



Electronic Theses and Dissertations

2023

Towards anticipating and mitigating the legal risks of bank mergers on the welfare of consumers of financial services.

Thuranira, Imelda Kawira
Strathmore Law School
Strathmore University

Recommended Citation

Thuranira, I. K. (2023). *Towards anticipating and mitigating the legal risks of bank mergers on the welfare of consumers of financial services* [Strathmore University]. <http://hdl.handle.net/11071/13435>

Follow this and additional works at: <http://hdl.handle.net/11071/13435>

Towards Anticipating and Mitigating the Legal Risks of Bank Mergers on the Welfare of Consumers of Financial Services

By

Imelda Kawira Thurania



June, 2023

Towards Anticipating and Mitigating the Legal Risks of Bank Mergers on the Welfare of Consumers of Financial Services

By

Imelda Kawira Thurania

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



This thesis is available for Library use on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement, declaration and Approval

Declaration and Approval

Declaration

I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

© No part of this thesis may be reproduced without the permission of the author and Strathmore University.

Imelda Kawira Thuranira

Sign _____ Date _____

Approval

The thesis of **Imelda Kawira Thuranira** was reviewed and approved for examination by the following: -

Dr. Fancy Too,

Senior Lecturer,

Strathmore Law School,

Strathmore University

Dr. Peter Kwenjera,

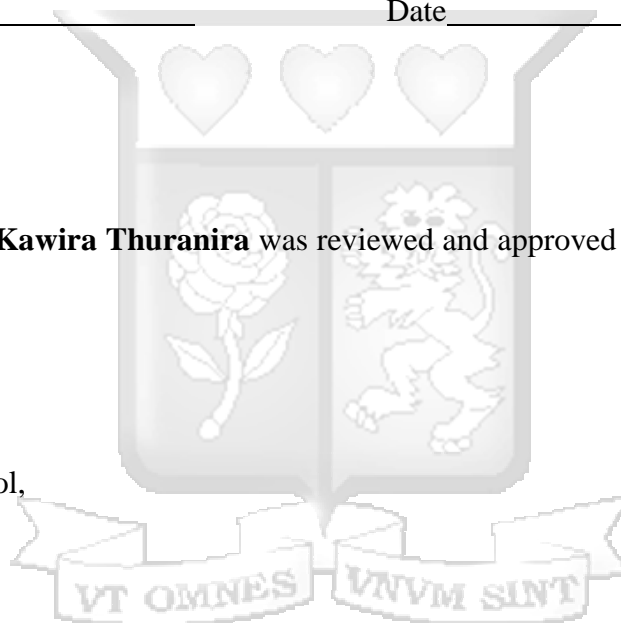
Dean, Strathmore Law School,

Strathmore University

Dr. Bernard Shibwabo,

Director, Office of Graduate Studies,

Strathmore University



Abstract

Mergers and acquisitions (MNAs) in the banking sector are characterized by unique aspects that are inherent in the sector considering that the sector is regulated separately. Therefore, the extent to which bank mergers alter the market composition and shifts in market power and dominance expose consumers of financial services to legal risks that are anchored on consumer protection concerns. This is considering that such changes that emerge from such MNAs could result in change in bank behaviour in a manner that has bearing on cost of credit, financial exclusion and resort to alternative informal financial services under which consumers do not enjoy protection. Historically, the absence of proper regulation of the financial sector has led to recessions, depressions and financial crises emerging from proliferation of bank MNA transactions. This study, therefore, investigates the nature of these legal risks, their effects on the welfare of the consumers of financial service; the extent to which the Kenyan legal framework anticipates and mitigates against the same as well as best practices that have been implemented to address these concerns. It proceeds to find that bank MNAs pose the risk of barring competition, increasing the cost of credit at the expense of vulnerable consumers of banking services, and other contemporary risks such as the risk of abuse of information-based market power and the risk of creeping mergers. Hence, it proceeds to identify the important role of the law in striking a balance between market power and efficiency gains of bank MNAs; the need to regulate information-based market power; and the need to subject unregulated mergers to scrutiny for possibility of creeping mergers; among other findings. This is important considering that bank mergers bear effects that traverse different sectors that are separately regulated, hence the need to iterate the utility of the law in facilitating regulatory coordination to anticipate, prevent and mitigate against these legal risks that otherwise remain hidden.

Key Words: Mergers and acquisitions, consumers, financial services, legal risks

Table of Contents

Declaration and Approval	ii
Abstract	iii
List of Abbreviations	vii
List of Cases.....	viii
List of Statutes	ix
Acknowledgements.....	x
Dedication	xi
Chapter One: Introduction	1
1.1 Introduction	1
1.2 Background	1
1.2.1 The Nature of Mergers and Acquisitions in Banking.....	1
1.2.2 Historical Background of MNAs in the Banking Sector.....	3
1.2.3 The Effects of Bank Mergers to the Welfare of Consumers	5
1.3 Statement of the problem	7
1.4 Justification of the study	8
1.5 Research objectives	8
1.6 Research questions	9
1.7 Hypothesis.....	9
1.8 Research methodology	9
1.9 Literature review	10
1.9.1 Rationale for MNAs in the Banking Sector.....	10
1.9.2 The Consumer Protection and Antitrust Concerns Arising from bank MNAs.....	13
1.9.3 The Role of the Law in Protecting the Welfare of Consumers in Bank Mergers....	16
1.9.4 The Gap in Literature	21
1.10 Theoretical framework Stakeholder Theory	21
1.11 Chapter Breakdown.....	23
Chapter 2: Bank Mergers and the Legal Risks to which Consumers of Financial Services are Exposed.....	25
2.1 Introduction	25
2.2 The Risk of Barring Competition.....	26
2.3 Bank Mergers and Increased Cost of Credit	28

2.4 The Risk of Limited Access to Banking Services.....	31
2.5 Other Contemporary Risks.....	33
2.5.1 The Risk of Information-Based Market Power	33
2.5.2 The Risk of Creeping Mergers	34
2.6 Conclusion.....	34
Chapter 3: Legal Framework for Mergers and Acquisitions in the Banking Sector in Kenya	36
3.1 Introduction	36
3.2 Constitutional Foundation of Consumer Protection.....	36
3.3 The Primary Regulation of MNAs of Banks in Kenya	37
3.3.1 Competition Act of Kenya.....	37
3.3.2 Appeals to the Competition Tribunal	42
3.3.3 Competition (General) Rules, 2019.....	43
3.4 Regional Competition Regulations	44
3.4.1 The East African Community Competition Act.....	44
3.4.2 COMESA Competition Rules	45
3.5 Consumer Protection in Kenya	46
3.5.1 Consumer Protection Act.....	46
3.5.2 Sector Specific Consumer Protection Laws	46
3.6 Conclusion.....	49
Chapter 4: An Analysis of Best Practices in the Anticipation and Mitigation of Legal Risks and Concerns that Arise Out of Bank Mergers.....	50
4.1 Introduction	50
4.2 Striking a Balance between Market Power and Efficiency Gains	50
4.2.1 Efficiency Gains as a Criterion for Merger Control.....	52
4.3 Regulation of Information-Based Market Power	52
4.4 Scrutiny of Creeping Mergers and Acquisitions	55
4.5 Third Party Rights to Appeal Merger Decisions.....	58
4.6 Conclusion.....	59
Chapter 5: Conclusion and Recommendations	61
5.1 Introduction	61
5.2 Conclusions	61
5.3 Recommendations	62

Bibliography65
Books.....65
Journal Articles66
Working Papers70
Dissertations/Thesis70
Internet Sources.....71
Appendices.....72
Appendix A: Similarity Report72
Appendix B: Ethical Clearance Confirmation73



List of Abbreviations

AGM	Annual General Meeting
CAK	Competition Authority of Kenya
CBK	Central Bank of Kenya
CCA	East African Competition Authority
CCC	COMESA Competition Commission
CMA	Capital Markets Authority
COMESA	Common Market for Eastern and Southern African States
EAC	East African Community
MNAs	Mergers and Acquisitions
NSE	Nairobi Securities Exchange
OECD	Organisation for Economic Co-operation and Development



List of Cases

Al-Jalal Enterprises Limited v Gulf African Bank Limited [2015] eKLR

Aly Khan Satchu v Capital Markets Authority [2019] eKLR

Brown Shoe Co v United States [1962] 370 US 294

Evans Aseto & Another v National Bank of Kenya (NBK) & another [2019] eKLR

Imaran Limited & 5 others v Central Bank of Kenya & 5 others [2016] eKLR

United Dominions Trust Ltd v Kirkwood [1966] 2 QB 431

United States of America v Microsoft Corporation [2001] 346 US 330,253

Vania Investments Pool Limited v Capital Markets Authority, Rea Trading Ltd, Centum Investments Ltd, Tausi Assurance Company Ltd, GA Insurance Ltd, Savco Stores Ltd & Kenyalogy.com Ltd [2014] eKLR



List of Statutes

Banking Act 9 of 1989

Capital Markets Act (Cap.485A)

Capital Markets (Take-overs and Mergers) Regulations, 2002

Central Bank of Kenya Act (Cap 491)

COMESA Competition (Amendment) Rules, 2014

Companies Act No.17 of 2015

Competition Act 12 of 2010

Consumer Protection Act No.46 of 2012

East African Community (EAC) Competition Act, 2006

Income Tax Act, Cap 470

The Constitution of Kenya, 2010



Acknowledgements

I would like to thank the Almighty God for giving me this opportunity to pursue this degree and more so the strength and guidance to write this paper. I thank Him for always going before me in my pursuit of this research. He always gave me strength even when I felt tired and discouraged. All Glory and Honour to Him.

My profound gratitude to my parents Mr and Mrs. Thuraira for always believing in me, cheering me on, their sacrifices, encouragement and most importantly praying for me. Thank you for believing in me when I did not believe in myself. Your unconditional love and support has always been felt and appreciated. Your prayers have always kept me going and brought me this far. I am lucky to have you.

To my second set of parents, Mr and Mrs. Mworira, no words can ever express my gratitude for your love, prayers and unwavering support that you showed me throughout this journey. You are the epitome of what love is and should be from a girl's second parents. You walked with me, prayed with and for me, empathised with me, celebrated with me and encouraged me. I will forever be indebted to you. I thank God for choosing you for me.

To my siblings Kelton, Dennis, Maggie and Jeff thank you for encouraging me, cheering me on and praying for me. I truly appreciate.

To my LLM study colleagues whose constant motivation kept me going.

A special appreciation to Rev. Mutahi for his relentless prayers. May God continue blessing you and may He go before you.

To my supervisor Dr. Fancy Too, thank you for your guidance, support and patience. I appreciate and are truly grateful for your contribution in this paper. I would have never achieved this without your thorough and relentless approach.

Dedication

This work is dedicated to my husband, Dr. Ken. You have been my biggest support system, you picked me up when I was down and discouraged, you cheered me on, you stayed up with me during the late nights studying. You never complained when I spent most of my time doing my studies on the contrary, you ensured I lacked nothing. You have been my pillar of strength and I do not think I would have done it without you. Thank you for supporting my dreams and ensuring I had everything at my disposal to ensure this a success. Thank you for making this easy for me. I truly thank God for you.

I also dedicate this work to my beloved son and Guardian Angel, Neo Mutuma. I know you have been praying for me to get strength to move on and complete my thesis. This unexplainable zeal can only be traced back to your prayers, my angel.



Chapter One: Introduction

1.1 Introduction

The lending behavior of banks is affected by the structure of the financial market that is triggered by market restructuring activities like mergers and acquisitions (MNAs).¹ The effect of which would either be acquisition of market power, monopolistic tendencies and abuse of market to the extent that undermines the efficiency of financial markets.² The banking industry has undergone numerous changes globally in the recent past through the modernization and automation of operations to restructuring that took the form of mergers and acquisitions.³ In the process the interest of consumers have not been adequately taken care of as the cost of borrowing has relatively been on the rise.

This research examines the impact of mergers and acquisitions on the welfare of the consumers of financial services in the banking sector. The main aim is to determine how the prevailing legal framework in Kenya protects the consumers from the potential negative effects of MNAs. This part provides a historical background of mergers and acquisitions in the banking industry globally and Kenya in particular. It investigates the extent to which the legal, policy and institutional framework protects the welfare of consumers when mergers and acquisitions occur in the banking sector. It further benchmarks best practices adopted in several jurisdictions towards addressing similar challenges. Finally, the study will proffer some recommendations for the reforms necessary to address the existing gaps.

1.2 Background

1.2.1 *The Nature of Mergers and Acquisitions in Banking*

Mergers involve the consolidation and or unification of two or more banking institutions into a single economic entity.⁴ The transactions involve the transfer of the assets and liabilities of one company to another company or into a newly incorporated company.⁵ Acquisitions on the

¹ Abdul F and Ocheng R, Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya? Kenya Bankers Association Centre for Research on Financial Markets and Policy, Working Paper Series May 2020, 3

² Abdul F and Ocheng R, 'Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya?', 3

³ Csikósová A., Čulková K. and Janošková M. (2016), 'Evaluation of quantitative indicators of marketing activities in the banking sector' 69(11) *Journal of Business Research*, 2016, 5028.

⁴ Section 933, *Companies Act* (Act No.17 of 2015).

⁵ Section 933, *Companies Act* (Act No.17 of 2015).

other hand refers to the purchase of assets and stock belonging to a target company.⁶ A consumer in this regard imply the persons to whom services are rendered.⁷ They also form part of persons to whom goods or services are marketed in the ordinary course of business.⁸ Mergers and acquisitions in the banking industry constitute a corporate restructuring response and strategy used by banks to increase market share and increase efficiency of operations through market dominance.⁹ Due to the numerous benefits that banks accrue from mergers and acquisitions, it has become one of the most attractive market restructuring mechanism globally.¹⁰

In Kenya the banking industry is not an exception, mergers and acquisitions are also driven by the desire to seek market dominance and enhance shareholder value.¹¹ In the process, banks hope to achieve superior performance in terms of increased profitability, increase stakeholder value, improved market share and competition through market power and dominance, reduce business risks, reduce costs and increase operational efficiency.¹² This raises the question as to whether such MNAs are beneficial to consumers of financial services in the sector. Scholars have argued that banks use this power to not only collude but use the newly acquired power to increase the cost of credit.¹³ It has been observed that lending rates rise exponentially which raises the cost of borrowing for small scale borrowers and businessmen.¹⁴ Studies in Kenya have also shown that mergers in banking sector have been linked to inadequate capital and insolvency issues.¹⁵

⁶ Koi-Akrofi, G.Y. (2016), 'Mergers and acquisitions failure rates and perspectives on why they fail' 17(1) *International Journal of Innovation and Applied Studies*, 2016, 150; Section 584, *Companies Act* (Act No.17 of 2015).

⁷ Article 1(b), *Comesa Competition Regulations*,(2004).

⁸ Section 2 (1), *Consumer Protection Act* (No.46 of 2012).

⁹ Ombaka, C. & Jagongo, A, 'Mergers and acquisitions on financial performance among selected commercial banks, Kenya' 3(1) *International Academic Journal of Economics and Finance*, 2018, 3.

¹⁰ Ombaka, C. & Jagongo, A, 'Mergers and acquisitions on financial performance among selected commercial banks, Kenya', 3

¹¹ Ondieki G and Njangiru, M, 'The Effect of Mergers and Acquisitions on Financial Performance of Banks (A Survey of Commercial Banks in Kenya)' 4(8) *International Journal of Innovative Research and Development*, 2015, 100.

¹² DeYoung, Evanoff and Molyneux, *Effects of mergers and acquisitions on financial institutions in South Africa*, 2009, 3.

¹³ Abdul F and Ochenge R, 'Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya?', 3

¹⁴ Chesang G, 'Merger restructuring and financial performance of commercial banks in Kenya' MBA Project: University of Nairobi, 2006.

¹⁵ Muniu J.M, (2011).Bank Efficiency, Mergers & Acquisitions and Shareholder Wealth Effects in Kenya

1.2.2 Historical Background of MNAs in the Banking Sector

An MNA transaction is not a recent phenomenon as it is said to have originated from the USA in 1895 in six waves each one representing an economic crisis mainly triggered by economic and social factors.¹⁶ Bank mergers occurred in waves mainly dictated by certain regulatory, legal or financial factors. A key characteristic of these mergers was the exposure of consumers to risks without any form of protection. The first wave of mergers in the US in the period 1895-1904 was motivated by the need to meet US regulatory and legal requirements.¹⁷ The 2nd wave in the period 1918-1929 in the USA concentrated on vertical mergers, unrelated conglomeration and the creation of oligopolies but not monopolies.¹⁸ This wave ended with depression of the US economy in 1929. The third wave in 1960-1980 was driven by financial innovation ending in 1969 with the fall of the stock market in the USA.¹⁹ The fourth wave was mainly driven by deregulation, foreign competition and the rising oil prices.²⁰ It ended in 1989 with the US economy in recession. The 5th wave occurred in 1991-2001 and was driven by globalization, liberalization and deregulation but ended with a bubble burst in the year 2000.²¹ The 6th wave (2003-2008) was the first one in the 21st century where corporations exploited low interest rates to make risky acquisitions.²² This wave was driven by plenty of liquidity that led to the global financial crisis with tremendous loss to global economy, increased borrowing costs as well as volatility in the financial markets.²³

The motivation for the regulation of MNAs in Kenya has mainly been motivated by the prevention of financial crises and loss of investor confidence and lastly to meet minimum

¹⁶ Ombaka, C. & Jagongo, A, 'Mergers and acquisitions on financial performance among selected commercial banks, Kenya', 4

¹⁷ Salter M. and Weinhold W, *Diversification by Acquisition*, Free Press, New York, 1980, 7.

¹⁸ Gaughan, P.A, *Mergers, Acquisitions, and Corporate Restructurings*. John Wiley & Sons, Inc, New Jersey, 2015, 9.

¹⁹ Ravenscraft, D.J. and Scherer, F.M, 'The profitability of mergers' 7(1). *International Journal of Industrial Organization*, 1989, 101.

²⁰ Mitchell M.L. and Mulherin J.H, 'The impact of industry shocks on takeover and restructuring activity' 41(2) *Journal of Financial Economics*, 2015, 193.

²¹ Gaughan, *Mergers, Acquisitions, and Corporate Restructurings*, 9.

²² Trang Ngo H, 'The Effects of Mergers and Acquisitions on Bank Risks' Unpublished PhD thesis, the University of Westminster, 2019, 50.

²³ Trang Ngo H, 'The Effects of Mergers and Acquisitions on Bank Risks' 50.

liquidity requirements set by the Central Bank of Kenya.²⁴ Similar to global trends, bank mergers in Kenya have been precipitated by crisis in the financial sector.²⁵ Kenya has experienced three financial crisis that correspond to waves of bank mergers in 1989, 1993 and 1998.²⁶ Critical for the state was the desire to stabilize the financial and banking sector. The crisis motivated tightening of banking regulations through changes to the Banking Act and the Central Bank of Kenya Act to enhance efficiency in the sector in line with international best practices under the Basel guidelines.²⁷ Through these interventions, it was believed the negative impacts of bank mergers to consumers would be contained.

The first merger wave that occurred in 1989 was prompted by a series of bank failures most prominently that of Rural Urban Credit Finance Company Limited in 1984.²⁸ Subsequently, nine insolvent banks merged to form the Consolidated Bank of Kenya Ltd under the Financial Sector Reform Programme set up by the Central Bank of Kenya to take over and restructure troubled financial institutions in the country.²⁹ Henceforth, amendments to the Central Bank Act saw the creation of the Deposit Protection Fund purposely to meet the liabilities of small depositors. The second wave of bank mergers in 1993 was motivated by the collapse of thirteen banks that led to loss of confidence in Kenya's financial sector. The third wave was caused by the collapse of five banking institutions in the period between 1996-1999. In 1999, Trust Bank which was then the 6th largest bank in Kenya collapsed with customer deposits caused by insider trading.³⁰ These three waves of bank mergers in Kenya were motivated by the need to ensure stability of financial sector and protection by raising minimum cash ratios.

²⁴ Rotich E et al, 'Effect of Mergers and Acquisitions on the Performance of Commercial Banks in Kenya: A Case of Selected Banks that Have Undergone M&A in Kenya' 6(24) *Research Journal of Finance and Accounting*, 2015.

²⁵ Oyoo J A, 'An Assessment of Mergers of Banks in Kenya: A Case Study of CFC Stanbic Bank' Unpublished MBA Thesis, United States International University Africa, 2015, 2.

²⁶ Oyoo J A, 'An Assessment of Mergers of Banks in Kenya: A Case Study of CFC Stanbic Bank' 2.

²⁷ A M Kithinji, *Mergers, Restructuring and Financial Performance of Commercial Banks in Kenya*, 2.

²⁸ Marangu K, 'Effects of Mergers on Financial Performance of Non Listed Banks in Kenya' Unpublished MBA Thesis, University of Nairobi, 2007, 15

²⁹ Rotich E et al, 'Effect of Mergers and Acquisitions on the Performance of Commercial Banks in Kenya: A Case of Selected Banks that Have Undergone M&A in Kenya' 5.

³⁰ Marangu K, 'Effects of Mergers on Financial Performance of Non Listed Banks in Kenya' 16.

The global financial crisis in 2007-2008³¹ accelerated MNAs in Kenya and even globally. Since 2014, 47 MNAs have been concluded with the latest one being an acquisition of National Bank of Kenya (NBK) by Kenya Commercial Bank (KCB) followed by a merger between Commercial Bank of Africa (CBA) and National Industrial Credit (NIC); and another between Co-operative Bank of Kenya Ltd and Jamii Bora Bank Ltd.³² The latter round of MNAs were driven by changes in the regulatory framework and the need for business growth and expansion.³³ The Basel III Framework of 2012³⁴ which was implemented in 2019 led to major re-organizations in Kenya's banking sector.³⁵ It sort to improve the safety and stability of the banking sector by requiring banks to build minimum capital of at least Ksh. 1 billion, to improve quality and quantity of liquidity standards, leverage ratios and enhance banking operations and financial disclosure mechanisms.³⁶ This was a catalyst for financially unstable banks having low capital ratios to either merge with other smaller banks or be acquired by bigger ones. The impact of these waves of mergers on the banking sector in Kenya is not consistent as they have shown mixed results, measured in terms of loan pricing and product availability.

1.2.3 The Effects of Bank Mergers to the Welfare of Consumers

Mergers are popular models for corporate restructuring for banks the world over and Kenya in the benefits to the customers is not assured. Studies by KPMG International have shown that 73-83% of all mergers fail in meeting their objectives.³⁷ Mergers alter the lending behavior of banks that respond to the changes to the market structure in using their market dominance to either increase monopolistic tendencies or increase benefits to customers.³⁸ This undermines the role banks play as intermediaries in Kenya's economic development in facilitating the flow

³¹ See generally Kenya Institute for Public Policy Research and Analysis, *Mergers and Acquisitions: The Experience in Kenyan Banking Industry*, KIPPRA, Nairobi, 2020.

³² Central bank of Kenya, *Monthly Economic review*, 2020, 4.

³³ Cytonn Investments, *Fund Report*, 2014-2020.

³⁴ Cytonn Investments, *Fund Report*, 2014-2020

³⁵ See generally Kenya Institute for Public Policy Research and Analysis, and Acquisitions: The Experience in Kenyan Banking Industry.

³⁶ Bank for International Settlements, *Basel III: Finalising Post Crisis Reforms*, Bank for International Settlements, Basel, 2017, 109.

³⁷ KPMG, *Navigating Complex MNAs*, KPMG International Limited, London, 2022, 4.

³⁸ Maundu, J, 'Mergers and acquisitions on the market performance of Commercial Banks in Kenya: A case study of the Kenyan banking industry' 7(3) *The Strategic Journal of Business & Change Management*, 2020, 1564.

of credit from finance surplus sectors to those that are deficient.³⁹ According to Abdula (2020), mergers have shown mixed impact on consumers, while some used newly acquired power to increase loan prices, others have observed greater availability of loan facilities.⁴⁰

MNAs in the banking sector register different levels of positive and negative effects.⁴¹ A case example was the acquisition of the low capitalized Equatorial Bank by Mwalimu Sacco, an institutional savings and credit co-operative society, in its quest of expanding beyond Sacco sector to mainstream banking services.⁴² The acquisition was to enable the Sacco to collect deposits from beyond its membership, access funds at lower rates, venture into trade finance and offer its members ATM services. The acquisition has, however, led to the main shareholders of the Sacco, the 75000 teachers, crying foul over the acquisition, which they claim was carried out without proper due diligence and which has put their hard earned savings at risk. Mwalimu's Sacco's initial investment of Ksh2.4 billion (\$21.81 million) in the bank has since been diluted to as low as Ksh1.2 billion (\$10.9 million).⁴³

The acquisition was objected to by several other stakeholders too. The Co-operative Alliance of Kenya — the umbrella body of about 15 million-member co-operative movement — raised a red flag over the credibility of the entire transaction, arguing that due process was not followed. Through a petition tabled in parliament, the teachers sought the intervention of the Central Bank of Kenya (CBK), noting that Spire Bank had since 2014 been marred with financial challenges. The petition read in part that, “As a key stakeholder in Mwalimu National Sacco, teachers are concerned that, should the financial woes facing Spire Bank be left to continue, the lender may end up being wound up, and sink with their hard-earned savings.” However, even with the opposition the deal was sanctioned by the Central Bank of Kenya, Competition Authority of Kenya and the Sacco Societies Regulatory Authority. This raises the

³⁹ Abdul and Ocheng, 'Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya?', 2.

⁴⁰ Maundu J, 'Mergers and Acquisitions on the Market Performance of Commercial Banks in Kenya: A Case Study of the Kenyan Banking Industry', 1564.

⁴¹ Abdul and Ocheng, 'Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya?', 2

⁴² Madzo M E, 'Effects of an Acquisition on the Financial Performance of a Firm: Case of Mwalimu National SACCO and Spire Bank, IV

⁴³ Madzo M E, 'Effects of an Acquisition on the Financial Performance of a Firm: Case of Mwalimu National SACCO and Spire Bank, IV

question of whether the two regulators are doing enough to protect depositors fund in the mergers and acquisitions?

Some merged banks have used market dominance and concentration of power to undermine the welfare of consumers by raising the cost of credit other monopolistic tendencies that result in financial exclusion. NIC and CBA were exempted from paying share transfer tax which was in their millions; the tax relief was speculated to be tied to bank's political network.⁴⁴ The foregoing was unsuccessfully challenged in court on the premise that Kenyans who were the consumers would lose money.⁴⁵ This happened despite the consumer and competition laws being in existence hence necessitating stricter measures and policies. For other merged banks, MNAs has been associated with benefits of economies of scale to consumers through efficient delivery of services.⁴⁶ A unique impact on the Kenyan banking market is that consumers have a preference for large merged banks as they are considered more stable and unlikely to collapse as compared to smaller ones.⁴⁷ In which case a bank mergers ought to be more beneficial to customers than otherwise anticipated.

1.3 Statement of the problem

There has been an upsurge of bank mergers and acquisitions in Kenya and other parts of the world. These consolidations involve few large banks acquiring the small and medium sized banks. The nature of such bank mergers is that they result in the restructuring of the financial market due to shifts in market power and dominance. Historical background establishes that there is a direct link between market restructuring activities such as M&As and the lending behavior of banks. This is considering that a bank is likely to alter its lending behavior in the event it is able to increase its market power and dominance following the successful conclusion of a merger or an acquisition transaction. Historical evidence from Kenya and different parts of the world point to the averment that different waves of bank mergers have historically ended in economic recessions, depressions, economic and financial crises resulting from the

⁴⁴ Ngugi S, 'An examination of the Kenyan Regulatory Framework in promoting Too Big to fail in relation to mergers in the Banking sector' dissertation, Stratmore University, 3 March 2021, 32

⁴⁵ Ngugi S, 'An examination of the Kenyan Regulatory Framework in promoting Too Big to fail in relation to mergers in the Banking sector' dissertation, Stratmore University, 3 March 2021, 32

⁴⁶ Abdul and Ocheng, 'Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya?', 4

⁴⁷ Mayabi M C, 'Evaluating the Legal Framework Governing Mergers and Acquisitions of Commercial Banks in Kenya' Unpublished LLM Thesis, University of Nairobi, 2013, 3.

proliferation of bank mergers coupled with the absence of proper regulation. Hence, bank mergers pose risks to the welfare of the consumers of financial services through potential collusion resulting in increased cost of lending and inadequate capital and insolvency issues, among others. Considering the fragmentation of Kenya's legal framework on mergers and acquisitions as well as banking regulation, bank mergers in Kenya potentially expose of consumers of financial services to anticompetitive behavior from banks and related legal risks without adequate protection of the law. Considering the inadequacy of research investigating or addressing this problem, the following study investigates the nature of legal risks that accrue from bank mergers, their effects on the welfare of the consumers of financial service, as well a critical investigation of the extent to which the prevailing regulatory and institutional framework protects consumers from such risks.

1.4 Justification of the study

The following study is centred on the intersection of two regulatory frameworks, that is, banking regulation and the regulation of mergers and acquisitions; and the extent to which they can be improved to protect the welfare of consumers during bank mergers. The findings of the study shall, therefore, be critical for legislators and policy makers in the two regulatory spheres as it explores the extent to which proper regulatory coordination can be achieved between the two. The findings of the study shall also be essential for practitioners, consultants and transaction advisors in MNA transactions to the extent that they offer guidance in terms of necessary adjustments to be made in transactions to take care of the interests of consumers. Further, the findings of the study also bear educational utility as it contributes to knowledge in both banking regulation as well as mergers and acquisitions. Its findings shall also be useful for students of commercial law with focus on the two areas.

1.5 Research objectives

The main objective is to investigate the extent to which the consumers of financial services in Kenya are protected from the legal risks and anti-competitive behaviour that result from bank mergers. This objective shall be realized through the following specific aims;

- a) To establish the legal risks that consumers of financial services are exposed to as a result of bank mergers;

- b) To investigate the extent to which the prevailing legal framework in Kenya protects consumers against these risks; and
- c) To benchmark the best practices in anticipating and mitigating the legal risks that consumers are exposed to as a result of bank mergers.

1.6 Research questions

The main research question that this study is set to answer is; to what extent are the consumers of financial services in Kenya protected from the legal risks and anti-competitive behaviour resulting from bank mergers? This question shall be answered based on the following minor research questions;

- a) What are the legal risks that consumers of financial services are exposed to as a result of bank mergers?
- b) To what extent does the prevailing legal framework in Kenya protect consumers against these risks?
- c) What are the best practices in anticipating and mitigating the legal risks that consumers are exposed to as a result of bank mergers.

1.7 Hypothesis

This study is based on the hypothesis that the prevailing regulatory framework in Kenya does not offer sufficient protection against the legal risks that bank mergers pose to the welfare of the consumers of financial services.

1.8 Research methodology

This study was undertaken through doctrinal legal research methodology which mostly entails desktop research.⁴⁸ It involves an analysis of legal doctrines in consumer protection, banking regulation and mergers and acquisitions while tracing their development process and legal reasoning by critically analysing them in primary and secondary sources of law.⁴⁹ The primary sources relied on include actual rules or statements of law entrenched in the Constitution, statutes, judicial decisions and advisory opinions from courts and other quasi-judicial bodies. The secondary sources relied on include but not limited to law review articles, journal articles,

⁴⁸ Amrit K, 'Doctrinal Legal Research' LLM Thesis, Tribhuvan University, 26 February 2018.

⁴⁹ Amrit K, 'Doctrinal Legal Research' LLM Thesis, Tribhuvan University, 26 February 2018.

textbooks, reports from approved legal sources and organisations, legal encyclopaedias, online sources. This was followed by identifying the legal issues and analysing them so as to search for the law that is at play, reading the primary and secondary sources, demystifying all the issues concerned and eventually answered the research questions while proving the hypothesis. While analysing the data, the study further benchmarked international standards and best practices from other jurisdictions.

One of the main and highly controversial limitation of this research methodology is that it is highly theoretical, technical and more so that it is uncritical and trivial.⁵⁰ Furthermore, that reliable data may be a tall order as one may not be competent enough to identify reliable data which falls within the scope of either primary or secondary data.⁵¹ Though the different scholars argue the above, in the real sense this methodology studies the law as it exists and not how it should be hence the available data gives a clear understanding of the law from a plethora of knowledge and not public participation which in most cases is not a requisite of most of the research.

1.9 Literature review

This section provides a review of the relevant literature on the impact of MNAs on consumers of banking services. While a lot of scholarly literature exists on effects of MNAs on the performance of banks in general, very little study has been done on its impact specifically on consumers. This study seeks to fill this gap in literature.

1.9.1 Rationale for MNAs in the Banking Sector

According to **Farah** (2017), the increased number of MNAs globally in the past four decades can be attributed the numerous benefits it brings to the economy⁵² He intimates that these mergers and acquisitions happened after the global financial crisis of 2008 during the recession and with the banks being desperate, they wished to enhance monetary stability and strength.⁵³ Observing that that the driving force for MNAs mergers was increased globalisation, financial

⁵⁰ Salim A. ,Dr. Zuryati Y. Dr. Zainal A, 'Legal Research of Doctrinal and Non-Doctrinal' 4 *International Journal of Trend in Research and Development* (2017).

⁵¹ Amrit K, 'Doctrinal Legal Research' LLM Thesis, Tribhuvan University, 26 February 2018.

⁵² Farah M.F, 'Application of the theory of planned behavior to customer switching intentions in the context of bank consolidations' *International Journal of Bank Marketing*, 2017, 147.

⁵³ Farah M.F, 'Application of the theory of planned behavior to customer switching intentions in the context of bank consolidations', 152.

deregulation and technological advances, striving banks to provide a wider range of services to customers over a larger geographical base of states and nations.⁵⁴ In addition the mergers enhance banks' efficiency in instances such as meeting targets due to the combined workforce while at the same time allowing for greater value creation through diversification of income and revenue streams.⁵⁵ The foregoing shows some of the major and desirable benefits of mergers and acquisitions that lead to many firms and in our context the banks to form such consolidations. However, the author falls short of discussing the effect of such mergers on consumers.

Gwaya and Mungai (2015) have argued that mergers in Kenya were motivated by the desire to enlarge their market share and increase their profitability.⁵⁶ Many of the banks combined resources (such as skills, management systems, equipment, processes and procedures) with the sole agenda of raising profitability. They advance the argument that mergers raise customer loyalty that is characterized by customer trust and confidence to the organisation's products.⁵⁷ This to some extent plausible however, the customers that were satisfied with the merger were few since majority of the consumers are not financially capable of meeting the new rates imposed post-merger. The authors have briefly touched on the negative impact of MNAs on consumers of banking services albeit not very detailed.

Kithitu, Cheluget, Keraro, Mokamba (2012), believe that the rationale for MNAs in the banking sector is the desire to increase profitability.⁵⁸ This is illustrated with banks having a weak capital base consolidating to create larger institutions that would enjoy economies with improved profitability.⁵⁹ The authors are of the opinion that MNAs not only improves profitability but encourages competition as consumers have an opportunity to choose from a

⁵⁴ Farah M.F, 'Application of the theory of planned behavior to customer switching intentions in the context of bank consolidations', 148.

⁵⁵ Farah M.F, 'Application of the theory of planned behavior to customer switching intentions in the context of bank consolidations', 147.

⁵⁶ Ondieki G and Njangiru M, 'The Effect of Mergers and Acquisitions on Financial Performance of Banks', 4.

⁵⁷ Ondieki G and Njangiru M, 'The Effect of Mergers and Acquisitions on Financial Performance of Banks', 4.

⁵⁸ Kithitu J, 'Role of Mergers and Acquisitions on the Performance of Commercial Banks in Kenya' 2 *International Journal of management of Business Studies*, 2012, 11..

⁵⁹ Joseph Kithitu and others, 'Role of Mergers and Acquisitions on the Performance of Commercial Banks in Kenya', 11.

variety of stronger banks and not from a few large banks who may end up controlling the prices consequently limiting consumer choice.

MICU (2016), intimated that the reason behind mergers and acquisitions in the banking sector is to survive and compete with rivals.⁶⁰ In addition, they indicate that the global financial crisis turned mergers and acquisitions rather popular as they assured critical corporate structural changes however, they are still the only feasible way of survival on competitive global market.⁶¹ Moreover, they state that the foregoing might be true but in some instances the mergers lessen competition. This study agrees that mergers help banks survive in a highly competitive environment but the banks in question should be the weaker banks who are not in a stable financial position to compete with top tier banks. The acquisition of the smaller banks compared to the mergers and acquisitions between large banks, will not lessen competition and consequently affect the consumer choice to the contrary they will increase consumer confidence as the banks will be at a better financial position with the creation of more capital.

Aydin and Buthe (2016) observe that competition is necessary for the tremendous benefits of a market economy leading to economic growth and innovation, greater variety, increased quality and/or lower price and makes it more likely than those benefits are widely shared.⁶² They further argue that efficiency as an operational goal of competition policy implies prioritising punishing and preventing ant-competitive practices that cause the greatest efficiency losses.⁶³ They opine that identifying impediments to market competition necessitates capacity building to enable and allow the competition agency to undertake the necessary economic, legal, and political analysis. Furthermore, and as a practical matter, fostering a culture of competition as a goal of competition law and policy to a large extent implies engaging in advocacy targeted towards the society at large.⁶⁴ This will also entail and necessitate the actual enforcement to warn or signal that the rules are meaningful.

⁶⁰ Micu A, and Micu I, 'Mergers and Acquisitions in the Banking Sector during the Financial Crisis' 4 (11) *SEA-Practical Application of Science, Romanian foundation for Business Intelligence*, 2016, 385.

⁶¹ Micu A, and Micu I, 'Mergers and Acquisitions in the Banking Sector during the Financial Crisis', 385.

⁶² Umut A and Tim B,' Competition Law and Policy in developing countries. Explaining variations in outcomes.Exploring possibilities & Limits',3.

⁶³ Umut A and Tim B,' 'Competition Law and Policy in developing countries. Explaining variations in outcomes.Exploring possibilities & Limits',3.

⁶⁴ Umut A and Tim B,' 'Competition Law and Policy in developing countries. Explaining variations in outcomes.Exploring possibilities & Limits',3.

1.9.2 The Consumer Protection and Antitrust Concerns Arising from bank MNAs

Bernile and Lyandres in a 2019 study state that despite MNAs being advantageous they have a negative impact on various stakeholders such as consumers.⁶⁵ Furthermore, horizontal mergers can lead to changes in compositions of market structure in the banking sector thereby increasing the market power of resulting entities. This consequently affects competition in input and output markets.⁶⁶ It therefore portrays a clear picture that there is always a chance that unsuspecting consumers may be affected by such restructuring processes. In this regard, **Olufemi** in a study conducted in 2020 makes an observation that is based on the Nigerian banking sector where he seeks to determine whether MNAs have created monopolies, increased price (bank interest rates) and reduced output. He observed that financial consolidation has negative influence on banking interest rates, competition and transmission mechanism.⁶⁷ This in its very nature leads to the inference that bank mergers are likely to result in an increase in the cost of credit and further financial exclusion of consumers.

Allen, Damar and Martinez in their 2016 study evaluated the changes in the local market conditions and the reported the behaviour of consumers as a result of the mergers of two major Canadian lenders. As part of their findings, the authors observed that among other effects, the consumers affected by the merger were more prone to switch to alternative banks after the merger.⁶⁸ At the face of it this seems to address the problem associated with increase in the cost of credit. However, in a different context where the bank mergers would have diluted competition, then smaller banks would not survive and therefore the consumers would not have alternative banks that offer better rates to switch to.

Scheinbaum and Stuckett in a 2020 paper argued that mergers in the corporate world should be challenged and undertaken with caution lest they lead to a skewed economy.⁶⁹ This is to the extent that mergers result in a highly concentrated market which is less competitive. The

⁶⁵ Gennaro B and Evgeny L, 'The Effects of Horizontal Merger Operating Efficiencies on Rivals, Customers and Suppliers' 23(1) *Review of Finance*, 2019, 117..

⁶⁶ Gennaro B and Evgeny L, 'The Effects of Horizontal Merger Operating Efficiencies on Rivals, Customers and Suppliers', 117.

⁶⁷ 'Saibu, Olufemi: 'The Impact of Merger and Acquisition on Financial Intermediation: Empirical Evidence from Nigerian Banking Industry' 28 December 2019- <https://ssrn.com/abstract=3510430> on 30 January 2020.

⁶⁸ Jason Allen, H Evren Damar and David Martinez-Miera, 'Consumer Bankruptcy, Bank Mergers, and Information' 20 *Review of Finance*, 2016, 1289.

⁶⁹ Marshall S and Maurice E, 'The Effective Competition Standard: A New Standard for Antitrust' 87 *University of Chicago Law Review*, 2020,595

authors believe that where economies or markets are highly concentrated, consumers are left with limited choices and limited power to prefer cheaper alternatives, elect from different qualities or chose from assorted providers of the goods and services they are in need of.⁷⁰ In addition, other stakeholders such as employees have to deal with the all-powerful employers with limited choices to elect from.⁷¹ On the other hand, suppliers and other competitors are unable to reach the market unless they pay their way through powerful intermediaries or end up being acquired.⁷² Henceforth, the authors aver that antitrust laws and in our case anti-competition laws are there to promote competition where it has been compromised in the economy. Hence the proposition that the role of the law should be effective enough to ensure healthy competition consequently a strong economy.

Cavagnino in 2019 introduced another perspective that is close to the Kenyan context and that is the concept of creeping acquisitions.⁷³ He argues that creeping acquisitions entail a number of small piecemeal mergers and acquisitions which may not look as constituting or will lead to anticompetitive behaviour but when considered as a whole or cumulative have the potential of substantially lessening competition.⁷⁴The foregoing explains to an extent the current state of some of the mergers and acquisitions happening in the banking sector in Kenya. He further asserts that competition is beneficial to the consumers as it leads to lower prices, higher quality and greater variety of goods and services and continual innovation.⁷⁵ The contrary is true. That reduced competition will likely result in higher prices, reduced quality and variety of goods and services, fewer gains in efficiency and productivity and reduced innovation.⁷⁶In addition, the higher the number of efficient competitors the greater the presence of vigorous competition in the market and economy at large.⁷⁷ On the flipside, the fewer the number of competitors and the more concentrated the relevant market the higher the probability of price co-ordination or even collusion.⁷⁸

⁷⁰ Marshall S and Maurice E, 'The Effective Competition Standard: A New Standard for Antitrust', 595.

⁷¹ Marshall S and Maurice E, 'The Effective Competition Standard: A New Standard for Antitrust', 595.

⁷² Marshall S and Maurice E, 'The Effective Competition Standard: A New Standard for Antitrust', 595.

⁷³ Cavagnino, A, 'Regime: The Call to Combat Creeping Acquisitions' 22 *International Trade and Business Law Review*, 201),119.

⁷⁴ Merger A C, 'Regime: The Call to Combat Creeping Acquisitions',120.

⁷⁵ Merger A C, 'Regime: The Call to Combat Creeping Acquisitions',121.

⁷⁶ Merger A C, 'Regime: The Call to Combat Creeping Acquisitions',119

⁷⁷ Merger A C, 'Regime: The Call to Combat Creeping Acquisitions',121

⁷⁸ Merger A C, 'Regime: The Call to Combat Creeping Acquisitions',120

Abdul and Ocheng in a 2020 study found that if the mergers and acquisitions resulted in banks with increased market power, such powerful banks may exert certain adverse monopoly tendencies.⁷⁹ Hence some borrowers may be harmed by the said mergers.⁸⁰ For instance, **Karani** in 2018⁸¹ observed that an amendment to the Banking Act⁸² was driven by accusations by regulatory institutions such as the Central Bank of Kenya that the large banks were colluding in a cartel-like behaviour to manipulate the industry. In his opinion, increased mergers and acquisitions by the top-tier banks and removal of the interest cap meant that the industry went back to old days when it was controlled by cartels.

Healey and Chenying in a 2017 paper argue for a preventive approach, an aspect not considered by most jurisdictions. According to the authors, for a merger to be approved in China there are certain stringent conditions that the parties have to meet including providing proof that the advantages of the merger exceed the disadvantages or that the merger is in harmony with the public interest.⁸³ They noted that in some cases the mergers would be disapproved on grounds that they would negatively affect consumers in China by removing an important competitor from the market, undermining the competitive effect of purchasing patterns and increasing the possibility of co-ordinated effects.⁸⁴ The same argument was made by **Nicholls and O'Brien** in 2014 that there should be no regulatory restrictions on competition unless clearly demonstrated to be in the public interest.⁸⁵ Stating that competition law has a role to play if financial regulators do not deal with the risk that financial institutions become “too big to be managed”.⁸⁶ Hence there has to be stringent conditions and measures of barring large banks from merging with other large banks.

⁷⁹ Abdul F and Ocheng, R ‘Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya?’ 20.

⁸⁰ Abdul F and Ocheng, R ‘Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya?’ 20.

⁸¹ Njebi N K, ‘Effects of the Banking (Amendment) Act of 2016 on the Kenyan Banking Sector’ 7 *Journal of Business & Financial Affairs*, 2018.

⁸² *The Banking (Amendment) Act of 2016*

⁸³ Healey D J, and Chenying Z, ‘Bank Mergers in China: What Role for Competition?’ 12 *Asian Journal of Comparative Law*, 2017, 81.

⁸⁴ Healey D J, and Chenying Z, ‘Bank Mergers in China: What Role for Competition?’, 81.

⁸⁵ Nicholls R and O'Brien J, ‘Hanging Together or Hanging Separately: Is Competition Law in the Process of Eclipsing Financial Regulation?’ 8 *Law and Financial Markets Review*, 2014, 178.

⁸⁶ Nicholls R and O'Brien J, ‘Hanging Together or Hanging Separately: Is Competition Law in the Process of Eclipsing Financial Regulation?’, 178.

1.9.3 The Role of the Law in Protecting the Welfare of Consumers in Bank Mergers

Dolmans and Mostyn (2014), argue that all parties should be treated equally and allowed to merge but they further state that even if we consider all entities to be treated fairly and allow for mergers and acquisitions in those different sectors, fairness will only be achieved if we consider the consumer welfare, competition on the merits, proportionality and due process.⁸⁷ This in essence means that as much as it is only fair to allow entities to create synergies and increase their economies of scale, one has to look at the expense of which they are doing the same and ensure other stakeholders and more so the consumers are protected.

In addition to the above, **Ucaryilmaz** (2021) intimates that since the 1980s the goals of competition law started to be linked to consumer welfare standard.⁸⁸ That one of the fundamental objectives of competition law was seen and believed to be consumer protection.⁸⁹ She further states that competition and consumer protection laws in essence exist due to some certain market failures. She further illustrates that while anti-competitive practices distort the supply side of the market, certain deceptive practices happen to the detriment of the consumers consequently distorting the demand side.⁹⁰ Therefore when the said laws are used they do so by protecting the honesty and trust in the contractual relationships.⁹¹ She further insists that consumer welfare is a standard for the assessment of mergers and acquisitions.⁹²

In addition to the above, **Ashleigh** (2018) suggests that in most cases competition in the long run results in harm to less efficient competitors therefore leading to a reduction in the sales and eventually being forced to leave the market.⁹³ As a result of the foregoing, it is established that competition at the end of the day benefits consumers rather than competitors.⁹⁴ Hence, part of consumer welfare involves consumers having variety of goods and services to choose from.⁹⁵ Therefore, for consumers to have a variety to choose from, there should be efficient and

⁸⁷ Dolmans M, 'The Dominance and Monopolies' 2 Review' *Law Business Research Ltd.*, 2014.

⁸⁸ Talyar U, 'Morality in Competition Law: The Culture of Honesty and Trust in Consumer Protection', 7, *Athens Journal of Law*, 2021, 189.

⁸⁹ Talyar Uc, 'Morality in Competition Law: The Culture of Honesty and Trust in Consumer Protection', 189.

⁹⁰ Talyar Uc, 'Morality in Competition Law: The Culture of Honesty and Trust in Consumer Protection', 190.

⁹¹ Talyar Uc, 'Morality in Competition Law: The Culture of Honesty and Trust in Consumer Protection', 189.

⁹² Talyar Uc, 'Morality in Competition Law: The Culture of Honesty and Trust in Consumer Protection', 205.

⁹³ Merger A C, 'Regime: The Call to Combat Creeping Acquisitions', 119,

⁹⁴ Merger A C, 'Regime: The Call to Combat Creeping Acquisitions', 120.

⁹⁵ Ashleigh C, 'Merger Regime: The Call to Combat Creeping Acquisitions', 119-204,

effective laws that protect them from mergers and acquisitions that bring about cartel like behaviour or will eventually lead to anticompetitive behaviour.

Stebek and Elias (2017), support the above by alluding to the fact that effective competition positively contributes to consumer welfare because it gives them a greater choice of products.⁹⁶ Furthermore, they intimate that even though competition law has its bear minimums such as standards of conduct, quality and safety, these may not always be enough to safeguard the interests of those who come into contact with the wide range of products. They argue that the foregoing can only be remedied by ensuring that some of the market policies also involve regulatory market intervention in addition to the pressure from the legal profession, academicians, consumers and the civil societies in conjunction with the media.⁹⁷ Further, **Stebek and Elias** argue that competition law in itself targets economic efficiency and overall social welfare and on the other hand, consumer protection law involves protection of the ultimate individual consumers of the goods and services. They allude to the fact that economic efficiency is not an end in itself but a means towards achieving ultimate aims and objectives such as consumer welfare at individual and group level

As **Averit and Lande** duly noted that anti-competition laws are geared towards preserving a good number of options for consumers to choose among and on the other hand consumer protection laws aim to protect the potential of consumers to make rational choices among the array of competing options. Furthermore, they state that any effective consumer choice requires both options in the market and the ability to select freely among the options hence anti-competition laws widen the options in the context of favourable market prices.⁹⁸ Moreover, they indicate that violations such as price-fixing, related horizontal restraints and predatory pricing adversely affect consumer choice.⁹⁹ These “vile” practices or violations end up distorting the supply of options by imposing certain restrictions on the various prices and products that the free market would definitely offer.¹⁰⁰

⁹⁶ Stebek and Elias N, 'Deliverables and Pledges under Ethiopian Trade Competition Law', 11 *Mizan Law Review* 2017, 32.

⁹⁷ Stebek and Elias N, 'Deliverables and Pledges under Ethiopian Trade Competition Law', 32

⁹⁸ Stebek and Elias N, 'Deliverables and Pledges under Ethiopian Trade Competition Law', 38

⁹⁹ Stebek and Elias N, 'Deliverables and Pledges under Ethiopian Trade Competition Law', 38

¹⁰⁰ Stebek and Elias N, 'Deliverables and Pledges under Ethiopian Trade Competition Law', 40

Huffman and Max (2010), on the other hand perceive competition law as regulating the marketplace to ensure that private conduct does not suppress free trade and competition.¹⁰¹ They further state that competition law has its goal to preserve competition as competition serves to optimise consumers' interests.¹⁰² On the other hand, they intimate that consumer protection regulation is designed to protect consumers' interests at individual transactions hence the two that is competition law and consumer protection have the end goal of protecting consumers.¹⁰³ Even though they argue that the two concepts have the same end, they believe both achieve the end goal in two different approaches being the failures with which consumer law is concerned undermine the consumer's ability to optimise his or her own welfare whereas competition law seeks to prevent harm to competition hence consumer welfare will be thereby maximised.¹⁰⁴

Aydin and Buthe (2016), give us a clear and realistic picture of competition law in a developing country whereby our country falls. They state that in the recent past it is estimated that around 130 countries have established competition laws which among other things establish a broader competition policy that authorises competition agencies to engage in advocacy.¹⁰⁵ They argue that most developing countries may not be successful in implementing the pro-market legislation.¹⁰⁶ They indicate that the foregoing may be due to several factors including but not limited to the reason that most of these developing countries are poor, economic and political inequality.¹⁰⁷

They further suggest that one of the main impediments in implementing the above is the shortage of resources including financial resources for the competition agency, legal and

¹⁰¹ Huffman and Max, 'Bridging the Divide-Theories of integrating Competition law and Consumer Protection',6 *European Competition Journal*, 2010, 7.

¹⁰² Huffman and Max, 'Bridging the Divide-Theories of integrating Competition law and Consumer Protection', 11.

¹⁰³ Huffman and Max, 'Bridging the Divide-Theories of integrating Competition law and Consumer Protection', 9.

¹⁰⁴ Huffman and Max, 'Bridging the Divide-Theories of integrating Competition law and Consumer Protection', 9.

¹⁰⁵ Umut A and Tim B, 'Competition Law and Policy in developing countries. Explaining variations in outcomes. Exploring possibilities & Limits',79 *Law and Contemporary problems*, 2016, 3..

¹⁰⁶ Umut A and Tim B, 'Competition Law and Policy in developing countries. Explaining variations in outcomes. Exploring possibilities & Limits', 6.

¹⁰⁷ Umut A and Tim B, 'Competition Law and Policy in developing countries. Explaining variations in outcomes. Exploring possibilities & Limits',7.

economic expertise within the agency, lack of competition culture which makes it harder to find skilled economists and lawyers. This the lack of competition culture makes it harder to develop the capacity to identify impediments to competitive markets which consequently makes it less likely that competitors, customers and maybe suppliers will turn to the competition agency when they get direct evidence or apparent consequences of suspected anti-competitive behaviour. The foregoing can only be cured by advocacy hence building a competition culture.¹⁰⁸

Shuying (2016), in addition to the above argues that consumers in most cases may not have the same level of access to information compared to the financial providers since the consumers may not have the adequate knowledge and skills to evaluate the available information.¹⁰⁹Hence adequate legal framework and an effective institutional structure should go hand in hand to ensure financial consumer protection.¹¹⁰He further argues that there should be some asymmetry when it comes to information, reasonable transactional costs and promotion of consumer awareness as these will eventually lead to an effective financial law.¹¹¹ Just as addressed earlier, consumers in many cases have unequal bargaining power compared to the banks due to the lack of adequate and understandable information and the laws in place may not be adequate to protect these vulnerable consumers. Hence the study to review the adequacy of the legal framework in place to ensure an effective banking/financial consumer protection.

Uzokwe and Heerdeen (2018), furthermore intimate that there are countless number of consumers worldwide who utilise the banking products and services everyday hence there should be proper mechanisms put in place to ensure consumer protection and more specifically for the complex financial products and services¹¹² such as when large mergers and acquisitions happen. They further argue that since the 2008 Global Financial Crisis, consumer protection has become the order of the day and its importance grown which consequently led to the G20

¹⁰⁸ Umut A and Tim B, 'Competition Law and Policy in developing countries. Explaining variations in outcomes. Exploring possibilities & Limits',6.

¹⁰⁹ Wen S, 'Banking Consumer Protection Regulation in China' 46 *Hong Kong Law Journal*, 2016, 599..

¹¹⁰ Wen S, 'Banking Consumer Protection Regulation in China',599.

¹¹¹ Wen S, 'Banking Consumer Protection Regulation in China', 600.

¹¹² Uzokwe, Van Herdeen, 'Consumer Protection in the Banking Industry: A comparison of the South African and Nigerian Codes of Banking Practice'81 *Journal of Contemporary History*, 2018, 631..

coming up with principles for consumer protection in 2011.¹¹³ The said principles state that “all financial consumers should be treated equitably, honestly and fairly and that special attention should be dedicated to the needs of vulnerable groups”.¹¹⁴ This clearly shows that financial consumer protection is quite important to the extent of capturing the attention of the international spectrum. They also recognise that consumer protection should be geared towards protecting the vulnerable consumers who include consumers who may not be privy to lawyers and technology that can interpret the complex transactional documentation availed by the banks and financial institutions.

Sourdin and Tania (2020), assert the above by trying to decipher the meaning of a vulnerable consumer as argued by several commentators and policy makers by intimating that a vulnerable consumer may be looked at from certain levels such as age or can be said to be one of low income, the jobless, the ones that have been disabled a long period of time, those ones with low educational backgrounds, the ones that live in the rural areas and the ethnic minorities.¹¹⁵ They proceed to intimate that vulnerability does not necessarily have to fall in foregoing categories, one can be vulnerable if placed in a situation which they have little to no control.¹¹⁶ They further argue that in this technological era banking products and services are subject to complex informational exchanges such as emails and online processes which may prove to be a tall order for the vulnerable consumers who may not be tech savvy.¹¹⁷ The definition of a vulnerable consumer indeed emphasizes the importance of ensuring that there is an effective and conducive legal framework for consumer protection since most of the consumers fall in one or more of the definitions of a vulnerable consumer.

In summary, there is a consensus in that mergers bring about profitability and create synergies. However, some writers note that the mergers and acquisitions need to take into consideration the impact the same will have on the public and more so the consumers. Other writers suggest

¹¹³ Uzokwe, Van Herdeen, ‘Consumer Protection in the Banking Industry: A comparison of the South African and Nigerian Codes of Banking Practice’, 631.

¹¹⁴ Uzokwe, Van Herdeen, ‘Consumer Protection in the Banking Industry: A comparison of the South African and Nigerian Codes of Banking Practice’, 636.

¹¹⁵ Sourdin and Tania, ‘Treating Vulnerable Consumers ‘Fairly’ When they make a complaint about Banking or Finance in Australia’, 32 *Bond Law Review*, 2020, 3.

¹¹⁶ Sourdin and Tania, ‘Treating Vulnerable Consumers ‘Fairly’ When they make a complaint about Banking or Finance in Australia’, 3.

¹¹⁷ Sourdin and Tania, ‘Treating Vulnerable Consumers ‘Fairly’ When they make a complaint about Banking or Finance in Australia’, 6.

that the mergers should be between top-tier banks and smaller banks but not between the top-tier banks themselves.

1.9.4 The Gap in Literature

Various literary works focus on the positive effects that bank mergers are likely to have on consumers. These include improving the efficiency of financial services by banks. This is courtesy of globalization, regulation of the financial sector as well as technological advances. However, it is these same utilities that pose a threat to consumer welfare that are not addressed on prevailing literature. For instance, while globalization ensure that banks can cover consumers from different jurisdictions, it is apparent that consumer protection standards vary from one jurisdiction to another. Hence, for similar bank services, consumers are likely to be accorded different forms of protection depending on their jurisdiction. Regarding regulation of the financial sector, following the effects of the 2008-09 financial crisis, various prudential measures have been incorporated towards ensuring strict regulation of the financial sector. However, the existing literature does not investigate the role of regulatory coordination between central banks, competition authorities and consumer protection authorities in ensuring that these strict prudential measures extend to covering consumer welfare issues that arise in bank mergers.

1.10 Theoretical framework Stakeholder Theory

The theoretical foundation of this study is based on the stakeholder theory. The proposition of the stakeholder theory is that while banks have the primary duty of profit maximization (pursuant to the conventional agency theory), they have an obligation to other stakeholders such as consumers and that goes beyond value or profit maximization. The term stakeholder was first used to describe key concepts in stakeholder theory like the jointness of interests, co-operative strategic position and the rejection of profit maximization under the shareholder theory.¹¹⁸ In 1984 Freeman formalized the stakeholder theory with his exposition that ethical business practices ought to take into consideration any group or individual who can affect or is affected by the achievement of the firms' objectives.¹¹⁹

¹¹⁸ Freeman R E, *Strategic management: A stakeholder approach*, Pitman Publishing Inc, Boston, 1984, 8.

¹¹⁹ Freeman R E, *Strategic management: A stakeholder approach*, Pitman Publishing Inc, Boston, 1984, 8.

Developing the stakeholder theory has been problematic since mechanisms have not been put into place to determine who the stakeholders are.¹²⁰ Scholars like Argenti argued that firms that attempted to be all things to everybody stand at a disadvantage and become unmanageable.¹²¹ Others like Freeman have alluded to the difficulties of measuring stakeholder involvement since stakeholders are competitors to the firm and therefore should not be considered.¹²² The theory fails to show how stakeholders should be represented in the firm since it suggests that rights should be given to those who benefit but cannot show any form of contribution.

The gist of the stakeholder theory is that a firm should create value for all stakeholders such as customers, suppliers, employees, investors, communities and others who have a stake in the organization and not just shareholders.¹²³ The theory has become a key consideration in the study of business ethics and has served as a platform for further study and development in the research and published work of many scholars. The theory suggests that the adoption of a relationship between a business and individuals who can affect and provide better opportunities for dealing effectively with challenges facing the firm.¹²⁴ The stakeholder views business as a set of relationships among groups or individuals with a stake in the activities that make up the business¹²⁵

According to this theory, to understand a business is to know how these relationships work and change over time. It is the executive's job to manage and shape these relationships to create as much value as possible for stakeholders and to manage the distribution of that value.¹²⁶ Where stakeholder interests conflict, the executive must find a way to re-think problems so that the needs of a broad group of stakeholders are addressed¹²⁷. If tradeoffs have to be made, as

¹²⁰ Ambler T and Wilson A, *The Problems of Stakeholder Theory*, 1995, 3.

¹²¹ Argenti J, *Your Organization: What is it for?*, McGraw Hill, New York, 1993.

¹²² Freeman R E, *Strategic Management: A Stakeholder Approach*, Pitman 1984.

¹²³ Freeman R E, *Strategic management: A stakeholder approach*, 8.

¹²⁴ Jones TM, 'Instrumental stakeholder theory: A synthesis of ethics & economics' *20 Academy of Management Review*, 1995, 404-437.

¹²⁵ Walsh, JP, 'Taking stock of stakeholder management' *30 Academy of Management Review*, (2005), 426-438.

¹²⁶ Freeman, *Strategic management: A stakeholder approach*.

¹²⁷ Harrison, JS, Bosse D A. and Phillips RA, 'Managing for stakeholders, stakeholder utility functions & competitive advantage' *Strategic Management Journal*, 2010, 58.

sometimes happens, then executives must figure out how to make the tradeoffs, and then work on improving the tradeoffs for all sides.

The relevance of the stakeholder theory to this study is that the consumer of financial services is a very important stakeholder whose interests should be considered and taken to account by the banks in the process of MNAs. Presently, the interests of consumers are largely ignored in many corporate strategy and management decisions involving MNAs. Therefore there is need for a standardized corporate accountability towards consumers during bank mergers.¹²⁸ This study, therefore, investigates the role of the law in facilitating regulatory coordination between banking regulation and the regulation of MNAs to protect the interests of consumers that are threatened by bank mergers.

1.11 Chapter Breakdown

Chapter One: Introduction

This chapter in particular, being the foundation of the study commences with the introduction and background of the study. Thereafter it outlines the problem statement, the justification of the study, the objectives of the study and ultimately the research questions. It further, outlines the hypothesis on which the study is based on, the research method that shall be used to undertake the study, identifies the gap in literature that shall be filled by the findings of the research. It culminates by discussing the theoretical framework within which the study is based.

Chapter Two: The Legal Risks of Bank Mergers on the Welfare of Consumers of Financial Services

This chapter reviews literature from various secondary sources such as text books, journal articles and reports to establish the nature of the risks that bank mergers pose to the welfare of consumers. As such, this part identifies the consumer protection concerns that arise out of ordinary MNA transactions and proceeds to further establish consumer protection concerns that are specific to bank mergers. This part further identifies the legal risks that arise from these consumer protection concerns while taking to account the uniqueness and realities of the banking sector.

¹²⁸ Azgad-Tromer and Shlomit 'The Case for Consumer-Oriented Corporate Governance, Accountability and Disclosure' *U. Pa. J. Bus. L.*, 2014, 227.

Chapter Three: A Critical Review of the Kenyan Legal Framework on Bank Mergers and Consumer Protection

This chapter examines the Kenyan legal and regulatory framework relevant to the banking regulation, consumer protection, and the regulation of mergers and acquisition. It will identify the specific sections of the statutes and regulations that relate to the consumer protection concerns and legal risks that are identified in the previous chapter. This shall be done with the aim of demystifying their adequacy or lack thereof in conferring protection of the consumers to the concerns and risks identified in the previous chapter.

Chapter Four: Analysis of the Best Practices in Anticipating and Mitigating Consumer Protection Concerns and Legal Risks that Arise from Bank Mergers.

This chapter conducts an analysis of the role of the law and regulatory institutions in protecting consumers in the banking sector from the legal risks and consumer protection concerns that arise from bank mergers. In this regard, this chapter benchmarks best practices from other jurisdictions to establish the legal mechanisms and regulatory approaches that regulators have taken in these jurisdiction to anticipate and mitigate against these legal risks and consumer protection concerns.

Chapter Five: Conclusion and Recommendations

This chapter gives the conclusion based on the findings of the research and proffers legislative, and policy recommendations that can be implemented in the current legal framework in Kenya to address the problem identified in the study and to ensure the existing gaps are adequately addressed.

Chapter 2: Bank Mergers and the Legal Risks to which Consumers of Financial Services are Exposed

2.1 Introduction

This chapter reviews literature from various secondary sources such as text books, journal articles and reports to establish the nature of the risks that bank mergers pose to the welfare of consumers. As such, this part identifies the consumer protection concerns that arise out of ordinary MNA transactions and proceeds to further establish consumer protection concerns that are specific to bank mergers. This part further identifies the legal risks that arise from these consumer protection concerns while taking to account the uniqueness and realities of the banking sector.

First, it is important to understand the rationale behind bank mergers in order to get a better comprehension of the concerns and legal risks that could arise out of market restructuring caused by such mergers. Traditionally, mergers and acquisitions have often been pursued by businesses for growth purpose. In the banking industry, mergers are commonly pursued with a view to achieving cost efficiency. In this regard, banks aim at attaining market leadership, growth and diversification, reducing bankruptcy risks, benefiting from economies of scale and realizing strategic integration into the market.¹²⁹ All these are achievable because a bank merger is premised on the expansion of a bank's capital assets at the end of the merger.¹³⁰ For instance, with regard to economies of scale, banks anticipate that mergers place them in a better position to manage larger assets and at the same time not miss out on the growing industrial clients and also be able to compete for the larger industrial clients.¹³¹ Regarding competitive diversification, banks anticipate that mergers will allow them to combine their specialty with other banks and gain competitive advantage in the market. Even so, in the course of pursuing these benefits, bank mergers exhibit competition and consumer protection concerns that end up undermining these benefits following the increased concentration of banking resources among fewer entities.

¹²⁹ Goyal, KA & Joshi, V. 'Mergers in Banking Industry of India: Come Emerging Issues' 2011 Asian Journal of Business and Management Sciences Vol. 1(2). P. 150.

¹³⁰ Kintner, EW & Hansen, HC 'A review of the law of bank mergers.' 1972 Boston College Industrial and Commercial Law Review Vol. 16(2) p. 216.

¹³¹ Kintner, EW & Hansen, HC 'A review of the law of bank mergers.' 1972 Boston College Industrial and Commercial Law Review Vol. 16(2) p. 216.

2.2 The Risk of Barring Competition

The most obvious risks and concerns resulting from bank mergers can be explained through two theories that exist in literature. The first is the potential competition theory. The theory is founded on the proposition that a bank merger that would potentially result in the elimination of potential competition should be rendered unlawful.¹³² With regard to the issue of choice to consumers, potential competition holds a prominent position because it represents the supplement or substitute for actual competition in the market. It is thus argued that a bank will be motivated to act as though it was already in competition if the bank is aware that there are other firms on the periphery with the ability to enter the bank market.¹³³ Hence, an outstanding legal risk that results from bank mergers is the possibility that a bank merger might result in the elimination of potential competition.

In this regard, role of the regulator is to identify potential regulators based on the relevant line of commerce and the geographic market within which the merger is to be undertaken.¹³⁴ Second, the regulator also ought to establish whether the potential competitor is likely to enter the market by taking to account the present and the future prospects of the market and any other barriers to entry that already exist. Further, the regulator in this regard must also consider the proponent banks' past history of mergers and acquisitions and branching to further ascertain the nature of their threats to potential competitors.¹³⁵ The other theoretical foundation upon which bank mergers ought to be scrutinized is the entrenchment theory. This is applicable in the context where a larger bank enters into a market dominated by smaller banks, through a merger transaction.¹³⁶ In this regard, the theory advances the proposition that the large bank with its resources is likely to scare off potential entries into the market while at the same time intimidating smaller banks that are already in the market.¹³⁷

Literature on the effects of bank mergers on competition reveal that there is a link between bank market structure and competition in the banking industry. The overriding position in

¹³² Kintner, EW & Hansen, HC 'A review of the law of bank mergers.' 1972 Boston College Industrial and Commercial Law Review Vol. 16(2). P. 252.

¹³³ Kintner, EW & Hansen, HC 'A review of the law of bank mergers.' 1972.p. 252.

¹³⁴ Kintner, EW & Hansen, HC 'A review of the law of bank mergers.' 1972 P. 253

¹³⁵ Kintner, EW & Hansen, HC 'A review of the law of bank mergers.' 1972 P. 254.

¹³⁶ Kintner, EW & Hansen, HC 'A review of the law of bank mergers.' 1972 P. 255.

¹³⁷ FTC v Procter & Gamble 386 U.S. 568 (1967).

literature regarding the relationship between the bank market structure and competition is that a highly concentrated market structure creates a conducive environment for collusion between banking entities.¹³⁸ This is premised on the position that bank mergers result in a highly concentrated bank market where there is less competition. It therefore, forms the premise upon which bank mergers ought to regulate for the outright competition concerns that result from such change in market structure. This is considering the position drawn from the economic theory that market structure affects various performance indicators of banks which in turn has an influence on the degree of competition in the bank market.¹³⁹ Hence, there is a proposition that changes in regulations on the bank market structure have an impact on the relationship between the market structure and bank performance, hence, competition.

There is rich literature that points to the position that in-market bank mergers often result in the removal of competition from a given market. This inherently raises competition concerns that also extend to the welfare of consumers. As a general rule, a regulator should authorize any merger or acquisition that would likely result in a monopoly or create an environment that is conducive to further collusions or any conspiracies to monopolize.¹⁴⁰ This is considering that in the absence of such regulation, the monopolist assumes a position that empowers them to raise the prices of their products or services without the fear that competition is likely to force it to lower its price in the said market.

However, it is important to be precautionary when it comes to taking a general approach when defining a market that is likely to be affected by a merger. In order to avoid any inaccuracies in the anti-trust analysis of bank mergers, it is important that the regulator not to group together individual products or services when reviewing the impact of bank mergers on them. The principle that speaks to this approach has conventionally been borrowed from the decision of the Supreme Court in United States in *US v Philadelphia National Bank*.¹⁴¹ In its decision the case noted that, specifically in the banking sector, regulators ought not to generalize all financial services as commercial banking services. This is considering that there are other

¹³⁸ Gilbert, RA. 'Bank market structure and competition: A survey' 1984 *Journal of Money, Credit and Banking* Vol. 16(4). P. 618.

¹³⁹ Gilbert, RA. 'Bank market structure and competition: A survey' 1984. P. 618.

¹⁴⁰ McCarthy, T. 'Refining product market definition in the antitrust analysis of bank mergers' 1997 *Duke Law Journal* Vol. 46(865). P. 866.

¹⁴¹ *United States v Philadelphia National Bank*, 374 U.S. 321, 356 (1963).

aspects of commercial banking services and products that are free from competition from the products and services of other financial institutions.¹⁴²

For these reasons, not all market products should be grouped together into a cluster when undertaking a merger review. Rather, the role of the law in this regard is to guide the regulator to identify a single line of commerce and only limit the merger review to commercial banking products and services that depict transactional complementarity.¹⁴³ In this regard, banking services are said to have transactional complementarity if consumers often choose them together. This is premised on the argument that competition will only take place among banks that offer the same group of clustered services. While this approach may make merger review for competition concerns more difficult, the clustering of markets for transactionally complementary products makes it possible to accurately identify competition where it exists.¹⁴⁴

2.3 Bank Mergers and Increased Cost of Credit

As a general rule, it is also anticipated that a bank merger is likely to afford the resulting entity the opportunity to exploit the benefits of economies of scale and reduce the cost of banking services. It is anticipated that this would also be beneficial to the consumers of banking services as it would increase the deposit rate it pays and reduce the interest rate it imposes on loans advanced to consumers.¹⁴⁵ However, an investigation on the impact of bank mergers on the cost of banking reveals empirical evidence that suggest that bank mergers do not generally reduce the cost of banking services.¹⁴⁶

The underlying proposition regarding cost of credit when it comes to bank mergers is that bank mergers pose a risk of an increase in market concentration which in turn results in an increase in interest rates. What is more concerning about these effects is that it is the vulnerable consumers that are mostly affected. This is considering the implication that such increased interest rates lock out low-income borrowers resulting in their financial exclusion. Further, it

¹⁴² McCarthy, T. 'Refining product market definition in the antitrust analysis of bank mergers' 1997 *Duke Law Journal* Vol. 46(865). P. 872.

¹⁴³ McCarthy, T. 'Refining product market definition in the antitrust analysis of bank mergers' 1997 P. 874.

¹⁴⁴ Garigga, JM 'Bank mergers and lending relationships' 2008 *European Central Bank Working Paper Series* No. 934. Retrieved from: <https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp934.pdf>

¹⁴⁵ Gilbert, RA. 'Bank market structure and competition: A survey' 1984 *Journal of Money, Credit and Banking* Vol. 16(4).

¹⁴⁶ Lott, S. *Bank mergers and the public interest.* (Public Interest Advocacy Center, 2005) p. 35.

also implies that they have to meet their financial needs through other risky avenues, such as informal financial services, under which they do not have the benefit of the protection of the law.

The most outstanding legal risk and concern on the welfare of consumers when it comes to a bank merger relates to the effect it is likely to have on the price and availability of credit. A study reviewing empirical evidence with respect to bank mergers in the United States of America in 2022 confirmed these concerns. In the study, it was reported that upon acquiring more market shares after mergers and acquisitions, bank mergers resulted in a significant increase in the price of mortgage credit.¹⁴⁷ This was based on the finding that banks that acquire larger shares of a local market through mergers and acquisitions charged higher interest rates to borrowers of mortgages.¹⁴⁸ What is more concerning is that this effect was worse with respect to subprime loans as compared to prime loans. This implies that more interest rates were charged on loans that were more accessible to low-income consumers whose vulnerability to financial exclusion warrants more protection in the banking market. With regard to availability of mortgage credit, the study also established that the same banks that gained larger local market shares as a result of mergers also registered higher rejection rates for low income applicants of mortgage loans.¹⁴⁹ Hence the conclusion that riskier and low-income borrowers were the most adversely affected by bank mergers. The findings in the 2022 study were made alongside the absence of evidence to demonstrate any efficiency gains on borrowers as a result of bank mergers.

These findings made in 2022 remain consistent with those that were made in 2002 on a different study that investigated the effect of bank mergers on loan contracts. Following a review of individual loan contracts between banks and companies, the following conclusions were recorded regarding the effect of bank mergers on bank credit policies. First, it was established that in-market bank mergers are only beneficial to borrowers if the mergers were undertaken

¹⁴⁷ Ratnadiwakara, D & Yerramilli, V 'Effect of bank mergers on the price and availability of mortgage credit' July 2022 Retrieved from: <https://www.bauer.uh.edu/yerramilli/RV-MergersMortgages.pdf> P. 29.

¹⁴⁸ Ratnadiwakara, D & Yerramilli, V 'Effect of bank mergers on the price and availability of mortgage credit' July 2022 P. 29

¹⁴⁹ Carletti, E; Hartmann, P & Spagnolo, G 'Bank mergers, competition and financial stability' 2007 *Journal of Money, Credit and Banking* Vol. 39(5).

with respect to the acquisition of entities with relatively smaller market shares.¹⁵⁰ This is attributed to the efficiency gains of economies of scale that come with the merger. Even though the interest rates charged by merged banks were found to decrease immediately, it was reported that the more the bank increased its market share, the more its efficiency effect became offset by market power.¹⁵¹ Therefore, it was established that in the long run, when banks become larger as a result of mergers, the inevitable outcome is the reduction in the supply of loans to small borrowers. Hence, the financial exclusion of low income consumers.

Even so, there are contrary findings in a study conducted in the year 2020. The study involved a review and analysis of data relating to the lending behaviour of 31 commercial banks in Kenya from 2003 to 2015. While inquiring into the impact of mergers on the loan pricing behaviour of banks, the study established that bank mergers in Kenya over that period registered results that are positive to the interests of consumers. This is considering that they reported that bank mergers overall resulted in a reduced rate of lending and a subsequent increase in loan supply.¹⁵² As such, this was reported as a gain to consumers as it implied that bank mergers resulted in an increase in credit availability over the study period. However, that notwithstanding, the study did not go without recognizing the potential threat that bank mergers pose to consumer welfare in the event the costs of increased market power (resulting from a bank merger) outplayed the efficiency gains that result from the economies of scale.¹⁵³

The studies analysed so far point to the fact that the risk of increase in the price of credit and the resulting financial exclusion of low income consumers is not outright inherent but conditional. The general rule from an economically objective standpoint is that the economies of scale that results from a merger ought to contribute to a lower cost of credit. However, it is established that the increase or decrease in access to credit as a result of bank mergers is dependent on whether the increased market power outweighs the efficiency gains incidental to the economies of scale. This was established in a 2011 study conducted in the United States

¹⁵⁰ Sapienza, P ‘The effects of banking mergers on loan contracts’ 2002 *The Journal of Finance* Vol 57(1). P. 364.

¹⁵¹ Sapienza, P ‘The effects of banking mergers on loan contracts’ 2002 *The Journal of Finance* Vol 57(1) p. 329.

¹⁵² Abdul, F & Ochenge, R ‘Do mergers and acquisitions impact bank lending behavior in Kenya?’ 2020 *Kenya Bankers Association Working Paper Series* Retrieved from: <https://www.kba.co.ke/wp-content/uploads/2022/05/WPS-45-2020.pdf>

¹⁵³ Abdul, F & Ochenge, R ‘Do mergers and acquisitions impact bank lending behavior in Kenya?’ 2020

where it was established that there are instances when certain mergers are likely to have such a high market power effect that dominates the cost savings that ought to inherently make loans more affordable and accessible.¹⁵⁴ In this regard, the role of the law and regulations is to implement mechanisms and criteria that limits the conditions under which bank mergers are undertaken with a view to preventing such outcomes where the market power resulting from a merger outweighs the efficiency gains that ought to work in favour of consumers. Therefore, the role of the regulator is to ensure that proponents of mergers demonstrate the actions the merging banking entities will take to ensure they strike a balance between the efficiency gains and the possible costs of increased market power that result from the merger activities.

2.4 The Risk of Limited Access to Banking Services

As a matter of public interest, bank mergers affect banking services in various ways that raise consumer protection concerns. First, one of the issues that critically informs the core of the protection of consumer welfare is choice. When it comes to protecting consumer welfare in banking services, this relates to the question of whether there are sufficient financial institutions to offer consumers the choice of banking services if a prospective bank merger goes through. This is based on the concern that the limitation of the choices the consumers of banking services have results in the risk that banking services will become less competitive after the merger.¹⁵⁵ Therefore, With regard to the question of choice, the legal risk that consumers of banking services is that a bank merger may eliminate competition in the offering of banking services.¹⁵⁶

Access to banking services, therefore, is also another consumer welfare concern that present a potential legal risk of bank mergers. This issue is critical in the subject of consumer protection because it is particularly important to vulnerable consumers of banking services, that is, the low income, the disabled and consumers in rural areas. When it comes to banking services, this set of vulnerable consumers of banking services often benefit from having access to standard low-cost bank accounts, overdraft protection, and access to short-term credit at very reasonable interest rates.¹⁵⁷ Hence, another legal risk incidental to bank mergers is the potential

¹⁵⁴ Erel, I 'The effect of bank mergers on loan prices: Evidence from the United States' 2011 *The Review of Financial Studies* Vol. 24(4) p.1068.

¹⁵⁵ Lott, S. *Bank mergers and the public interest.* (Public Interest Advocacy Center, 2005).

¹⁵⁶ Lott, S. *Bank mergers and the public interest.* (Public Interest Advocacy Center, 2005). P. 28.

¹⁵⁷ Gonzalez, MC et al. 'The relationship between vulnerable financial consumers and banking institutions. A qualitative study in Spain' 2021 *Geoforum* Vol. 119.

exclusion of vulnerable consumers of banking services from benefiting from the financial system following the potential reduction of effective banking services that are specific to their needs.¹⁵⁸ What comes with this risk is the fear that this group of vulnerable consumers may have to resort to other non-bank outlets or informal alternative financial services that leave them more exposed and vulnerable to exploitation.¹⁵⁹ This concern emerges considering that bank mergers potentially create a less competitive marketplace that creates less incentive for banks in the market to improve access to banking services resulting in more financial exclusion and exposure of consumers to informal alternative financial services.

When it comes to choice, the role of the law is to establish mechanisms that establish the metrics that accurately identify and anticipate bank mergers that are likely to limit the choice of consumers by reducing competition when it comes to banking services. Conventionally, part of the role that the law has played in mitigating this risk has been through the implementation of divestitures.¹⁶⁰ This remedy refers to orders that are issued to parties in a bank merger to divest assets or shares by, for instance, selling off some of their branches to competitors.¹⁶¹ A remedy that is only common to the regulation of bank mergers. Unlike other legal mechanism, this remedy is applicable even after the bank merger has already been executed.

In its application, the relevant authority may undertake continuous review and establish the extent to which a bank merger has affected competition in the market. In the event it is established that a bank merger has substantially reduced or prevented competition, then the regulator may order divestiture. It is then anticipated that divestiture plays a critical role in replacing lost competitors to the extent that restores the state of competition in the market to what it was even before the merger. The role of the law with regard to this risk, therefore, is to establish the mechanism of a public impact assessment that detects the impact that bank mergers have on the market with regard to consumer welfare. In addition to divestitures, the

¹⁵⁸ Gonzalez, MC et al. 'The relationship between vulnerable financial consumers and banking institutions. A qualitative study in Spain' 2021.

¹⁵⁹ Gonzalez, MC et al. 'The relationship between vulnerable financial consumers and banking institutions. A qualitative study in Spain' 2021.

¹⁶⁰ Lee, VY 'Corporate asset restructuring through mergers and acquisitions and divestitures' 2021 *University of Reading* Retrieved from:

https://centaur.reading.ac.uk/101461/2/23864261_LEE_Thesis_Vicky%20Lee%20%282%29.pdf

¹⁶¹ Kwast, ML. 'Bank mergers, What should policymakers do?' 1999 *Journal of Banking & Finance* Vol. 2392(4).

law may also empower the regulator to direct the entity that results from a bank merger to take various remedial steps to mitigate any consumer protection concerns identified from the assessment.

Regarding access to banking services, the role of the law in this regard is to ensure that bank mergers do not exacerbate the divide that already exists between the rich and the poor when it comes to access to banking services. Hence, it is important for the regulator to establish mechanisms that are essential to evaluate the extent to which a bank merger is likely to affect access to financial services.¹⁶² The law in this regard also ought to sufficiently confer the regulator with the power to grant a conditional authorization of a bank merger that is based on measures that can be taken to ensure that the state of access to banking services in the marketplace remain the same or are improved even after the bank merger.

2.5 Other Contemporary Risks

2.5.1 The Risk of Information-Based Market Power

Competition in the banking sector is unique compared to ordinary competition in the conventional market. The state of competition in the banking market is not dependent on the number of market participants only. Rather, it is heavily influenced by the amount of asymmetric information that banks possess with regard to their borrowers.¹⁶³ It is also important to note that such information about the consumers in the market is not often readily transferable to other potential lenders. Therefore, at the face of a bank merger, the resulting entity – in addition to increasing its market share – also increases its information-based market power.¹⁶⁴ This is very disadvantageous to consumers considering that they are vulnerable to the extent that they are the party that is disadvantaged and suffers most from such information asymmetry.¹⁶⁵

¹⁶² Kwast, ML. 'Bank mergers, What should policymakers do?' 1999 *Journal of Banking & Finance* Vol. 2392(4).

¹⁶³ Sapienza, P 'The effects of banking mergers on loan contracts' 2002 *The Journal of Finance* Vol 57(1). P. 364

¹⁶⁴ Dermine, J. 'Bank Mergers in Europe: The Public Policy Issues' 2000 *Journal of Common Market Studies* Vol. 38(3). P. 409.

¹⁶⁵ Howe, JS & Morillon, TG 'Do mergers and acquisitions affect information asymmetry in the banking sector?' 2020 *Managerial Finance* Vol. 46(12).

2.5.2 The Risk of Creeping Mergers

Creeping mergers have in recent history become an area of concern. They represent mergers and acquisitions that raise competition issues and pose a threat to consumer welfare indirectly. As such, despite the far reaching impact they could have on the economy, the relevant competition and consumer authorities may not detect them to mitigate the threats they pose on the economy. Hence, they refer to small mergers and acquisitions that pass the statutory tests entrenched in law when considered separately. However, when considered cumulatively, they are found to culminate in substantive lessening of competition in the market involved. Creeping mergers are of critical concern before the conventional regulation of mergers and acquisitions can neither anticipate or mitigate against their effects. It therefore calls for innovative regulatory mechanisms that can adequately anticipate and mitigate against the long-term effects they are likely to have on the banking market.

2.6 Conclusion

This chapter has demonstrated the legal risks and concerns on consumer welfare incidental to bank mergers as follows. First, there is an inherent risk that bank mergers may bar competition. Here, the role of the law is to ensure that the regulator is able to execute proper identification of the relevant market with proper tools for transactional complementarity to be able to flag bank mergers that are likely to bar competition. Second, there is a risk that bank mergers may result in an increase in the cost of lending to an extent that is detrimental to low income consumers. The role of the law with respect to this risk is based on the responsibility of the regulator to ensure that merging banks demonstrate to the satisfaction of the regulator that the they have taken or will take steps to ensure that the costs of increased market power do not outweigh the efficiency gains that ought to inherently result from the merger. Third, there is also a risk that bank mergers are likely to limit the choices that consumers have with regarding to banking services which is also linked to limiting access to banking services especially to vulnerable low income consumers. This leaves them exposed to exploitative alternatives that are not in the best of their interests. It is established in this regard that the role of the law is to empower regulators to implement divestitures, require impact assessments before mergers, and ensure merging banks take steps to mitigate the impact that the resulting merger may have on consumers with respect to access to financial services. Finally, it is also important for the law

regulating bank mergers to anticipate risks posed by contemporary issues such as information-based market power as well as creeping mergers.



Chapter 3: Legal Framework for Mergers and Acquisitions in the Banking Sector in Kenya

3.1 Introduction

This chapter examines the Kenyan legal and regulatory framework relevant to the banking regulation, consumer protection, and the regulation of mergers and acquisition. It will identify the specific provisions on the statutes and regulations that relate to the consumer protection concerns and legal risks that have been identified in the previous chapter. This shall be done with the aim of demystifying their adequacy or lack thereof in conferring protection of the consumers to the concerns and risks identified in the previous chapter.

3.2 Constitutional Foundation of Consumer Protection

The foundation of consumer rights in Kenya is entrenched under Article 46 of the Constitution of Kenya, 2010 which creates the constitutional right of consumers to services of reasonable quality.¹⁶⁶ Consumer rights under this provision also confer upon consumers the right to have access to information that is necessary for them to gain the full benefit of the services at their disposal.¹⁶⁷ In this regard, the state is under the obligation to protect the economic interest of consumers¹⁶⁸ and also ensure that they are compensated for loss or injury they would suffer in the event they have been exposed to defective goods or services.¹⁶⁹ A construction of these consumer rights as enshrined in the Constitution depict a critical obligation that is imposed on the state to ensure that the rights of consumers are protected. It is based on this premise that the Constitution anticipates that the National Parliament of Kenya shall enact legislation that provides for the protection of consumer welfare with respect to goods and services that are either offered by public bodies or private entities.¹⁷⁰ Further, bank customers whose fundamental right to protection from exploitation is infringed on account of MNAs, have a constitutional right to seek redress from the Courts. This is informed by the fact that the

¹⁶⁶ Article 46(1)(a), *The Constitution of Kenya* (2010).

¹⁶⁷ Article 46(1)(b), *Constitution of Kenya* (2010).

¹⁶⁸ Article 46(1)(c), *Constitution of Kenya* (2010).

¹⁶⁹ Article 46(1)(d), *Constitution of Kenya* (2010).

¹⁷⁰ Article 46(2) & (3), *Constitution of Kenya* (2010).

Constitution is the supreme law of the Republic¹⁷¹ and any law inconsistent with the COK is void to the extent of its inconsistency.¹⁷²

Before delving into analysing the legislation that the Constitution requires Parliament to enact in order to protect consumer welfare, it is important to demonstrate the extent to which the prevailing Constitutional regime anticipates the risks discussed in the previous chapter. First, while entrenching the right to services of reasonable quality, the Constitution anticipates that the state shall protect consumers of banking services from being exposed to exploitative services. It is already established in the previous chapter that when bank mergers limit the choice of consumers and constrain their access to banking services. It forces consumers to resort to informal alternative financial services which are not of reasonable quality. Second, the right to ensure consumers are presented with information that is necessary for them to gain full benefit from goods and services, it is apparent that the Constitution from a general perspective anticipates such concerns as the risk of information based market power that emanates from the high levels of information asymmetry in the banking market. Hence, the Constitution in this regard sets a basis upon which consumers should be protected from the risks of information based market power. Third, the obligation of the state to protect the economic interests of consumers covers concerns that arise from the risk of high cost of credit caused by bank mergers and any constraints in competition that also result from it.

Therefore, it is apparent that the constitutional dispensation in Kenya – as far as consumer protection is concerned – establishes a solid basis upon which the concerns and legal risks arising from bank mergers discussed in this study can be anticipated and mitigated. Even so, it is also important to investigate the extent to which the law that operationalizes these constitutional provisions is effective in anticipating and mitigating these risks with respect to competition and consumer protection law in the following part.

3.3 The Primary Regulation of MNAs of Banks in Kenya

3.3.1 Competition Act of Kenya

One of the key concerns raised in the previous chapter regarding bank mergers is the proposition that there is a risk that they may bar competition in the banking market. The

¹⁷¹ Article 2, *Constitution of Kenya* (2010).

¹⁷² Article 2, *The Constitution of Kenya* (2010).

Competition Act of Kenya¹⁷³ is responsible for the regulation of competition law in Kenya. The main objective of CAK is the promotion and safeguarding of competition, protection of consumer interests in terms of unfair and misleading market conduct and the creation of institutions for the implementation and enforcement of the Act.¹⁷⁴ Key among the institutions established under the Act include the Competition Authority of Kenya (CAK)¹⁷⁵ and the Competition Tribunal¹⁷⁶ whose mandates would be analyzed below. However, transactions with a regional component since Kenya is a member of the EAC are subject to COMESA and the East African Community Competition regulations.

The main regulator of MNAs in Kenya is the Competition Authority of Kenya established under Section 7 of the Competition Act of Kenya. While MNAs having a regional element attracts oversight of the COMESA Competition Commission (CCC) and the East African Community Competition Authority.¹⁷⁷ MNAs involving companies listed on the Nairobi Securities Exchange (NSE) attracts scrutiny and approval requirements under the Capital Markets Authority as set out in the Capital Markets Authority (Takeover and Mergers), Regulations, 2002. The regulatory regime for banks mergers is fragmented and largely dependent on whether a bank is regulated or not. For that matter banks have to seek multiple consents before approvals of their merger applications by the CAK. This not only results in overlaps in regulation but undermines the authority of CAK as the final authority in bank mergers.¹⁷⁸

3.3.1.1 Mandate of the Competition Authority of Kenya (CAK)

The mandate of the CAK is classified into five categories. First is the regulation of the restrictive trade practices¹⁷⁹ that encompass restrictive agreements, practices and decisions, abuse of dominant position,¹⁸⁰ exemption of certain restrictive practices¹⁸¹ and investigation

¹⁷³ No. 12 of 2010

¹⁷⁴ Preamble, CAK

¹⁷⁵ Part II, *the Competition Authority of Kenya*

¹⁷⁶ Part VII, *the Competition Authority of Kenya*.

¹⁷⁷ Section 36, *the East African Community Competition Act*, 2006.

¹⁷⁸ Nzomo V, Treatment of Buyer Power in Competition Law: Case of Supermarket Retail Sector in Kenya' *The Law Society of Kenya Journal*, 13(1), 2017.

¹⁷⁹ Part III, *the Competition Authority of Kenya*

¹⁸⁰ Section 23, *the Competition Authority of Kenya*

¹⁸¹ Section 25, *the Competition Authority of Kenya*

into prohibited practices.¹⁸² The Authority determines what constitutes abuse of dominant position,¹⁸³ since it has certain investigative roles over conduct that is prohibited either upon receipt of information from government agencies or on its own motion.¹⁸⁴ The Act in Part IV regulates the exercise of mergers of all types within the country and foreign ones having subsidiaries in Kenya, this is in addition to the control of unwarranted concentration of economic power.¹⁸⁵ The Act defines unwarranted concentration of economic power in the existence of cross directorship between two distinct undertakings or companies producing substantially similar goods or services and whose combined market share is more than forty per cent.¹⁸⁶

3.3.1.2 Protection of Consumer Welfare and Offences

Another key mandate of the CAK is the regulation of consumer welfare over actions that are either false or misleading representation. This is key in the context of banking as it is meant to ensure banks carry out services that are of a good standard and quality.¹⁸⁷ The Act has created certain offences for the protection of consumer's' particularly prohibition of false representations that service of a specific standard and quality is provided.¹⁸⁸ It would amount to an offence for a bank to mislead customers with respect to price of services or the existence, exclusion or effect of any condition, warranty, guarantee, right or even remedy.¹⁸⁹

Section 56 creates an offence out of conduct that is unconscionable involving a party having a higher bargaining power that require a customer comply with conditions that are unreasonable in terms of protecting his interests.¹⁹⁰ Parties having a higher bargaining power can exert levels of influence to customers who may not have the option to acquire similar services elsewhere.¹⁹¹ In direct reference to banking, imposition of fees and charges should only be levied with prior attention of the consumer prior to their imposition or prior to the provision of the service.¹⁹²

¹⁸² Section 31, *the Competition Authority of Kenya*

¹⁸³ Section 23, *the Competition Authority of Kenya*

¹⁸⁴ Section 31, *the Competition Authority of Kenya*

¹⁸⁵ Section 50, *the Competition Authority of Kenya*

¹⁸⁶ Section 2, *the Competition Authority of Kenya*

¹⁸⁷ Section 55, *the Competition Authority of Kenya*

¹⁸⁸ Section 55(a), *the Competition Authority of Kenya*

¹⁸⁹ Section 55(b), *the Competition Authority of Kenya*

¹⁹⁰ Section 56(1), *the Competition Authority of Kenya*

¹⁹¹ Section 56(e), *the Competition Authority of Kenya*

¹⁹² Section 56(3), *the Competition Authority of Kenya*

Customers are further entitled to disclosure of information concerning all forms of increment in charges and fees that are imposed for the provision of services.¹⁹³

The Authority has a number of remedies at its disposal for parties that contravene any of the provisions of the Act. It can make consultations with the Kenya Bureau of Standards (KBS) on issues of standards and quality¹⁹⁴ as well as to other special state agencies for determination and reporting back.¹⁹⁵ Thirdly, the authority can notify consumer bodies of any form of infringement likely to harm the public.¹⁹⁶ Lastly, those found liable for contravening any provision of the Act could be convicted and imprisoned for a term of not more than 5 years or a fine of Ksh 10 million or to both.¹⁹⁷ Various scholars have found this punishment to be inadequate.

While creating an offence against unconscionable conduct, it is apparent that the competition Act anticipates that there are risks to consumer welfare that may result from a merger such as the acquisition of a higher bargaining power. This is a clear anticipation of the risk that bank mergers are likely to result in an increase in the cost of credit, the risk that competition may be barred and the risk that the consumers may be left with limited choices for access to financial services. Specifically, with regard to banking, the provision against unconscionable conduct requires banks to bring any additional charges and fees to the attention of the consumer before the same is imposed in banking services.¹⁹⁸ Even though this sets a decent information standard that protects the welfare of the consumer, it is still not effective to protecting the consumer where a bank merger has already limited the choices they have with regard to accessing banking services. It is also important to note that, when investigating against the unconscionable conduct, the Act anticipates that the CAK shall not give regard to circumstances that were not reasonably foreseeable at the time of the alleged contravention.¹⁹⁹ The application of this provision to the banking sector might absolve many bank mergers from liability considering the extent to which some of the effects of the mergers are not foreseeable in the hindsight. As

¹⁹³ Section 56(4), *the Competition Authority of Kenya*

¹⁹⁴ Section 63, *the Competition Authority of Kenya*

¹⁹⁵ Section 68, *the Competition Authority of Kenya*

¹⁹⁶ Section 69, *the Competition Authority of Kenya*

¹⁹⁷ Section 70, *the Competition Authority of Kenya*

¹⁹⁸ Section 56(3), *Competition Act, 2010.*

¹⁹⁹ Section 56(6)(a), *Competition Act, 2010.*

such, this exemption waters down any mitigation that the offence created under section 56 ought to have extended to the risks of barring competition, increasing the cost of credit and limiting consumer choice as well as access to banking services.

3.3.1.3 Confidentiality of Customer Information

The Competition Act provides for the protection of the confidentiality of consumer information in the following ways. First, the Act anticipates that information that shall be submitted to the authority shall be treated as confidential where the party submitting the same has made a claim for confidentiality.²⁰⁰ As such, the party submitting the same has to satisfy the authority as to confidentiality of such information before it is granted and marked as confidential material.²⁰¹ Further, in the event the CAK is not willing to grant confidentiality, the party that submitted such information is at liberty to withdraw the same within 14 days of the decision of the CAK.²⁰²

Information disclosure came up in the acquisition of the low capitalized Equatorial Bank by Mwalimu Sacco, an institutional savings and credit co-operative society, in its quest of expanding beyond Sacco sector to mainstream banking services.²⁰³ The acquisition was to enable the Sacco to collect deposits from beyond its membership, access funds at lower rates, venture into trade finance and offer its members ATM services. The acquisition led to the main shareholders of the Sacco, the 75000 teachers, crying foul over the acquisition, which they claim was carried out without proper due diligence and which has put their hard earned savings at risk. Mwalimu's Sacco's initial investment of Ksh2.4 billion (\$21.81 million) in the bank has since been diluted to as low as Ksh1.2 billion (\$10.9 million).²⁰⁴ The acquisition was objected to by several other stakeholders like the Co-operative Alliance of Kenya over the credibility of the entire transaction, arguing that due process was not followed.²⁰⁵ Through a petition tabled in parliament, the teachers body sought the intervention of the Central Bank of

²⁰⁰ Section 20(3), Competition Act, 2010.

²⁰¹ Section 20(5), Competition Act, 2010.

²⁰² Section 20(7), Competition Act, 2010.

²⁰³ Kunga M, 'The Effect of Acquisition Strategy on SACC Performance in Kenya: A Case of Mwalimu National SACCO' Unpublished MBA Thesis, Daystar University, 2021, XI.

²⁰⁴ Kunga M, 'The Effect of Acquisition Strategy on SACC Performance in Kenya: A Case of Mwalimu National SACCO', XI.

²⁰⁵ Madzo M E, 'Effects of an Acquisition on the Financial Performance of a Firm: Case of Mwalimu National SACCO and Spire Bank, Unpublished MBA Thesis, United States International University-Africa, 2020, IV

Kenya (CBK), noting that Spire Bank has since 2014 been dogged with financial challenges.²⁰⁶ However, even with the opposition the deal was sanctioned by the Central Bank of Kenya, Competition Authority of Kenya and the Sacco Societies Regulatory Authority.²⁰⁷

While the provision for confidentiality of consumer information at its application is plausible, it is still important to appreciate the unique role that information plays in mergers in the banking sector. First, it is important to note that confidentiality of consumer information is likely to be abused by entities that emerge out of bank mergers. As a result of merger transactions, the resulting entity is able to have access to a significant portion of the market's consumer information that must have been held by the other target entities prior to the merger. In this regard, the resulting entity does not only amass market power from an economics perspective, the entity also acquires information-based market power. This creates a level of information asymmetry that the bank is in a position to abuse at the expense of consumers. It is apparent that the Act does not anticipate such outcomes and therefore leaves this risk alive to the detriment of the consumers of banking services.

3.3.2 Appeals to the Competition Tribunal

The structure and provision for the Competition Tribunal under the Act is something worth taking note for. The Competition Act establishes a Competition Tribunal established to hear and determine appeals that arise from decisions made by the Tribunal.²⁰⁸ However, a closer look at the persons that may exercise the right to appeal to the decisions of the Authority, the following is observable. The Act only anticipates that persons entitled to appeal in the tribunal include persons directed to discontinue certain trade practices; those issued with a stop or desist order; those conditionally allowed to continue with some trade practices; and those ordered to pay pecuniary penalties or fines.²⁰⁹

What is apparent from the profile of the persons who have standing before the tribunal is that they represent business entities. To this extent, the Competition Act only anticipates that it is

²⁰⁶ Madzo M E, 'Effects of an Acquisition on the Financial Performance of a Firm: Case of Mwalimu National SACCO and Spire Bank, IV

²⁰⁷ Madzo M E, 'Effects of an Acquisition on the Financial Performance of a Firm: Case of Mwalimu National SACCO and Spire Bank, IV

²⁰⁸ Section 71, Competition Act, 2010.

²⁰⁹ Section 73(a), Competition Act, 2010.

only business entities that can be aggrieved by the decisions of the CAK. This is a false and legally risky presumption. Considering that the authority makes decisions with respect to approving mergers and acquisitions which are also likely to affect consumers, it is legally risky for the Act to leave consumers without an avenue to express dissatisfaction with the decision of the CAK to approve a bank merger that is likely to affect their interests. In this regard, it is clear that the Act does not appreciate the risks incidental to transactions such as bank mergers to which consumers are highly vulnerable to the extent that it does not confer standing to this group of stakeholders to challenge the decision of the CAK to approve a merger.

3.3.3 *Competition (General) Rules, 2019*

The Competition (General) Rules of 2019 were introduced in 2019 to implement certain changes in MNAs deals.²¹⁰ Some of the changes included the scope of MNAs transactions, merger fees, categories and notifications of merger restrictive trade practices and control of mergers. Subsequently the rules have categorized mergers into notifiable mergers, mergers excluded from notification and mergers that require exclusion application. The rules have delimited what constitutes a merger transaction to exclude joint ventures, any arrangement with creditors that does not include change of control, acquisition of assets where the acquirer holds less than 20% of voting rights.²¹¹ Mergers that require notification are those with a minimum combined turnover or assets of Ksh.1 billion and or assets of over Ksh 500 million.²¹² Second are mergers where turnover of the acquirer is Ksh. 1 billion so long as it is within the same market segment. Lastly are mergers that meet the requirements of CCC. So long as the notification threshold and two thirds or more of the turnover or assets are either generated or located in Kenya.²¹³

The 2nd type of mergers are those that are excluded from notification or approval of the authority, particularly those whose combined turnover or assets of the merging parties is less than Ksh 500 million.²¹⁴ They are also mergers that meet the COMESA Competition notification threshold and two thirds turnover or assets are not either generated or located in

²¹⁰ Legal Notice 176 of 2019.

²¹¹ Section 6(1), *Competition (General) Rules, 2019*

²¹² Part II, *Competition (General) Rules, 2019*.

²¹³ Section 10, *Competition (General) Rules, 2019*

²¹⁴ Section 9, *Competition (General) Rules, 2019*

Kenya.²¹⁵ Third category of mergers that do not require notification are those taking place outside Kenya but not have any connection with the country.²¹⁶ Fourth category of mergers are those requiring exclusive notification are either those with combined turnover or assets of between Ksh.500million-Ksh 1 billion. For this category, an exclusion application fee is required to be submitted to CAK.²¹⁷

Despite these categorizations of mergers that are subject to exemptions and otherwise, it is important to appreciate that the effects of mergers in the banking sector have effects that are widely spread across the national economy. To this end, they are heavily impactful and should all be subjected to scrutiny without exemptions. This is considering the risk of creeping mergers that was identified in the previous chapter. This refers to small mergers that do not inherently raise market power but eventually do so in the long run. Therefore, in anticipation of this risk, it would be important for the Competition Act to exempt bank mergers from such exemptions. This is considering that thresholds that are merely monetary in nature are not sufficient to warrant a determination of the kind of bank mergers that have to be brought to the attention of the authority owing to the risk of creeping mergers in the banking market.

3.4 Regional Competition Regulations

Regional MNAs regulations provide an extra layer of scrutiny for cross border merger transactions designed to protect bank customers and members within the East African Community region. This is pursuant to Kenya's accession to the East African Community that places certain obligations for cross border mergers and related dispute resolution mechanisms. Two frameworks are relevant and considered under the East African Community Competition Act and COMESA guidelines.

3.4.1 The East African Community Competition Act

The East African Community Competition Act has set out to promote and protect fair competition in the Community, to provide for consumer welfare, to establish the East African Community Competition Authority (CCA).²¹⁸ The EACCA places certain obligations on Kenya for being a member of the EAC Treaty. Pursuant to Article 2(5)(6) of Kenya's

²¹⁵ Section 8, *Competition (General) Rules*, 201

²¹⁶ Section 7, *Competition (General) Rules*, 2019

²¹⁷ Section 9(2), *Competition (General) Rules*, 2019

²¹⁸ Preamble, *the East African Community Competition Act*, 2006.

Constitution, all treaties and Conventions ratified by Kenya become part and parcel of Kenya's legal system. In view of this, the EAC Competition Act (EACCA) applies to all mergers of a cross border nature. The essence of EACCA is the enhancement of competition for regional firms while they compete in the world market using some of the tools at its disposal like the East African Community Vision 2050.²¹⁹ The Act establishes the East African Competition Authority (CCA)²²⁰ to implement and enforce the EACCA and as a dispute resolution mechanism under the Act.

The EACCA provides regulations for all cross border mergers within the EAC region requiring consistent notification to the CCA.²²¹ This is in sharp contrast to notification under CAK requiring each of the merging entities to notify the authority in writing.²²² Only the notification of the acquiring entity is required under the EACCA.²²³ This makes the EACCA notification framework more efficient as it avoids duplicity of notifications enshrined in the CAK. Further, Kenya's CA places no obligation of confidentiality on parties to the merger, the CCA is mandated to ensure its agents do not disclose confidential information.²²⁴ Breach of the obligation of confidentiality constitutes a criminal offence punishable under the EACCA.

3.4.2 COMESA Competition Rules

The COMESA Competition Regulations were gazetted in 2013. They require any mergers that have a regional component to be notified to the COMESA Competition Commission (CCC). However, does set a threshold that determines which mergers to be notified and which ones should not.²²⁵ The absence of a threshold is an approach that the Kenyan national legislation should emulate especially with respect to the banking sector as it is anticipative of creeping mergers that pose long term risks to the consumers of banking services.

²¹⁹ East African Community, *EAC Vision 2050*

²²⁰ Section 37, *EACCA*.

²²¹ Section 11, *EACCA*.

²²² Section 46, *EACCA*.

²²³ Section 12, *EACCA*.

²²⁴ Section 25, *EACCA*.

²²⁵ Ochieng J, Oraro C, Nyakundi S and Kamara P, *Corporate MNAs*, Oraro and Company Advocates: Nairobi, 2021, 6.

3.5 Consumer Protection in Kenya

3.5.1 Consumer Protection Act

The Consumer Protection Act (CPA)²²⁶ was enacted as the implementation statute of Article 46 of the Constitution. The main objective of the legislation is the protection of consumers, prevent unfair trade practices in the consumer transactions and to provide for matters connected with the consumer protection.²²⁷ First, it is important to note that the Consumer Protection Act is a very generic enactment to the extent that it provides for consumer protection with respect to all kinds of consumers in different markets.

Considering that the banking sector is regulated separately, the Consumer Act does not appear to be effective in dealing with consumer concerns that accrue to consumers as a result of bank mergers. For instance, when it comes to the procedures for enforcement of consumer rights, the Act provides for remedies such as cancellation of consumer agreements²²⁸ and action in court.²²⁹ Further, the enactment also makes specific provisions with regard to credit agreements and how the rights of consumers can be protected in the course of credit arrangements between borrowers and lenders.²³⁰ However, these provisions are not made in light of anticipating any risks that could arise out of bank mergers and acquisitions. Further, with regard to unfair practices, the enactment makes provisions against practices such as false representation,²³¹ renegotiation of prices²³² and unconscionable representation;²³³ both of which are not essential in protecting against the risks and concerns that arise specifically from bank mergers.

3.5.2 Sector Specific Consumer Protection Laws

A number of sector specific regulations come into play depending on whether the Company or ban subjected to MNAs transactions is public or private. Considering that this study reviews impact on banking customers, the Banking Act, CBK Act and Consumer Protection Act are considered.

²²⁶ No.46 of 2012

²²⁷ Preamble, *Consumer Protection Act*

²²⁸ Consumer Protection Act No. 46 of 2012, Section 78.

²²⁹ Consumer Protection Act No. 46 of 2012, Section 84.

²³⁰ Consumer Protection Act No. 46 of 2012, Part VII.

²³¹ Consumer Protection Act No. 46 of 2012, Section 12.

²³² Consumer Protection Act No. 46 of 2012, Section 14.

²³³ Consumer Protection Act No. 46 of 2012, Section 13.

3.5.2.1 The Company's Act

The Company's Act introduces another new layer of approval for the regulation of public companies that seek MNAs. Directors of merging companies are required to prepare a terms of scheme for any proposals that seeks a merge.²³⁴ The details of the scheme should include: share exchange ratios and the cash to be paid.²³⁵ Directors of merging firms are similarly required to lodge the terms together with the proposals to the Registrar of Companies.²³⁶ This means that Company Act by adding an extra layer of scrutiny for banks as public companies should prepare terms of proposals and subsequent registration with the Registrar of Companies to ensure only those meeting specified requirements get the necessary approval. .

3.5.2.2 The Banking Act

The Banking Act (BA)²³⁷ regulates institutions carrying on banking business²³⁸ to ensure that only those meeting strict regulatory requirements are licensed. The institutions licensed under BA shall not amalgamate, transfer their assets or liabilities without the approval of the Cabinet Secretary for Finance. In the context of banks that undergo MNAs, the Banking Act has restricted the percentage of shareholding a particular individual or firm should hold.²³⁹ For that matter, only banking institutions, the government of Kenya, foreign governments, state corporations' foreign companies licensed to operate as financial institutions and non-operating holding companies approved by the CBK. The latter is allowed to hold more than 25% of the share capital of a financial institution. Bank shareholders are protected from of MNAs as it is a requirement under the Act that any form of merger should be confirmed by the majority during the annual general meeting (AGM).²⁴⁰ However, this does not take to account the interests of consumers who are important stakeholders that are likely to be affected by the prospective MNA transaction.

²³⁴ Section 934, *Company Act*, 2015

²³⁵ Section 934, *Company Act*, 2015

²³⁶ Section 935, *Company Act*

²³⁷ *The Banking Act*, Cap 488 of the Laws of Kenya

²³⁸ Preamble, *the Banking Act*

²³⁹ Section 13(1)(e), *Banking Act*, 2015

²⁴⁰ Section 9(4), *Banking Act*, 2015

3.5.2.3 Central Bank of Kenya Act

The Central Bank of Kenya (CBK) is established by the CBK Act²⁴¹ and tasked with among other things formulating monetary policy and promoting price stability²⁴² in the financial system.²⁴³ It should be noted that MNAs of banks in Kenya were consummated for purposes of meeting certain minimum regulatory requirements set by the CBK for purposes of expanding their market.²⁴⁴ In this category was the merger between Equitorial Commercial Bank Limited and Southern Credit Banking Credit. As well as the merger between East African Building Society Bank Limited with Eco Bank Limited.

The CBK has also introduced Prudential Guidelines on Mergers, Amalgamations and Transfer of Assets and Liabilities²⁴⁵ as an extra layer of customer protection that would ensure effective regulation and efficiency of operation of banking business in Kenya. The scope of the guidelines is to all commercial banks that seek to enter into a merger are required to seek not only the approval of CBK but should it up with information disclosure and a letter of approval from CAK. Only then would such banks get the approval of CBK. However, considering that disclosure of information under CAK and CBK vary, it would be ideal to synchronize the two disclosure formats for purposes of uniformity. This is an effective regulatory coordination mechanism that facilitates cooperation between two essential authorities that are important for the regulation of MNAs especially in the banking sector. However, more regulatory coordination mechanisms can be established to an extent that ensures collaboration between the two regulators to determine critical questions such as proper market identification with proper tools for establishing transactional complementary as an important tool in evaluating the extent to which bank mergers bar competition as demonstrated in the previous chapter.

3.5.2.4 Capital Markets (Takeover and Merger) Regulations 2002

CMA regulations provide steps on approval requirements for takeovers of controlling interest in listed companies.²⁴⁶ The approval requirements in this regulations are not exclusive of

²⁴¹ *The Central Bank of Kenya Act*, Cap 491 of the Laws of Kenya

²⁴² Section 4(1), *Central Bank of Kenya Act* (Cap 491).

²⁴³ Preamble, CBK Act

²⁴⁴ Minister of Finance Directive of 2008. Proposed raising of minimum shareholding of banks from Ksh 250 million to Ksh 1 billion by 2012

²⁴⁵ Contained in CBK/PG/12

²⁴⁶ Preamble, *the Capital Markets Authority Act*

regulatory requirements contained in the Competition Act but are complementary along with many others. For that matter the acquiring bank would similarly have meet the approval requirements of the CMA, CA, the Banking Act as well as the CBK Act.

The CMA prohibits the issuance of more than 25% or more of share capital of a subsidiary of a listed company or 10% or more of the share capital of a subsidiary that has contributed to 25% or more of the average turnover in the last three financial years of the listed company without full disclosure. Further, regulations of a company with 25% controlling share is in a listed company can only acquire up to 5% in any one year of up to a maximum of 50%. The CBK has further limited ownership of more than 5% of share capital of a financial institutional unless it is exempt by the Banking Act.

3.6 Conclusion

This chapter has critically reviewed the legal framework on bank mergers in Kenya and established the following. That the Constitution of Kenya, 2010 establishes a solid grounding regarding the protection of consumers of bank services against the legal risks and concerns that have been identified in the previous chapter. However, the statutes implementing the constitutional foundational principles on the protection of consumer rights, albeit plausible, seem to fall short in various aspects. For instance, the existing statutes do not provide more comprehensive regulatory coordination mechanisms to facilitate a proper review of the banking market and the risk of bar to competition that bank mergers could have. The statutes also do not anticipate certain complex emerging risks such as information based market power and the proliferation of creeping MNAs that might escape the radar of the regulators owing to the generally established thresholds set out in the Acts. Further, consumers of banking services are not presented with the best mechanisms to enforce the remedies that accrue to them, for instance, by virtue of the position that they do not enjoy standing before the Tribunal. The subsequent chapter, therefore, conducts an analysis while benchmarking best practices that have been adopted in other countries to effectively respond to the legal risks and concerns that afflict bank mergers.

Chapter 4: An Analysis of Best Practices in the Anticipation and Mitigation of Legal Risks and Concerns that Arise Out of Bank Mergers

4.1 Introduction

This chapter conducts an analysis of the role of the law and regulatory institutions in protecting consumers in the banking sector from the legal risks and consumer protection concerns that arise from bank mergers. In this regard, this chapter benchmarks best practices from different jurisdictions to establish the legal mechanisms and regulatory approaches that regulators have taken in these jurisdiction to anticipate and mitigate against these legal risks and consumer protection concerns.

4.2 Striking a Balance between Market Power and Efficiency Gains

The second chapter of this study identified the increase in cost of lending and resulting financial exclusion of vulnerable consumers as one of the legal risks and consumer concerns that arise from MNA transactions. The subsequent chapter also established that the Kenyan legal framework does not comprehensively establish a regulatory mechanism that empowers regulators to ensure that the costs of increased market power of merged entities do not outweigh the efficiency gains incidental to the merger to an extent that forces the emerging entity to increase the cost of lending. Previous studies have already pointed to the finding that large banks in Africa tend to use their market power to levy higher interest rates as they grow bigger through MNA transactions.²⁴⁷ This is based on the finding that there are thresholds beyond which the increase in bank size results in diseconomy of scale and resulting inefficiency.²⁴⁸ As such, it has become difficult to realize financial inclusion through mergers and acquisitions as the risk for financial exclusion is higher with the increase in the size of banks.²⁴⁹ Therefore, it is paramount to investigate the best practices that have been adopted or proposed with respect to dealing with the risk that arises from this concern.

²⁴⁷ Asongu, SA & Odhiambo, NM 'Size, efficiency, market power, and economies of scale in the African banking sector' 2019 *Financial Innovation* Vol. 4. Retrieved from: <https://jfin-swufe.springeropen.com/articles/10.1186/s40854-019-0120-x#citeas>

²⁴⁸ Asongu, SA & Odhiambo, NM 'Size, efficiency, market power, and economies of scale in the African banking sector' 2019.

²⁴⁹ Asongu, SA & Odhiambo, NM 'Size, efficiency, market power, and economies of scale in the African banking sector' 2019.

From a conventional standpoint, it is anticipated that mergers involving large banks that generate more market power are supposed to increase consumer welfare. This is premised on the argument surrounding the price effect of market power that is dominated by the consumer's preference for a larger bank.²⁵⁰ This implies that such as merger should result in the reduction in the cost of lending owing to the efficiency of gains attributed to cost savings and other savings of administrative costs as a result of the MNA transactions. However, in the second chapter, it was established that this is not necessarily the case in all bank mergers and acquisitions. As such, there is often a possibility that the costs incidental to the acquisition of market power might outweigh the inherent efficiency gain with the effect of causing unanticipated outcomes such as an increase in the cost of lending that was not anticipated in the first place. This is based on empirical findings that even though cost efficiencies increase with increase in the size of the bank, the same is set to decline as the bank gets larger.²⁵¹

An empirical study conducted in 2013 to some extent also informs the role of the law in dealing with the risk of increased cost of lending that occasionally results from bank mergers. In the empirical study, it was established that cost efficiencies play a critical role in mergers between small banks.²⁵² This implies that there are lower chances that mergers between small banks would result in an increase in the cost or price of credit. However, it was further reported that for mergers between two large banks, the market power effect exhibits dominance over the cost efficiencies effect.²⁵³ This implies that mergers between large banks pose a relatively higher risk of increase in the cost of lending. This, therefore, points regulators to the focal point at which they have to exercise additional scrutiny when it comes to ensuring that bank mergers do not result in the increase in the cost of credit to the detriment of vulnerable consumers.²⁵⁴ In this regard, the emerging best regulatory practice is to subject mergers between large banks to reviews that require the merging banks to demonstrate that they shall take steps to ensure

²⁵⁰ Kumar, P. 'Market power and cost efficiencies in banking' October 1, 2013 Retrieved from: <https://capcp.la.psu.edu/capcp/wp-content/uploads/sites/11/2020/07/PKumarjmp.pdf>

²⁵¹ Kumar, P. 'Market power and cost efficiencies in banking' 2013 p. 33.

²⁵² Kumar, P. 'Market power and cost efficiencies in banking' 2013 P. 34.

²⁵³ Spierdijka, L & Zaourasa, M. 'Measuring banks' market power in the presence of economies of scale: A scale-corrected learner index' 2018 *Journal of Banking & Finance* Vol. 87.

²⁵⁴ Blonigen, BA & Pierce, JR 'Evidence for the effects of mergers on market power and efficiency' 2016 *Finance and Economics Discussion Series* No. 82.

that the domination of market power over efficiency gains in their mergers shall not warrant them to increase the cost of credit at the expense of vulnerable consumers.

4.2.1 Efficiency Gains as a Criterion for Merger Control

One of the best practices that have been alluded to towards striking the balance between market power and efficiency gains in Europe involves taking to account efficiency gains in horizontal mergers and balancing them against the anti-competitive effects that could result from the merger. This is a tool for integrating efficiency standards onto merger regulations. It involve empowering the regulator with the discretion to take efficiency gains into account when approving mergers.²⁵⁵ One of the practices that has attracted debate in Europe in this regard is a regulatory tool known as the efficiency defense. This is a requirement in the law that the regulators should be able to approve mergers even if it is established that the merger might impede competition – provided that the entities proposing the mergers have demonstrated efficiency gains.²⁵⁶ This approach has attracted heavy criticism that such a practice might result in corrupt practices that create an environment where mergers are approved based on corporate and political lobbying.²⁵⁷ Even so, it has also been argued that sometimes the efficiency gains in appear to solve the competition problem to the extent that they result in price reduction for the benefit of consumers. Therefore, it would suffice to infer that even though the efficiency defense might not be applicable to other sectors, it is a regulatory tool that could be effective in the banking sector. As long as proponents are able to demonstrate that their merger will lead to price reduction with regard to credit, this is already a plausible outcome that upholds consumer welfare.

4.3 Regulation of Information-Based Market Power

The previous chapters have already established that one of the legal risks and consumer concerns that emerge from bank mergers is the acquisition of information-based market power. Upon evaluating the Kenyan legal framework, it has also been established that the prevailing

²⁵⁵ Roller, LH; Stennek, J & Verboven, F. 'Efficiency gains from mergers' 2000 *WZB Discussion Paper* No. FS IV 00-09 Retrieved from: <https://www.econstor.eu/bitstream/10419/51032/1/322768578.pdf>

²⁵⁶ McIver, T & Heemsoth, AM, 'Merger control in the United Kingdom: Overview' Retrieved from: [https://uk.practicallaw.thomsonreuters.com/0-500-7317?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/0-500-7317?transitionType=Default&contextData=(sc.Default)&firstPage=true)

²⁵⁷ Strohm, A. 'Efficiencies in merger control: All you always wanted to know and were afraid to ask' Retrieved from: <https://ec.europa.eu/dgs/competition/economist/strohm3.pdf>

regime does not anticipate complex risks that emanate from information based market power that arise from bank mergers in Kenya. Even so, this is a consumer concern that bears heavy risks that cannot be wished away in the current information age. It is already outright that the reinforcement of the cycle between data and the size of a company results into inevitable concerns regarding market power.²⁵⁸ This is considering that such information-based market power is likely to give merging banks the ability to manipulate the data they have acquired to maintain prices above competitive levels or reduce the quality of their services below competitive levels without experiencing any consequences.

The concerns arising out of information-based market power are founded on the premise that merging banks often maintain independent large information systems and data sets. As such, it is anticipated that the end of an MNA transaction could create give the emerging entity a competitive advantage owing to the market power it acquires following the resultant data set.²⁵⁹ Therefore, there are fears that such market power is likely to empower banks to control the market price and as a result create conditions that make it impossible for new prospective entrants to join the market.²⁶⁰ Therefore, the extent to which banks are able to collect and process large amounts of data²⁶¹ warrants the need for regulators to start looking into the concerns that arise with respect to the banking market as well as the digital market over which digital financial services are undertaken.

Banking services offered in Kenya today are characterized by digital financial services which exist over a distinct digital market. It is apparent that bank MNASs – to the extent that they involve integration of such information within the digital markets – create concerns regarding the market power that arises from such transactions. In the prevailing information age characterized with big data, competition regulators have reported experiencing difficulties in

²⁵⁸ Veldkamp, L & Eeckhout, J. ‘The role of data in creating market power’ August 15, 2022 *CEPR* Retrieved from: <https://cepr.org/voxeu/columns/role-data-creating-market-power>

²⁵⁹ Fedorovici, SD ‘The role of data in mergers: The need to define a relevant market for data’ May 15, 2018 *University of Oslo*.

²⁶⁰ Berger, AN; Bonime, SD; Goldberg, LG & White, LJ ‘The dynamics of market entry: The effects of mergers and acquisitions in the banking industry’ 2004 *Journal of Business* Vol. 77(4). P. 797.

²⁶¹ Torngren, O. ‘Mergers in big data-driven markets – Is the dimensions of privacy and protection of personal data something to consider in merger review?’ 2017 *Stockholm University* Retrieved from: <https://su.diva-portal.org/smash/get/diva2:1186978/FULLTEXT01.pdf>

assessing markets especially with regard to digital markets.²⁶² Information based market power, therefore, emerges as a digital competition issue that adds on to the economic competition issues that are already within the radar of regulators. With data being considered the new oil, it has been established that data makes it possible for banks to acquire market power even if they are to sell their products and services at the price of zero.²⁶³ As such, it is an evolving issue that cannot be ignored by legislators and regulators when reviewing MNA applications.

There have been different best practices that have been proposed in light of focusing and responding to such digital competition issues as information based market power. The first best practice that is proposed by the OECD is the need for regulators and the relevant authorities to refine the scope within which they undertake the analysis of market power to take into account digital competition issues that arise out of possession and ownership of significant market information especially after an MNA transaction.²⁶⁴ While the OECD proposes a simple-to-apply criteria, it also highlights a few forms in which market power exists with respect to information and data held by banks. These include platform power and intermediation power, bottleneck power, and portfolio power.

For instance, regulators ought to be able to assess for platform power and intermediation power²⁶⁵ in order to establish the extent to which the resulting entity is able to manipulate the information data set that emerges from the MNA transaction to create a very powerful platform with intermediation power in the market. This means power that is created when each of the merging entities offer exclusive access to a subset of consumers that firms on the other side of the platform require.²⁶⁶ The detection of such platform and intermediation power has been adapted in German competition law. According to the German legislation, during the assessment of dominance, the regulator is required to take into account the importance of intermediary services provided by the undertaking with respect to accessing supply and sales

²⁶² Schoch, DS 'Mergers and acquisitions in the data economy' 2020 *SSRN* Retrieved from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686247

²⁶³ OECD, 'The evolving concept of market power in the digital economy 2022 *OECD Competition Policy Roundtable Background Note* Retrieved from: <https://www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf>

²⁶⁴ OECD, 'The evolving concept of market power in the digital economy 2022

²⁶⁵ Osoro, J & Kiplagat, J 'Market power and intermediation efficiency in Kenya: Blind spots and empirical clarity' may 2020 *Kenya Bankers Association Center for Research on Financial Markets and Policy* Retrieved from: <https://www.kba.co.ke/wp-content/uploads/2022/05/WPS-39-2020.pdf>

²⁶⁶ OECD, 'The evolving concept of market power in the digital economy 2022.

markets.²⁶⁷ On the other hand, with regard to portfolio power, the regulator should be able to assess the extent to which an MNA transaction empowers the resulting entity with sufficient consumer information to expand the range of products or services it offers in the market to an extent that is anti-competitive.²⁶⁸ Further, the role of the regulator is to evaluate the nature of the digital business conducted between the merging entities to establish the extent to which the resulting entity involves the tying of digital services together in a manner that extends the potential portfolio of the resulting entity in a manner that suppresses competition.

4.4 Scrutiny of Creeping Mergers and Acquisitions

In the previous chapters, one of the legal risks and consumer concerns that have been attributed to bank mergers is creeping mergers and acquisitions. These have been flagged as small acquisitions that involve gradual purchase of other entities on the open market in a gradual manner until a controlling interest is established. A critical review of the Kenyan legal framework in the previous chapter has also identified and established that the Kenyan legal framework as it is does not anticipate or establish any mitigating mechanisms against the risk that is likely to be caused by creeping mergers and acquisitions in the banking sector. As such, it has been established that the role of the law in this regard is to establish mechanisms that make it possible for regulators to monitor the extent to which acquirers gain market power through several small transactions that do not *prima facie* lessen competition substantively or do not trigger the application of the Competition Act and other relevant laws and regulations.

The issue identified with creeping acquisitions and the need to regulate the same is relatively new especially in the banking sector. However, jurisdictions such as South African have been taking steps towards making amendments to their Competition Act to include provisions for the regulation of creeping mergers. The move is based on previous concerns that arise as a result of market concentration that resulted from the merger of private hospitals in the country.²⁶⁹ In the absence of the appropriate regulations in the country, the country's

²⁶⁷ Act Against Restraints of Competition, Section 18.

²⁶⁸ OECD, 'The evolving concept of market power in the digital economy 2022.

²⁶⁹ Rhee, J. 'Creeping acquisitions in Europe' 2014 *Harvard Law School Forum on Corporate Governance* November 5, 2014 Retrieved from: <https://corpgov.law.harvard.edu/2014/11/05/creeping-acquisitions-in-europe/>

competition authorities approved these mergers that following gradual accumulation of market power led to market concentration in the healthcare industry.

In 2017, the Competition Amendment Bill was proposed by the Government of South Africa for legislation. Part of the key amendments introduced by the Bill reflects one of the best practices that can be adopted with respect to anticipating and mitigating against the risk posed by creeping mergers. This was to be achieved through the introduction of an additional provision under Section 12B, subsection 3 with the following effect. That parties to a merger or an acquisition regardless of its size would be required to disclose all merger activities that they have been engaged in over the preceding years in order to establish the markets or areas in which creeping acquisitions are being introduced.²⁷⁰ Based on such disclosures, it was anticipated that the relevant competition authorities would be in the best position to investigate and consider the nature of the merger for the potential risk of the effects of creeping mergers and acquisitions. The role of the regulator in this regard is to consider and follow the conventional process of assessing market power as well as any other competition issues. However, this assessment is only conducted in light of the consideration of a series of transactions that the merging entities have previously engaged in as opposed to the single transaction they intend to undertake.

Even though the prevailing Competition regime in Kenya provides for the requirement of notification with respect to small mergers, this additional provision will reinforce the notification requirement. This is considering that the notification in this regard is not only of the prospective intentions to merge but also of the merging activities that have been undertaken by the parties in the preceding years. This will make it possible for the CAK to detect creeping mergers that are likely to result in market concentration when considered cumulatively over time. Even so, it is important to note that these provisions introducing scrutiny of creeping mergers were not successfully legislated into the South African Competition Act. However, it

²⁷⁰ Bosiu, T. 'Merger control provisions: The case of creeping acquisitions' May 30, 2018 *University of Johannesburg* Retrieved from: <https://www.competition.org.za/cred-blog-competition-review/2018/5/30/merger-control-provisions-the-case-of-creeping-acquisitions>

is important to note that the same practice has been effectively maintained in other jurisdictions such as Finland.²⁷¹

There are a few concerns that arise from the provision for scrutiny of creeping mergers that could be attributed to the failure of the amendment bill seeking to introduce the same in South Africa.²⁷² The first concern relates to the preferable period over which the scrutiny ought to be undertaken. This is considering the implications that exist between allowing a shorter period or an alternatively longer period of scrutiny. For instance, it is argued that a shorter period – such as three (3) years which was proposed in South Africa’s Competition Amendment Bill – is likely to result in a moral hazard. This implies that the parties intending to merge might delay their transaction while awaiting for the statutorily prescribed period to lapse before proceeding with the merger.²⁷³ Hence, if their last merging activities fall outside the statutorily prescribed period, then they get to escape the creeping merger scrutiny. As such, the provision becomes ineffective to the extent that previous MNA activities by the entity escape the scrutiny of the regulator despite the glaring risk of a creeping merger.

On the other hand, it is also argued that a longer duration might also not be effective in helping the regulator successfully avert the risks of creeping mergers. The argument is anchored on the premise that market dynamics are likely to change over time.²⁷⁴ This means that the consumer preferences and technological conditions in the markets also continue to change. As such, it would be deemed unfair to include a provision for a period that is too long to an extent that can complicate market definition and analysis. This is considering that the market has not been the same over the period and it is not fair to analyze it as if it has remained constant. This therefore calls for the need to implement this best practice in light of taking to account a reasonable

²⁷¹ Enriques, L & Gatti, M. ‘Creeping acquisitions in Europe: Enabling companies to be better sage than sorry’ 2014 *European Corporate Governance Institute Working Paper No. 264*.

²⁷² Robb, G. ‘Creeping mergers – should we be concerned? A case study of hospital mergers in South Africa’ Retrieved from: <http://www.compcom.co.za/wp-content/uploads/2014/09/Creeping-mergers-conference-paper-Final.pdf>

²⁷³ Clarke, J. “Submission to the Competition and Consumer Policy Division, the Treasury, on discussion paper: Creeping acquisitions’ 2008 Retrieved from: <https://static1.squarespace.com/static/5da3d2a597390948a4b98cb8/t/5db38d69820b8d29022d05e6/1572048235615/JC-2008creepingacquisitions.pdf>

²⁷⁴ Bell, A. ‘Australia: merger law reform: “creeping acquisitions”’ October 8, 2008 *Norton Rose Fulbright* Retrieved from: <https://www.mondaq.com/australia/antitrust-eu-competition-/67152/merger-law-reform-creeping-acquisitions>

period within which creeping merger scrutiny ought to be undertaken. The role of the legislators in this regard is to find a balance between averting the moral hazard that is likely to play out when a shorter period is put in consideration; and the complication of market definition in the event a longer period is taken to account.

4.5 Third Party Rights to Appeal Merger Decisions

It has been established in the previous chapters that the Competition regime in Kenya and the establishment of the Tribunal under the Act does not anticipate that individual consumers possess the right to challenge the decisions of the CAK. This is considering that the profile of persons with locus as anticipated under the act only reflect business entities. However, it is important to note that all risks and concerns that arise to consumers with respect to bank mergers cannot be effectively mitigated if the same consumers (in their capacities as third parties) are not able to enforce their rights and interests. As such, it is essential to look into a practice in merger control that provides for the admissibility of third parties to appeal merger decisions made by the relevant authorities.

So far this practice has been adopted in Europe with respect to the decisions of the European Commission with respect to merger applications. Pursuant to the EC laws, third parties have the locus to challenge decisions that are addressed to other persons in the event such decisions bear a direct and individual concern to the third parties.²⁷⁵ This study has substantively pointed at the extent to which bank MNAs affect consumers based on the legal risks and consumer protection concerns that potentially arise out of bank mergers. With regard to this practice in Europe, it is important to note that the standard or threshold that has been set for the third party right is based on the demonstration of direct and individual concern with respect to the decision issued.²⁷⁶ This is an important filter to the regulatory tool that prevents the opening of floodgates to an extent that would make MNA reviews litigious. In this regard, the third party

²⁷⁵ Aleshkina, L. 'Third party rights to appeal merger decisions according to EC and Swedish rules' 2007 *Uppsala University* Retrieved from: https://www.konkurrensverket.se/globalassets/dokument/kunskap-och-forskning/uppsatstavling/uppsatser/uppsats-2008_liana-aleshkina.pdf

²⁷⁶ Aleshkina, L. 'Third party rights to appeal merger decisions according to EC and Swedish rules' 2007

is tasked with the burden of demonstrating the immediacy of the effects that the decision to approve the merger is likely to have on them if it stands.²⁷⁷

In the prevailing circumstances under Kenya's competition regime, it is apparent that the strict approach taken by the Competition Act that locks out third parties undermines the overriding objective of the Competition Act especially when it comes to protection the welfare of consumers. This is considering that the Act provides an outright provision that one of its objects is to protect consumers.²⁷⁸ As such, it is questionable whether the omission of consumers as part of those with standing to commence action or appeal decisions of the Authority before the Tribunal will assist with the realization of this objective. This could therefore be corrected by introducing fresh legislative amendments to the Act and regulations with respect to conferring locus to third parties. An alternative approach could be based on adopting judicial precedent that prevents courts from interpreting the provision on locus strictly and requiring judicial officers to be flexible enough in their interpretation of these provisions to accommodate consumers who have to demonstrate direct and individual concern.

4.6 Conclusion

The following chapter has conducted an analysis of the best practices that are essential in the anticipation and mitigation of the legal risks and consumer protection concerns that arise out of bank mergers. First, it has shed light on the practice in merger control that requires regulators to strike a balance between market power and efficiency gains from mergers and acquisitions. In this regard, it points towards the need for regulators to focus on critically reviewing mergers between large banks and imposing requirements that subject them to additional scrutiny to establish that the pursuit of their efficiency gains would not be set back by diseconomies of scale at the expense of vulnerable consumers of banking services. In the same vein, it also evaluates the utility of the efficiency defense as a regulatory tool. Second, when it comes to regulatory approaches to dealing with the anti-competitive effects of information based market power, this part points to the utility of a digital competition policy that empowers regulators to scrutinize merger applications for concerns arising out of platform and intermediation power

²⁷⁷ Linhartova, J. 'Third-party rights to appeal merger approval decisionso' April2015 *Lexology* Retrieved from: <https://www.lexology.com/commentary/competition-antitrust/czech-republic/schoenherr-rechtsanwlte/third-party-rights-to-appeal-merger-approval-decisions>

²⁷⁸ Competition Act, 2010 Section 3(b).

as well as portfolio power. Third, this chapter also looks into practices that have been adopted towards scrutiny of creeping MNA transactions. As such, it highlights the regulatory tool that empowers regulators to subject merger applications to creeping merger scrutiny which involves extending disclosure requirements for applicants to include disclosure of their merger activities in the preceding years over a period that is strategically determined as discussed above. Finally, this part highlights a regulatory tool that lies at the peak of ensuring that consumers are able to enforce against the risks anticipated with respect to bank mergers. As such, it discusses the essence of conferring individual consumers with the locus to appeal merger approval decisions as long as they can demonstrate direct and individual concerns with respect to the decision they seek to challenge.



Chapter 5: Conclusion and Recommendations

5.1 Introduction

This chapter gives the conclusion based on the findings of the research and proffers legislative, and policy recommendations that can be implemented in the current legal framework in Kenya to address the problem identified in the study and to ensure the existing gaps are adequately addressed.

5.2 Conclusions

The following study sought to investigate the legal risks and consumer protection concerns that are likely to emerge as a result of bank mergers and acquisitions in Kenya. Hence, the overriding aim of the study was to investigate the extent to which the consumers of financial services in Kenya are protected from the legal risks and anti-competitive behaviour that result from bank mergers. The findings of the study prove the hypothesis posed in the initial chapter that the prevailing regulatory framework in Kenya does not offer sufficient protection against the legal risks that bank mergers pose to the welfare of the consumers of financial services.

With regard to establishing the legal risks that consumers of financial services are exposed to as a result of bank mergers the second chapter has established the following. Among the risks and consumer protection concerns relating to bank mergers include the risk of barring competition as a result of acquisition of potential competition; the risk of increase in cost of credit where the efficiency gains of mergers start experiencing diseconomies of scale hence resulting in financial exclusion of vulnerable consumers and resort to unprotected alternatives to credit; the risk of limited access to banking services; as well as contemporary risks such as potential abuse of information-based market power and the risk of creeping mergers that eventually have substantive effect on competition despite not posing a threat at the initial instances.

Following an investigation of the extent to which the prevailing legal framework in Kenya protects consumers of financial service against these risks the third chapter established the following. First, the constitutional dispensation in Kenya establishes a strong foundation upon which all the risks that accrue to consumers as a result of bank MNAs can be protected against. However, the enactments that are entrusted with realizing the core constitutional principles of the protection of consumer rights fall short of anticipating and mitigating against these risks.

The study in this regard established that the existing consumer protection and competition regime lack strong regulatory coordination mechanisms that ensure proper coordination between the different authorities and regulators overseeing the activities of banks. It was also established that the statutes do not anticipate complex contemporary risks such as potential abuse of information based market power and the possible effects of the proliferation of creeping mergers. Further, when it comes to enforcement of consumer welfare, it was established that the statutes do not confer consumers with third party rights to appeal against merger approval decisions that are likely to affect their constitutionally protected interests.

Upon analysing and benchmarking the best practices in anticipating and mitigating the legal risks that consumers are exposed to as a result of bank mergers the fourth chapter established the following. That it is possible to anticipate and mitigate the legal risks and consumer protection concerns identified in the study through the following regulatory tools. The first is based on introducing efficiency criteria in merger control by striking a balance between market power and efficiency gains of bank MNAs when reviewing mergers by large banks. The second tool points to regulation against the potential abuse of information-based market power by introduction of a digital competition policy that empowers regulators with the right tools to detect platform and intermediation power as well as portfolio power in a prospective MNA transaction. The third tool involves additional scrutiny of MNA transactions for possibility of creeping mergers. This involves requiring applicants to submit information regarding their previous merger or acquisition activities over the preceding years. Finally, is an enforcement tool that involves the conferment of consumers with third party rights that give them locus to challenge merger approval decisions.

5.3 Recommendations

This section provides some recommendations for reforms that would ensure better protection of consumers in the event of MNAs in the banking sector in Kenya. The recommendations are thematic and based on the findings articulated in the study in the previous chapter.

Based on the foregoing conclusions, the study suggests the following recommendations;

1. The need to introduce a regulatory mechanism in the Competition Act that introduces additional scrutiny to mergers between large banks that allows regulators to grant approvals based on the conditions that the resulting entity shall take steps – and periodically report to

the regulator on the same – to ensure that the cost of their increased market power does not affect the efficiency gains of the merger to an extent that causes increase in the cost of credit. For instance, the introduction of an efficiency defense specifically applicable to bank mergers. This might however experience a drawback in terms of the challenge that would emerge with regard to categorizing and distinguishing small banks from large ones.

2. The need to develop a digital competition policy in Kenya that anticipates and mitigates against digital competition issues that emerge from concerns such as information-based market power that emerges from MNA transactions. This is meant to empower the regulators to evaluate the positioning of the merging entities in the digital banking services market to detect whether the resulting entity will acquire platform and intermediation power or portfolio power in a manner that is anti-competitive. The limitation attributable to this recommendation is that the policy may have to be established generally as a digital competition policy and not specific to the banking sector. This would therefore require significant regulatory coordination to achieve effectiveness.
3. That the Competition Act be amended with effect to introducing an additional requirement for merging parties, regardless of the size of the mergers, to disclose the merger activities they have engaged in over the preceding years, during the notification to CAK of the prospective merger. It is anticipated that this should allow the regulator with sufficient information to evaluate the effects of the series of transactions undertaken by the merging entities in order to flag creeping mergers. Despite the challenge in determining the period of scrutiny, the practice ought to be implemented with respect to a reasonable period taking to account the dynamics of market definition and possibility of moral hazards.
4. That the Competition Act and Regulations be amended with effect to conferring consumers with the inherent locus standi to move the tribunal with respect to seeking remedies based on grievances that arise from mergers and acquisitions. Even though it is anticipated that the prevailing court system should be in a position to deal with the plight of consumers with respect to mergers and acquisitions, conferment of locus before the tribunal should enable consumers to highlight their grievances at the earliest opportunity possible especially with regard to interests that the courts may not provide adequate remedies after MNA transactions have already been approved.

5. The need to establish an additional criterion with proper market identification tools for transactional complementarity that enables the CAK to efficiently distinguish the nature of the markets that bank mergers are likely to affect. This is considering that different banks offer different services and their effect on consumers cannot be categorized or confined within one market based on assumption. As such this is important for accurate and efficient identification of the risks that are likely to accrue to consumers with respect to specific segments of a market affected by the merger. This recommendation shall however be implemented more effectively if there are proper regulatory coordination mechanisms between the CBK and the CAK and other authorities that are relevant in distinguishing market segments that bank mergers are likely to affect.



Bibliography

Books

Bank for International Settlements, Basel III: Finalising Post Crisis Reforms, Bank for International Settlements, Basel, 2017, 109.

Berle, A. A., & Means, G. C., *The Modern Corporation and Private Property*, Harcourt, Brace & World, New York, 1932, 5.

Fox E and Bakhoum M, *Making Markets Work for Africa: Markets, Development and Competition Law in Sub-Saharan Africa* OUP 2019, 4.

Freeman R E, *Strategic management: A stakeholder approach*, Pitman Publishing Inc, Boston, 1984.

FTI Consulting, *What is the South Africa's competition regime and what is new?*, 2019.

Kenya Institute for Public Policy Research and Analysis, *Mergers and Acquisitions: The Experience in Kenyan Banking Industry*, KIPPRA, Nairobi, 2020.

McKenzie B, *An Overview of Competition and Antitrust Regulations in Africa* (Baker McKenzie: Johannesburg, 2019, 109.

Ng'ang'a J K and Felicia Solomon Ndale, Kenya: Overview of M & A Activity, in Mark Zerdin, *The Mergers & Acquisitions Review*, 8th ed, Law Business Research Ltd: London, 2014, 448.

Njisane Y. and Ratshisusu H, 'Public Interest Issues in Cross-Border Mergers: Is There a Role for Competition Authorities?' *In Competition Policy for the New Era: Insights from the BRICS Countries* Oxford University Press, Oxford, 2017.

Organisation for Economic Co-operation and Development, *G20 High-Level Principles on Financial Consumer Protection*, OECD, Paris, 2011, 10.

Uwadi E C., *A Case for Public Interest Considerations in Merger Control: Analysis with*

Reference to Competition Law Enforcement in Developing Countries: The Example of South Africa Transnational Dispute Management, 2020, 2.

Journal Articles

Abbas H. 'Merger Failures & Corporate Strategy: Change Management to Solve the Query' 13(1). *International Journal of Sciences: Basic and Applied Research*, 2014, 90.

Allen, J, 'Consumer Bankruptcy, Bank Mergers, and Information' 20 *Review of Finance*, 2016, 1289.

Changole, P M., and Boshoff W H, 'Non-competition Goals and Their Impact on South African Merger Control: An Empirical Analysis' *Review of Industrial Organization* 2022, 1-41.

Competition Commission, *Guidelines on the Assessment of Public Interest Provisions in Merger Regulation under the Competition Act No. 89 of 1998*. Competition Commission of South Africa, 612 *Government Gazette* No. 40039, 2016.

Csikósová A., Čulková K. and Janošková M. (2016), 'Evaluation of quantitative indicators of marketing activities in the banking sector' 69(11) *Journal of Business Research*, 2016, 5028-5033.

Dolmans M, 'The Dominance and Monopolies' 2 *Review' Law Business Research Ltd.,* 2014.

Fama, E. F., & Jensen, M. C, "Separation of ownership and control", 26 *Journal of Law and Economics*, 301.

Fakarudin K, 'The impact of globalization on the performance of banks in South Africa' 26 *Review of International Business Strategy*, 2016, 517.

Fitchett James A. 'Consumers as stakeholders: prospects for democracy in marketing theory' *Business' 14 European Review*, 2005, 14.

Fox E.M, 'Competition Policy at the Intersection of Equity and Efficiency: The Developed and

Developing Worlds', 83 *The Antitrust Bulletin* 2019, 3–6.

Gennaro B and Evgeny L, 'The Effects of Horizontal Merger Operating Efficiencies on Rivals, Customers and Suppliers' 23(1) *Review of Finance*, 2019, 117.

Griffiths M. and Gumbie, W, 'The public interest test in the South African merger control regime' 3 (2) *Journal of Antitrust Enforcement*, 2015, 408–424.

Harrison, JS, Bosse D A. and Phillips RA, 'Managing for stakeholders, stakeholder utility functions & competitive advantage' *Strategic Management Journal*, 2010, 58.

Hartzenberg T, 'Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries' 26 (3) *Northwestern Journal of International Law & Business* 2006, 667.

Healey D J, and Chenying Z, 'Bank Mergers in China: What Role for Competition?' 12 *Asian Journal of Comparative Law*, 2017, 81.

Herdeen U'Consumer Protection in the Banking Industry: A comparison of the South African and Nigerian Codes of Banking Practice' 81 *Journal of Contemporary History*, 2018, 631.

Huffman and Max,"Bridging the Divide-Theories of integrating Competition law and Consumer Protection', 6 *European Competition Journal*, 2010, 7.

Jarrow R A, 'Market Manipulation, Bubbles, Corners and Short Squeezes' 27 (3) *Journal of Finance and Quantitative Analysis*, 1992, 311.

Jones TM, 'Instrumental stakeholder theory: A synthesis of ethics & economics' 20 *Academy of Management Review*, 1995, 404-437.

Kithitu J, 'Role of Mergers and Acquisitions on the Performance of Commercial Banks in Kenya' 2 *International Journal of management of Business Studies*, 2012, 11.

Kemal, M, 'Post-merger profitability: A case of Royal Bank of Scotland' 2(5) *International*

Journal of Business and Social Science, 2011, 157.

Koi-Akrofi, G.Y, “Mergers and acquisitions failure rates and perspectives on why they fail’

17(1) *International Journal of Innovation and Applied Studies*, 2016, 150.

Marshall S and Maurice E,’ The Effective Competition Standard: A New Standard for Antitrust’ 87 *University of Chicago Law Review*, 2020,595.

Merger AC, Regime: The Call to Combat Creeping Acquisitions’ 22 *International Trade and Business Law Review*, 201, 119.

Micu A, and Micu I, ‘Mergers and Acquisitions in the Banking Sector during the Financial Crisis’ 4 (11) *SEA-Practical Application of Science, Romanian foundation for Business Intelligence*, 2016, 385.

Mithamo M K, Marwa, M and Letting N, ‘An Analysis of Challenges Facing Major Supermarkets that Emanate From the Changing Environment: A Case of Kenyan Large Cities’ 3(4) *Journal Of Business Management And Economics* 2015, 4.

Nicholls R and O’Brien J, ‘Hanging Together or Hanging Separately: Is Competition Law in the Process of Eclipsing Financial Regulation?’ 8 *Law and Financial Markets Review*, 2014, 178.

Nicholson, R., Salaber, J. & Cao, T, ‘Long-term performance of Mergers and Acquisitions, in ASEAN countries’ 36 *Research in International Business and Finance*, 2015, 373.

Njebi N K, ‘Effects of the Banking (Amendment) Act of 2016 on the Kenyan Banking Sector’ 7 *Journal of Business & Financial Affairs*, 2018.

Ombaka, C. & Jagongo, A, ‘Mergers and acquisitions on financial performance among selected commercial banks, Kenya’ 3(1) *International Academic Journal of Economics and Finance*, 2018, 3.

Ondieki G and Njangiru, M, ‘The Effect of Mergers and Acquisitions on Financial Performance

of Banks (A Survey of Commercial Banks in Kenya)' 4(8) *International Journal of Innovative Research and Development*, 2015, 100.

Raslan, A.A, 'Mixed Policy Objectives in Merger Control: What Can Developing Countries Learn from South Africa?' 39 (4) *World Competition Law and Economics Review* 2016, 625–652.

Simon P, 'Market Concentration in the Dairy Processing Industry in Kenya and Producer Milk Prices', (2017) 24 *Policy Brief* 1.

Sourdin and Tania, 'Treating Vulnerable Consumers 'Fairly' When they make a complaint about Banking or Finance in Australia', 32 *Bond Law Review*, 2020, 3.

Stebek and Elias N, 'Deliverables and Pledges under Ethiopian Trade Competition Law', 11 *Mizan Law Review* 2017, 32.

Talyar U, 'Morality in Competition Law: The Culture of Honesty and Trust in Consumer Protection', 7, *Athens Journal of Law*, 2021, 189.

Tromer A and Shlomit 'The Case for Consumer-Oriented Corporate Governance, Accountability and Disclosure' *U. Pa. J. Bus. L.*, 2014, 227.

Umut A and Tim B, 'Competition Law and Policy in developing countries. Explaining variations in outcomes. Exploring possibilities & Limits', 79 *Law and Contemporary problems*, 2016, 3.

Vaheesan, S, 'The twilight of the technocrats' monopoly on antitrust?' 127 *Yale Law Journal Forum*, 2018, 980–995.

Wen S, 'Banking Consumer Protection Regulation in China' 46 *Hong Kong Law Journal*, 2016, 599.

Working Papers

Abdul F and Ochenge R, Do Mergers and Acquisitions Impact Bank Lending Behavior in Kenya? Kenya Bankers Association Centre for Research on Financial Markets and Policy, Working Paper Series May 2020, 3

Mncube L & Ratshisusu H, 'Competition Policy and Black Empowerment: South Africa's Path to Inclusion' Black Economic Empowerment Project SCIS Working Paper, No. 22, 2021, 4.

Dissertations/Thesis

Amrit K, 'Doctrinal Legal Research' LLM Thesis, Tribhuvan University' 2018, 26.

Amuti N, 'An Examination of the Adequacy of the Consumer Protection Act in Protecting Banking Borrowers in Kenya. A Case Study of the National Bank of Kenya Terms and Conditions for an Unsecured Loan, LLM Thesis, University of Nairobi, 2016, 3.

Chesang G, 'Merger restructuring and financial performance of commercial banks in Kenya' MBA Project: University of Nairobi, 2006.

Kunga M, 'The Effect of Acquisition Strategy on SACCO Performance in Kenya: A Case of Mwalimu National SACCO' MBA Thesis, Daystar University, 2021, XI.

Madzo M E, 'Effects of an Acquisition on the Financial Performance of a Firm: Case of Mwalimu National SACCO and Spire Bank, Unpublished MBA Thesis, United States International University-Africa, 2020, IV.

Morai E R, 'Legal Response Towards Tackling Financial Crime in Kenya's Banking Sector: Is it Enough?' (LLM Thesis, University of Nairobi, 2019, 20.

Nanyama M M, 'Evaluating the Legal Framework Governing Mergers and Acquisitions of Commercial Banks in Kenya' PHD Thesis, University of Nairobi, 2017.

Ngugi S, 'An Examination of the Kenyan Regulatory Framework in Promoting Too Big To fail in realtion to Mergers in the Banking Sector' Dissertation, Strathmore University,3 March 2021,32.

Nyagah G, ' The Effects of Mergers and Acquisitions in Firm Performance: A Case of East African Breweries Limited' MBA Thesis, United States International University Africa: Nairobi, 2018, 1.

Wanjiku L, 'The Effect of Mergers and Acquisitions Strategy on Performance Britam Insurance Company Limited in Kenya' MBA Thesis, University of Nairobi, 2017, 3.

Internet Sources

Evidence from Nigerian Banking Industry' 28 December 2019-
<https://ssrn.com/abstract=3510430> on 30 January 2020.

Guimaraes B and Pannella P, 'Short-squeeze Bubbles' 2021)-
<https://ssrn.com/abstract=3797556>, on 15 May 2022.

Kamhunga, S, 'Half of Africa's top 10 merger and acquisition deals this year target SA. Business Day'-<http://www.bdlive.co.za/business/2012/12/04/half-of-africas-top-10-merger-and-acquisition-deals-this-year-target-sa> on 8 May 2022.

Market M, 'Global M&A Report Press Release', 2018.-
<https://www.mergermarket.com/info/2016-global-ma-report-press-release> on 7 May 2022.

Saibu O, 'The Impact of Merger and Acquisition on Financial Intermediation: Empirical

Appendices

Appendix A: Similarity Report



Document Information

Analyzed document	Effects of Mergers and Acquisitions on Consumers in the Kenyan Banking Sector.docx (D142818715)
Submitted	2022-08-11 09:35:00
Submitted by	
Submitter email	Imelda.Thuranira@strathmore.edu
Similarity	2%
Analysis address	library.strath@analysis.arkund.com

Sources included in the report

W	URL: https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4801&context=icp Fetched: 2019-10-11 14:22:50	17
W	URL: https://www.serialpublishers.org/Journals/The%20Role%20of%20Communication%20Authority%20of%20Kenya%20(CAK)%20in%20Telecommunication%20Industry.pdf Fetched: 2022-06-02 14:58:15	3
W	URL: https://www.fticonsulting.com/~/_media/Files/emea--files/insights/articles/what-south-africas-competition-regime-whats-new.pdf Fetched: 2021-10-04 16:48:17	4
W	URL: https://ssrn.com/abstract=3510430 Fetched: 2022-08-11 09:35:00	2

Entire Document

EFFECT OF MERGERS AND ACQUISITIONS ON CONSUMERS IN THE KENYAN BANKING SECTOR
IMELDA KAWIRA THURANIRA
SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE MASTER OF LAWS DEGREE (INTERNATIONAL FINANCIAL LAW AND REGULATION) AT STRATHMORE UNIVERSITY
Strathmore Law School Strathmore University Nairobi, Kenya DECLARATION
I declare that this work has not been previously submitted and approved for the award of a degree by this or any other University. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself. © No part of this thesis may be reproduced without the permission of the author and Strathmore University. Imelda Kawira Thuranira Signature Date Approval The thesis of Imelda Kawira Thuranira was reviewed and approved by the following: Dr. Fancy Too, Senior Lecturer/Director, Postgraduate Programs, Strathmore Law School, Strathmore University
Dr. Peter Kwenjera, Dean, Strathmore Law School, Strathmore University
Dr. Bernard Shitwabo, Director, Office of Graduate Studies, Strathmore University
ABSTRACT Mergers and acquisitions perform a vital role in corporate finance in enabling firms achieve varied objectives and financial strategies. In Kenya, banks have been merging with the goal of improving their economies of scale and scope. Several studies have been done on different effects of mergers and acquisitions but none has interrogated the impact of these activities on the customers, a gap that this study seeks to fill. The overarching purpose of the study is to examine how the legal framework protects the banks' customers from the potential negative consequences of the mergers and acquisitions such as lessening competition hence limiting the choice of consumers, price fixing, reduced quality and variety of goods. A key finding is that customers are vulnerable as they are negatively impacted and the legal framework is lacking consistency and harmonisation thus rendering it inadequate to protecting consumers from the effect of the mergers and acquisitions in the banking sector. The study therefore recommends that there should be consultation and harmonisation between the bank regulators, consumer protection authorities and competition authorities. Furthermore, there should be specific legal provisions and a body that deals with specifically with the consumers' issues in the banking sector who will be in charge of implementing the specific legal framework and policies. Moreover, there needs to be public education and advocacy on consumer protection so that not only the elite are aware of their rights but also the low economy consumers who are the majority in our country and are the most vulnerable.
Table of Contents LIST OF ABBREVIATIONS 7 TABLE OF CASES 8 ACKNOWLEDGEMENT 10 CHAPTER 1 12 1. INTRODUCTION AND BACKGROUND 12 1.0 Introduction 12 1.1 Background 13 1.2 Statement of the problem 18 1.3 Justification of the study 19 1.4 Research objectives 20 1.5 Research questions 20 1.6 Hypothesis 21 1.7 Research methodology 21 1.8 Literature review 22 1.8.1 Rationale for M and A in the Banking Sector 22 1.8.2 Negative Impact of Mergers and Acquisitions on Consumers 25 1.8.3 Comparative Analysis and Best Practices 28 1.8.4 Legal Framework for M and As 28 1.9 Theoretical framework 34 1.9.1 Agency Theory 35 1.9.2 Stakeholder Theory 37 1.10 Chapter Breakdown 39 Chapter One: Introduction 39 Chapter Two: The legal framework for mergers and acquisitions in the banking sector 39 Chapter Three: Comparative Analysis and Best Practices in Mergers and Acquisitions in South Africa 39 Chapter Four: Conclusion and Recommendations 40 2. LEGAL FRAMEWORK FOR MERGERS AND ACQUISITIONS IN THE BANKING SECTOR IN KENYA 41 2.0 Introduction 41 2.1 Evolution of Competition Regulation in Kenya 41 2.2 Rationale for Consumer Protection 42 2.3 Constitutional Foundation of Consumer Protection 44 2.4 Primary Regulation of M and A of Banks in Kenya 44 2.4.1 Competition Act of Kenya 4 2.4.2 Mandate of Competition Tribunal 49 2.4.3 Competition (General) Rules, 2019 51 2.5 Sector Specific Consumer Protection Laws 52 2.5.1 Consumer Protection Act 52 2.5.2 The Company's Act 53 2.5.3 The Banking Act 53 2.5.4 Central Bank of Kenya Act 54 2.5.5 Capital Markets (Takeover and Merger) Regulations 2002 55 2.6 Regional Competition Regulations 56 2.6.1 The East African Community Competition Act 56 2.6.2 COMESA Competition Rules 57 2.7 Conclusion 58 CHAPTER THREE 59 3. COMPARATIVE ANALYSIS AND LESSONS LEARNED 59 3.0 Introduction 59 3.1 Justification for the Selection of the UK and South Africa 59 3.2 Risk Based Approach to Consumer Protection in the UK 60 3.3 Evolution of Competition Legislation in South Africa 61 3.4 Protection of Bank Customers in M and A in South Africa 63 3.4.1 Public Interest in M and As in South Africa 63 3.4.2 Challenges to Public Interest in South Africa 66 3.4.3 Government Participati

Appendix B: Ethical Clearance Confirmation



1st March 2022

Mrs Thuranira-Muthuuri, Imelda
imelda.thuranira@strathmore.edu

Dear Mrs Thuranira-Muthuuri

RE: Mergers or Is There More Than Meets The Eye? Evaluating The Effect Of Mergers And Acquisitions On The Consumers In The Banking Sector.

This is to inform you that SU-IERC has reviewed and **approved** your above **SU Master's** research proposal. Your application reference number is **SU-IERC1217/21**. The approval period is **1st March 2022 to 28th February 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: Prof Fred Were,
Chairperson; SU-IERC

