefore not incentivized to switch to their competitors. This presents a hurdle for the new entrants in the telecommunications service provision to gain and grow their customer base.<sup>153</sup>

Barrier to entry as an anticompetitive conduct is demonstrated in the following case. In the *Hungarotel* case,<sup>154</sup> a dominant telecom company allowed its consumers to switch if they are using the basic package of their services. However, the same telecommunications company did not allow switching for its consumers who were on the packages that had discounted tariffs. This hindered consumers from using the telecommunications services of other competitors. HCA viewed this action as a barrier to market entry because it created disadvantageous conditions for competitors. The result of this was that potential competitors could shy away from venturing into the market due to a lack of ready consumers. The telecommunications company in its defense stated that its

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<sup>153</sup> Centre for Competition, Regulation and Economic Development, University of Johannesburg, *Competition barriers to entry and inclusive growth: telecommunications sector study*, 2016, 6.

<sup>154</sup> *Hungarotel* (2005), Hungarian Competition Authority.

operation as a company would be threatened if it allowed switching in discounted tariffs. This defense was rejected by HCA.

### **2.1.5.2 Abuse of buyer power**

This is a situation whereby a buyer who has the financial means to buy certain goods or services uses their financially advantageous position to gain an unfair advantage when dealing with their suppliers. This was demonstrated in the dispute between Beta Solutions Limited (BSL), which specialized in installation of telecommunication masts and Linksoft Integrated Systems East Africa Limited (LIS) which offers services of technology solutions. A complaint against LIS regarding abuse of buyer power was presented to CAK by BSL which complaint was based on the following facts.<sup>155</sup>

LIS subcontracted BSL to install communication masts at designated sites for Safaricom PLC who was the client of LIS. The intervals of payment were as follows. BSL was to receive a percentage of the total cost as a down payment. The next percentage of the payment was to be paid once Safaricom PLC accepts the works done by BSL. The final percentage of payment was to be paid after the works have been completed, inspected and approved in writing by Safaricom PLC. As agreed, BSL completed the works which were inspected and even approved accordingly by Safaricom PLC. However, BSL complained that they were yet to receive the full payment and that there was a delay in getting the payments. This was followed by LIS halting allocation of contracts to and termination of the contract between them and BSL. Supporting and convincing documentation was presented by BSL which included receipts, invoices and email correspondence that showed that payments were overdue to BSL from LIS.

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<sup>155</sup> Competition Authority of Kenya, *Annual reports and financial statements*, 2021, 50-51.

CAK in its analysis established that the payments owed to BSL by LIS were indeed overdue. Moreover, CAK noted that the infrastructure as it had been set up could be accessed for use with or without payment, yet BSL was servicing a debt that they incurred to facilitate construction of those masts. CAK further established that BSL was at an economic dependency position towards LIS. This is because LIS had a large market share in Kenya comprising of several high-profile entities.

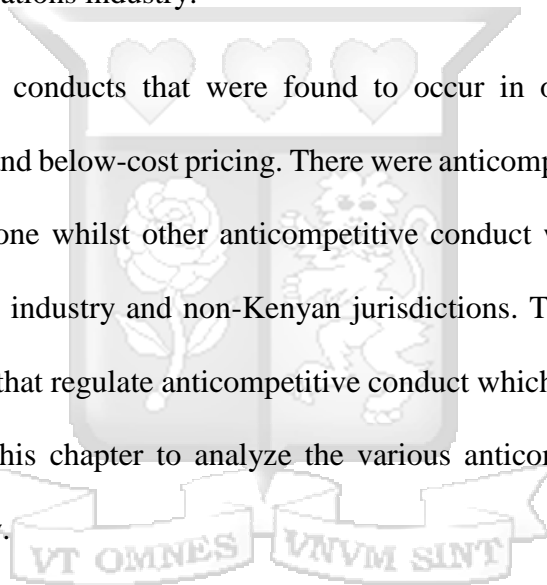
Review of the relevant market revealed that telecommunications infrastructure development is capital intensive. Therefore, very few players get the installation contracts directly from clients. They afterwards sub-contract the installation contracts to smaller players. As a result, the main contractors tend to have a superior bargaining position over subcontractors due to factors like the scale of investment requirement, years of practice to be established, control of critical technology, and the ability to win big contracts.

CAK noted that the delays in payment had no negative impact on LIS which even went ahead to replace BSL with alternative sub-contractors. In contrast, however, BSL suffered major negative impacts that saw it reduce their number of staff and be unable to service the debts they owed to their suppliers and financiers. On top of that BSL lost the capacity to supply installation services to other contractors. CAK concluded that LIS had abused its buyer power as evidenced by delaying the payments they owed to BSL. A notification was issued to LIS by CAK regarding this finding. LIS opted to settle the outstanding debts owed to BSL in instalments. CAK also under its enforcement mechanism ensured that BSL remained as a going concern. From the foregoing abuse of buyer power can also occur in the Kenyan telecommunications industry as show by the analyzed case which occurred in Kenya.

## 2.2 CONCLUSION

There are numerous anticompetitive conducts in the telecommunications sector. The ones that were analyzed fell into five themes, as follows, Market Access Restrictions, Price Manipulations, Exclusionary Practices, Competitive Process Interference and Barriers to Market Entry and Expansion. The analysis revealed that some of those anticompetitive conducts were experienced in the Kenyan telecommunications industry. This is manifested in the case law analyzed from the Kenyan jurisdiction and the articles that included Kenyan case studies on anticompetitive practices in the Kenyan telecommunications industry.

There were anticompetitive conducts that were found to occur in other jurisdictions. These included mobility restraints and below-cost pricing. There were anticompetitive conducts that were found to occur in Kenya alone whilst other anticompetitive conduct was practiced in both the Kenyan telecommunications industry and non-Kenyan jurisdictions. The following chapter will analyze the legal provisions that regulate anticompetitive conduct which can be categorized in the various themes utilized in this chapter to analyze the various anticompetitive conducts in the telecommunications industry.



## CHAPTER THREE

### LEGAL AND REGULATORY FRAMEWORK FOR COMPETITION IN KENYA

#### 3.1 Introduction

This chapter interrogates the legal and regulatory framework for regulating competition in the Kenyan telecommunications industry. This chapter also highlights and analyzes any regulatory gaps identified and thereafter gives a conclusion. The approach taken is analysis of regulation of individual anticompetitive practices under the umbrella of the themes utilized in the preceding chapter.

##### 3.1.1 Market Access Restrictions

This section will examine the legal provisions of the various laws that regulate anticompetitive conducts that can be categorized under this theme.

##### 3.1.1.1 The Constitution of Kenya 2010

Article 46 of the Constitution provides that consumers have a right to information that enables them to assess whether the services or goods they are paying for are fit for purpose.<sup>156</sup> This provision ensures that consumers are protected from purchasing goods or services that they do not fully understand their benefit to them as consumers and aids in their selection of the most suitable good or services among competing varieties. This provision therefore prevents market access restrictions that may be suffered by suppliers of the varieties of products that consumers may be interested in.

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<sup>156</sup> Article 46 (1) (b), *Constitution of Kenya* (2010).

### **3.1.1.2 The Competition Act No. 12 of 2010**

One of the objectives of the Act is creating an enabling environment for existing suppliers in the market.<sup>157</sup> This ensures that all suppliers in a given industry can access the market for purposes of selling their goods or services. The Act also defines restrictive trade practices as agreements, decisions and concerted practices by business entities that are anticompetitive.<sup>158</sup> The Act gives specific actions that can be anticompetitive because they are restricting trade and provides for any other action that can be regarded as a restrictive trade practice as long as it distorts competition in any manner.<sup>159</sup> This provision prohibits anticompetitive conducts that fall under market access restrictions as they restrict trade. Unwarranted concentration of economic power whereby there is lessening of competition as regards distribution of goods or services is prohibited by the Act.<sup>160</sup> This anticompetitive practice falls under market access restrictions since it prevents some of the goods or services from being offered for sale to the consumers in the market.

### **3.1.1.3 The Consumer Protection Act No. 46 of 2012**

This Act provides that one of its purposes is curbing any disadvantages experienced by consumers in accessing goods and services<sup>161</sup>. This provision prevents anticompetitive practices that falls under market access restrictions since the above mentioned disadvantage can limits the goods and services available for sale to consumers.

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<sup>157</sup> Section 3, *Competition Act* (Act No. 12 of 2010).

<sup>158</sup> Section 21, *Competition Act* (Act No. 12 of 2010).

<sup>159</sup> Section 21 (3), *Competition Act* (Act No. 12 of 2010).

<sup>160</sup> Section 50 (4) (c ), *Competition Act* (Act No. 12 of 2010).

<sup>161</sup> Section 3 (4) (b), *Consumer Protection Act* (Act No. 46 of 2012).

#### **3.1.1.4 The Kenya Information and Communications Act No. 2 of 1998**

This Act provides for enhancement of effective competition among suppliers of the telecommunications services.<sup>162</sup> This provision ensures that any anticompetitive conduct that falls under market access restrictions is prohibited to enhance effective competition among the telecommunications service suppliers. This Act prohibits anticompetitive conduct generally among all entities that have been licensed to offer their services as provided in this Act.<sup>163</sup> This Act further provides that CA is committed to promote fair competition among the licensed entities that are regulated by the Act through supporting the formulation of regulations to promote fair competition.<sup>164</sup> These provisions prohibits all anticompetitive practices that may be categorized as restricting market access. This Act further provides for acts or omissions that can be regarded as a breach of fair competition among all the entities licensed by CA.<sup>165</sup> For example concerted practices that adversely affect competition or limit markets.<sup>166</sup> These provisions prohibit anticompetitive conducts that restrict market access.

#### **3.1.2 Pricing Manipulations**

This section will examine the legal provisions of the various laws that regulate anticompetitive conducts that are categorized under this theme.

##### **3.1.2.1 The Constitution of Kenya 2010**

Article 46 further provides that consumers should be accorded protection of their health, safety and economic interests.<sup>167</sup> This provision prohibits anticompetitive conduct that may be

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<sup>162</sup> Section 23 (2) (b), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>163</sup> Section 84Q, *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>164</sup> Section 84R, *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>165</sup> Section 84S, *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>166</sup> Section 84S (2) (b), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>167</sup> Article 46 (1) (c), *Constitution of Kenya* (2010).

categorized as price manipulations since it requires that consumers' economic interests should be protected. Article 46 further provides that consumers have the right to compensation due to adverse effects occasioned by consuming defective goods or services.<sup>168</sup> Compensating consumers as provided in this provision implies that their economic interests are being protected against anticompetitive conduct under the theme of price manipulations.

### **3.1.2.2 The Competition Act No. 12 of 2010**

One of the objectives of the Act is consumer protection.<sup>169</sup> Regulating anticompetitive conduct that are a manifestation of price manipulations eventually leads to consumer protection. The Act provides that price fixing and maintenance of minimum resale price is an example of a restrictive trade practice.<sup>170</sup> This provision prohibits anticompetitive practices that are a manifestation of price manipulations. The Act prohibits false or misleading representation regarding the price of goods and services.<sup>171</sup> This anticompetitive conduct is a manifestation of price manipulations by suppliers of goods and services.

### **3.1.2.3 The Competition General Rules 2019**

The Rules regulate the imposition of unilateral fees and charges on services offered to consumers.<sup>172</sup> These kinds of fees are usually charged onto unsuspecting consumers. CAK has intervened to require the service providers to reveal to the consumers about these fees prior to agreeing to any binding engagement with the consumers.<sup>173</sup> This anticompetitive conduct manifests price manipulations.

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<sup>168</sup> Article 46 (1) (d), *Constitution of Kenya* (2010).

<sup>169</sup> Section 3, *Competition Act* (Act No. 12 of 2010).

<sup>170</sup> Section 21 (3), *Competition Act* (Act No. 12 of 2010).

<sup>171</sup> Section 55 (b) (i), *Competition Act* (Act No. 12 of 2010).

<sup>172</sup> Part VI, *Competition General Rules* (2019).

<sup>173</sup> Rule 31 (1), *Competition General Rules* (2019).

#### **3.1.2.4 The Consumer Protection Act No. 46 of 2012**

This Act provides that consumers are not overcharged in scenarios where the price of the goods or services are estimated.<sup>174</sup> This prohibits anticompetitive practice that is a manifestation of price manipulations with adverse effects on the consumers. This Act also prohibits unconscionable business conducts that represents the price of goods and services to be grossly excessive than the price for similar goods or services sold to other consumers.<sup>175</sup> This Act also prohibits a person who uses their ability to control the consumer goods from forcing the consumer to renegotiate the price of the goods.<sup>176</sup> These anticompetitive conducts prohibited by this Act are a manifestation of price manipulations by suppliers of goods or services.

#### **3.1.2.5 The Kenya Information and Communications Act No. 2 of 1998**

This Act provides for regulation of the prices, variety and quality of telecommunications services sold to consumers in Kenya.<sup>177</sup> This provisions prohibits anticompetitive conducts that manifest price manipulations by suppliers in the telecommunications industry since it requires regulation of prices. The Act prohibits the concerted practice of price fixing.<sup>178</sup> The CA after investigating and concluding that the accused has committed an anticompetitive conduct may offer remedies which include the following. They are cease and desist orders, payment of a determined fine and nullification of any anticompetitive agreements.<sup>179</sup>

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<sup>174</sup> Section 6, *Consumer Protection Act* (Act No. 46 of 2012).

<sup>175</sup> Section 13 (2) (b), *Consumer Protection Act* (Act No. 46 of 2012).

<sup>176</sup> Section 14, *Consumer Protection Act* (Act No. 46 of 2012).

<sup>177</sup> Section 23 (2) (a), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>178</sup> Section 84S (2) (b), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>179</sup> Section 84T (6), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

### **3.1.2.6 The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010.**

Regulation 9(4) requires the dominant service provider to set interconnection charges based on objective criterion and the principles of transparency and cost orientation set out in Regulation 11 which provides as follows among other things. That the dominant service provider may consider the ability of a person to pay for a service when deciding whether to offer the service to that person.<sup>180</sup> Regulation 9 (6) (a) provides that a dominant communication service provider should not adjust the interconnection charges without prior notice in writing to CA. This prevents excessive charges to the client requiring interconnection services. These regulations prohibit anticompetitive conduct that are a manifestation of price manipulations by a dominant entity in the telecommunications industry.

### **3.1.2.7 The Kenya Information and Communications (Consumer Protection) Regulations, 2010**

Regulation 3 (1) (g) provides for equal access to the same quality and price of a communication service for all customers in a particular area of the communication market. This prohibits the communication service providers from engaging in anticompetitive conduct that are a manifestation of price manipulations by ensuring that communications service prices are not discriminatory.

### **3.1.3 Exclusionary Practices**

This section will examine the legal provisions of the various laws that regulate anticompetitive conducts that are categorized under this theme

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<sup>180</sup> Regulation 11 (2) (a), *Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations*, (2010).

### **3.1.3.1 The Constitution of Kenya 2010**

Article 46 of the Constitution further provides that the Parliament of Kenya shall enact legislation that protects consumers and regulates advertising.<sup>181</sup> This provisions prohibits all anticompetitive conducts since it is in the Constitution of Kenya from which derives all laws that promote fair competition and consumer protection. Therefore, it also prohibits anticompetitive practices that manifest exclusionary practices.

### **3.1.3.2 The Competition Act No. 12 of 2010**

Some of the objectives of the Act are creating an enabling environment for existing suppliers in the market and preventing barriers to entry for potential suppliers in a market.<sup>182</sup> The Act further prohibits the restrictive trade practice of dividing markets by allocating customers, suppliers, areas or specific goods and services.<sup>183</sup> The Act prohibits the unwarranted concentration of economic power whereby there is limitation of competition in the distribution of any goods or the provision of any services.<sup>184</sup> These provisions prohibit anticompetitive conduct that are a manifestation of exclusionary practices that reduces the suppliers in a given market.

### **3.1.3.3 The Consumer Protection Act No. 46 of 2012**

The Act provides for curbing any disadvantages experienced by consumers in accessing goods and services.<sup>185</sup> This could be a manifestation of exclusionary practices since such anticompetitive practices reduce the suppliers in a given market which limits the variety of goods that can be accessed by the consumers.

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<sup>181</sup> Article 46 (2), *Constitution of Kenya* (2010).

<sup>182</sup> Section 3, *Competition Act* (Act No. 12 of 2010).

<sup>183</sup> Section 21 (3) (b), *Competition Act* (Act No. 12 of 2010).

<sup>184</sup> Section 50 (4) (c ), *Competition Act* (Act No. 12 of 2010).

<sup>185</sup> Section 3 (4) (b), *Consumer Protection Act* (Act No. 46 of 2012).

### **3.1.3.4 The Kenya Information and Communications Act No. 2 of 1998**

This Act provides for nationwide provision of telecommunications services.<sup>186</sup> This provision ensures that suppliers are not prevented from selling their services in their markets of choice since exclusionary practices limit the suppliers in a certain market. This Act further prohibits actions that lead to market sharing, limitation of markets or control of markets by suppliers.<sup>187</sup> This is because such actions are a manifestation of anticompetitive practices under the theme of exclusionary practices in that they limit the suppliers that offer telecommunications services in a certain market.

### **3.1.4 Competitive Process Interference**

This section will examine the legal provisions of the various laws that regulate anticompetitive conducts that are categorized under this theme

#### **3.1.4.1 The Constitution of Kenya 2010**

Article 46 of the Constitution states that consumers have a right to information that enables them to assess whether the services or goods they are paying for are fit for purpose.<sup>188</sup> This provision ensures that consumers are protected from purchasing goods or services that they do not fully understand their benefit to them as consumers and aids in their selection of the most suitable goods or services among competing varieties thus preventing interference with the competitive process in general. Article 46 of the Constitution further provides that the Parliament of Kenya shall enact legislation that protects consumers and regulates advertising.<sup>189</sup> This provisions prohibits

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<sup>186</sup> Section 23, *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>187</sup> Section 84S (2) (b), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>188</sup> Article 46 (1) (b), *Constitution of Kenya* (2010).

<sup>189</sup> Article 46 (2), *Constitution of Kenya* (2010).

anticompetitive conduct that may interfere with the competitive process for instance anticompetitive advertising.

#### **3.1.4.2 The Competition Act No. 12 of 2010**

One of the objectives of the Act is creating an enabling environment for existing suppliers in the market and preventing barriers to entry for potential suppliers in a market.<sup>190</sup> These provisions ensure that competition is not interfered with since this prevents suppliers from trading in an enabling environment. The Act also prohibits the restrictive trade practices that prevent, distort or lessen competition.<sup>191</sup> The Act further prohibits abuse of dominant position in its various forms.<sup>192</sup> These include unfair trading conditions, discrimination when dealing with various parties in similar transactions, practices that limit production, distribution, sale and expansion of suppliers.<sup>193</sup> The Act provides for merger control by CAK.<sup>194</sup> This is important since the effect of some mergers can be anticompetitive.<sup>195</sup> Such mergers interfere with the competitive process. Unwarranted concentration of economic power that is manifested through inadequacy in the production, supply and distribution of goods and services is considered anticompetitive as provided in the Act.<sup>196</sup> These provisions prohibit conduct that may be categorized as interfering with the competitive process.

#### **3.1.4.3 The Competition General Rules 2019**

The Rules set out the criteria for determining whether a merger has been implemented without the permission of CAK.<sup>197</sup> The Rules require merging parties who have been excluded pursuant to the

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<sup>190</sup> Section 3, *Competition Act* (Act No. 12 of 2010).

<sup>191</sup> Section 21, *Competition Act* (Act No. 12 of 2010).

<sup>192</sup> Section 24, *Competition Act* (Act No. 12 of 2010).

<sup>193</sup> Section 24 (2), *Competition Act* (Act No. 12 of 2010).

<sup>194</sup> Section 42, *Competition Act* (Act No. 12 of 2010).

<sup>195</sup> Section 46 (2), *Competition Act* (Act No. 12 of 2010).

<sup>196</sup> Section 50 (4) (e), *Competition Act* (Act No. 12 of 2010).

<sup>197</sup> Rule 10, *Competition General Rules* (2019).

Act<sup>198</sup> to still seek the approval of CAK in circumstances whereby such merger can lead to anticompetitive effects.<sup>199</sup> This Rule ensures that merging parties do not hide under the umbrella of exclusion to engage in anticompetitive conduct that eventually hurt public interest. The Rules further provide for the possibility of obtaining an advisory opinion from CAK by any entity intending to merge prior to starting intricate negotiations on the proposed merger.<sup>200</sup>

It is provided in the Rules that any merger that has been implemented without the requisite approval from CAK should be brought to the attention of CAK.<sup>201</sup> Such information can also be known by CAK from its own market surveillance, and this necessitates an investigation by CAK into such a merger.<sup>202</sup> The above provisions ensure that no merger is implemented without the review of CAK and thus protects the market from anticompetitive mergers. CAK may prescribe remedies to address the anticompetitive concerns of the merger with or without consulting the undertakings that intend to merge.<sup>203</sup> This allows the parties concerned to come up with the most appropriate measures to reduce or prevent the anticompetitive effect of their merger.

There is also a requirement by the Rules that a merged entity for a merger that has been approved conditionally should submit a compliance report regularly as determined by CAK for assessment of its compliance with the conditions to which the merged entity was subject.<sup>204</sup> This further ensures that the merged entity does not engage in any anticompetitive conduct that has been prohibited by the conditions that govern the existence of the entity.

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<sup>198</sup> Section 42 (1), *Competition Act* (Act No. 12 of 2010).

<sup>199</sup> Rule 13, *Competition General Rules*, (2019).

<sup>200</sup> Rule 14, *Competition General Rules* (2019)

<sup>201</sup> Rule 17 (1), *Competition General Rules* (2019).

<sup>202</sup> Rule 17 (2), *Competition General Rules* (2019).

<sup>203</sup> Rule 19 (1), *Competition General Rules* (2019).

<sup>204</sup> Rule 19 (2), *Competition General Rules* (2019).

#### **3.1.4.4 The Consumer Protection Act No. 46 of 2012**

The Act prohibits unfair practices that generally include false representation and unconscionable conduct.<sup>205</sup> Such anticompetitive practices can be categorized under the theme of competitive process interference because the perpetrating suppliers are not honest regarding the goods or services they are selling.

#### **3.1.4.5 The Kenya Information and Communications Act No. 2 of 1998**

The Act provides for enhancement of effective competition among suppliers of the telecommunications services.<sup>206</sup> This helps prevent anticompetitive conduct that interfere with the competitive process. This Act further provides for acts or omissions that can be regarded as a breach of fair competition which are abuse of dominant position and concerted practice.<sup>207</sup> Prohibition of these anticompetitive conducts helps prevent interference with the competitive process.

#### **3.1.4.6 The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, 2010.**

Regulation 9(2) prohibits abuse of dominant position by a dominant licensee in the communications market during negotiation of interconnection. Regulation 9(4) requires the dominant service provider to set interconnection charges based on objective criterion and the principles of transparency and cost orientation set out in Regulation 11; which Regulation provides as follows among other things. That the dominant service provider may consider the ability of a person to pay for a service when deciding whether to offer the service to that person<sup>208</sup>. Regulation

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<sup>205</sup> Part III, *Consumer Protection Act* (Act No. 46 of 2012).

<sup>206</sup> Section 23 (2) (b), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>207</sup> Section 84S (2), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>208</sup> Regulation 11 (2) (a), *Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations*, (2010).

9 (6) (a) provides that a dominant communication service provider should not adjust the interconnection charges without prior notice in writing to CA. This helps curb competitive process interference by suppliers who abuse their dominant position.

### **3.1.5 Barriers to Market Entry and Expansion**

This section will examine the legal provisions of the various laws that regulate anticompetitive conducts that are categorized under this theme

#### **3.1.5.1 The Competition Act No. 12 of 2010**

One of the objectives of the Act is preventing barriers to entry for potential suppliers in a market.<sup>209</sup> The Act also prohibits restrictive trade practices that lead to division of markets.<sup>210</sup> This is because generally all suppliers in a given industry are prevented from accessing those markets which is a manifestation of barrier to entry and expansion. The Act further prohibits abuse of buyer power manifested whereby a buyer limits the supplies sold to competing buyers by the suppliers.<sup>211</sup> Unwarranted concentration of economic power that limit competition in supply of goods or provision of services are considered anticompetitive as provided in the Act.<sup>212</sup> This lowers the interest that the suppliers will have in a new market or new niche within the market which is a manifestation of barriers to entry and expansion.

#### **3.1.5.2 The Consumer Protection Act No. 46 of 2012**

The Act provides that the disadvantages experienced by consumers in accessing goods and services should be prevented.<sup>213</sup> This provision prohibits anticompetitive conduct that are a manifestation

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<sup>209</sup> Section 3, *Competition Act* (Act No. 12 of 2010).

<sup>210</sup> Section 21 (3) (b), *Competition Act* (Act No. 12 of 2010).

<sup>211</sup> Section 24A (5), *Competition Act* (Act No. 12 of 2010).

<sup>212</sup> Section 50 (4) (c ), *Competition Act* (Act No. 12 of 2010).

<sup>213</sup> Section 3 (4) (b), *Consumer Protection Act* (Act No. 46 of 2012).

of barriers to entry and expansion since they can lead to lack of access to a variety of goods or services by consumers.

### **3.1.5.3 The Kenya Information and Communications Act No. 2 of 1998**

This Act further provides for enhancement of effective competition among suppliers of the telecommunications services.<sup>214</sup> These provisions help prevent barriers to entry and expansion since in that such anticompetitive conducts can inhibit effective competition among suppliers. The Act further provides that the licensing of telecommunications service providers also entails allowing competing service providers to use the telecommunications system of another service provider.<sup>215</sup> This enhances reduction of barriers to entry in the market due to infrastructural costs.

This Act prohibits anticompetitive conduct generally among all entities that have been licensed to offer their services as provided in this Act<sup>216</sup>. This enhances prevention of anticompetitive conduct that amounts to barriers to entry and expansion. This Act further provides for acts or omissions that can be regarded as a breach of fair competition among all the entities licensed by CA. They are market control, market allocation, discriminative conditions for various parties in similar transactions.<sup>217</sup> These prohibited actions are a manifestation of barriers to entry and expansion since the market is closed off from some suppliers.

## **3.2 CONCLUSION**

In this chapter the study analyzed the various anticompetitive practices prohibited by the various laws of Kenya under each theme that was used to categorize the various anticompetitive conducts

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<sup>214</sup> Section 23 (2) (b), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>215</sup> Section 25 (3), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>216</sup> Section 84Q, *Kenya Information and Communications Act*, (Act No. 2 of 1998).

<sup>217</sup> Section 84S (2) (a) and (b), *Kenya Information and Communications Act*, (Act No. 2 of 1998).

in the telecommunications industry in that were analyzed in chapter two. Under the theme of market access restrictions, the Constitution of Kenya required consumers to be informed of the product they are buying so that if they are not interested in it they may access the market for other preferred products. The Competition Act required the creation of an enabling environment for existing suppliers in the market. It also prohibited restrictive trade practices. This Act further prohibited unwarranted concentration of economic power that resulted into lessening of competition as regards distribution of goods or services.

The Consumer Protection Act provides that consumers should not find unnecessary hurdles when trying to access goods or services. The Kenya Information and Communications Act, on the other hand provides that there should be enhanced effective competition among suppliers of the telecommunications services. This Act further prohibits anticompetitive conduct generally among all entities that have been licensed to offer their services. It also provides that CA is committed to promote fair competition among the licensed entities that are regulated by the Act through supporting the formulation of regulations to promote fair competition. The Act also prohibits concerted practices that adversely affect competition or limit markets. From the foregoing, these laws do not bring out the anticompetitive practices falling under this theme as analyzed in chapter two. These anticompetitive conducts are tying, sim lock and mobility restraints which occur in the telecommunications industry and fall under the theme of market access restrictions.

As regards the theme of price manipulations, the Constitution of Kenya requires the protection of the economic interests of consumers. The Constitution further provides that consumers have the right to compensation due to adverse effects occasioned by consuming defective goods or services since it remedies their economic losses. The Competition Act by requiring consumer protection prohibits anticompetitive behavior under the theme of price manipulations. The Act further

prohibits price fixing and maintenance of minimum resale price. Finally, under this theme, the Act prohibits false or misleading representation regarding the price of goods and services.

The Competition General Rules regulate the imposition of unilateral fees and charges on services offered to consumers. The Consumer Protection Act prohibits the overcharging of consumers when the price of the goods or services are estimated. This Act also prohibits unconscionable business conducts that represents the price of goods and services to be grossly excessive than the price for similar goods or services sold to other consumers. This Act further prohibits a person who uses their ability to control the consumer goods from forcing the consumer to renegotiate the price of the goods.

The Kenya Information and Communications Act provides for regulation of the prices, variety and quality of telecommunications services sold to consumers in Kenya. The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations require the dominant service provider to set interconnection charges based on objective criterion and the principles of transparency and cost orientation as set out in those Regulations. The Regulations further provide that a dominant communication service provider should notify CA prior to adjusting the interconnection charges. The Kenya Information and Communications (Consumer Protection) Regulations provide for equal access to the same quality and price of a communication service for all customers in a particular area of the communication market. The above laws that were analyzed under the theme of price manipulations lacked provisions that address price squeeze, predatory pricing and below-cost pricing. These were the anticompetitive practices analyzed under this theme in the preceding chapter.

As regards the theme of exclusionary practices, the following anticompetitive conducts are prohibited by Kenyan laws. The Constitution of Kenya provides that the Parliament of Kenya shall

enact legislation that protects consumers and regulates advertising. The Competition Act provides for the creation of an enabling environment for existing suppliers in the market and preventing barriers to entry for potential suppliers in a market. The Act further prohibits the restrictive trade practice of dividing markets by allocating customers, suppliers, areas or specific goods and services. The Act prohibits the unwarranted concentration of economic power whereby there is limitation of competition in the distribution of any goods or the provision of any services. One such action is refusals to supply which was analyzed in the previous chapter. The Consumer Protection Act provides for curbing any disadvantages experienced by consumers in accessing goods and services. One such disadvantage in accessing services is what the analysis in chapter two refers to as communication blockage.

The Kenya Information and Communications Act provides for nationwide provision of telecommunications services. It further prohibits actions that lead to market sharing, limitation of markets or control of markets by suppliers. Such actions that lead to market control is vertical foreclosure as analyzed in the preceding chapter. Therefore, the anticompetitive practices that were analyzed previously under this theme are addressed in these laws but in a general way.

As regards the theme of competitive process interference, the following anticompetitive conducts are prohibited by Kenyan laws. The Constitution of Kenya states that consumers have a right to information that enables them to assess whether the services or goods they are paying for are fit for purpose. The Constitution further provides that the Parliament of Kenya shall enact legislation that protects consumers and regulates advertising. The Competition Act provides for creating an enabling environment for existing suppliers in the market and preventing barriers to entry for potential suppliers in a market. The Act also prohibits the restrictive trade practices that prevent, distort or lessen competition. The Act further prohibits abuse of dominant position in its various

forms. These include unfair trading conditions, discrimination when dealing with various parties in similar transactions, practices that limit production, distribution, sale and expansion of suppliers.

The Act provides for merger control by CAK. This is important since the effect of some mergers can be anticompetitive thus interfering with the competitive process. Unwarranted concentration of economic power that is manifested through inadequacy in the production, supply and distribution of goods and services is considered anticompetitive as provided in the Act. The Competition General Rules require merging parties who have been excluded pursuant to the Act to still seek the approval of CAK in circumstances whereby such merger can lead to anticompetitive effects. CAK may prescribe remedies to address the anticompetitive concerns of the merger with or without consulting the undertakings that intend to merge. The Rules further require that a merged entity for a merger that has been approved conditionally should submit a compliance report regularly as determined by CAK for assessment of its compliance with the conditions to which the merged entity was subject.

The Consumer Protection Act prohibits unfair practices that generally include false representation and unconscionable conduct. The Kenya Information and Communications Act provides for enhancement of effective competition among suppliers of the telecommunications services. The Act further provides for acts or omissions that can be regarded as a breach of fair competition which are abuse of dominant position and concerted practice. The Kenya Information and Communications (Fair Competition and Equality of Treatment) Regulations, prohibits abuse of dominant position by a dominant licensee in the communications market during negotiation of interconnection.

The Regulations require the dominant service provider to set interconnection charges based on objective criterion and the principles of transparency and cost orientation as set out in the

Regulations. The Regulations further provide that a dominant communication service provider should not adjust the interconnection charges without prior notice in writing to CA. These provisions prohibit anticompetitive mergers and abuse of dominant position that may be categorized as interfering with the competitive process as analyzed in the previous chapter. As regards, collusion the Competition Act prohibits practices that limit expansion of suppliers which as analyzed in the previous chapter, is a consequence of collusion.<sup>218</sup>

As regards the theme of barriers to entry and expansion, the following anticompetitive conducts are prohibited by Kenyan laws. The Competition Act has as one of its objectives preventing barriers to entry for potential suppliers in a market. The Act also prohibits restrictive trade practices that lead to division of markets. The Act further prohibits abuse of buyer power manifested whereby a buyer limits the supplies sold to competing buyers by the suppliers. Unwarranted concentration of economic power that limit competition in supply of goods or provision of services are considered anticompetitive as provided in the Act. The Consumer Protection Act provides that the disadvantages experienced by consumers in accessing goods and services should be prevented. The Kenya Information and Communications Act provides for enhancement of effective competition among suppliers of the telecommunications services. The Act further provides that the licensing of telecommunications service providers also entails allowing competing service providers to use the telecommunications system of another service provider. Any anticompetitive practice is generally prohibited among all entities that have been licensed to offer their services as provided in the Act. This Act further prohibits acts or omissions that can be regarded as a breach of fair competition among all the entities licensed by CA. These conducts are market control,

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<sup>218</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 165.

market allocation, discriminative conditions for various parties in similar transactions. The laws examined under the theme of barriers to entry and expansion prohibit explicitly abuse of buyer power and barriers to entry as analyzed in the preceding chapter.



## CHAPTER FOUR

### FINDINGS, CONCLUSION AND RECOMMENDATIONS

This chapter presents the findings of the research above. It also draws conclusions from the findings. This chapter further gives recommendations to be considered for implementation and further research.

#### 4.1 FINDINGS

This study found out that there are numerous anticompetitive conducts that occur in the telecommunications industry. Some of this anticompetitive conducts were found to have occurred in the Kenyan telecommunications industry. The other anticompetitive conducts were found to have occurred in the telecommunications industries of other jurisdictions. Moreover, those anticompetitive conducts were addressed by the respective competition regulatory agencies in those jurisdictions and the perpetrators were fined as well as ordered to cease and desist from those anticompetitive behaviors.

In addition, some of those anticompetitive conducts were found to have occurred in both the telecommunications industry of Kenya and also in the telecommunications industries of other jurisdictions. This research also revealed that the non-Kenyan jurisdictions singled out the various anticompetitive conducts that happened even though some of those anticompetitive conduct were a manifestation of other anticompetitive conducts in the telecommunications industry. An example is the anticompetitive conduct of refusal to supply<sup>219</sup> as one of the manifestations of abuse of dominant position in the telecommunications industry.

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<sup>219</sup> *National Roaming Case* (2003), Turkish Competition Authority

The specific anticompetitive conducts that this research found to occur in the telecommunications industry are the following were analyzed under five themes. These themes were market access restrictions, price manipulations, exclusionary practices, competitive process interference and barriers to entry and expansion. The specific anticompetitive practices that were analyzed were the following. Tying which was under the theme of market access restrictions was defined previously was found to have occurred in both the European Union and the United States of America as analyzed in the case brought against MC. Tying was found to have occurred in the Kenyan telecommunications industry as indicated in the study done by Kiriinya S and Chesula O.<sup>220</sup> It is regarded as an anticompetitive conduct because customers are not free to choose the service or products they want and are therefore forced to purchase products that they do not need thus requiring consumer protection from search.

Sim lock which was also under the theme of market access restrictions and as previously<sup>221</sup> defined was found to occur in the Netherlands telecommunications industry.<sup>222</sup> The legal and regulatory framework in the Netherlands required the elimination of sim locks on mobile phones as it was regarded to be anticompetitive.<sup>223</sup> This was aimed to empower the end users to choose the telecommunications service providers they preferred.<sup>224</sup> This opened up the telecommunications market to other competitors to offer their services. Price squeeze as an anticompetitive conduct

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<sup>220</sup> Kiriinya S and Chesula O, 'Competitiveness in the telecommunication sector in Kenya using porters five forces model', 3.

<sup>221</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets', 89.

<sup>222</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets', 89

<sup>223</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets', 89

<sup>224</sup> Ubacht J, 'A process perspective on regulation a grounded theory study into regulatory practice in newly liberalized network-based markets', 89

was found to have occurred in the telecommunications industry of both Hungary<sup>225</sup> and Italy<sup>226</sup> as illustrated in the respective cases in this research. This anticompetitive conduct that falls under the theme of price manipulations was prohibited by the respective authorities because it led to barrier to entry of potential competitors thus reducing the variety of services available to consumers.

Predatory pricing is another anticompetitive conduct that is under the theme of price manipulations and that was found to have occurred in the telecommunications industry in Germany.<sup>227</sup> This study revealed that it is anticompetitive because when the reduction in price is lower than the cost of production<sup>228</sup> the competing entities may be forced out of the market due to making losses and this may lead to monopolistic markets. Anticompetitive mergers which was analyzed under the theme of competitive process interference in the telecommunications industry are prohibited because of consumer welfare protection. This study found out that consumers stand to suffer most when entities merge because their dominance is increased and may lead to selling of services to consumers at high prices. This was shown in the case<sup>229</sup> analyzed previously in this research.

This study also revealed that abuse of dominant position which was analyzed under the theme of barriers to entry and expansion is considered an anticompetitive conduct as it leads to an economic disadvantage on the competitors as illustrated in the respective cases<sup>230</sup> that were analyzed<sup>231</sup> from various the jurisdictions.<sup>232</sup> This research also revealed that mobility restraint that was analyzed under the theme of market access restrictions is an anticompetitive conduct that occurs in telecommunications industry. This is considered as an anticompetitive conduct because it can

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<sup>225</sup> *MATAV* (2002), Hungarian Competition Authority.

<sup>226</sup> *Comportamenti Abusivi di Telecom Italia, Provvedimento* (2004), Italian Competition Authority.

<sup>227</sup> *Deutsche Telekom AG* (2003), European Commission.

<sup>228</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 164.

<sup>229</sup> *T-Mobile Austria Acquisition of Tele Ring* (2006), The European Commission.

<sup>230</sup> *Clear v New Zealand* (1995), The Supreme Court of New Zealand.

<sup>231</sup> Long T and Walker G, 'Abuse of market dominance by state monopolies in Vietnam', 203

<sup>232</sup> *Airtel Kenya Limited vs Safaricom Limited* (2014), Competition Authority of Kenya.

manifest when there are pricing arrangements that prevent a customer of the telecommunications service from switching suppliers.<sup>233</sup> It is also evident in instances where there are exit penalties which are implemented where a customer terminates an agreement for supply of telecommunications service before a specified term ends thus indicating that a carrier or carriage service provider is attempting to lock in customers.<sup>234</sup>

The study found out that vertical foreclosure that was analyzed under the theme of exclusionary practices is an anticompetitive conduct in the telecommunications industry for the following reason. There are instances where a vertically integrated incumbent telecommunication service provider is deciding access prices and interconnection quality for its local network with the aim of adversely affecting the competing entity in the long distance segment.<sup>235</sup> This implies that such decisions are made with disregard to any regulatory provisions. Refusals to supply which was analyzed under the theme of exclusionary practices is considered an anticompetitive conduct since an entity deliberately fails to provide the goods or the services that a competitor depends on to effectively compete.<sup>236</sup> This was illustrated in a case<sup>237</sup> that occurred in the telecommunications industry of Turkey.

This research also revealed that collusion which was analyzed under the theme of competitive process interference is an anticompetitive conduct that can occur in the telecommunications industry. It is considered anticompetitive since consumers suffer adverse effects like increased prices for the telecommunications services. This was noted in the cases that occurred in South

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<sup>233</sup> Australian Competition and Consumer Commission, *Anti-competitive conduct in telecommunications markets – an information paper*, 1999, 45.

<sup>234</sup> Australian Competition and Consumer Commission, *Anti-competitive conduct in telecommunications markets – an information paper*, 1999, 45.

<sup>235</sup> <https://www.semanticscholar.org/paper/C%C3%A9sar-Mattos-Vertical-Foreclosure-in-Thorough-Access-Mattos/08a8750b91c1dbf8f5a9d974497a056d6f2af102>

<sup>236</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 165.

<sup>237</sup> *National Roaming Case* (2003), Turkish Competition Authority

Korea<sup>238</sup> and Guernsey.<sup>239</sup> The study further found out that barriers to entry that was analyzed under the theme of barriers to entry and expansion is an anticompetitive conduct in the telecommunications industry in that it reduces the varieties of choice available for consumers of telecommunications services. This was illustrated in a study done in the South African telecommunications market.<sup>240</sup> It was also illustrated in the case that occurred in Hungary.<sup>241</sup> This thesis also discovered that below-cost pricing which was analyzed under the theme of price manipulations is an anticompetitive conduct that occurs in the telecommunications industry as illustrated in the case brought by TekSavvy Solutions against Bell Canada and Rogers Communications Canada.<sup>242</sup> This was considered an anticompetitive conduct because telecommunications services were sold in the retail market at prices that were lower than the wholesale prices and that this would drive out competitors from the retail market.

The study further revealed communication blockage that was analyzed under the theme of exclusionary practices was also anticompetitive.<sup>243</sup> The reason why it is considered anticompetitive is that consumers were negatively affected with their communication not reaching the intended recipients.<sup>244</sup> In addition, it was noted to affect both the small scale and large scale service providers in the telecommunications industry in the United States of America.<sup>245</sup> Abuse of buyer power that was analyzed under the barriers to entry and expansion theme was also found to

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<sup>238</sup> Nam I, 'Collusion in a telecom market in which the entrant raises the price in return for a discount in interconnection charges by the incumbent', 7.

<sup>239</sup> <https://www.itv.com/news/channel/2022-07-21/phone-company-sure-fined-nearly-3m-for-breaching-guernsey-competition-law>

<sup>240</sup> Centre for Competition, Regulation and Economic Development, University of Johannesburg, *Competition barriers to entry and inclusive growth: telecommunications sector study*, 2016, 6.

<sup>241</sup> *Hungarotel* (2005), Hungarian Competition Authority.

<sup>242</sup> <https://www.canadianlawyermag.com/news/general/complaint-filed-against-bell-canada-and-rogers-for-anti-competitive-conduct/326683>

<sup>243</sup> Narechania T, 'The secret life of a text message' 120 (6) *Columbia Law Review*, 205.

<sup>244</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/>

<sup>245</sup> <https://www.cnet.com/home/internet/telco-agrees-to-stop-blocking-voip-calls/>

occur in telecommunications industry in Kenya<sup>246</sup> and was considered anticompetitive for the following reason. When the buyer of telecommunications installation services delays payment after satisfactory delivery of the services then the supplier is adversely affected.<sup>247</sup>

Analysis of the legal and regulatory framework for competition law in Kenya reveals that the current law prohibits the following anticompetitive practices. Firstly, failing to inform consumers about the product they are buying so that if they are not interested in it they may access the market for other preferred products. The laws also prohibit market interference through lack of an enabling environment for existing suppliers in the market. Restrictive trade practices are also prohibited by the current laws. There is also prohibition of unwarranted concentration of economic power that resulted into lessening of competition as regards distribution of goods or services. The current laws further prohibit subjecting consumers to unnecessary hurdles when trying to access goods or services. In addition, the laws prohibit anticompetitive conduct generally among all entities that have been licensed to offer their telecommunications services. Moreover, the laws prohibit concerted practices that adversely affect competition or limit markets.

On top of that, the laws prohibit violation of the economic interests of consumers and requires compensation due to adverse effects occasioned by consuming defective goods or services since it remedies their economic losses. The laws further prohibit price fixing, maintenance of minimum resale price and false or misleading representation regarding the price of goods and services. The laws also regulate the imposition of unilateral fees and charges on services offered to consumers. In addition, the laws prohibit the overcharging of consumers when the price of the goods or services are estimated. It is further prohibited by the laws the practice of unconscionable business

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<sup>246</sup> Competition Authority of Kenya, *Annual reports and financial statements*, 2021, 50-51.

<sup>247</sup> Competition Authority of Kenya, *Annual reports and financial statements*, 2021, 50-51.

conducts that represents the price of goods and services to be grossly excessive than the price for similar goods or services sold to other consumers. To add onto that, the current laws prohibit a person who uses their ability to control the consumer goods from forcing the consumer to renegotiate the price of the goods.

The laws go on to prohibit abuse of dominance in various forms like whereby a telecommunications service provider decides to set interconnection charges in disregard of objective criterion, without consulting with CA and in disregard of the principles of transparency and cost orientation as set out in the Regulations. Moreover, the laws prohibit price discriminations for customers of a communication service in a particular area of the communications services market. In addition, the laws prohibit the restrictive trade practice of dividing markets by allocating customers, suppliers, areas or specific goods and services. The laws also prohibit the unwarranted concentration of economic power whereby there is limitation of competition in the distribution of any goods or the provision of any services. One such action is refusals to supply which was analyzed in chapter two.

The laws also prohibit any disadvantages experienced by consumers in accessing goods and services. One such disadvantage in accessing services is what the analysis in chapter two refers to as communication blockage. On top of that the current laws prohibit actions that lead to market sharing, limitation of markets or control of markets by suppliers. Such actions that can lead to market control is vertical foreclosure as analyzed in chapter two. Analysis of the current laws revealed that they also prohibit the restrictive trade practices that prevent, distort or lessen competition. In addition, the laws prohibit abuse of dominant position in its various forms which include unfair trading conditions, discrimination when dealing with various parties in similar transactions, practices that limit production, distribution, sale and expansion of suppliers.

The current laws also prohibit anticompetitive mergers and unwarranted concentration of economic power that is manifested through inadequacy in the production, supply and distribution of goods and services. The laws further prohibit concerted practices false representation and unconscionable conduct. These provisions prohibit anticompetitive mergers and abuse of dominant position that may be categorized as interfering with the competitive process as analyzed in the previous chapter. As regards, collusion the law prohibits practices that limit expansion of suppliers which is a consequence of collusion as analyzed in chapter two.

In addition to the above, the laws prohibit abuse of buyer power manifested whereby a buyer limits the supplies sold to competing buyers by the suppliers. The current law also prohibits unwarranted concentration of economic power that limit competition in supply of goods or provision of services. The anticompetitive practices such as market control, market allocation, discriminative conditions for various parties in similar transactions are also prohibited by the laws.

However, specifically for the telecommunications industry in Kenya, and as shown in the analysis on chapter two, there are certain anticompetitive practices which are not covered in the law as it is framed. These are tying, sim lock and mobility restraints which occur in the telecommunications industry and fall under the theme of market access restrictions. Those anticompetitive practices in the telecommunications industry that were analyzed under the theme of price manipulations are also not addressed by the current laws. They are price squeeze, predatory pricing and below-cost pricing.

## **4.2 CONCLUSION**

Based on the findings, the study concludes that there is need to amend the laws so that they reflect regulation of anti-competitive practices not currently regulated for the protection of consumer

welfare in the telecommunications industry. This is because the telecommunications industry in Kenya has countrywide market coverage. In addition, the anticompetitive conducts that occur in other telecommunications jurisdictions can as well happen in Kenya and it is prudent to have laws in place to address those anticompetitive practices when they arise so that consumers are adequately protected in the telecommunications industry.

The suggested amendments are informed by the gaps identified after concluding the interrogation of the legal and regulatory framework for competition as regards the telecommunications industry in Kenya. The gaps so identified are that some of the anticompetitive practices analyzed in chapter two are not regulated by the current Kenyan laws. Therefore, these amendments are also informed by the findings from this research of the analysis of anticompetitive behavior in the telecommunications industry particularly the anticompetitive behaviors that were found to occur in the telecommunications industry of non-Kenyan jurisdictions and are equally not addressed in the Kenyan laws as they are currently. Therefore, when those conducts occur in the telecommunications industry, the law will not be sufficient to address them because they are not prohibited by the laws. The amendments are enumerated in detail in the following recommendations.

### **4.3 RECOMMENDATIONS**

This research gives the following general recommendations that can be specifically applied as explained further. The current laws should prohibit the following anticompetitive conducts that occur in the telecommunications industry. These are tying, sim lock, mobility restraints, price squeeze, predatory pricing and below-cost pricing. Since the Competition Act contains the law that regulates competition nationally, it should be amended to include a section for prohibition of

anticompetitive practices in the telecommunications industry. This is because telecommunications services are offered nationally and have consumers countrywide. The section should define the anticompetitive conducts as follows together with the ingredients that constitute each anticompetitive conduct. Tying which is defined as putting a service that a supplier has significant market power together with another service which the supplier holds little or no market power such that one cannot purchase either service independent of the other service. It should state that the ingredient includes attaching the main product with a side product such that the two cannot be bought in isolation.

The law should be amended to define sim lock as deterring an end user from changing the telecommunications service provider for a fixed period. The main ingredient for sim lock should be stated as lack of freedom for a customer to switch telecommunications service providers. The law should also be amended to define price squeeze as a scenario where a dominant supplier sells to its competitors downstream a product that is necessary for the competitors to provide retail services to the final consumers at high charges in relation to the retail price of those competitors. The law should also state its ingredient as a dominant entity selling its wholesale prices at a higher rate than the retail prices for the same services.

The law should also be amended to define predatory pricing as a situation where a telecommunications supplier decides to forego short-lived profits by reducing the prices of its services. The law should also state that what constitutes predatory pricing is that the entity must have reasonable expectations of recovering the self-inflicted loss of price reduction. The law should also be amended to define mobility restraints as a situation whereby a consumer of the services of a telecommunications entity is indirectly prohibited from getting the same services from another competing supplier. The ingredient for mobility restraints being inability of

consumers to switch service providers at will without refund of the balance of the cost of the service that they have been locked in by their initial telecommunications service provider.

The law should be amended to define vertical foreclosure as a situation whereby an entity that is dominant and has market power in a certain market uses such power to gain advantage in another market that is related to its current market. On top of that, the current laws should be amended to include vertical foreclosure as one of the actions that lead to limitation of markets or control of markets by suppliers. The ingredients of vertical foreclosure being a vertically integrated company in the telecommunications sector that has the incentive of ownership of a local and a long distance network denying interconnection, charging high prices for interconnection or offering a poor interconnection quality to competitors in the long distance market who depend on its local loop to offer telecommunications services,

The law should also be amended to define refusals to supply as an anticompetitive conduct in the telecommunications industry where an entity deliberately fails to provide the goods or the services that a competitor depends on to effectively compete. The current laws should be amended to include refusals to supply as one of the actions that limit competition in the distribution of any goods or the provision of any services. The law should also state the ingredient for refusal to supply as a situation where an entity deliberately fails to provide the goods or the services that a competitor depends on to effectively compete. The law should also include the ingredient for refusals to supply as that the perpetrator should be having some level of dominance in the telecommunications market.

The law should be amended to include collusion as a situation whereby two or more telecommunications suppliers collaborate to achieve either of the following aims. Firstly, they may want to maintain certain prices for their products. Secondly, they may also increase the prices of

their products. Thirdly, they may deny crucial supplies to their competitors. The law should further be amended to include collusion as one of the anticompetitive practices that limit expansion of suppliers which as analyzed in chapter two, is a consequence of collusion.<sup>248</sup> The ingredient for collusion to be stated as the secretive agreement between the entities that has anticompetitive effects.

The law should also be amended to define below-cost pricing as the selling of telecommunications services to certain customers at costs that are below the tariffed rates. The law should further be amended to include communication blockage as an anticompetitive practice that shows the disadvantages experienced by consumers in accessing goods and services. It should be defined as a situation when a given telecommunications service provider deliberately prevents communication originating from a competing service provider in a different network from reaching the recipients in its network. The ingredient for this anticompetitive conduct should be stated in the law as the inability of off-net communications from entering the network of the entity blocking such communication.

The Consumer Protection Act being the national law for consumer protection should prohibit the anticompetitive conducts that occur in the telecommunications industry that directly affect consumers of these services. The anticompetitive conducts are the following. Tying, sim lock, mobility restraints, price squeeze, predatory pricing, below-cost pricing. These anticompetitive conducts have been defined above. Lastly the laws should be amended to include penalties for the above recommended anticompetitive conducts that put an immediate stop to the anticompetitive conduct to ensure consumers are protected from such violation of their consumer rights. Such

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<sup>248</sup> Berkhan M, 'General and industry specific regulation of competition in the telecommunications industry', 165.

penalties include cease and desist orders, injunctions and settlement each to be imposed on a case by case basis.



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# APPENDICES

## APPENDIX A: SIMILARITY REPORT

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### ORIGINALITY REPORT

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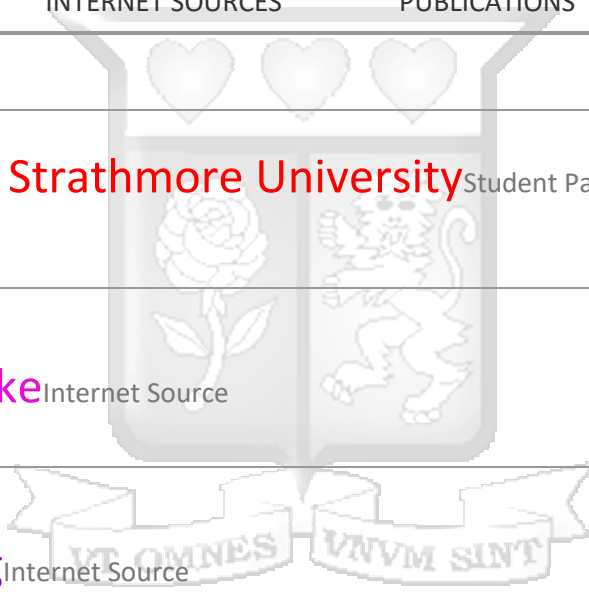
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## APPENDIX B: ETHICAL CLEARANCE CERTIFICATE



**16<sup>th</sup> May 2022**

Mrs. Ojango, Agnes  
Andeso  
agnes.ojango@strathmore.edu

Dear Mrs. Ojango,

**RE: A Necessary 'Evil': Keeping Competition Within Reasonable Boundaries In The Telecommunications Industry In Kenya**

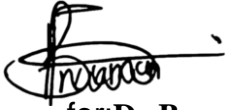
This is to inform you that SU-IERC has reviewed and **approved** your above **SU Masters'** research proposal. Your application reference number is **SU-IERC1291/22**. The approval period is **16<sup>th</sup> May 2022 to 15<sup>th</sup> May 2023**.

This approval is subject to compliance with the following requirements:

- i. Only approved documents including (informed consents, study instruments, MTA) will be used
- ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
- iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
- iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
- v. Clearance for export of biological specimens must be obtained from relevant institutions.
- vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
- vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology, and Innovation (NACOSTI) <https://research-portal.nacosti.go.ke/> and obtain other clearances needed.

Yours sincerely,



for: **Dr Ben  
Ngoye,  
Secretary;  
SU-IERC**



**Cc: Prof Fred  
Were,  
Chairperson;  
SU-IERC**

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