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THE INTEROPERATION OF INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW IN MARKET REGULATION: THE AFRICAN EXPERIENCE

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Abstract

Markets are regulated by different mechanisms aimed at safeguarding diverse conflicting interests within the market system. In a free market economy, the absence of regulatory framework may be injurious to the consumers. Competition law intervenes as a regulatory mechanism to balance the needs of the society and the interests of the entrepreneurs. Interplay between competition law and intellectual property law has been a vexed issue but it appears that both laws focus on enhancing economic welfare and innovation. In recognition of the proposition that competition policy and intellectual property rights are complementarity policies, this article seeks to examine the recent enactment of competition laws across the African continent with a view to assessing the efficacy of these laws in consonance with global realities. The study inter alia, found that the statutory IP related restrictions in some jurisdictions are beyond the legal reach of some competition regulatory authorities in Africa thereby engenders asymmetry between increased intellectual property protection and limited competition control. The paper calls for possible intervention of legal instruments at national, regional and international levels in order to entrench harmony between IPR and competition policy in Africa for the benefits of the stakeholders.

Keywords: Intellectual Property, Competition Law, Market Regulation, Africa

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Introduction

Intellectual Property Law and Competition Law are critical to the regulation of a defined market and promotion of consumer welfare. In contemporary world economy, it is obvious that a tassel exists between intellectual property rights (IPR) and competition law. Whereas competition law deals with an efficient mechanism to counter competitive agreements, regulating mergers and acquisitions, restricting the use of dominant position[1] among other vital functions, IPR consists of a bundle of legal rights conferred upon the right holder to acquire the monopoly to utilize commercially his intellectual creations.[2] In other words, intellectual property rights are right to exclude whereas competition law establishes rules governing competition in order to regulate anti-competitive practices in a defined market. In Africa, there is a growing awareness of competition law as a mechanism to eliminate practices that restrict trade and generally discourage monopoly. In this direction, between 24-25 November, 2022, the International Bar Association (IBA) Antitrust Committee, the IBA African Regional Forum and the Nigerian Federal Competition and Consumer Protection Commission (FCCPC) hosted a global conference in Lagos, Nigeria with the theme 'IBA/FCCPC Competition Law in Africa Conference: Regulatory Developments and Enforcement Trends Across the Continent'[3]. Against the backdrop of the conference which extensively discussed emerging trends in competition law in Africa, this paper focuses on the role of competition law and intellectual property law in the light of market regulations in Africa. Structurally, the article encompasses seven segments. The introductory aspect is contained in the first part. For a better appreciation of the subject matter, part two defines the key concepts in the study while part three follows progressively with the discussion on the interoperation of intellectual property rights and competition law. The fourth segment of the article examines the legal framework of competition law and IPRs with special focus on Paris Convention, the TRIPS Agreement and the analysis of the United States and European Union's Competition Law and IPR policy respectively. Part five assess the African

[1] Surabhi Singh and RichaGoel, 'The Interplay between Competition Law and IPR' <https://blog.ipleaders.in/interplay-competition-law-ipr/?amp=1> accessed 2 January 2023

[2] ShubhodipChakraborty, ' Interplay Between Competition Law and IPR in its Regulation of Market' <https://www.lawctopus.com/academike/interplay-competition-law-ipr-regulation-market/amp=1> accessed 2 January 2023

[3] See ' Conference Details/ International Bar Association' <https://www.ibanet,org/conference-details/CONF2259> Accessed 19 March 2023

experience on Competition Law and IPRs policy whereas the sixth segment embodies the challenges thereto. The last part of the article draws the conclusion.

Definition of Key Concepts

Market Mechanism

Economic operation of countries around the world is basically operated through two mechanisms and the motive behind adopting any of the mechanisms is for the complexity and better operation of a particular country's market. For the sake of this paper, the two market mechanism for the regulation of economic activities are the free market system and the regulated market operation.[4]

In a country that operates free market economy, there is a decentralized[5] approach where prices of goods are set freely by consent between buyers and sellers and they are free from government intervention or any other regulatory measures.[6] Through this approach, direct relationship is maintained between entrepreneur and consumer. Similarly, products are produced under this market mechanism with no significant intervention from the government as products and prices are basically determined by the forces of demand and supply. From an economic perspective, it has been asserted that free market economy approach is the best tool in allocating scarce resources.[7] However, it has been argued by Singh and Goel, that 'through this system, the manufacturer takes unfair advantage of the consumer easily for the profit and the untamed competing interest cause an unbalanced in country economy or market'.[8]

On the other hand, a regulated market system is a centralized approach with government involvement and planning of the economy. In this system, business and trade are regulated through multiple agencies and closely monitored by the government to prevent unfair trade practices and monopoly. This is achieved through the instrumentality of legislations and regulatory framework. Although the regulated economy is encouraged as a tool for the prevention of unfair trade practices, it has also been criticized on the grounds that excessive

[4] See Surabhi Singh and RichaGoel (n1)
[5] MorBakhoun, 'The Interface between Intellectual Property Rights and Competition Law' Max Planck Institute for Intellectual Property and Competition Law, Munich- Germany. P4
[6] Chakraborty (n2)
[7] Bakhoun (n5)
[8] Singh and Goel, (n1)

restriction imposed on the economy by the government discourages invention and innovation[9] which are critical to the survival of any economy. From the foregoing, it can be deduced that in view of the advantages and disadvantages inherent in both the regulated market and the free market economy, the intervention of IPR and antitrust law in market operation becomes apt. This is to create relatively price stability in the system and to avoid an unbalanced market situation in the absence of control.

The Concept of Intellectual Property Rights

The World Intellectual Property Organization (WIPO) captures Intellectual Property (IP) as creations of mind, such as inventions; literary and artistic works; designs and symbols, names and images used in commerce.[10] As a creation of mind, Wolters Kluwer [11] posits that IP include rights relating to literary, artistic and scientific works; industrial designs, trademarks, service marks, geographical indications and all other rights resulting from intellectual activity in the industrial, scientific, literally or artistic fields. Therefore, IP are broadly divided into two branches, namely industrial property and copyright.[12] While copyright is concerned with literally, musical and artistic creation, industrial property covers rights in patents, trademarks, industrial designs, utility models, plants and animal varieties.[13] Similarly, IP is subject to be used in trade and seeks to encourage creativity, and inventiveness aimed at offering a system that guarantees that proprietors can have control and exploitation of creations, works or invention in order to recoup their investments.

On the other hand, Intellectual Property Rights (IPRs) are the exclusive rights conferred upon the creator or the inventor of the property to use and enjoy his creation or invention exclusively.[14]As

[9] Ibid

[10] See 'What is intellectual property?'<https://www.wipo.int/about-ip/en/> accessed 3 January 2023

[11]Wolters Kluwer, *Introduction to Intellectual Property: Theory and Practice* (Kluwer Law International BV 2017)3

[12]Abounu Peter Onyilo, 'Towards Effective Enforcement of Trademark Rights Infringement in Nigeria' <https://journals.unizik.edu.ng/index.php/jcpl/article/view/663> accessed 19 March 2023

[13]Femi Olubanwo and OluwatobaOguntuase, '*Strengthening Intellectual Rights and Protection in Nigeria*' <https://www.mondaq.com/nigeria/trademark/788714/strengthening-intellectual-property-rights-and-protection-in-nigeria> accessed 4 January 2023

[14]See SupreetKaur, 'Interface between Intellectual Property and Competition Law: Essential Facilities Doctrine' http://papers.ssrn.com/sol3/papers.cfm?abstract_1802450> accessed 4 January 2023

Kur[15] asserts, the aim is to provide incentives to innovators to produce new inventions and creations which in turn, provides society with a steady stream of innovations and fuels economic, cultural and social growth. It also affords inventors, and authors in the case of copyright, protection from imitation and gives right holders substantial discretion over how to use or license their intellectual property.[16] IP law therefore, provides protection to IPRs which are granted in terms of statutory provisions and, in some cases, common law to grant economic exclusivity over inventions in all fields of technology.[17] The duty of the State in this regard is to reward and protect the right holder against unauthorized exploitation of his IPRs and at the same time prevent the abuse of such rights by the creators in the overall interest of the general public.

The Concept of Competition Law

Competition law, also known as antitrust law seeks to promote healthy market competition by regulating the market in a particular economy. The regulation is done by monitoring any anti-competitive conduct[18] among the stakeholders in the market. As succinctly captured by Kaur, the goal is to 'prevent monopolization of the production process and allowing entry to the competitors in the market and in this regard, ushers an environment of free and fair play of market forces'.[19] Simply put, competition law is enacted to encourage healthy competiveness approach in an economy and discourage practices considered abusive in the market which in turn, engenders the introduction and sustenance of quality products at affordable rates within a defined economy. This implies that competition law prevents monopoly and artificial entry barriers to new industry players.While competition law rationale is geared towards promoting and protecting competition, in most cases, competition law basically discourages restrictive agreements which include agreement between competitors to use only one kind of technology;

[15] Joseph Jar Kur, *Intellectual Property Law and Entrepreneurship in Nigeria: Principles and Practice* (Aboki Publishers 2015) 5

[16] Richard Gilbert and Alan Weinschel, '*Competition Policy for Intellectual Property: Balancing Competition and Reward*' cited in Kaur (n14)

[17] See Caroline B. Ncube, *Harnessing Intellectual Property for Development: Some Thoughts on an Appropriate Theoretical Framework* [2013] Potchefstroom Electronic Law Journal 16(4) 373

[18] See AnushaShivaswamy, '*Competition Law and IPR: A Critical Analysis*' <https://legalsericeindia.com/legal/article-7101-competititon-law-and-ipr-a-critical-analysis.html> accessed 5 January 2023

[19] Kaur (n 14)

abuse of dominant position and anti-competitive mergers between firms with competing research interest.[20] Other anti-competitive behaviours that competition law seeks to control include predatory pricing, price fixing, bid rigging and dumping. By implication, competition law can intervene to correct anti-competitive conduct geared towards competitiveness in commercial environments. In other words, competition law might ultimately affect innovation-the hallmark of IPR.

The Interoperation of Intellectual Property Rights and Competition Law

The interface between antitrust law and IPR has become a subject of legal scrutiny in recent years as industry stakeholders are inclined to the harmonization of both laws in order to promote innovation and protect competition. Significantly, anti-trust law has established itself as one of the most effective mechanisms in the prevention and control of anti-competitive behaviours in the market. On its part, the monopolistic nature of IPRs guarantee an absolute right to the IP proprietor to reap from the fruits of his labour and prevent unauthorized exploitation of his IPR. This legal monopoly confers on the IP owner sometimes lead to market power which create inevitable tension between IPRs and competition law viewed by some as areas at odds with each other. The inherent conflict between IPRs and Competition Law is precipitated by the fact that IPR seeks to provide protection and monopoly to the owner of intellectual creation whereas competition laws seek to provide fair and free competition by eliminating monopolies in the market.[21] Therefore, Competition Law focuses on limiting monopoly power and the goal is to protect and promote consumer welfare.[22] On the other hand, IPR is focused on innovation by providing exclusivity to the proprietor for commercial activity. Despite the perceived tension, antitrust law and IPRs are operationally complimentary as both laws exist to promote and foster efficiency and economic growth. Similarly, it has been asserted that IPRs and competition law have like purpose of maximization of social welfare[23]. In this wise, IPRs grant an exclusive right with hope to induce people to make investments in things that are needed in the society while

[20] Ian McEwin, 'The Interoperation of Intellectual Property and Competition Law Rules and Principles' <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=203326> accessed 29 January 2023.

[21] See Singh and Goel, (n1)

[22] See Shivaswamy (n 18)

[23] RishikaSugandh and Siddhartha Srivastava, '*Interface between Intellectual Property Rights and Competition Law: Indian Jurisprudence*' <http://ijlls.in/interface-between-intellectual-property-rights-and-competition-law-indian-jurisprudence/> accessed 5 January 2023

competition law aims to provide the consumers highest quality of goods and services at the lowest price.[24]In addition, competition law stimulates innovation, thereby enhances the development of IP.

From the foregoing intervention, whereas there may be some noticeable conflicts between anti-trust law and IPRs, in reality, there is basically no tension between the two. It has been submitted that the paradigm of interface between the IPRs and Competition Law is that the two legal regimes are interconnected by the economics of fostering innovation[25] and the convoluted web of legal policies that seek to stabilize the scope and effect of each policy.[26] In other words, the goal of both IPRs and competition law is geared towards achieving consumer welfare even though the means to achieve this common goal may not be the same. Therefore, as Bakhoun[27] summarized it, from a dual and opposite approach with a conception of competition law as an instrument that limits and control the exercise of IP, both field have turned out to be complementary, pursuing the same goal of innovation.

The Legal Framework of Competition Law and Intellectual Property Rights

Across the world, IPRs and competition law are considered critical to the survival of any healthy economy. Therefore, some legal regimes and guidelines in relation to IPRs and competition law are hereunder appreciated in order to situate the discourse in its proper perspective.

The Paris Convention for the Protection of Industrial Property (Paris Convention)

The Paris Convention adopted in 1883, was the first step taken to help creators ensure that their intellectual works were protected in other countries. The Paris Convention applies to industrial property including patent, trademarks, industrial designs, utility models, service marks, trade

[24] ibid

[25] Zeus IP Advocate, 'The Interface between Intellectual Property Rights and Competition Law' <https://www.zeusip.com/the-interface-between-intellectual-property-rights-and-competition-law.html> accessed 5 January 2023

[26] Ibid

[27] MorBakhoum, '*Intellectual Property Rights and Competition Law: Between Innovation, Access and Implications for Public Health*' in AdejokeOyewumi, Emmanuel Sackey and Martha Chikowore (eds) Intellectual Property Law, Practice and Management: Perspective from Africa (Africa University 2018).

names, geographical indications and the repression of unfair competition.[28]Thus, under the Paris Convention, member States are obliged to provide protection against unfair competition. Under Article 10bis (2) of the Paris Convention, unfair competition is defined as 'any act of competition contrary to the honest practices in industrial and or commercial matters'. Article 10 bis of the Paris Convention broadly classified some behaviours in the course of industrial or commercial activities as unfair competition. Such behaviours include acts that are misleading, acts damaging goodwill or reputation and free riding. There may be little ingredient of fairness in competition in the commercial and industrial world if market forces are allowed to determine the concept of fairness in the economy. To this end, the Paris Convention mandates its member States to create market regulation aimed at discouraging unfair competition and enshrine same in their respective local legislation.

Trade- Related Aspects of Intellectual Property Rights (TRIPS Agreement)

The TRIPS Agreement, an international agreement coordinated by the World Trade Organization (WTO), sets minimum standards of protection to be provided by each WHO members for IP protection. However, members of the WTO are free to determine the appropriate method of implementing the provisions of the TRIPS Agreement within their respective jurisdictions. The TRIPS Agreement which became operational on 1 January 1995, is described as 'the most comprehensive multilateral agreement on intellectual property'.[29] During the negotiation of the TRIPS Agreement, some WTO members expressed serious concern on the regulation of unfair competition and the abusive powers of the IP right holders[30] within their national enclave. For this reason, the TRIPS Agreement makes provisions for minimum standards concerning the use of intellectual property in order to discourage anti-competitive practices. Therefore, Article 39 of the TRIPS Agreement provides for protection of undisclosed information without consent in a manner contrary to honest commercial practices. Similarly, WTO members are obliged to

[28] See WIPO, '*Paris Convention for the Protection of Industrial Property*' <https://www.wipo.int/treaties/en/ip/paris/> accessed 5 January 2023

[29] WTO, '*Intellectual property- overview of TRIPS Agreement*' <https://www.wto.org/english/tratop_e/intel2_e.htm> accessed 4 January 2023

[30] See Chakraborty (n2)

specify in their legislation, licensing practices that may constitute any abuse of IPRs having an adverse effect on competition in the relevant market and adopt measures to counter the anti-competitive practices.[31] Two important measures that have been effectively adopted and deployed by many members of the WTO to prevent abuse of IPRs are compulsory licensing and parallel imports. It is to be noted that compulsory licensing is not granted by the State in a vacuum but under some conditions such as in the case of national emergency, interest of public health and anti-competitive practices. [32] In other words, Article 31 of the TRIPS Agreement as it relates to competition related flexibilities recognizes the remedy of compulsory licensing available to the State, to correct abusive use of patents to the detriment of the consumers.

United States of America's Legal Regime

The United States (US) has robust anti-trust law despite its free market economy operation. To this end, in the event that entrepreneurs engage in unfair competitive practices, legislations are in place to tame unfair competitive activities. As far back as 1890, the US Congress passed the first competition legislation called the Sherman Act described as a 'comprehensive charter of economic liberty aimed at preserving free and unfettered competition as a rule of trade.'[33] Section 1 of the Sherman Act, primarily makes it unlawful, every contract, combination, or conspiracy in restraint of trade. The consequences for violating the Sherman Act ranges from civil to criminal. Although most enforcement actions in relation to the violation of the Sherman Act are treated as civil, violation of the Sherman Act in the areas of bid rigging and price fixing among competitors can be treated as criminal in nature and individuals and businesses that violate same may be prosecuted by the US authorities. In the same vein, the US Congress, in 1914, enacted two additional competition laws known as the Federal Trade Commission Act (FTC) and the Clayton Act. Whereas the FTC out rightly prohibits unfair competitive practices, the Clayton Act, on the other hand, introduced additional provisions regarding certain specific

[31] See Article 40 (2) TRIPS Agreement
[32] See Article 31 of the TRIPS Agreement
[33] See Federal Trade Commission, '*Antitrust Laws*' <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> accessed 6 January 2023

anti-competitive practices that the Sherman Act does not clearly prohibit, such as exclusive dealing agreements, mergers and interlocking directorates,[34] and combination. Specifically, section 7 of the Clayton Act prohibits mergers and acquisitions where the effect may be substantially to lessen competition, or tend to create a monopoly.

Competition Law and IPR policy received judicial imprimatur in US in the Microsoft case.[35] This case was instituted against the Microsoft in 1998 by the US government for alleged contravention of the relevant provisions of Sherman Act particularly with regard to stifling competition in the software industry. Microsoft contended that the alleged practices were non-coercive and that consumers enjoyed the freedom of choice due to the presence of other similar products in the market. Judgment was entered in favour of the government to the effect that Microsoft had abused its dominant position in the market and committed monopolization and tying in apparent violation of sections 1 and 2 of the Sherman Act.

European Union on Competition Law and IPR Policy

Antitrust law basically regulates and foster competition between firms in the same market. Expectedly, the European Union (EU)'s anti-trust legal framework is aimed at regulating anti-competitive behaviours such as restrictive agreements, abuse of dominance and merger control. Thus, under the provision of Article 101 of the Treaty on the Functioning of the European Union[36] some actions are considered prohibited as they are incompatible with the EU common market. These actions relate to all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between EU member states. These anti-competitive agreements within the EU members known as common market, include directly or indirectly fixing of purchase prices or other trading conditions; limit or control production, technical development or investment; share market of source of supply and applying dissimilar conditions to similar transactions. Thus, in *ConstenGrundig v Commission*,[37] the court held that an agreement between Grundig, (a German Manufacturer) and a French distributor, Consten, in

[34] A situation where same person making business decision for competing companies.
[35] *United states v Microsoft Corp* (2001) 346 U.S App. D.C 330, F.3d 34
[36] Hereinafter referred to as the ' TFEU'
[37] (1966) ECR 299

which Consten obtain French rights to GINT trademarked products and restricted freedom of trade by restricting other undertakings (competitors) from importing GINT products in the French market was illegal because it constituted vertical anti-competitive agreements.

Article 101 of the TFEU has also been accorded positive consideration by the European Commission in many instances. In Fentanyl case,[38] a US based pharmaceutical company, Johnson & Johnson (J & J) and the generic branches of the Swiss-based company, Novartis concluded anticompetitive agreement to delay the market entry of a cheaper generic version of the pain-killer fentanyl in the Netherland, in disobedience to Article 101 of the TFEU.[39] Fentanyl, a pain-killer, was initially developed by J&J. However, Fentanyl IP protection had expired in the Netherlands and Novatis' Dutch subsidiary, Sandoz, was on the verge of launching its generic depot patch into the Dutch market. Instead of starting the sale of the generic version, Sandoz concluded a 'co-promotion agreement' with Jansen-Cilag, J&J Dutch subsidiary in July 2005. The agreement provided strong incentives for Sandoz not to enter the market.[40] Consequently, Sandoz did not offer its product on the market. The agreement did not only delayed the entry of a cheaper generic medicine for seventeen months but also kept prices for fentanyl artificially high in the Netherlands to the detriment of patients and taxpayers. Upon anti-trust investigation, the European Commission concluded that the object of the agreement was anticompetitive and a violation of Article 101 of the TFEU and fines the parties to the agreement accordingly.[41] Indeed, the so called 'co-promotion agreement' between the two companies was anticompetitive and created an artificial barrier to market entry and a clear case of antitrust practices.

Similarly, Article 102 of the TFEU prohibits abuse of dominance and provides that it manifests when a company 'directly or indirectly imposes unfair purchase or selling prices or unfair trading condition.' Dominance refers to ability to operate independently of competitors and

[38] European Commission case number AT. 39685

[39] Ibid

[40] The New York Times, ' Europe says Johnson & Johnson Paid to Delay Generic Fentanyl' https://www.nytimes.com/2013/02/01/business/global/eu-says-drug-makers-paid-to-delay-generic-version.html Accessed 28 January 2023

[41] See 'Antitrust: Commission fines Johnson & Johnson and Norvatis 16 million for delaying market entry of generic pain-killer fentanyl'<https://ec.europa.eu/commission/presscorner/detail/en/ip_13_1233> accessed 20 January 2023

customers without restraint.[42] This is measured by market shares, barriers to market entry among other considerations. Under the EU anti-trust law, there are two vital requirements for an abuse of dominance to take place: the undertaking must have a dominant position in the market and it must abuse it dominant position. Abuse of dominance may take the form of exploitative abuse[43] and exclusionary abuse.[44] Instances of abuse as it relates to IPR include refusal to licence, tying, and excessive pricing. Whereas excessive pricing is no doubt a form of unfair prices, there is no clear definition as to what constitute excessive pricing. In United Brands Company and United Brands Continental v Commission,[45] the EU Court of Justice was of the opinion that a price is excessive when it has 'no reasonable relation to the economic value of the product'.[46] In other words, from the judgment of the court, excessive pricing can be determined by the price and costs of products in comparison to competitive products.

Abuse of dominance was equally accorded consideration by the European Commission in several cases and lately on Aspen's case.[47] The Italian Competition Authority launched an investigation in 2016 and found that Aspen 'had fixed unfair prices with increases up to 1500%'[48] contrary to Article 102 (a) of the TFEU and Aspen was accordingly fined. In 2017, similar investigation on excessive pricing was opened by the EU Commission against Aspen[49] for life saving cancer medicine. The EU Commission came to the conclusion that the company's prices were undoubtedly disproportionate[50] and in violation of Article 102 of the TFEU and Article 54 of the European Economic Area (EEA) Agreement which prevent the imposition of unfair trading conditions on customers. In July 2020, the EU Commission published the proposed

[42] Bakhoun (n5)
[43] For example, using the market power to raise price
[44] Using market power to determine entry.
[45] (1978) European Court Reports 00207
[46] Para 250
[47] See 'Price Increases for cancer drugs up to 1500%: the ICA imposes a 5 million Euro fine on the multinational Aspen <https://en.agcm.it/en/media/detail?id=1c53b769-446d-4e36-bfed-49e2f7454e03> accessed 20 January 2023
[48] ibid
[49] Under case number AT 40394-Aspen
[50] PriyalShukla, 'The Curious case of Aspen Pharmaceuticals and Excessive Pricing' <https://europeanlawblog.eu/2021/05/20/the-curious-case-of-aspen-pharmaceuticals-and-excessive-pricing/> accessed 20 January 2023

commitments offered by Aspen in accordance with Article 9(1) of the Council Regulation (EC)[51] to address the EU Commission's competition concerns to remedy its anti-competition behaviour. As part of the deal, *inter alia,* Aspen radically reduce its prices across Europe for six medicines that are essential to treat serious forms of blood cancer.[52] The EU equally frowns at mergers and acquisition which would significantly reduce competition in the single market. The legal framework for the EU merger control is the Council Regulation (EC) No. 139/2004.[53] The essence of the merger control among other things, is to prohibit mergers and acquisition that would create dominant companies that are likely to raise prices for consumers. The exposition and analysis above demonstrate the seriousness in which the legal instruments under consideration attach to competition law and IP policy. We shall now turn to the African continent for the same purpose.

The African Experienceon Competition Law and IPR Policy

Africa as a continent continues to intensify efforts for economic growth and development through various forms of investments. This is positively demonstrated lately by the signing of the African Continental Free Trade Area (AFCFTA) Agreement byAfrican Union Member States which came into force on the 30th May, 2019. AFCFTA is believed to have potential to foster industrialization, job creation, and investment, thus enhancing the competiveness of Africa in the medium to long term.[54] Trading under the AFCFTA commenced on the January 1st, 2021. Interestingly, one of the core objectives of AFCFTA as contained in Article 4(c) of the AFCFTA Agreement is cooperation on investment, intellectual property rights and competition policy. Competition law enforcement in Africa has become increasingly important over the years as different jurisdictions in Africa are strengthening their competition legislation by enacting new anti-trust laws or amending existing ones to reflect prevailing global realities. Some instances across the regions in Africa will situate the assessment in its proper perspective:

[51] No 1/2003

[52] See 'Antitrust: Commission accepts commitments by Aspen to reduce prices for six off-patent cancer medicines by 73%addressing excessive pricing concerns' <https://ec.europa'eu/commission/presscorner/detail/en/ip_21_524> Accessed 20 January 2023

[53] The EU Merger Regulation

[54] See ' About The AFCFTA' https://au-afcfta.org/about/ accessed 21 January 2023

Nigeria

Nigeria, situate in West Africa, enacted the Federal Competition and Consumer Protection Act (FCCPA) 2019. Importantly, the FCCPA under section 3 established the Federal Competition and Consumer Protection Commission[55] to act as the competition regulator empowered to prevent and punish anti-competitive practices, regulate mergers and performs consumer protection functions.[56] Section 39 of the FCCPA also established the Competition and Consumer Protection Tribunal[57] to handle issues that may arise from the application and violations of the FCCPA. Consequently, an appeal for the review of the decision of the Commission lies with Tribunal and appeals from the Tribunal go to the Court of Appeal. Section 104 of this important piece of legislation made the FCCPA supreme in all matters relating to competition and consumer protection and subject only to the provisions of the Constitution of the Federal Republic of Nigeria 1999 (as amended). In consonance with anti-trust regimes around the world, the FCCPA prohibits agreements in restraint of competition[58] which include but not limited to agreements for price rigging, price fixing, prohibition of minimum resale prices, collusive tendering with few exceptions such as collective bargaining agreements, activities of professional associations designed to develop or enforce standards of professional associations.[59] In the discharge of its statutory functions, the Commission in the year 2022, moved to sanction airline operators in Nigeria for alleged conspiracy in price-fixing by increasing fares by at least 66 per cent[60]contrary to the spirit and intendment of sections 107 and 108 respectively of the FCCPA which forbids competitors from fixing prices and prohibits any conspiracy or agreement between competitors in any manner that unduly restrains or injures competition.

[55]Hereinafter referred to as 'Commission'.
[56] Anthony Idigbe, 'Overview of Development of Competition Law in Nigeria' <https://www.mondaq.com/nigeria/antitrust-eu-competion-/848544/overview-of-develoment-of-competition-law-in-nigeria> accessed 21 January 2023
[57] Hereinafter referred to as 'the Tribunal'
[58] Section 59 ibid
[59] See section 68 ibid
[60] See WoleOyebade, 'Row over price-fixing as FCCPC moves to sanction airlines' <https://guardian.ng/business-services/aviation-business/row-over-price-fixing-as-fccpc-moves-to-sanction-airlines/> accessed 21 January 2023

The FCCPA, under section 72, equally forbids abuse of dominant position in any industry in compliance with international best practices. By the provision of section 70(1) of the FCCPA, an undertaking is considered to be in dominant position, *inter alia,* if it is able to act without taking account of the reaction of its customers or competitors. Abuse of the dominant position may occur when an undertaking in a dominant position charges an excessive price to the detriment of the consumers; refuses to give a competitor access to an essential facility when it is economically feasible to do so; engages in exclusionary act such as inducing a supplier or customer not to deal with a competitor and selling goods or services below their marginal average cost.[61] To restrict monopoly, the Commission is empowered to investigate the industry concerned and report to the Tribunal with the findings. The Tribunal upon the receipt of such findings may make orders for the purpose of preventing or remedying the adverse of the monopoly situation.[62] Consequently, the Commission, in the last quarter of 2021, engaged in a cartel and other anti-competitive conduct investigations in the shipping and freight forwarding industry in Nigeria in breach of the FCCPA.[63]Indeed, the enactment of the FCCPA is a watershed in antitrust legal framework in Nigeria with the potentials to curtail monopolistic tendencies and create equal opportunities necessary for small and medium scale industries to thrive in the best interest of the Nigerian economy.

Algeria

In the Northern African country of Algeria, the competition law is governed by Ordinance No. 03-03 of July 19, 2002 as amended in 2008 and 2010. However, preparation is in advanced stage to review the current legislation in Algeria in order to position the antitrust law in line with current domestic and international realities. As of February 2022, a first draft of the new

[61] See GbengaBiobaku& Co, 'The Federal Competition and Consumer Protection Act 2018: A giant stride in the right direction' <https://www.gbc-law.com/the-federal-competition-and-consumer-protection-act-2018a-giant-stride-in-he-right-direcion> accessed 21 January 2023

[62] Ibid

[63] See 'Federal Competition & Consumer Protection Launches Cartel and other Anti-Competitive Conduct Investigation into Shipping and Freight Forwarding Industry' <https://fccp-gov.ng/federal-competition-consumer-protection-commission-launches-cartel-and-other-anti-competitive-conduct-investigation-into-shipping-and-freight-forwarding-industry/> accessed 21 January 2023

competition law was being reviewed by the Secretariat General of the Prime Ministry.[64] Antitrust authority in Algeria is known as the Competition Council. Like many other jurisdictions, the Algerian competition law prohibits anti-competitive practices in all ramifications. In 2019, the Competition Council in exercise of its powers, imposed a daily penalty of DZD 500,000[65] on supplier, in the case of Archipel v United Tobacco Company,[66] which persisted until the cessation of an abuse of dominant position and refusal to sell.[67] Similarly, Article 10 of the Algerian Competition Law prohibits clauses in contracts which 'confers on an undertaking exclusivity in the exercise of an activity' falling within the purview of the prevailing law. The prohibition on exclusivity broadly applies to production, distribution and service operations in Algeria.[68] Importantly too, Algerian Competition Law prohibits abuse of economic dependence. In accordance with Article 11 of the Competition Law, the abusive exploitation by an enterprise of the state of dependence of another enterprise, customer or supplier shall be prohibited if it is likely to affect the free play of competition. As enshrined in Article 11 of the Algerian Competition Law, abuse of dependence may include a refusal to sell, without legitimate reason for refusal; concomitant or discriminatory selling; the obligation to resell at a minimum price; and any other act that would reduce or eliminate the benefits of competition in a market.

Angola

In Angola, competition legal regime includes the Competition Act 2018 and the Competition Regulations 2018. These legislative instruments have been strengthened by the establishment of the Angola Regulatory Authority ("CRA") in December 2018 as a competition watchdogs entrust with regulatory, supervisory and sanctioning functions. Pursuant to the powers conferred

[64] See Baker McKenzie, 'African Competition Guide' <https://resourcehub.bakermckenzie.com/en/resources/africa-competition-guide/africa/algeria/topics/general> accessed 22 January 2022

[65] Approximately USD 3,850

[66] See Baker McKenzie, 'African Competition Guide' <https://resourcehub.bakermckenzie.com/en/resources/africa-competition-guide/africa/algeria/topics/prohibited-practices> accessed 22 January 2022

[67] Ibid

[68] See Baker McKenzie, 'Prohibited Practices-Algeria-African Competition Guide' https://resourcehub.bakermckenzie.com/en/resources/africa-competition-guide/africa/algeria/topics/prohibited-practices Accessed 22 January 2022

on the authority under the enabling laws and in order to ensure greater speed and efficiency in tackling anti-competitive conduct, the CRA launched a Complaint Portal on Restrictive Competition Practices[69] to facilitate the provision of information on anti-competitive practices to all sectors and industries. Consequent upon this laudable initiative and the information received from the public, in 2021, the CRA conducted enquiries with respect to anti-competitive practices in different industries including the telecommunication and petroleum product sectors[70] in a bid to discourage anti-competitive conduct in Angolan market. Similarly, the Competition Act creates a formal merger control framework in consideration that merger must not hamper smooth competition and must be consistent with public interest. In this wise, mergers must be subject to prior notification to the CRA and must meet certain specified requirements such as, a particular economic sector or origin; the relevant employment level; and the capability of the industry in Angola to compete internationally.[71] In the area of merger and acquisition, the CRA imposed conditions on the merger between Angolan oil and fuel company Sonangola and French oil group Total, as well as the acquisition by Sonnagol of Trafigura's Group[72] in order to assess the effects the merger and acquisition may have on competition in the sector.

Botswana

In Southern Africa, the Botswana Competition Amendment Act 2018, which repeals the Competition Act, 2009 became operational on 2 December 2019. The new Competition Act seeks to enhance more effective competition legislation particularly the sanctions for competition law contraventions in terms of horizontal restrictive practices, abuse of dominance, exemption and merger. The Competition Act 2018 strengthens consumer protection and welfare by placing the legislation under the administration of the competition authority known as the Competition and Consumer Authority Botswana ("CCAB"). Similarly, the Competition and Consumer Tribunal was also established to adjudicate over the contravention of the Competition

[69] See Baker McKenzie, 'African Competition Guide' <https://resourcehub.bakermckenzie.com/en/resource/Africa-competition-guide/Africa/angola/topics/general> accessed 22 January 2023

[70] ibid

[71] See 'Angola- African Antitrust & Competition Law' https://africanantitrust.com/category/angola/ Accessed 23 January 2023

[72] See 'Competition laws proliferating across the African continent' <https://lexafrica.com/2022/03/competition-law-proliferating-across-the-african-continent/> accessed 23 January 2023

Act and handle appeal in relation to the provisions of the Competition Act. Another striking outlook of the new legislation is the introduction of criminal sanctions in cartel conduct applicable to any officer or director of an enterprise. Accordingly, section 26 of the Competition Act 2018 provides that any director or employee who is found to have engaged in restrictive horizontal practices is liable to a fine not exceeding BWP 100,000 or imprisonment for up to five years, or both.

Botswana Competition Law is equally strict in relation to merger implementation prior to approval by the authority (gun-jumping). The Competition Act[73]imposes a fine not exceeding 10 per cent of the consideration or the combined turnover of the parties involved in the merger-whichever is greater. In the same vein, the competition authority prohibited a merger between Universal House (Pty) Ltd and Mmegi Investment Holdings (Pty) Ltd on the grounds that the transaction was likely to lead to a substantial prevention or lessening of competition in Botswana's market.[74] Another noticeable provision of the current Competition Act in Botswana is the delineation of the types of conduct that may constitute an abuse of dominant position, including predatory conduct, tying and bundling, refusal to supply or deal with other enterprises, discriminating in price or other trading condition and exclusive dealing. In one of the instances of abuse of dominance case on grounds of refusal to deal and excessive pricing, the CCAB challenged Gaborone Container Terminal Proprietary Limited ("GABCON") at the Tribunal.[75] While the matter was pending before the Tribunal, the parties entered into settlement agreement wherein GABCON admitted to have abused its dominant position in the market and undertake to abide by the established legal framework and regulations within the industry in Botswana.

Uganda

In a bid to foster innovation and the expansion of the country's small and medium scale enterprises, the Ugandan government in East Africa formally introduced Competition Bill into

[73] Section 58(3)

[74] See Michael-James Curie, 'Botswana: Competition Authority Prohibits Merger Post-Implementation' <https://africanantitrust.com/2017/03/13/botswana-competition-authotity-prohibits-merger-post-implementation/> accessed 23 January 2023

[75] See Baker McKenzie 'African Competition Guide' <https://resourcehub.bakermckenzie.com/en/resources/africa-competition-guide/africa/botswana/topics/general> accessed 22 January 2023

the parliament to be enacted into law in the last quarter of the year 2022. Before the introduction of the bill, there are sector specific regulators such as the Uganda Communication Commission, which have attempted to control unfair trading practices through the instrumentality of regulations. Equally important to note is that Uganda is a member State of Common Market for Eastern and Southern Africa (COMESA)[76] and therefore subject to COMESA competition law framework. Similarly, Uganda, as a member of East African Community (EAC), has adopted and ratified the region's competition law and policy. In addition, Ugandan has also ratified and signed the AFCFTA, which has a competition law regime.[77] Thus, in addition to local legislation and regulations, Uganda competition activities should be conducted in adherence to COMESA, EAC and AFCFTA legal regimes as they relate to anti-competitive conduct.

In view of the sector specific competition regulations considered as insufficient in Uganda, the proposed competition law, according to the Minister of State for Industry, David Bahati, 'seeks to provide a comprehensive set of principles to regulate competition in all sectors'[78] of the Uganda's economy. The Bill which contains seven part and twenty-nine clauses, aims to promote competition between enterprises and leaves the market unbound by the manipulation of stronger trading enterprises. [79] Particularly, the Bill seeks to regulate anti-competition agreements, abuse of dominance, mergers and acquisition. Thus, according to clause 8(1), a person shall not enter into any agreements or take any decision to engage in any concerted action or practice, in respect of production, supply, distribution, acquisition, or control of goods, or the provision of services, which causes or is likely to cause an adverse effect on competition. In a situation where an enterprise maintains dominant position in a particular sector of the Ugandan

[76] See ' Common Market for East and Central Africa' http://www.womenconnect.org/web/uganda/trade-agreements/-/asset_publisher/elB4FDF84aAB/content/common-market-for-east-and-central-africa-comesa- Accessed 29 January 2023

[77] See Baker McKenzie, 'African Competition Guide-Uganda' <https://resourcehub.bakermckenzie.com/en/resources/africa-competition-guide/africa/uganda/topics/regional-bodies> accessed 26 January 2023

[78] See 'Gov't Tables Bill Seeking to Promote Fair Competition in Enterprises' <https://businessfocus.co.ug/govt-tables-bill-seeking-to-promote-fair-competition-in-enterprises/> accessed 26 January 2023

[79] See Stephen Kafeero, 'Competition Law: Uganda finally moves to enact one' <https://www.monitor.co.ug/uganda/news/nationl/competition-law-uganda-finally-moves-to-enact-one-4050126> accessed 26 January 2023

economy, Clause 10(1) of the Bill prevents such an organization or enterprise from abusing its dominant position.

In terms of mergers, acquisition and joint ventures, the proposed competition law requires an enterprise that seeks to enter agreement to give notice of same to the Trade Ministry in consonance with the form prescribed by regulations issued by the Minister. Mergers, acquisition and joint venture entered into in contravention of the proposed provision of the law will be void.[80] The proposed law does not envisage creation of an independent authority for its enforcement. Therefore, the Trade Ministry shall be shouldered with the responsibility to administer the law by promoting and sustaining fair competition in the Ugandan economy. However, when it becomes operational, the law makes provision for the creation of technical committee on competition and consumer protection[81]to assist the Trade Ministry to properly perform their statutory functions.

The Challenges

It is envisaged that antitrust law should be tailored towards consumer protection and healthy competitive practices in a defined market. The unique African competition law exemption on IPRs indeed, poses an enormous challenge to the balancing of the competition law and IPRs on the African continent. As Bakhoun[82] argued, the asymmetry between increased IP protection and limited competition control has become a dilemma within the African IPRs and antitrust law environment. This is evidence in the weakness of the African competition legal framework owing largely to 'the newness of competition laws in African legal landscapes.'[83] Statutory exemptions for IP are provided in some jurisdictions in Africa thereby limit the scope of application of competition law provisions to IPRs-related cases. For instance, in Southern Africa, Article 3(d) of the Malawi's Competition and Fair Trading Act[84]exempts 'those elements of any agreement which relates exclusively to the use, license or assignment of rights under, or existing by virtue of, any copyright, patent or trademark' from the application of the Act. In East Africa,

[80]Ibid
[81] Ibid
[82]See Bakhoun (n 5)
[83] ibid
[84] Chapter 48:08

Schedule 3 Part A Paragraph 2 of the Mauritius Competition Act 2009 equally excludes the application of the Act to any agreement with provisions relating to the use, licence or assignment or of rights by virtue of laws relating to copyright, industrial design, patents, trademark or service marks. Similarly, in West Africa, the Gambia Competition Act 2007,[85] exempts from the operation of the Act an agreement or conduct as it relates to the protection, exercise, licensing or assignment relating to intellectual property rights.

The foregoing exceptions are also extended to regulatory authorities in some African countries. For example, Article 30(1) of Namibia Competition Act No. 2 of 2003 stipulates the power of the Namibian Competition Commission to grant exemption 'in relation to any agreement or practice relating to the exercise of any right or interest acquired or protected in terms of any law relating to copyright, patents, designs, trademarks, plant varieties or any other intellectual property rights'.[86] In similar vein, Article 28(1) of the Kenyan Competition Act No. 12 of 2010, empowers the Competition Authority of Kenya, upon application to determine and 'grant exemption in relation to any agreement or practice relating to the exercise of right or interest acquired or protected in terms of any law' relating to intellectual property rights. With the avalanche of general exceptions of IP related restriction of competition provided in some jurisdictions, it is submitted that IP related restrictions are beyond the legal reach of some competition regulatory authorities in Africa.

Conclusion

A glean from the analysis above leads inexorably to the conclusion that IPR is a right confers by the State to inventor or creator for commercial exploitation of their creation whereas Competition Law primarily protect and balance the right of manufacturers and consumers. The complementarity of the two concepts is not in doubt as Competition Law only intervenes to control the misuse of the monopoly position granted to the IPR. Therefore, Competition Law is a *sine qua non* for maintaining a balance between competition policy and IPR in market dynamics.

[85] Schedule 1 (section 5(2))

[86] See Namibia Legal Information Institute, 'Competition Act 2003' https://namiblii.org/akn/na/act/2003/2/eng%402006-11-01 Accessed 27 January 2023

Lately, African countries have made commendable impact on Competition Law. However, the noticeable lack of symmetry between increased IPR protection and restricted competition control occasioned by statutory exemption of IP from the purview of Competition Law in some jurisdictions in Africa calls for possible intervention of legal instruments at national, regional and international levels in order to entrench harmony between IPR and competition policy in Africa. Ultimately, the interest of IP right holders and consumers within the market system should be balanced.